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HIGGS & JOHNSON COUNSEL & ATTORNEYS-AT-LAW VOLUME 55, ISSUE 2/2011

NEW LEGISLATION: THE PROBATE AND ADMINISTRATION OF ESTATES ACT

Jillian Chase-Jones

IN THIS ISSUE

The Probate and Administration of Estates Act (the "Act") was assented to on 8th February, 2011 and came into effect on 1st June, 2011. The purpose of the new legislation is to consolidate into one statute the laws relating to obtaining grants of representation and the administration of estates in The Bahamas.

The old law with respect to probate matters was derived from various sources namely:

- **Part V** of the **Supreme Court Act** (Ch. 53 of the Statute Law of the Bahamas, 2009 Revised Edition) where the substantive provisions on probate causes and matters were found;
- **Part II** of the **Supreme Court Act** which contained the Probate Rules governing non-contentious probate business;
- **Order 68** of the **Supreme Court Rules** which contained the provisions governing contentious probate proceedings;
- the **Administration of Estates Act** (Ch. 108 of the Statute Law of The Bahamas, 2009 Revised Edition); and
- Where the laws of The Bahamas were silent, reference was made to the English probate law practice and procedure which had been extended to The Bahamas prior to our Supreme Court Act being enacted.

This Act repealed Part V of the Supreme Court Act, section 341 of the Penal Code (which relates to stealing a will or codicil) and the Administration of Estates Act in its entirety.

The Act introduces the establishment of a depository for Wills which comes under the control and direction of the Chief Justice. The concept is that, for a fee, a person may deposit his Will with the Registrar of the Supreme Court for safe keeping. As Wills are deposited, the Registrar shall cause a record of such deposits to be maintained.

Each deposited Will must be in a sealed envelope which must have clearly stated thereon (i) the name and address of the testator as it appears in the Will, (ii) the name and address of the executor, or executors if more than one, as it appears in the Will, (iii) the date of the Will and (iv) the name of the person who deposits the Will. A Will may only be withdrawn or available for inspection by the testator during his life. After the lifetime of the testator and upon providing proof of the death of the testator, the executor (or his attorney) or any beneficiary named in the Will (or his attorney) may inspect the Will.

It should be noted that the placing of a Will in the depository does not create the presumption that such Will is the last Will created by the testator.

The Act also seeks to clarify the Court's jurisdiction with respect to who would be eligible to obtain a grant of representation in the estate of a deceased person in The Bahamas. The deceased person should have either been ordinarily resident in The Bahamas or his estate should consist of property in The Bahamas. For interpretation purposes "property includes a thing in action and any interest in real or personal property", e. g., a right to sue, real estate or monies standing to the credit in a bank account in the name of the testator (respectively).

Another concept introduced by the Act is that of sub-registries of the Probate Division of the Supreme Court. Before the Act came into force all probate applications were submitted to the Probate Registry in New Providence. New provisions now allow for applications to be submitted directly to self-sufficient sub-registries located on any one of the Family Islands, which should alleviate the burden on New Providence. Presently, the only sub-registry which is able to

facilitate applications is on Grand Bahama.

The following types of grants of representation may now be applied for under the Act:-

- grant of probate;
- grant of administration;
- grant of administration *pendente lite*;
- grant *de bonis non*;
- grant *ad litem*;
- grant of special representation where personal representative is abroad;
- grant during minority of executor;
- grant where a minor is a co-executor;
- grant in case of mental incapacity;
- administration with the will annexed;
- grant to attorneys;
- grant where a deceased person died outside The Bahamas;
- grant in an additional name; and
- grant to consular officers.

The Act also introduces a new provision to deal with small estates, i.e., estates which are valued at less than ten thousand ($10,000) dollars.

While in certain applications it is still necessary to give a bond to the court, under the new Act, only one surety is required unless the court decides otherwise. Such bond shall be double the amount at which the personal estate and effects of a deceased person are sworn as opposed to the current amount of four hundred ($400) dollars. Additionally, there is now an obligation on the personal representative, once the grant has been issued, to file a return of the value of the personal estate and effects of the deceased within 6 months after the date of the grant where the estate is in New Providence and within 9 months after the date of the grant where the estate or any part thereof is on a Family Island. Failure to file the return within the specified time is a summary offence with a penalty not exceeding three thousand ($3,000) dollars.

The Act also seeks to address the issue of grants of representation for estates in civil law jurisdictions. It enables the "paper" issued in the civil law jurisdiction to be presented for the purposes of making an application for a grant of representation in The Bahamas. "Paper" is defined in the Act as "...*any document issued in respect of a testamentary or non-testamentary application*".

Notably, section 40 of the Act allows bank managers to pay up to twenty-five hundred ($2,500) dollars from funds which are held to the credit of a deceased person to any person who, upon producing satisfactory evidence, appears to the manager to be entitled by law to the funds without the need to produce a grant of representation. It is necessary for the person claiming the funds first of all to deliver to the bank a declaration to the effect that the funds are to be used for funeral expenses. This codifies the practice currently employed by most local retail banks.

The Act further provides for employers to pay sums being held to the credit of deceased employees (not being public officers) to a beneficiary designated in writing under oath by the deceased employee without the need for such beneficiary to produce a grant of representation. Any sums so held by an employer will not form part of the deceased employee's estate and will not be subject to his debts.

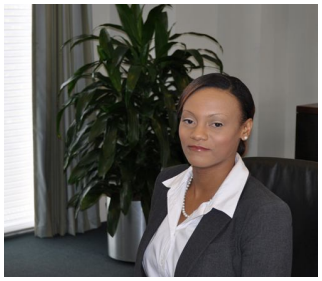
The Act also introduces a new provision to deal with small estates, i.e., estates which are valued at less than ten thousand ($10,000) dollars. It is anticipated that the process will be faster than a regular application. With small estates, an applicant need only file a petition and produce evidence of the death of the deceased. The applicant is then interviewed by the Registrar who would advise what other documents (if any) would be required to complete the application. The Registrar would have the discretion to reduce the usual requirements.

The remainder of the Act deals with the administration of estates in The Bahamas and includes no significant departure from the previous law.

Any applications for grants of representation which were submitted to the Probate Registry filed prior to the coming into force of the Act are not affected by the provisions of the Act.

Jillian Chase-Jones, an Associate in the Ocean Centre office, is a private client attorney and commercial lawyer specializing in Trusts and Estates, Immigration, Conveyancing, Banking Law and Commercial Law.

New Associates Welcomed in The Bahamas



Ms. LaShay A. S. Thompson specializes in civil litigation.

She obtained a Bachelor of Law LLB (Hons.) degree from the University of Manchester, England and attended Bar School at The College of Law (London). She was thereafter called to The Bar of England and Wales in July 2007 as a member of The Honourable Society of Lincoln's Inn and to The Bahamas Bar in September 2007.

Ms. Thompson joined Higgs & Johnson as an Associate in 2011.

Ms. Ja'Ann M. Major's practice areas include Real Estate and Conveyancing, Commercial Law, Probate & Estate Administration and Maritime Law.

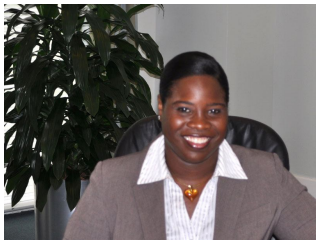
She obtained a dual honours Bachelor of Arts degree in Law (LL.B) and Business Administration from Keele University and a Master of Law (LL.M) degree from Emory University. She was admitted to both the Bar of England and Wales and The Bahamas Bar in 2008.

Ms. Major became an Associate at Higgs & Johnson in 2011, following the completion of pupillage with the firm.

Mrs. Iyandra P. Bryan is focusing her legal practice on derivatives, securities, corporate and commercial law, international tax law, bankruptcy, insolvency, corporate restructuring and international financial crimes.

She received her Juris Doctorate from University of Florida's Levin College of Law and is admitted to practice in Florida, the District of Columbia, and The Bahamas.

Mrs. Bryan became an Associate at Higgs & Johnson in 2011, following the completion of pupillage with the firm.



Mrs. Melissa L. Selver-Rolle is an Associate in the Real Estate & Development group with a legal practice focused on Real Property and Private Client & Wealth Management. She rejoined Higgs & Johnson in 2011 after years of general practice specializing in Commercial matters, Civil Litigation, Probates and Administration of Estates.

She received her LL.B from the University of Buckingham before completing the Bar Vocational Course at BPP Law School in London, England. In 2002 she was called to both the Bar of England and Wales and the Bahamas Bar

Mrs. Dwana Davis-Imhoff joined Higgs & Johnson as an Associate in 2011 and is currently specializing in Trusts and Estate Planning. She also has over three years of experience in a wide range of practice areas in Civil Litigation in addition to experience in Alternative Dispute Resolution, Arbitration and constitutional matters.

Mrs. Davis-Imhoff holds a Bachelor of Laws degree from the University of the West Indies in Barbados. She attended the Eugene Dupuch Law School in The Bahamas where she obtained a Legal Education Certificate. She was called to The Bahamas Bar in 2007.

The Uncertain Future in the Rule of Hastings-Bass

Tom Mylott

In an unprecedented turn of events, a recent English Court of Appeal decision has confirmed that a previously accepted trust principle (the "*Hastings-Bass* rule") has been misunderstood and misapplied for many years, creating potentially wide ranging implications for both the onshore and offshore trust industries. ***The twinned appeals of Futter v Futter and Pitt v. Holt,*** in March 2011, re-examined the long standing *Hastings-Bass* rule, established in the case of the same name.

In deciding in what circumstances the court can set aside the exercise by a trustee of a dispositive power, the Court drew a distinction between void dispositions and voidable dispositions.

The Hastings-Bass rule

Re Hastings- Bass prompted a sequence of decisions by which the rule became well established, the clearest formulation of the rule being enunciated in the case of *Sieff v Fox* by Lloyd J (when sitting as a High Court Judge):

"Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, **the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account**".

It is therefore oddly fitting that it should be Lloyd LJ, now sitting in the Court of Appeal, who should provide the leading judgment in the 2011 decision which re-examines the principle which historically purportedly gave the court the power to set aside a trustee's exercise of a discretionary dispositive power when such exercise had unintended consequences.

The 2011 twinned Court of Appeal Decisions of *Futter* and *Pitt*

The facts of both cases leading up to the appeal are set out below:

Pitt v Holt

Mr. Pitt was seriously injured in a serious road traffic accident and a structured settlement was provided for him as compensation. His wife, appointed by the Court of Protection as his receiver, sought professional advice and on the basis of that advice, she settled the compensation funds onto a discretionary trust. The professional advice should have led Mrs. Pitt to establish the trust in a way which would have avoided immediate and ongoing tax charges but instead there was an immediate charge to inheritance tax on the whole sum and a further charge would arise on any distributions as well as at the 10 year anniversary of the trust.

Following Mr. Pitt's death, Mrs. Pitt and Mr. Pitt's personal representatives, brought proceedings in the High Court for a declaration that the settlement by which the trust was established was void or voidable and should be set aside. The High Court held that the settlement should be set aside under the *Hastings-Bass* rule.

Futter v Futter

On advice, the trustee of two offshore discretionary trusts had exercised a power of advancement in favour of beneficiaries with the intention that stockpiled gains on assets within the trusts, which would otherwise be chargeable when the assets were transferred, would avoid incurring a capital gains tax charge through offsetting the personal annual exemptions and losses of the beneficiaries.

Unfortunately, the exercise of offsetting in such circumstances was prohibited in the governing tax legislation. The trustee sought a declaration that the advancements were void and of no effect or alternatively an order setting them aside. The High Court held that the advancements were vitiated under the rule in *Hastings-Bass* and should be set aside and the transaction declared void.

The Court of Appeal Judgment

In deciding in what circumstances the court can set aside the exercise by a trustee of a dispositive power, the Court drew a distinction between void dispositions and voidable dispositions. Where the exercise of a dispositive discretion is not within the scope of the relevant power the disposition is void. Where the exercise of the discretion is within the scope of the power but is vitiated by a failure to take into account a relevant matter or by taking into account an irrelevant matter, it may be

voidable but it must be shown to have been in breach of a fiduciary duty.

The court confirmed that a trustee who obtains professional advice, even if incorrect, advice has fulfilled its duties by seeking that advice and will not have acted in breach of trust. In the absence of a breach of trust, the trustee's act is not voidable.

HMRC was successful in both appeals meaning that the actions of the trustee in each case were not reversed and applied specifically to the two cases:

Pitt v Holt- The court held that Mrs. Pitt had acted within the scope of her power as trustee (therefore not void) and she had sought and acted on proper advice which, although the advice was wrong, she had fulfilled her fiduciary obligations and the actions were therefore not voidable.

Futter v Futter-The court held that the trustee in both trusts had acted within its powers under the trusts and, as with *Pitt*, given that the trustee had acted upon professional advice (albeit incorrect) there was no breach of fiduciary duty and the advancements were not voidable.

Conclusions

Looking to the future, it will not be possible for parties to rely upon the court to reverse the effects of a misjudged exercise of a trustee's discretion and the focus instead will seemingly be on the advice given. Such a situation will potentially create difficulties at an earlier stage in the decision making process; the professional adviser will be looking to protect himself against professional negligence actions and trustees will likely protect themselves by seeking a "second opinion".

A professional negligence claim will create significant extra cost for the trust thereby raising the question of whether such a course of action is in the best interests of the beneficiaries and if assets have been distributed and significant sums have had to be paid in unexpected tax charges there will be a question over whether there are sufficient funds available to bring the claim.

Whether trust jurisdictions around the world will follow this judgment is of course another issue. In the Cayman Islands, for example, the *Hastings-Bass* rule has in the past been accepted as good authority. Normally the parties involved in such a court application desire the *Hastings-Bass* outcome and the reason why the appeal was heard in both the *Futter* and *Pitt* cases was because of the involvement of the UK Revenue, HMRC, and the consequent loss of a tax liability in its favour if the first instance decision was not reversed.

Tom Mylott, an Associate in the Cayman Islands office, specializes in trusts, tax planning and wills. He has acted in multiple aspects of wealth management and advised trustees on their obligations, duties, powers and possible trust distributions.

H&J Sponsors Annual Texaco Speech Competition

Partner with responsibility for the Abaco office, Stephen J. Melvin (r) with the principal and Quitel (c)

Higgs & Johnson continues to sponsor the annual Texaco Speech Competition which is considered the premier speech competition in The Bahamas. It provides a platform for the best young speakers from around The Bahamas to compete for scholarships and other prizes. This year's topic was "Texaco Bahamas: Stay Safe, Lose the Distractions".

The 3rd place winner, Ms. Quitel Charlton, is an 11th grade student of St Francis de Sales High School in Abaco. She stated, "This competition meant more to me than just a scholarship or cash prizes. It was an opportunity to show The Bahamas that the youth of our nation are not all asleep. We do recognize the monstrosity made of road safety by our citizens and have taken a stand along with Texaco."

According to Partner, Mr. Oscar N. Johnson Jr, "Chevron Bahamas should be commended for continuing to put on such a prestigious competition over the last ten years. The Firm is proud to be a sponsor and recognizes the important role the private sector plays in the continuity of such programs."

Silver Sponsor at ILO Global Counsel Awards

(L-R) Derek N. Jones, Tara A. Archer and Dr. Earl A. Cash

(L-R) Gonzalo S. Zeballos, Partner, Baker Hostetler; Henry J. Ricardo, Partner, Dewey & LeBoeuf LLP; nominee Ian Whan Tong (CNC); Derek N. Jones, Tara A. Archer and Dr. Earl A. Cash of Higgs & Johnson.

Higgs & Johnson's nominee, Mr. Ian Whan Tong, Group Legal Counsel of Cayman National Corporation ("CNC") was part of an elite group of 8 persons shortlisted for the 2011 Global Counsel Award (General Commercial category). Over three thousand nominees were received for this Award, sponsored by the International Law Office and the Association of Corporate Counsel. The Award recognizes excellence in in-house lawyers, with a focus on effective communication, legal understanding, and commercial awareness.

As a silver sponsor, Higgs & Johnson hosted the Cayman National table for Ian Whan Tong at Cipriani's in New York with Partners, Dr. Earl A. Cash and Tara A. Archer from The Bahamas and Derek N. Jones of the Cayman Islands attending. The Higgs & Johnson/CNC table also included colleagues from prestigious New York Law Firms, Gonzalo S. Zeballos (Baker Hostetler), and Henry J. Ricardo (Dewey & LeBoeuf LLP).

Mr. Derek Jones, Regional Managing Partner of Higgs & Johnson's Cayman Office noted, "It was a lavish affair of which I was happy to be a part. While the Award was ultimately won by Joshua Izenberg of Alion Science and Technology Corporation, to whom the Firm extends sincere congratulations, it was nonetheless an extremely proud occasion not only for CNC, but also for the Cayman Islands."

Coffee Break Sponsor at STEP Conference

Associates Tom Mylott (Cayman) and Jillian Chase-Jones (Bahamas) man the H&J booth.

Higgs & Johnson was a coffee break sponsor at the 2011 STEP Caribbean Conference held in Bermuda. Under the theme, "IFC's Key Partners in Economic Growth" the conference considered the various issues regarding contributions made by International Finance Centres to the global economy.

The STEP Caribbean Conference continued to attract a cadre of world class speakers who provided leading edge information and indicators of the latest in industry trends.

Heather L. Thompson, a Bahamian partner, was invited to be one of the participants in the breakout session, 'Question Time: Ask the Experts'. She was available to answer questions about the issues of trust law and practice in The Bahamas. She noted, "It was a good opportunity to represent The Bahamas on the panel as it increases the presence and recognition of the jurisdiction with regards to wealth management."

The New Securities Industry Act: Innovative Changes

Iyandra P. Bryan

The new Securities Industry Act, 2011 (the "New Act") was passed in the House of Assembly on 18 April 2011 and was approved by the Senate. The date of assent for the New Act was 1st. June 2011, and an appointed day should be specified within the upcoming months. The Securities Industry Regulations, 2011 (the "Regulations") have also been published and are expected to be signed by the Minister simultaneously with the coming into force of the New Act.

Under the Old Act, international business companies were not eligible to apply for registration as a broker dealer.

The New Act will allow The Bahamas to position itself to attract more securities business by becoming a Signatory 'A' member of the International Organization of Securities Commissions ("IOSCO"), the global body for securities regulators. Among other innovative changes, the New Act modernizes the regulation of the securities industry in a manner consistent with international best practices, enhancing the powers of the Securities Commission of The Bahamas (the "Securities Commission"), and resolving the deficiencies in the former Securities Industry Act, 1999 (the "Old Act") identified by the International Monetary Fund. The result is intended to safeguard investors from fraudulent, unfair, or improper practices and to promote fair and efficient capital markets and confidence in the capital markets in The Bahamas. The defined purposes of the New Act are investor protection, fair and efficient markets, systemic stability, fostering investor education, and reducing the misuse of regulated businesses for financial crime.

Importantly, the New Act clarifies the definition of securities and the activities that would mandate registration with the Securities Commission. The New Act is a more comprehensive legislative framework, where the principal legal obligations are embodied in the Act itself, and detailed requirements are prescribed by the Regulations or the Rules of the Securities Commission. This is particularly important as the securities industry involves active changes, which require the Securities Commission to respond rapidly.

Outlined below are key changes to the Old Act effectuated by the New Act.

Securities Business

The obligation to register with the Securities Commission will now arise in respect of the carrying on of "securities business" in or from within The Bahamas. The categories of activities which constitute securities business are the following:-

- dealing in securities;
- arranging deals in securities;
- managing securities, and
- advising on securities.

Entities incorporated in The Bahamas whose sole securities business is the provision of advisory or management services to one or more investment funds licensed or registered with the Securities Commission as standard, professional or SMART funds and entities engaged in carrying on securities business exclusively for one or more affiliated companies will not be subject to register under the New Act.

Registered Firms

Firms will be registered to carry on one or more of the categories of securities business and will no longer be classified as Class I, II, IIII or IV broker dealer or a securities investment advisor. Class I broker dealers registered under the Old Act will be authorized to carry on all categories of securities business. Class II broker dealers registered under the Old Act will be authorized to carry out all categories of securities business, other than buying, selling, subscribing for or underwriting securities as principal. Securities Investment advisors registered under the Old Act will be authorized to engage in managing and advising on securities. Securities investment advisors and broker dealers registered under the Old Act will not need to re-register with the Securities Commission.

Under the Old Act, international business companies were not eligible to apply for registration as a broker dealer. These companies will now be eligible to apply for registration to conduct securities business.

Categories of Registration for Individuals

Individuals will no longer be registered as principal, broker, stock-broker, or securities investment advisor. The new categories of registration for individuals are chief executive officer, compliance officer, trading representative, discretionary management representative, or advising representative. All individuals wishing to be registered under the New Act must be

employed by a registered firm.

Prospectus Disclosure Regime

The New Act provides for key changes to the prospectus disclosure regime. The New Act requires the filing of both a preliminary prospectus and a prospectus with the Securities Commission where a trade in a security would be a "distribution" of that security, unless an exemption from the requirement to file applies. "Distribution" is defined under the New Act as including a trade in the security of an issuer that has not previously been issued or a trade in a previously issued security of that issuer that has been redeemed, purchased or donated by that Issuer. Once the Securities Commission has issued a receipt for the preliminary prospectus, the issuer can solicit expressions of interests and distribute the preliminary prospectus. No binding agreement can be entered into for the purchase of securities until the Securities Commission has issued a receipt for the prospectus.

The following offerings are exempted from the requirement to file a preliminary prospectus and a prospectus:-

- offerings to employees;
- offerings by approved foreign issuers; and
- "private placement" offerings by operating companies to accredited investors only ("private placement offerings").

Abbreviated filing requirements will apply in the case of offerings by approved foreign issuers and private placement offerings.

Abbreviated filing requirements will apply in the case of offerings by approved foreign issuers and private placement offerings.

Take-Over Bids

The Old Act failed to contain any regulations relating to take over bids, and the New Act cures this absence by providing that take over bids by public issuers must be conducted in accordance with the prescribed Regulations or Rules of the Securities Commission. The Securities Commission has indicated that the draft rules relating to take over bids will be circulated for consultation once the New Act comes into force.

Should you have any question with respect to the aforesaid, please contact a member of Higgs & Johnson's Securities Group.

Iyandra P. Bryan, an Associate in the Ocean Centre office, is focusing her practice on derivatives, securities, corporate and commercial law, international tax law, bankruptcy, insolvency, corporate restructuring and international financial crimes.

Derek N. Jones Admitted to the Cayman Bar

(L-R) Francine Bryce, Associate; Gina Berry, Partner; Derek Jones, Regional Managing Partner; Chief Justice, Hon. Anthony Smellie QC; Philip Boni, Partner and Associates Kate Palfrey, John Harris and Alexia Adda

Mr. Derek N. Jones was admitted to practice as an attorney-at-law in the Cayman Islands by the Honourable Chief Justice, Mr. Anthony Smellie QC, on the application of Higgs & Johnson, Attorneys-at-Law.

Mr. Jones, who has joined Higgs & Johnson as Regional Managing Partner, has a formidable track record as a commercial practitioner, is a former President of the Jamaican Bar Association and currently serves as Honorary Consul for Sweden.

The Chief Justice, in welcoming Mr. Jones, expressed that this was indeed a great day for the Cayman Bar as Mr. Jones' excellent reputation was well known and was already permeating the Caymanian community in a most positive manner.

Mr. Jones thanked the Chief Justice for his gracious welcome and the many members of Higgs & Johnson who were in attendance for their support. Mr. Jones reiterated his commitment to assisting the legal community in whatever capacity he was needed.

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