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THE BAHAMAS - COMMITTED TO PROTECTING CONFIDENTIALITY ON THE BASIS OF LEGITIMACY & CREDIBILITY

Michael F. L. Allen

Higgs & Johnson sponsored its 2013 annual client seminar during the month of September under the theme of "Riding the Waves of Change: Compliance, Confidentiality and More".

Opening remarks at the seminar were provided by the Minister of Financial Services Mr. L. Ryan Pinder. In the context of what was noted by the Minister as an ever-changing environment of financial services and international financial matters it was observed that new policies, legislation and agreements were under development and affecting in some form or fashion, the financial services industry, including compliance. Mr Pinder anticipated the ongoing evolution of international tax transparency and compliance and identified a clear global expansion in compliance. He further noted that the developments in what is regarded as international best practices in international financial services have called for increased compliance requirements on institutions and clients.

The Minister pointed to the fact that the issues relative to compliance have extended beyond the know your client and due diligence evolution in local legislation. Relevant developments potentially and in actuality affecting The Bahamas are also

found in laws of other countries and are reflected in discussions regarding multilateral requirements of information exchange. It was understood that compliance is now extending beyond money laundering matters that have had the focus of the last decade, and now impacts international tax concerns. The United States Foreign Account Tax Compliance Act (FATCA) represented the first step where the requirements of additional compliance with respect to tax matters could be seen.

Mr. Pinder's useful analysis of developments in compliance which reflected the distinction between compliance within the arena of tax related matters and compliance as a means to negating money laundering formed the basis for much of his presentation. He noted that the certainty facing the global community was that there are impositions on local and foreign private financial Institutions creating the obligation for tax compliance and reporting. Insofar as The Bahamas is concerned he advised that the Government of The Bahamas was assisting in minimizing the effect of such impositions by a course of action considered to be the best way forward; effectively through a Model 1

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Mr. Pinder expressed confidence that with arguments grounded in legitimacy and credibility, confidentiality can be protected.

Intergovernmental Agreement. By way of explanation he advised that this will cause the Government, and specifically the Ministry of Finance to be the Competent Authority in transmitting information to the United States Internal Revenue Service. It is anticipated that the private sector will continue to be responsible for the gathering of information adequate to meet compliance and due diligence requirements, but will not have the added responsibility of sending information directly to the IRS.

Minister Pinder was aware that of primary concern to the local and international community is the place of confidentiality within the evolving arena of compliance which increasingly trended towards greater transparency. He pointed to the reality that confidentiality is important for a number of reasons including those connected with personal safety concerns and issues connected with lack of confidence in certain foreign governmental authorities. The Government had engaged its United States counterparts on this matter when dealing with discussions regarding provisions of FATCA, particularly as regards the initial requirement that all trusts managed by professional trustees (even those without US interests) be required to register and enter into an FFI agreement with the IRS. He further advised that having advanced the argument expressing legitimate concerns for maintaining confidentiality, the result was that the US Treasury updated its

FATCA exemption Annexes (Annex II) of both Model IGA agreements to include an exemption for “trustee sponsored trusts” such that a trust with a professional trustee, would be exempt from the registration and from FFI agreement requirements where the due diligence and reporting (relative to the existence of US interests) are carried out by the professional trustee which is a FFI under FATCA. The Minister underscored the significance of this amendment for The Bahamas.

Mr. Pinder expressed confidence that with arguments grounded in legitimacy and credibility, confidentiality can be protected. It was however his view that The Bahamas must continue to demonstrate that it is a jurisdiction with a highly skilled workforce, a long history of integrity and a well regulated industry where wealth is managed and in turn positioned for international business and investment globally. Accordingly he emphasized that the Government remained committed to the philosophy and argument of confidentiality with legitimacy, and looked to work hand in hand with the regulators to ensure that The Bahamas is a jurisdiction sensitive to the operation of the private sector and an inviting jurisdiction to the international financial services participants. As part of his concluding remarks he maintained that The Bahamas is a jurisdiction of substance and credibility, always operating consistent with international best practices.

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ADDRESSING MENTAL CAPACITY: LAW, PITFALLS & BEST PRACTICES

Nadia J. Fountain

A person must have soundness of mind, memory and understanding to make a will.

Mental capacity in its basic form is the ability to make a decision and the loss thereof can happen to any one of us at any time. For the healthy, it may be the result of a sudden illness or injury. For older people, the onset of incapacity may be slower; the result of the progression of an illness such as Alzheimer's disease or just part of the normal aging process.

Understanding incapacity or capacity may seem as complex as the mind itself, but for the purposes of this article the following terms will carry their legal definitions as provided by *Stroud's Judicial Dictionary of Words and Phrases*. 6th ed. London: Sweet & Maxwell.

- *Capacity* - an ability or fitness to receive: In law it signifies when a man or body politick is able to give, or take lands, or other things, or to sue actions.
- *legal incapacity* - A person may be incapacitated by law or statute from acting in certain circumstances such as being a Minor; in the past being a woman or in event of a mental disease or disorder.

The Law

The Mental Health Act ('MHA') provides a mechanism for a person suffering from a mental disease or disorder to be declared legally incapable of acting and under Section 34 of the MHA the court is able to be appointed as custodian of their assets. Such an order may be obtained by way of an application supported by two medical certificates, certifying the mental disease or disorder from which the person is suffering from. The court isn't able to

handle the property and affairs of a mentally incapacitated person and would usually do so through a receiver. There is no test or formula set out in the MHA to determine Mental Incapacity.

Giving a Lifetime Gift

The leading case of *Re Beaney (Deceased)* [1978] 1 WLR 770 sets out the test of capacity to make a gift, and states that capacity to make a gift will vary depending on the size, nature and circumstances of the gift.

The degree of understanding required for the making of a valid inter vivos gift was relative to the transaction to be effected. If the subject matter and value of the gift were trivial in relation to the donor's other assets, a low degree of understanding would be sufficient. If however the effect of the gift was to dispose of the donor's only asset of value and to pre-empt the devolution of this estate under his will or on his intestacy, the degree of understanding required was as high as that required for a will and the donor had to understand the claims of all potential donees along with the extent of property to be disposed of.

Making a Will

A person must have soundness of mind, memory and understanding to make a will and therefore must:

- understand the nature and effect of a will
- understand the nature and extent of their property; and
- be suffering from no disorder of the

mind or insane delusion that would result in an unwanted disposition.

In addition to the four part test above, the common law acknowledges that there may be a lucid interval where a person suffering from mental illness may have “will making capacity”. When the test has been applied in more recent cases, account has been taken of new knowledge of medical and psychological matters and changing circumstances in society.

Professionals must ensure that they are acting in accordance with the terms of the relationships between the parties.

The Golden Rule

The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator and to make a concurrent record of the examination and findings.

Undue Influence

A voluntary gift will be set aside if (i) there exists an act or acts which twist a person’s mind so that he acts not of his own will but because of the influence asserted against him (based on the principle that no one should be allowed to retain any benefit arising from his own fraud or wrongful act); and (ii) a relationship between the donor and donee, has at or shortly before the execution of the gift, been such as to raise a presumption that the donee had influence over the donor. The donee will have the obligation to rebut this presumption. A presumption is triggered when:

- there is a relationship where one acquires influence or ascendancy; and
- the transaction excites suspicion or calls for an explanation.

The court may interfere in these cases, not on the ground that any wrongful act has been committed on the part of the donee, but on public policy grounds. This would usually be applicable where it is impossible to prove a specific wrongful act.

Duties/Responsibilities of Professionals

Persons acting in a professional capacity should tread very carefully when dealing with persons who appear to lack capacity. Professionals must ensure that they are acting in accordance with the terms of the relationships between the parties. In order to determine that a customer may not be acting of his own will, professionals should look for warning signs that may include:-

- a transaction that is unusual;
- an unusual relationship which appears to be influencing a transaction; and
- the making of choices that seem inconsistent with previously held values.

It should be noted however that a major pitfall for professionals is determining what is sufficient evidence to refuse to obey a customer’s mandate on the grounds that the client may be suffering from a mental disorder, which is not easy to define. Some best practices that professionals can follow include i) maintaining contact with the customer ii) documenting aspects of the relationship (such as noting medical conditions), iii) ensuring that customer records are up to date in the event of staff turnover, iv) keeping detailed records and v) recording conversations, where possible.

Nadia J. Fountain is a Senior Associate in the Ocean Centre office. She is a member of the Private Clients & Wealth Management group specialising in wills, estate planning, foundations, private trust companies, issues in company law and international commercial contracts.

CASE REPORT

Influenced greatly by the current economic downturn, the number of home repossession court actions has been notable over the past several years. There are a number of issues which arise from the repossession actions; one issue which is sometimes overlooked is the responsibility, if any, of a mortgagee in relation to the property of a mortgagor which remains in the home after repossession or which the mortgagee must remove from the home during the repossession process.

Unfortunately, there is limited reported judicial authority in relation to this point. However, in 2000, Higgs & Johnson was successful within an action in which the duty of a mortgagee in relation to the property of an evicted mortgagor was specifically considered. Having regard to the continued relevance of this topic, it is our pleasure to provide a retrospective of an article on this issue first published in Focus in our March, 2000 issue.

Associate, Audley D. Hanna, Jr.

Although, aware of the impending sale, the Plaintiff failed to return to the property to secure her chattels. This occurred despite the fact that access was available to her.

JOAN DAVIS (PLAINTIFF) V. FINANCE CORPORATION (BAHAMAS) LTD. (FIRST DEFENDANT) V. MICHAEL COLIN LIGHTBOURN (SECOND DEFENDANT) and LORRICK ROBERTS (THIRD DEFENDANT)

Common Law Side No. 1160 of 1995

Emmanuel E. Osadebay, Senior Justice

Dated the 11th day of February, 2000

The Plaintiff's claim included, (1) damages for an alleged breach by the First Defendant of its equitable duty to obtain the true market value of mortgaged premises of the Plaintiff sold by the First Defendant under its power of sale and (2) damages in respect of chattels alleged to have been in the mortgaged premises at the date of sale.

The Plaintiff and her then fiancée obtained a loan of \$30,000.00 from the First Defendant. The loan was secured by an Indenture of Legal Mortgage dated 7th August, 1990 over premises in Alice Town, Bimini, ('the property') belonging to the Plaintiff. The First Defendant requested as a condition for the granting of the loan, appraisal of the property. The Plaintiff submitted an appraisal from Charles Christie in 1990 in which the market value of the property was estimated to be \$45,000.00. It was not in dispute that in

1993 the Plaintiff was in default. The First Defendant lost contact with the Plaintiff who since the granting of the loan had changed her address without notifying the First Defendant.

In the above circumstance, the First Defendant proceeded to exercise its right of sale under the mortgage. Before the sale, the First Defendant in 1993 engaged the services of the Second Defendant to establish an estimate of the market value of the property. The Second Defendant was denied access to the interior of the property by the Plaintiff and thereby effected his appraisal without having gained entry. He appraised the market value of the property in 1993 at \$28,000.00. The property was advertised for sale in 1993 and three offers were received. The First Defendant accepted the highest offer of \$26,500.00 which was received from the Third Defendant. Although, aware of the impending sale, the Plaintiff failed to return to the property to secure her chattels. This occurred despite the fact that access was available to her. The Plaintiff also had relatives, including a sister, who lived in the neighbourhood and had not asked any of them to remove and secure her chattels. Upon purchasing the property the Third Defendant removed the Plaintiff's

chattels. As there were no storage facilities in Bimini, the Third Defendant stored the Plaintiff's chattels in the shop of a relative of the Plaintiff with the assistance of the Plaintiff's cousin.

The Plaintiff alleged that (1) the difference in the market value of the property between the appraisal in 1993 was so substantial that the First Defendant was negligent in relying solely on the 1993 appraisal and selling the property at an undervalue; (2) the First Defendant was careless and reckless in relying on the 1993 appraisal as the Second Defendant had not entered the interior of the property in effecting his appraisal; and (3) the First Defendant acted in breach of its fiduciary duty to secure the Plaintiff's goods, thereby causing her to suffer loss and damage.

The Court dismissed the Plaintiff's claim against the Defendants.

The Judge referred to the decision in *Cuckmere Brick Co. Ltd. and Another v. Mutual Finance Ltd.* (1971) 1 Ch. 949 regarding the rights and obligations of a mortgagee in the exercise of its power of sale. The Judge held as follows:-

- On the question of sale at an undervalue, the Judge referred to the decision by Crossman J in *Waring (Lord) v. London & Manchester Assurance Co. Ltd & Ors* (1935) 1 Ch. 310 and stated that for the Plaintiff to succeed on this ground 'there must be something far beyond the mere fact of an undervalue'. The Judge accepted as a principle of law that the First Defendant as a mortgagee in the exercise of its power of sale under the mortgage owed to the Plaintiff as a mortgagor a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which it decided to sell the

property. The Judge stated that he was satisfied that the 1990 appraisal of \$45,000.00 made at the time when the loan was granted did not reflect the true market value of the property at the time when the First Defendant decided to sell the property in 1993.

- The Judge stated further that it is a fundamental legal and moral principle under our system that a person should not be allowed to gain an advantage or compensation by virtue of his or her own default. See: *Hong Kong Fir etc v. Kawasaki Kisen* (1962) 1 All E.R. 474 and *Shepherd & Co. Ltd. v. Jerronn* (1986) 3 All E. R. 589. The Plaintiff was therefore not allowed to gain any advantage or compensation by her own default in refusing the Second Defendant access to the interior property.
- In determining whether the First Defendant, in the circumstances, owed the Plaintiff any fiduciary duty, as alleged, to secure the Plaintiff's goods, the Judge stated that the decision in *Jones v. Foley* (1891) 1 Q.B. 730 reflect the common law position in The Bahamas. A mortgagee who takes possession in exercise of his rights under the mortgage is not obliged to look after the chattels left on the premises pending their removal. However, a mortgagee who takes possession in exercise of his rights, subject to any rights he may claim over the chattels, is under a duty to allow the mortgagor to remove any chattels belonging to him. The Plaintiff had been requested but failed to remove her chattels from the property. The continued presence of the Plaintiff's chattels on the property constituted a trespass which the mortgagee was entitled to take steps to end.

The Judge stated further that it is a fundamental legal and moral principle under our system that a person should not be allowed to gain an advantage or compensation by virtue of his or her own default.

RIDING THE WAVES OF CHANGE: COMPLIANCE, CONFIDENTIALITY & MORE

HIGGS & JOHNSON hosted its annual client seminar on Thursday 26 September 2013 under the theme '*Riding the Waves of Change: Compliance, Confidentiality & More.*' Welcome remarks were given by **Oscar N. Johnson, Jr.**, Managing Partner of the Firm. Minister of Financial Services, the Hon. Ryan Pinder, MP, in his opening remarks noted that the developments in what is regarded as international best practices in international financial services has resulted in increased compliance requirements for institutions and clients. Minister Pinder stated, "Change can be intimidating, can cause operations to change and adapt, and can result in increased costs, but it can also result in new and additional opportunities and allow for a jurisdiction and industry to be reflective of progressive evolution."

The first session, '*Addressing Mental Capacity: Law, Pitfalls and Best Practice*' was presented by Senior Associate, **Nadia J. Fountain**. She provided insights with regard to the evolving concepts of incapacity and also discussed the duties of and best practice options for local professionals.

Baker & McKenzie Partner, Simon Beck spoke on the topic '*Confidentiality of Financial Information is Dead! Will There Be Any Survivors?*' He highlighted the impact that FATCA, legislation in Europe and Latin America and multi-lateral and bi-lateral conventions have had on the client's ability to keep their affairs confidential. In discussing these recent events he concluded that confidentiality of information is not dead but there are

greater exceptions to the principle which continue to develop.

Portia J. Nicholson, Firm Partner along with Charles Virgill, Senior Bank Examiner of the Central Bank elaborated on the topic '*Overdoing Compliance: Perspectives of the Regulator & Practitioner*'. Noting that regulatory compliance is risk based, a lot of discretion lies with the financial institutions which must balance client's needs with their reputational concerns.

The seminar concluded with a mock arbitration between 'DaCustomer is Always Wright' and 'Bank & Trust Company Ltd.' Associates **Audley D. Hanna, Jr.** and **Dwana Davis-Imhoff** represented the Bank and Mr. Wright respectively before a distinguished arbitral panel comprised of the Firm's Senior Partner, **Philip C. Dunkley, QC**, **Tara A. A. Archer**, Partner along with Simon Beck. They decided the fate of both parties in a reasoned oral judgment. This segment was lively as Counsel did battle on behalf of their clients and concluded with Mrs. Davis-Imhoff's victory as the Arbitral Panel found in favor of Mr. Wright. In it's ongoing effort to promote education in The Bahamas, Higgs & Johnson sponsored the attendance of faculty and students of both the UWI/COB Law Degree program and the Eugene Dupuch Law School. Sponsors of the Seminar included H&J Corporate Services Ltd., First Bahamas Title Insurance Agency and H&J Fiduciary Services Ltd. all of which are affiliates of Higgs & Johnson.

H&J's CLIENT SEMINAR SCENES ~ 2013

A) Partners with
guest speaker
Minister Ryan
Pinder



B) Philip Dunkley,
Leon Potier, Simon
Beck and Oscar
Johnson



C) Higgs & Johnson
Associates during
the cocktail reception



D) Oscar Johnson
with Acting Justice
Ian Winder



E) Simon Beck
expounding on his
topic of
Confidentiality



F) Arbitral panel
discuss the case
presented before
them



G) Minister Pinder
interacts with
attendees during the
coffee break



H) Heather
Thompson (left) with
attendee Jackie Rolle

