



## IMPORTANCE OF TITLE INSURANCE IN THE BAHAMAS

Ja'Ann M. Major

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In real estate transactions in The Bahamas, the use of title insurance is a recent development. Until the late 1990s, purchasers and lenders relied exclusively on their attorney's legal opinion on title, which is based on a thorough title search and supported by the attorney's professional indemnity insurance. In The Bahamas, an attorney acting for a purchaser or a lender has a duty to investigate the vendor's or the borrower's title and to confirm to such purchaser or lender that the vendor or borrower has a good and marketable title to the property being purchased or mortgaged, free from any recorded encumbrances.

The Bahamas has an unregistered land system; accordingly, in order to provide such confirmation, the attorney is required to conduct title searches dating back at least thirty (30) years or for a period extending back to a Crown Grant, a Crown Lease or a Certificate of Title issued in accordance with the Quieting Titles Act of The Bahamas (whichever is shorter). These title searches will reveal any recorded defects in the title or liens on the property.

In instances where title defects are discovered, a purchaser or lender may wish to purchase title insurance. Title insurance is a form of indemnity insurance which insures against financial loss suffered as a result of defects in title to real property which were in existence at

the time when the title insurance policy was issued. There are two types of title insurance policies: (i) an Owner's Policy, which protects the purchaser's interest in the property and is issued in the amount of the purchase price of the property; and (ii) a Loan Policy, which protects a first priority lender's interest in the property, and is issued in the amount of the loan. Both policies are purchased for a one-time fee.

Before a title insurance company agrees to issue a title insurance policy, it conducts title searches similar to those searches conducted by an attorney who is providing a legal opinion on title. Upon completing its title searches, the title insurance company will issue a title insurance commitment, which will outline, inter alia, any requirements (which would include any title defects or issues revealed by the title searches) which must be satisfied before a title insurance policy can be issued. All known title defects or issues must be resolved or otherwise would be listed as exceptions to the title insurance coverage.

There are several benefits to obtaining title insurance. These include the following:

- A title insurance policy will indemnify a purchaser or a lender against any loss suffered by the purchaser or a lender as a result of a title defect or lien which existed at the date of the policy,

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*For additional copies of FOCUS, please contact Antonia Burrows at 242 502 5200 or at [aburrows@higgsjohnson.com](mailto:aburrows@higgsjohnson.com).*

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*It is important to note that the title insurance coverage is limited to those title defects or liens which existed at the date of the title insurance policy and does not cover future risks.*

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but was not revealed by the title or specifically excluded from the insurance coverage.

- Title insurance covers recorded title defects or liens, which would be revealed by a usual title search, as well as hidden defects or liens which would not be revealed by the usual title search. Such defects or liens would include:
  - A forged will or deed
  - A signature by a minor or mentally incompetent person
  - Adverse possession
  - Clerical errors in the records
  - Confusion arising from similarity of names
  - False affidavits
  - Evidence of a fraudulent transfer of property
  - Judgment against a property owner
  - Lawsuits that relate to the property
  - Misfiling of a document by the Registry of Records
  - Sellers who misrepresent their marital status
  - Undisclosed heirs
  - Undiscovered wills
  - Unreleased mortgages
- The title insurance company will assume the responsibility of defending any lawsuit attacking the title insured and will also bear all costs, legal fees and expenses related thereto.
- In instances where a purchaser or lender secures title insurance

coverage for a property, they in turn would be able to offer title insurance to a future purchaser; resulting in an expedited completion of the transaction.

- Title insurance gives a purchaser or lender who has already obtained a legal opinion on title from an attorney an added level of security.

Notwithstanding the foregoing, it is important to note that the title insurance coverage is limited to those title defects or liens which existed at the date of the title insurance policy and does not cover future risks. In addition, title insurance only provides coverage over a title defect, it does not correct or eliminate it, nor will the title insurance company attempt to resolve a title defect or issue.

Ultimately, while the use of title insurance in The Bahamas is becoming increasingly popular, it should not be considered as an alternative to engaging a local Bahamian real estate attorney to assist with a real estate transaction, as the process for purchasing real estate in The Bahamas can sometimes be very complex. For example, in cases where a title defect or lien is discovered, an attorney will usually work to resolve these issues before issuing the legal opinion on title. The title insurance company on the other hand would simply issue a title insurance commitment which lists the defect as something to be addressed by the purchaser or the lender. In this instance, the purchaser or the lender would be well advised to engage the services of a Bahamian real estate attorney to assist in resolving the defect and to provide general legal advice in relation to the transaction.

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*Ja'Ann M. Major is an Associate in the firm's Real Estate & Development Practice Group and is also In House counsel for First Bahamas Title Insurance Agency. She has experience in a broad range of matters including residential and commercial property acquisitions and sales by Bahamians and non-Bahamians.*



## CAYMAN: A TRUSTEE'S DUTY OF DISCLOSURE

Jo-Anne Stephens

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*Schmidt made it clear that all beneficiaries, whatever their status (including mere objects of a discretionary power), may request accounts and disclosure of trust documents.*

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At common law, a trustee is under a duty to account for his stewardship of the trust fund. This duty is owed to the beneficiaries and in effect means that a trustee should be prepared to disclose to the beneficiaries full particulars of the assets, trust accounts, details of investments and other trust documents. However, the right of the beneficiaries to the trust accounts and documents is not an absolute right. A trustee may reject the request for information if he is justified in doing so. The circumstances when refusal is justified are vague but the issue has been considered in the House of Lord's decision of *Schmidt v Rosewood Trust Ltd* [2003] 3 All ER 76. In that case, the House of Lords rejected the argument that a beneficiary's right to the trust documents is a proprietary right. Instead, it held that the correct approach is to regard the right to disclosure of trust documents as one aspect of the inherent jurisdiction of the court to supervise and where necessary to intervene in the administration of the trust. Prior to the *Schmidt* case, it was doubted whether the rights to trust accounts and other documents were enjoyed by beneficiaries under a discretionary dispositive power. *Schmidt* made it clear that all beneficiaries, whatever their status (including mere objects of a discretionary power), may request accounts and disclosure of trust documents.

At common law therefore, the starting point is that a trustee has a duty to provide information to all beneficiaries but may refuse to do so if it has compelling reasons. Essentially, it is a balancing of the reasons in favour of disclosure and

those against disclosure. The court will consider the interest of the beneficiary requesting the information, the purpose of the request, the interests of the other beneficiaries, and the trust as a whole. It seems to be settled law that trustees would be justified in refusing to disclose trust documents if doing so would reveal their deliberations or reasons for exercising a particular discretion. Therefore, a trustee would not normally provide the agendas and minutes of trustee's meetings, the reasons for dispositive and administrative decisions, and the letter of wishes. However, it may be required to disclose the trust deed, deeds of appointment, deeds of retirement and removal of trustees, trust accounts, legal opinions and instructions to counsel paid by the trust.

Before a trustee in the Cayman Islands proceeds to release information to a beneficiary in accordance with the common law, it would be prudent to consider the trustee's obligations under the *Confidential Relationships (Preservation) Law (2015 Revision)*. Section 3(2) of that Law prohibits a professional person from releasing confidential information (including trust documentation), in among other circumstances, other than in the normal course of business or with the consent, express or implied, of the relevant principal or in accordance with the law. "Principal" is defined as a person who has imparted confidential information in the course of the transaction of business of a professional nature. The identity of the principal is not always clear in a trust structure but will usually be the settlor of

the trust.

It is arguable that where a trustee has a specific duty to disclose information under the Trust Deed, the duty to disclose that information to the beneficiaries may be within the normal course of business. However, in other cases, it may be less clear and the facts should be carefully considered before the trustee acts to disclose the document or information in question to the beneficiary. If the trustee is in doubt and cannot obtain the

principal's consent, then it will be well-advised to seek legal advice/and or the court's direction.

*\*At the date of this Article there has been a proposal to repeal the Confidential Relationships (Preservation) Law (2015 Revision) with the proposed changes set out in Confidential Information Disclosure Bill 2016. This Bill will have the effect, among other things, of removing criminal liability for breach of confidence and reverting to the common law and rules of equity to determine liability.*

**Jo-Anne Stephens is Deputy Chair of the Private Client and Wealth Management Practice Group and advises on the creation of trusts and ownership structures, trust and company administration and contentious trust disputes. She recently received the STEP Student Excellence Award for obtaining the highest grade in the world in her STEP exam.**

## HEALTH CITY VISIT IN THE CAYMAN ISLANDS



Attorneys in the Cayman office were invited to an amazing lunch, informational talk and tour of Health City, a medically advanced tertiary hospital. It has a unique model of healthcare, built with a focus on the patient and rooted in innovative business models that allow the delivery of high quality, affordable care.





# THE LIMITED LIABILITY COMPANIES LAW IN THE CAYMAN ISLANDS

Alric Lindsay

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*With the expertise and new perspectives offered..., the newly acquired public company could see itself reorganised as a private company, having its management team rejuvenated and policies reformed.*

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The Limited Liability Companies Law, 2016 (“the Law”) was recently enacted in the Cayman Islands. Once in force, the Law will allow a limited liability company (“LLC”) to be established with the combined features of a corporation (e.g. separate legal personality) and a partnership (e.g. allocation of profits and losses to its members and the possibility of a member or manager agreeing to be personally liable for all of the debts of the LLC). This adds to the existing structuring opportunities available to Cayman Islands stakeholders. Some of the new options which might be explored under the Law are described below, none of which has been tested because the Law is not yet in force.

## **LLC as a general partner in an exempted limited partnership**

According to the Law, unless the LLC agreement provides otherwise, a LLC has the power to act as a general partner (sole or otherwise) of an exempted limited partnership. This will allow the members of the general partner (in the form of a LLC) to allocate profits and losses amongst themselves in a manner similar to the exempted limited partnership.

## **LLC as a management company**

In addition to acting as a general partner, a LLC may operate as an investment management company, conducting securities investment business in respect of Cayman Islands based investment funds. The LLC could therefore receive management fees and/or performance fees earned in respect of the management of other entities.

## **LLC as a private equity fund**

A third use of a LLC might be to raise capital from private sources and invest in start-up companies that have innovative ideas or in growing companies that need capital for expansion. Hopefully, those companies would become immensely profitable or go public, ultimately resulting in returns for the LLC and allocation of profits to its members.

In another scenario, the capital raised may be combined with borrowed money to acquire a much larger, public company which may be experiencing financial or other challenges. With the expertise and new perspectives offered by the members or managers of the LLC, the newly acquired public company could see itself reorganised as a private company, having its management team rejuvenated and policies reformed. If the implementation of these changes results in profits, the LLC may consider making its investment available for sale as a public company once again. This could lead to a big payout for members or managers of the LLC.

## **How do we get started?**

Any one or more persons may form a LLC for any lawful business, purpose or activity, whether or not for profit.

A LLC is registered by payment to the Registrar of Limited Liability Companies (the “Registrar”) of a registration fee and filing with the Registrar a registration statement containing:

- the name of the LLC and, if applicable, its dual foreign name together with its translated name;
- the address in the Cayman Islands of

the registered office of the LLC;

- the term, if any, for which the LLC is formed (if not formed for an unlimited duration); and
- a declaration that the LLC shall not undertake business with the public in the Cayman Islands other than so far as may be necessary for the carrying on of the business of that LLC outside the Cayman Islands as contemplated by the LLC Law.

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*Such remedies, sanctions or consequences may include reduction, elimination, forfeiture or sale of the member's LLC interest or any rights of the member under the LLC agreement.*

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A certificate of registration will be issued by the Registrar, after which the LLC shall be deemed to be registered as of the date of filing.

#### **Who will run the company after registration?**

The member or members of a LLC shall enter into an LLC agreement to regulate the conduct of its business or affairs. Unless otherwise provided in the agreement, its management shall be vested in its members acting by a majority. However, the LLC agreement may provide for management in whole or part by one or more managers and for specified remedies, sanctions or consequences to apply where a member

or manager fails to perform in accordance with, or to comply with the terms and conditions of, the LLC agreement.

Such remedies, sanctions or consequences may include reduction, elimination, forfeiture or sale of the member's LLC interest or any rights of the member under the LLC agreement. These are not entirely new provisions as offending members will be treated in a manner similar to defaulting partners in an exempted limited partnership.

#### **Why you should pay attention to the new legislation?**

Once the Law comes into force by an order to be passed by the Cayman Islands government, clients must ensure that they understand their duties, rights and remedies as managers or members of a LLC. This will include taking Cayman Islands legal advice and not simply signing off on documentation purporting to fairly address all rights. After all, each transaction is different and the provisions that will appear in LLC agreements will vary depending on whether legal counsel is representing a manager or a member.

*Alric Lindsay is a Senior Associate and Deputy Chair of the firm's Investment Funds Practice Group and advises on all aspects of investment funds, specialising in private equity and hedge fund formation.*

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*Cayman attorneys attend the WISTA conference. Cayman Managing Partner, Gina M. Berry also gave the Vote of Thanks at the closing.*

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## RECOGNITION & ENFORCEMENT OF FOREIGN JUDGMENTS

Felix Beneby, Jr.

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*The REJA defines “judgment” as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the REJA.*

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A person obtaining a foreign judgment in civil proceedings in a superior court, outside the jurisdiction of the Commonwealth of The Bahamas, may have the option of having the judgment recognized and registered in The Bahamas upon complying with certain statutory provisions and/or common law principles. This aligns with a global approach of assistance amongst countries, in relation to enforcing certain legal orders, remedies or awards afforded to the appropriate parties.

The recognition and enforcement of foreign judgments made in applicable countries such as the United Kingdom and select Commonwealth countries (Australia, Bermuda and Jamaica to name a few); are primarily governed by the **Reciprocal of Enforcement of Judgments Act 1924, chapter 67 of the Statute Laws of the Bahamas** (the “REJA”). Section 3 (1) of the REJA provides:

*Where a judgment has been obtained in a superior court outside The Bahamas, the person awarded judgment may apply to the Supreme Court, at any time **within twelve months after the date of the judgment**, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in The Bahamas and subject to the provisions of this section, order*

*the judgment to be registered accordingly.*

The REJA defines “judgment” as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the REJA and includes an award in proceedings on an arbitration if the award has become enforceable in the same manner as a judgment given by a court in the place of origin.

Section 2 of REJA provides that judgments will **NOT** be registered in The Bahamas under particular circumstances. Such circumstances include **If**:

- the original court acted without jurisdiction;
- the person obtaining the judgment, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
- the defendant in the proceedings was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- the judgment was obtained by fraud;
- the defendant satisfies the registering court either that an appeal is pending or that he is entitled or intends to appeal against the judgment;
- the judgment was in respect of a

cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

Application of the REJA was seen in the Bahamian case of **Casio Computer Co. v Tsuru (BHSJ) No. 643 of 2001**, where the Honorable Mr. Justice Small applied the provisions of the REJA in recognizing Casio Computer's worldwide freezing injunction obtained in England and Wales against the Defendant, Tsuru.

If the country in which the judgment was obtained is not an applicable country under the ambit of the REJA, one may still have recourse to have the judgment recognized in The Bahamas, by way of common law upon satisfying certain legal criteria.

In determining whether the judgment is to be recognized and enforced the Bahamian courts will consider, amongst other things:

- Whether the judgment is final and conclusive;
- Whether the foreign court has jurisdiction; and

- Whether the judgment is for a debt or definite amount of money including a final order for cost and other than a sum payable in respect of taxes, fines, penalties or other charges.

### **Defences against Recognition and Enforcement of Foreign Judgment**

#### *Fraud*

If a question arises as to whether the foreign judgment was obtained fraudulently then the foreign judgment will not be enforced in the Bahamian court.

#### *Public Policy*

Generally, where a law or judgment is contrary to public policy then the foreign judgment will be unenforceable.

#### *Natural Justice*

If it can be concluded that natural justice did not prevail in the proceedings whereby the foreign judgment was granted, it shall not be enforced. This position is synonymous with the latin phrase "*audi alteram partem*" which means let the other side be heard as well.

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*If it can be concluded that natural justice did not prevail in the proceedings whereby the foreign judgment was granted, it shall not be enforced.*

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*Felix Beneby, Jr. is an Associate in the Litigation Practice Group specializing in civil and commercial litigation. He provides legal advice and counsel regarding cross-border and multi-jurisdictional litigation, fraud, asset-tracing and recovery matters .*

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*Global Managing Director, Oscar N. Johnson, Jr visits with Lee Ying Ying, Partner at Kelvin Chia Partnership, a TerraLex member Firm, while in Singapore.*

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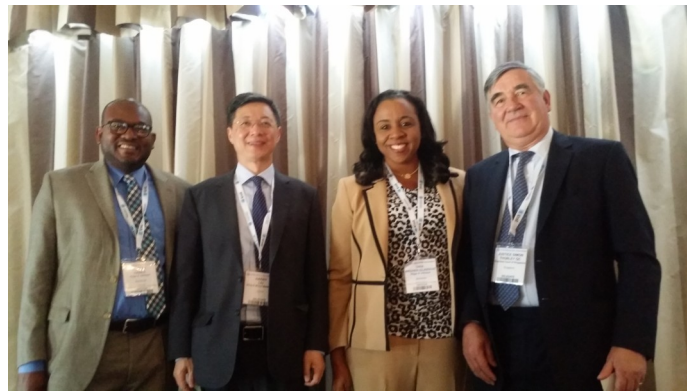




## FIRM SPONSORS IBA LITIGATION FORUM



*Audley Hanna and Tara Archer near the H&J sign at the refreshment break.*



*Audley Hanna and Tara Archer with delegates from the forum.*



*Audley Hanna and Tara Archer with the Hon. Susan Illston US District Court, San Francisco and Cedric Chao, head of International Arbitration at DL Piper.*

Higgs & Johnson litigators, Tara Archer (Partner) and Audley Hanna (Associate) attended the annual International Bar Association (“IBA”) Litigation forum; of which the firm was also a sponsor. They joined corporate counsel, managing partners, heads of various law firm departments and policymakers from all over the world through working sessions and social events.

This year’s conference highlighted many issues including the growing clash between privacy and information sharing rules in Europe and North America and their effect on litigation; litigating complex, high value technology disputes; and the latest opinions for the use of litigation as a dispute resolution mechanism in key Asian jurisdictions.

Mrs. Archer noted, “The sessions were thought-provoking and garnered much discussion especially with regard to the emerging issues surrounding technology and what it brings to the litigation process.”

Mrs. Archer and Mr. Hanna are Officers of various IBA Committees. Mrs. Archer has over eighteen (18) years of legal experience and she along with Mr. Hanna practice in the areas of commercial and civil litigation, law of insolvency, banking law, employment law and IP law.