

HJ FOCUS

HIGGS & JOHNSON COUNSEL & ATTORNEYS-AT-LAW

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APPLICATIONS BY TRUSTEES FOR THE COURT'S 'OPINION, ADVICE OR DIRECTION'

N. LEROY SMITH

The Courts of Equity have always recognized the right of trustees to approach the Court for directions. Under the laws of The Bahamas, express provision is made for trustees to apply for guidance with respect to the administration of trusts under Section 77 of the Trustee Act 1998 ("Section 77").

When Will It Be Appropriate To Apply For Directions?

In the leading English case of Public Trustee v Cooper [2001] W.T.L.R. 901 (Ch D), Mr Justice Hart quoted from a judgment of Robert Walker J in an unnamed 1995 case wherein Walker J. said that when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well):-

- The first category is where the issue is whether some proposed action is within the trustees' powers;
- The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided on how they want to exercise such powers but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved

and which is within their powers;

- The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked or because the trustees are disabled as a result of a conflict of interest; and
- The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court.

Key Principles Underpinning Trustee Directions Applications

- *The Trustee should ensure that it has done its homework and take proper expert advice*

In the decision of the Supreme Court of New South Wales in Re Appln of NSW Trustee & Guardian - BC201402504 it was stated that:

"In applying to the court for judicial advice, the trustee is not abrogating or delegating its obligation to apply its own judgment in deciding whether to do (or not do) something in execution of the trust. The trustee must actively and honestly bring its mind to bear on any particular problem confronting it. Where necessary,

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For additional copies of FOCUS, please contact Antonia Burrows at 242 502 5200 or at aburrows@higgsjohnson.com.

“...provided that the court’s advice, opinion and/or directions are embodied within an Order, the Trustee will receive the benefit of the ‘statutory indemnity’ supplied by Section 98 of the Trustee Act...”

it is entitled to do so with the benefit of such legal or other advice...The trustee should then determine a course of action subject, again if it thinks appropriate, to obtaining judicial advice about that course of action...in almost all cases an application for judicial advice should be accompanied by counsel's opinion. The content of that opinion will be a significant matter which the court will take into account in determining whether or not to give the advice sought.”

- The Trustee should endeavour to provide full materials and information to the Court
Section 78 of the Trustee Act provides that applications pursuant to Section 77 must be brought pursuant to a “written statement” signed by counsel and attorney.

The applicant should disclose all relevant matters and materials to the Court. This is not least because, section 77(4) provides that ‘a trustee shall not receive the protection afforded by Section 77(3) [as to which please see below] “...if he is guilty of any fraud or willful concealment or misrepresentation in obtaining such opinion, advice or direction.”

- The Trustee should be concerned to assist the court and to ensure that (where appropriate) relevant/interested parties are given notice of the application

An application pursuant to Section 77 is in the nature of a private application. However, the Judge seised of the matter is empowered to direct that notice be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient.

The Effect of the Court’s Advice, Opinion or Directions under Section 77

Section 77(3) states that “A trustee or personal representative acting upon the

opinion, advice or direction given by the Judge shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee or personal representative in the subject matter of the said application.”

Additionally, provided that the court’s advice, opinion and/or directions are embodied within an Order, the Trustee will receive the benefit of the ‘statutory indemnity’ supplied by Section 98 of the Trustee Act, which provides that “...this Act and every order purporting to be made under this Act shall be a complete indemnity to all persons for any acts done pursuant thereto...”.

Costs of the Section 77 Application

Legal costs of Section 77 applications are “in the discretion of the Judge”. However, the preponderance of authority holds that absent exceptional circumstances, a trustee (even where it has been ‘hyper-cautious’) should be entitled to recover its legal costs from the trust fund.

There is a paucity of reported instances in which a trustee has been deprived of its costs; one such case was BA v Verite Trust Co Ltd, Re E, L, O and R Trusts [2008] JRC 150 wherein the Royal Court of Jersey held that “A trustee may only be denied an indemnity for its costs if it has acted unreasonably, which is a high hurdle”.

Conclusion

In circumstances where trustees are faced with difficult questions concerning trusts under their stewardship or where they are applying their minds to momentous decisions which could, for example, potentially give rise to substantial liability, it shall be a counsel of prudence for that trustee to seek expert advice and with the benefit thereof, to consider seeking the court’s opinion, advice and/or directions.

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N. Leroy Smith, Partner, focuses on all facets of trust law including representing fiduciaries and individual clients (both private and institutional) in a range of trust and estate litigation; and advising clients in the drafting and administration of Bahamian trusts.



CAYMAN INTRODUCES NEW COPYRIGHT LAW

Francine Bryce

Until recently, copyright protection in the Cayman Islands was based on the UK Copyright Act 1956 (the “1956 Act”), notwithstanding that the UK had long replaced the 1956 Act with the Copyright, Designs and Patents Act 1988 (the “1988 Act”).

With the increasing advancements in information technology and particularly digital forms, modernization of the copyright laws in Cayman Islands was inevitable and became a top priority. The revamping of the copyright protection framework was also driven by the desire to encourage and support the work of local creators, as well as to offer greater protection opportunities for international creators who wanted to invest or conduct business in Cayman.

In June 30, 2016, the Copyright (Cayman Islands) Order, 2015 and Copyright (Cayman Islands) (Amendment) Order, 2016 (“Copyright Laws”) came into effect to extend certain copyrights under Part 1 of the 1988 Act.

What has changed and what does this mean for you?

- *Increased Rights*

The Copyright Laws have brought with it increased rights and a wider recognition of rights which were not previously covered by the 1956 Act. This includes for example, rights over computer program and database, computer based documents, works in a cable programme, printing of literary works and other forms of work which never existed in 1956.

There are also greater protections available through an expansion of the

Moral rights, are an example of a new category of rights in which an author or director of work (whether or not he is the owner of the copyright) has the right to be identified as the author and raise objections to any distortions of his work.

descriptions of work in which copy rights are conferred.

Moral rights are an example of a new category of rights in which an author or director of work (whether or not he is the owner of the copyright) has the right to be identified as the author and raise objections to any distortions of his work.

Another newly recognized right is the right of a person who commissions the taking of photographs or a film for private or domestic purposes, not to have copies of the work issued or exhibited to the public without consent.

- *Duration of Rights*

Another notable change brought by the Copyright Laws relates to the duration of copyrights which has been increased from the previous 50 years under the 1956 Act, to 70 years. These areas include:

Literary, dramatic, musical or artistic works

From 50 years to now 70 years from the end of the calendar year in which the last remaining author of the work dies OR 70 years from the end of the calendar year in which the work is made available to the public in the case of the work of unknown authorship.

Film

From 50 years to now 70 years from the end of the calendar year in which the last principal director, author or compose dies OR in the case of the work of unknown authorship, 70 years from the end of the calendar year of creation or in which the work is made available to the public.

Sound recordings

Remains at 50 years from the end of the calendar year in which the work is created

but also now continues 50 years from the end of the calendar year in which the work is released.

Restricted Acts/Copyright Infringement

Under the Copyright Laws, a list of restricted acts have been introduced which now forms an additional basis for copyright infringement claims. If a person performs any of these restricted acts without the owner's consent, this constitutes copyright infringement. The restricted acts include:

- Making copies of the work

- Issuing copies of the work to the public
- Renting or lending the work to the public
- Performing, showing or playing the work in public
- Communicating the work to the public
- Making adaptations of the work

In summary, the overall changes are an initial step by the Cayman Islands to develop its copyright laws in line with international standards.

Francine Bryce is a Senior Associate with over 10 years of experience advising on all aspects of corporate and commercial law including investment funds and securities, banking, corporate and finance transactions.

CAYMAN ASSOCIATE RECEIVES STEP AWARD



Cayman Associate, Jo-Anne Stephens (left), was the recipient of the STEP Excellence Award for the highest score worldwide in the STEP Advanced Certificate in Company Law & Practice. She is pictured with Country Managing Partner, Gina M. Berry .



CONTRACTING OUT OF THE RIGHT TO LIMIT LIABILITY IN MARITIME CONTRACTS

Audley D. Hanna, Jr.

"Reliance upon the Act has been invoked on a number of occasions within this jurisdiction but has now been highlighted by a case which has been recently decided by the Privy Council."

It has, for some time, been considered appropriate to provide those engaged in maritime operations with specific protection in relation to the risks of claims arising from maritime accidents. The general rationale behind this protection is that, as a matter of public policy, it is important to ensure that maritime trade can be facilitated without undue impediment. Accordingly, one of the rather unique aspects of maritime law is the statutory right provided to ship owners to limit their liability for damage arising from, most usually, collisions (that is accidents involving two or more ships) and allisions (accidents involving a ship and a structure). Within The Bahamas, this statutory protection is provided by virtue of the Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989 (the "Act"). The Act provides a formula, based upon the size of the ship which occasioned the damage, which sets out a limit of the amount which can be recovered against that ship within a proceeding arising from an incident. Further, this limit is cumulative in that no matter how many claimants may be involved, the total amount which all claimants can recover is limited to the amount ascertained by this formula. In order to rely upon the right to limit the liability, ship owners must commence independent proceedings whereby they essentially request of the Court the right to establish a limitation fund and a declaration that any recovery in relation to a relevant incident be limited to the sum contained within the said limitation fund.

Reliance upon the Act has been invoked on a number of occasions within this jurisdiction but has now been highlighted by a case which has been recently decided by the Privy Council. This case is of particular importance as it addresses an aspect of the limitation of liability which does not appear to have been previously determined judicially, at least not definitively; namely whether parties to commercial maritime contracts can expressly contract out of the right to limit liability under the Act.

In brief, the relevant factual legal background arose in 2012, when an oil tanker struck a docking facility on the island of Grand Bahama causing significant damage. Subsequent to proceedings being commenced against the oil tanker for damages, the owners of the oil tanker commenced a limitation action seeking to limit their liability in accordance with the Act and to establish a limitation fund from which any recovery arising from the allision would be paid.

There was a contract between the oil tanker and the owner of the docking facility which contained a provision whereby the oil tanker would be responsible for any and all damage to property belonging to the owner of the docking facility. In reliance upon this provision, the owner of the docking facility, within the limitation action, challenged the right to rely upon the Act and to, thereby, set up a limitation fund.

Arguments in relation to whether the application of the Act could be avoided by virtue of a contractual provision were

"...the Privy Council confirmed that it was, in fact, possible for parties to expressly exclude the operation of the Act and the right to limit liability provided that the exclusionary language was sufficiently clear."

initially made before the Supreme Court of The Bahamas. In considering the matter, the Judge determined that it was, in fact, permissible to exclude the operation of the Act and to exclude the right to limit liability. The Judge also held that the operative contractual provision was sufficient for this purpose.

The decision of the Judge at first instance was appealed by the owners of the oil tanker to the Court of Appeal on the basis that the clause in question was insufficient for the purpose of excluding the operation of the Act and the right to establish a limitation fund. Within its ultimate ruling the Court of Appeal overturned the decision at first instance and determined that it was not in fact possible to exclude the operation of the Act and the statutory right to limit liability.

Having regard to the impact of the Court of Appeal's ruling, as well as the public policy and commercial implications arising

from the determination that it was not possible to exclude the operation of the Act, the ruling of the Court of Appeal was appealed to the Privy Council. The Privy Council considered the respective arguments of the parties on 23 February, 2016, and, thereafter, issued its Judgment on 19 July, 2016.

Within its judgment, the Privy Council confirmed that it was, in fact, possible for parties to expressly exclude the operation of the Act and the right to limit liability, provided that the exclusionary language was sufficiently clear. While, in this case, the Privy Council was not convinced that the operative contractual provision was sufficiently clear to exclude the applicability of the Act. The judgment provides clarity to the extent that the principle of freedom of contract shall be operative in the context of the right to limit liability in commercial maritime agreements.

Audley D. Hanna, Jr., Associate, specialises in various areas of Civil and Commercial Litigation, with a particular focus on employment law, admiralty law, insurance law, intellectual property litigation, and personal injury litigation.

SALVATION ARMY'S 'CHRISTMAS IN JULY'

Higgs & Johnson was a proud sponsor of the Salvation Army's "Christmas in July - Need Has No Season" initiative led by the Bahamas Division. In addition to sponsoring a kettle, staff were encouraged to purchase shirts to show their support on the final Friday in July at all the offices. Pictured are staff from the Ocean Centre office.





REDEMPTIONS FROM CAYMAN FUNDS

Alric Lindsay

Liquidity and Cayman Funds

Prior to investing in a Cayman Islands investment fund, it is customary for a proposed investor to ask the Cayman fund's directors or investment manager to confirm the liquidity terms of the Cayman fund. By "liquidity", the investor is referring to the possibility and frequency that the Cayman fund's shares may be redeemed. The investor is also interested in the mechanics of a redemption, in particular when it may be deemed effective.

In order to determine when a redemption of redeemable shares of a Cayman corporate fund is deemed effective, it is useful to observe some of the provisions of the Companies Law of the Cayman Islands and the judgment passed down by the Judicial Committee of the Privy Council in the Cayman case of Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited ("Strategic Turnaround").

What the Companies Law says

Section 37(1) of the Companies Law states that:

"Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder and, for the avoidance of doubt, it shall be lawful for the rights attaching to any shares to be varied, subject to the provisions of the company's articles of association, so as to provide that such shares are to be or are

liable to be so redeemed."

Section 37(2) goes on to say the following: "Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, purchase its own shares, including any redeemable shares."

Lastly, section 37(3) states as follows:

- a. "No share may be redeemed or purchased unless it is fully paid.
- b. A company may not redeem or purchase any of its shares if, as a result of the redemption or purchase, there would no longer be any issued shares of the company other than shares held as treasury shares.
- c. Redemption or purchase of shares may be effected in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association.
- d. If the articles of association do not authorise the manner and terms of the purchase, a company shall not purchase any of its own shares unless the manner and terms of purchase have first been authorised by a resolution of the company."

Having looked at what is required under the Companies Law to permit a redemption of shares, it is now useful to examine what was determined in Strategic Turnaround regarding the effective date of a redemption.

Strategic Turnaround: When a redemption of shares is legally effected

In delivering the opinion of the Privy

"Having looked at what is required, it is now useful to examine what was determined in Strategic Turnaround regarding the effective date of a redemption and when redeeming investors become creditors of a Cayman fund."

“...Lord Mance stated that it is a basic principle of company law that capital subscribed to a company may not be returned to shareholders otherwise than as prescribed by statute.”

Council in Strategic Turnaround, Lord Mance stated that it is a basic principle of company law that capital subscribed to a company may not be returned to shareholders otherwise than as prescribed by statute.

In this regard, reference was made by Lord Mance to the above-mentioned sections 37(1) and 37(3)(c) of the Cayman Companies Law. In a nutshell:

- if authorised to do so by its articles of association, a Cayman fund may issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder; and
- the manner in which any redemption

may be effected must be authorized by or pursuant to the articles of association.

Accordingly, if (i) a Cayman fund is authorised by its articles of association to issue redeemable shares (ii) the Cayman fund issues redeemable shares pursuant to the authority in the articles of association (iii) redeemable shares are redeemable at the option of the company or the shareholder and (iv) the articles of association describe the authorised manner and the terms upon which any redemption may be effected, then the redemption will be effective if executed in the manner authorised by the articles of association.

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.

STEP CARIBBEAN CONFERENCE 2016



Senior Associate, Sharmon Ingraham (2nd from right) attended the STEP Caribbean conference held in St. Lucia. She is pictured with other delegates at the Ministry of Financial Services booth including the Minister for Finance, Hope Strachan (center).

BAHAMAS PRIMARY SCHOOL STUDENT OF THE YEAR ~ 2016

**(L-R) Mr. Deal (Father),
Mrs. Sweeting
(Teacher), Mrs. Deal
(Mother), Mr. Paul
Davis (Partner), Vania
Deal (H&J Scholarship
Recipient), Portia
Nicholson (Partner)
and Ricardo Deveaux
(President of BPSTOY).**



Higgs & Johnson was pleased to support the 2016 Bahamas Primary School Student of the Year (BPSTOY). BPSTOY was established in 1997 with the aim of recognizing a group of students who are often overlooked and seldom appreciated. President and CEO, Dr. Ricardo Deveaux noted, “On behalf of the Foundation we are thankful to Higgs & Johnson for their financial contribution and ongoing support over the years. Everyone has the power to make a difference in the life of a child.”

Vania Deal, the H&J Scholarship recipient, graduated as valedictorian of 6th grade at NCA with a GPA of 4.0 and an elementary cumulative percentage of 99%. She enjoys reading, swimming, judo and archery. Her mother noted, “She does not allow medical hurdles to prevent her from running the race called life to the best of her ability.”

Partner, Portia Nicholson noted, “We wish to congratulate Vania on her success at this year’s awards and it is our pleasure to provide her with this scholarship. It was also delightful to talk with her when she visited our offices as she proved to be confident, knowledgeable and well-versed in a number of different areas. We wish her continued success as she moves on to high school.”