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Sexual Harassment in the Bahamian Workplace

Adrian M. Hunt



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With each passing week, it seems that one high profile male figure after another in the United States is being accused of sexual harassment within the workplace. From movie producers to (formerly) respected journalists to politicians, news reports are uncovering accounts of increasingly shocking and repulsive actions and behaviors by men in the workplace. Propelled by the “Me Too” movement, the accusations include a wide variety of acts that have been widely condemned as unacceptable behavior on the part of the alleged perpetrators.

One aspect of the discussions now being had across the United States and elsewhere is the question whether all of the perpetrators, while their actions remain indefensible, ought to be subject to the same repercussions such as the loss of their

jobs and positions, or if there is some degree of misconduct that might warrant less severe consequences. This question invites some consideration of the existing sexual harassment laws in The Bahamas.

The statutory definition of sexual harassment in The Bahamas is set out in the Sexual Offences Act (“The SOA”). The definition applies to prospective employers, persons in authority (presumably managers and supervisors) and co-workers who importune or solicit sexual favours from another person/co-worker under any threat or promise of benefit. However it applies equally to persons who importune or solicit some favor or advantage from another person in a position of authority in any place of employment in exchange for sexual favours. The statutory definition rightly recognizes that sexual harassment may be comprised of a single act of abuse of power by a person of either sex, rather than

assuming any dominance of one sex over the other. It also reflects a more progressive mindset that sexual harassment can be attributed to a person who solicits an advantage in exchange for sexual favours.

There are however, glaring concerns with the SOA in two regards. The first is that sexual harassment is limited to importuning or soliciting sexual favours in exchange for some benefit in the workplace, or conversely importuning or soliciting some benefit in the workplace in exchange for sexual favours. What does not appear to have been contemplated or otherwise taken into account are acts that fall short of solicitation.


Some of the accounts coming to light from the Me Too movement reflect acts of self-gratification which do not fall strictly within the statutory requirement of importuning or soliciting a sexual favour in exchange for a benefit or vice versa. It does not appear from these accounts that the victims of such acts experienced any less fear, threat, or thoughts that they could not extricate themselves from the situation than those who were solicited for sexual favours

under a threat or promise of a benefit. It is therefore difficult to appreciate why the existing definition of sexual harassment seemingly allows such a distinction to be made. This distinction is even more confusing when it is considered that such conduct is arguably an offence of indecent assault, as defined by the SOA, but would not constitute sexual harassment.

This connects to the second concern, which is that the SOA, while defining sexual harassment, does not define 'importune', 'solicit', or 'sexual' favours. Similarly, while the Bahamian Courts have referenced the above statutory definition of sexual harassment, there has not been any judicial consideration of any of these terms that would indicate that sexual harassment as defined in the SOA is capable of capturing a wide variety of acts of sexual misconduct.

That said, the difficulties in trying to provide an all-encompassing definition of sexual harassment are obvious. A wider definition of the terms importune, solicit, or sexual favours to include non-verbal acts that are deemed intimidating and threatening may result in a subjective test that captures otherwise innocent

acts: a colleague who leans in too closely to another while sharing a joke; a congratulatory pat on the shoulder that lingers; a comment about a co-worker's appearance or dress, delivered with a smile, all risk being deemed sexual harassment under a wider, more subjective definition. Conversely, too narrow a definition of importune, solicit, or sexual favours, would fail to be sufficiently reactive to the accounts now coming forward.

Employers are left trying to balance the implementation of policies that adequately address acts of sexual misconduct or predation with the ideals and goals of fostering a collaborative work environment. This balancing exercise offers perhaps the best approach for redefining sexual harassment in the workplace. The definition ought to provide a non-exhaustive list of conduct that can objectively be viewed as improper conduct in the workplace, without unduly hindering workplace interactions. Whether this redefinition is ultimately pursued is a matter for Parliament but the Me Too Movement certainly makes the case for the same. 




Mr. Adrian Hunt is a member of the Firm's Litigation practice group. His practice areas include Civil and Commercial litigation, Insolvency law, Employment law and Intellectual Property.
ahunt@higgsjohnson.com



Attorney General Speaks at Seminar

The Attorney General and Minister of Legal Affairs, Senator the Hon. Carl W. Bethel, QC, gave opening remarks at the firm's annual client seminar held last month. In his remarks, he noted that The Bahamas has

demonstrated a willingness and preparedness to embrace change in an ever evolving world and financial market; adding that the implementation of international standards and best

practices, will improve the quality, image and reputation of The Bahamas which is an investors' market. 

Pictured is the Attorney General flanked by partners of the firm.

STAR-Crossed Trustees

By Jo-Anne Stephens



Trusts are increasingly embroiled in foreign divorce proceedings, with trustees asked to either submit to the foreign proceedings or disclose confidential trust information. Before acceding to these requests, trustees must consider the firewall legislation (if any) in their jurisdiction and their fiduciary duties under the trust. Trustees may be well advised to seek the direction or blessing of their local court before complying with the request of a foreign court.

In a recent seminal decision of the Grand Court of the Cayman Islands, *In the Matter of the A Trust* (the STAR Trust case delivered on 1 December 2016), Justice Ingrid Mangatal considered the enforceability in the Cayman Islands of English and Welsh court orders made with respect to Cayman trusts, and the circumstances in which trustees should seek the court's directions regarding both submission to a foreign court and

the release of confidential information in foreign proceedings.

In the STAR Trust case, C Ltd (the trustee) was the trustee of a Cayman STAR trust (the trust). The settlor and his wife and children were excluded from benefiting under the trust. The settlor and his wife were involved in divorce proceedings in the High Court of England and Wales in which the wife sought a variation of the settlement, pursuant to s24(1)(c) of the *Matrimonial Causes Act 1973*, and the setting aside of her exclusion as a beneficiary of the settlement.

The trustee sought the following directions from the Grand Court, pursuant to s48 of the Cayman Islands *Trusts Law (2011 Revision)* (the Trusts Law):

- whether or not the trustee should submit to the jurisdiction of the English courts and participate in the matrimonial proceedings; and
- whether or not the trustee should

disclose further confidential information to the parties to the English matrimonial proceedings.

When should a trustee seek the Grand Court's direction?

Section 48 of the Trusts Law provides: 'Any trustee shall be at liberty to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money.'

Mangatal J considered the circumstances in which a trustee may seek the direction of the court under s48. Relying on the English decision in the case of *Public Trustee v Cooper*, ([2001] WTLR 901) the judge set out four distinct situations in which directions should be sought:

Where the issue is whether or not some proposed action is within the trustee's powers. This issue is ultimately determined by construction of the trust instrument or a statute, or both. It is not always easy to distinguish that situation from the second one, below.

Where the issue is whether the proposed course of action is a proper exercise of the trustee's powers, where there is no real doubt as to the nature of the trustee's powers and the trustee has decided how it wants to exercise them, but, because the decision is particularly momentous, the trustee wishes to obtain the blessing of the court for the action on which it has resolved and which is within its powers. An obvious example of this is a decision by a trustee to sell a family estate or a controlling holding in a family company. In such circumstances, there is no doubt as to the extent of the trustee's powers or what the trustee can do if it thinks it

prudent.

Where the trustees surrender their discretion. The court will accept a surrender of discretion only for a good reason, the most obvious being that the trustees are deadlocked (so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest.

Where the trustee has actually taken action and that action is attacked as being either outside its powers or an improper exercise of its powers. Cases of this sort usually result in hostile litigation and are decided in open court. In the STAR Trust case, Mangatal J found that the questions posed by the trustee fell properly within category 2 of the above, and held that it was an important step for the trustee to receive the court's direction before acceding to, or refusing, the jurisdiction of a foreign court.

Firewall legislation

Subject to certain specified exceptions, it seems clear that, by virtue of sections 90–93 of the Trusts Law (known as the 'firewall provisions'), an order of the


English High Court with respect to a Cayman trust will not be enforced against the trustee, the beneficiaries or the trust fund. The effect of the Cayman firewall provisions was described by Justice Henderson, in *In the Matter of the B Trust*, ([2010] (2) CILR 348) as follows: 'A trust in the Cayman Islands can only be varied in accordance with the law of the Cayman Islands and only by a court of the Cayman Islands.'

It is, therefore, settled law that, subject to specified exceptions, a foreign judgment against a Cayman trust is unenforceable in the Cayman Islands, whether or not the trustee submits to the jurisdiction of the foreign court. It is generally unwise for a trustee to submit to the jurisdiction of a foreign court, as this submission could potentially create a conflict between the trustee's duty to observe the terms of the trust and its obligation to comply with the terms of the order. However, there may be circumstances where it is expedient, and in the best interests of the beneficiaries, to submit to a foreign jurisdiction. For example, where all the trust assets are in England, it may be in the interests of the

beneficiaries for a trustee to appear before the English court to put forward its point of view, because, by reason of the location of the assets, that court will be able to enforce its order without regard to the trustee.

In the STAR Trust case, there were no compelling reasons for the trustee to submit to the jurisdiction of the English High Court.

Confidential information

It is a trustee's duty to account to beneficiaries for the administration of the trust property. Mangatal J noted that Part VIII of the Trusts Law, also known as the 'STAR Trust Law', modifies the general provision in respect of such trusts. In STAR trusts, the beneficiaries have no standing to enforce the trust, and all such rights are vested in the enforcer, who also has the sole right to obtain information from the trustee. Anyone else seeking information from the trustee is in the same position as a stranger seeking information in an ordinary trust. In both situations, the consideration is whether or not providing such information and documentation is in the best interests of the trust. 



Mrs. Jo-Anne Stephens is a member of the Firm's Private Client & Wealth Management practice group. Her practice areas include Commercial Transactions, Estates, Commercial & Trust Litigation and Trusts.
jstephens@higgsjohnson.com



Minister of Education Speaks at Seminar

The Minister of Education, the Hon. Jeffrey Lloyd spoke at the annual client seminar on the topic 'The Winds of Change are Blowin'. He

encouraged the attendees to embrace change; understanding the benefits and responsibilities that accompanies their period change. His

heartfelt remarks were well received by those in attendance.

Pictured is the Minister flanked by partners of the firm.

The Age of Adapting

Delivered at the Higgs & Johnson 2017 Annual Client Seminar

By Dr. Earl A. Cash



“The reports of my death are greatly exaggerated”, wrote Mark Twain after hearing that his obituary had been published in the New York Journal in May 1897. In like manner, the death of the Private Client and Wealth Management industry has been grossly overstated.

Change in the industry is nothing new. In the late fifties some private bankers saw Cuba as the Riviera of the Caribbean. Some even went so far as to establish some trusts in US financial entities on the Island. By the end of 1958, the total book value of US enterprise in Cuba was, with the exception of Venezuela, the highest in Latin America.

By the time of Fidel Castro’s 1959 Cuban Revolution however, the US investments had either migrated or were nationalized. Trust companies in the Cayman Islands and The Bahamas scrambled quickly to bolster trust documents with what became known initially as ‘Cuba clauses’ and subsequently as ‘flee clauses’. Such

clauses provided that in the event a certain portion of the trust fund was nationalized, confiscated or lost to burdensome taxation, the trust assets would automatically flee to another more favorable jurisdiction. Thus, these clauses provided comfort to settlors establishing offshore trusts.

Likewise, in the 1980s certain offshore jurisdictions were able to flaunt their bank secrecy laws, which prohibited primarily, though not exclusively, the release of any banking information without a court order or the consent of the customer. This was the impact of our noted section 10 of the *Banks and Trust Companies Regulations Act (“BTCRA”)* in the 1980s.

The Bahamas bank secrecy provisions were later replaced by the confidentiality obligations in section 19 of the BTCRA, as amended. The revised provision took into account the new regulatory framework imposed upon the Private Client and Wealth Management industry as a result of aggressive action by the Organization for Economic Co-operation and Development in 2008 and 2009, which resulted in a Black List and thereafter a White List and a Grey List. As Bernadette Carey said in her article, *“Much Ado about Nothing”* in *Trust & Trustees* 1 February 2010, this new “colour-coding appears to have been primarily conducted on the basis of the number of TIEAs that each financial centre has entered into prior to the G-20 Summit” in April 2009.

The OECD appeared to view offshore financial centres as being as odious as some of us now view terrorism. Prime Minister Gordon Brown of the United

Kingdom came close to pronouncing many of the British Overseas Territories economic enemies and subversive to the good order and economic viability of the highly developed countries. The OECD felt its aggression was supported by the increased incidence of money laundering and the financing of terrorist activities.

In 2012 the Financial Action Task Force made recommendations in relation to the international anti-money laundering procedures and combating the financing of terrorism and, thereafter, the Caribbean Financial Action Task Force addressed the same issues in the context of the Caribbean.

Eventually, the US introduced the Foreign Account Tax Compliance Act, and the OECD, the common reporting standard. All are stated to be intended to lead to greater tax transparency on the part of citizens of those developed countries. Many such countries also implemented tax amnesties whereby their citizens would get a one-time, substantial tax break if they brought their assets back on-shore or if they paid the appropriate taxes on those assets. With all of these approaches converging on international offshore centres, and with the OECD and its organs forever moving the goal post, many have prophesied the end of Private Client and Wealth Management. Ironically, the UK still has Jersey and Guernsey and the US has Delaware and Nevada.

So, what is the prognosis for the industry? Perhaps, you might have heard of the old Gale Garnett song, *We’ll Sing in the Sunshine*. This is the position that workers in the Private Client and

Wealth Management have to adopt. Firstly, cater to clients who are tax compliant and are not seeking to evade or avoid their tax obligations at home. Secondly, adjust your business to suit clients who are not primarily concerned about bank secrecy and confidentiality but understand that disclosure to the regulators in their home countries may be required.

This much is certain, high net worth individuals will forever seek ways to guard against civil strife, governmental unrest or other calamities that might

impede the transfer of their wealth in their countries. Many meet their tax obligations, but prefer to keep their funds in an offshore jurisdiction as an extra precaution. Private bankers will have to become more knowledgeable about the particular regimes of the countries of their clients and tailor their products to fit the needs of such clients. A one-size-fits-all approach will no longer work. This will call for some ingenuity and creativity, but the offshore jurisdictions will be up to the challenge, as we have always been.

The day will never come when there will be no Private Client and Wealth Management industry. Instead, the industry will morph into a form quite different from what we were used to just a few decades ago. So, I exhort you, in this era of global transparency, get ready to sing in the sunshine. 🎵



Dr. Earl A. Cash is a Chair of the Firm's Private Client & Wealth Practice Group. He has extensive legal experience concentrated in the areas of trusts, estates and banking law.
ecash@higgsjohnson.com

Private Wealth Practice Earns Top Rankings



Higgs & Johnson's Private Wealth practice received honours from leading rankings agencies, underscoring the team's longstanding reputation as a frontrunner in the private client arena in The Bahamas.

The firm received a top tier ranking by *Chambers High Net Worth 2017 Guide*, published by global legal services directory Chambers and Partners. Private wealth attorneys Philip Dunkley, QC; Earl Cash; and Heather Thompson were also recognised as leaders in the trust sector by the expert publication. Citing international private wealth market insiders and clients who describe the firm as "first-class", "very



strong", and "very highly regarded," Chambers highlights the firm's top quality advisory work for trust companies, particularly on the administration and creation of complex private trusts for high net worth individuals and businesses. The firm is

"pretty big in private client work, and they're very good estate planning lawyers," one source told Chambers.

Heather was also included in the IFC's PowerWomen Top 200 list.

Real Estate Partner, Stephen Melvin was recognised by legal directory *Who's Who Legal – Private Client*. For over 20 years, *Who's Who Legal* has identified the foremost legal practitioners in business law based on comprehensive, independent research and analysis on the international legal services marketplace. Mr. Melvin has experience in working with private high net worth clients on the sale and acquisition of hotels, marinas and private islands. 🎵



Annual Firm Seminar



Partner, Tara Cooper Burnside and Global Managing Director, Oscar N. Johnson, Jr with guest speaker Allan Wright.



Associate, Adrian Hunt with Althea Albury, panelists on the panel discussion *The Evolution of the Employment Relationship*.



Partner, Michael Allen with Robert Myers and Edison Sumner, who was a panelist on the employment panel discussion.



Partners, Christel Sands-Feaste and Paul Davis following his presentation on the Common Reporting Standard.



Partner, Portia Nicholson with Tamioka Watson prior to their segment on the relaxation of Exchange Control.



Firm Manager, Diane Knowles and Consultant, Leon Potier chat with Cayman Country Managing Partner, Gina Berry.



Partner, Tara Archer-Glasgow with Tanya McCartney, panelist on the relaxation of Exchange Control panel discussion.



Consultant, Heather Thompson (center) with attendees during the mid-morning break of the seminar.

HIGGS & JOHNSON hosted its annual client seminar under the theme *'Weathering a Changing Climate'*. Welcome remarks were given by Sterling H. Cooke, Partner in the Bahamas and Gina Berry, Country Managing Partner in the Cayman Islands. Opening remarks were given by the Attorney General & Minister of Legal Affairs, Senator the Hon. Carl W. Bethel, QC. The seminar sessions addressed The Bahamas' progress toward the implementation of Automatic Exchange of Information under CRS and issues related to implementation in the Cayman Islands; the evolution of bank secrecy and client confidentiality and their effects on the private wealth industry; the myths, realities and future of artificial intelligence in the law; and ways to maintain fiscal strength in the country as well as the benefits and responsibilities of this period of change. The seminar also included dynamic and interactive panel discussions on the evolution of the employment relationship and the relaxation of exchange controls. The seminar hosted a cadre of interesting and prominent speakers from many different sectors of economics, finance and technology. Higgs & Johnson speakers included Bahamas partners, Dr. Earl A. Cash, Paul Davis and Portia Nicholson; Senior Associate from the Cayman Islands, Jo-Anne Stephens; Adrian Hunt, Bahamas Associate and Kendrick Knowles, Systems Administrator. Invited guest speakers included The Hon. Jeffrey L. Lloyd, M.P. and Minister of Education; Althea Albury, Senior Deputy Director at the Department of Labour; Edison Sumner, CEO & President of the Bahamas Chamber of Commerce & Employer Federation; Allan Wright, Senior Country Economist at the Inter-American Development Bank; Tamioka Watson, Manager of Exchange Control at the Central Bank of The Bahamas and Tanya McCartney, CEO of the Bahamas Financial Services Board.