

THE PRIVATE WEALTH
AND PRIVATE
CLIENT REVIEW

EIGHTH EDITION

Editor
John Riches

THE LAWREVIEWS

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BAHAMAS

*Earl A Cash and Nia G Rolle*¹

I INTRODUCTION

The Commonwealth of The Bahamas (The Bahamas) set its sights on becoming a premier international financial centre more than 40 years ago. With coordination from the Central Bank, the Ministry of Finance, other relevant governmental departments and the banking and financial community, a roadmap was devised to make the country a leading offshore tax-neutral jurisdiction. The Bahamas boasts a familiar democratic government, based on the Westminster System, inherited from its years as a colony of Great Britain. With a bicameral legislature consisting of the House and the Senate and a distinguished judiciary, it provides an attractive environment for business and commercial transactions. The easy communication with the Americas and Europe is a bonus augmented by the proximity of The Bahamas to the United States of America. Besides being an attractive business centre for the ultra-high and high net worth individuals, The Bahamas is also a place where many of those individuals have chosen to reside. Such choice has been aided by direct flights or easy connections to numerous cities in Canada, the United States, the Caribbean, Central and South America, the United Kingdom and Europe. Indeed, The Bahamas is readily a gateway to the world because of its geographic advantage.

Many of the globally recognised financial institutions have some presence or affiliation in The Bahamas. They exist alongside several boutique institutions that would attract those who prefer banking with smaller institutions. Professionals, including private bankers, lawyers, accountants and other service providers, facilitate the conduct of business on a highly proficient level. Government has taken aggressive steps to liberalise immigration laws to allow the importation of any additional skilled assistance that would be useful in servicing the needs of the ultra-high and high net worth individuals.

The key points that make The Bahamas an important jurisdiction for private client matters are given below.²

i Location

The Bahamas is an archipelago spanning 100,000 square miles extending southeast from Florida in the United States of America to northern Hispaniola. The proximity to the United

1 Earl A Cash is a partner and Nia G Rolle is an associate at Higgs & Johnson.

2 'Business in The Bahamas', Bahamas Financial Services Board, www.bfsb-bahamas.com/business-in-the-bahamas.

States makes The Bahamas a hub for regional investment and business in the United States, Canada and Central and South America. It is in the same time zone as New York and Toronto, with office hours that align with most of the major business centres in the Americas.

ii Wealth and asset management services

The Bahamas is home to over 270 licensed banks and trust companies, including seven of the world's top eight private banks and 35 of the top 100 global banks. These financial institutions deliver services involving private banking and trust services, accounting, legal services, e-commerce, insurance, and corporate and shipping registries. The Bahamas North American banks have been doing business in The Bahamas for more than a century and European and Swiss banks have deep roots established over more than 70 years. Financial institutions from other regions with growing economies are recognising the advantages of operating in The Bahamas. Additionally, there is an excess of 800 funds that are licensed in The Bahamas and more than 60 fund administrators.

iii Political and economic stability

The Bahamas has more than 280 years of uninterrupted parliamentary democracy. It has been an independent nation since 1973, and retains a Westminster-based system of government and an English-based legal system. Additionally, its currency is on a par with the US dollar.

iv Taxation

The Bahamas remains a tax-neutral platform where international persons receive the same tax benefits as Bahamians. There are no income, capital gains and inheritance taxes for all residents of The Bahamas.

v Highly educated workforce

Most Bahamians who desire to be wealth management practitioners receive their qualifications from universities in the United States, Canada and the United Kingdom.

vi Infrastructure

The Bahamas has developed infrastructure suited for the facilitation of international business, with some 21 international airports, 10,000 acres on Grand Bahama Island earmarked for an industrial and commercial zone (along with one of the deepest harbours in the region), and modern facilities connected globally.

vii Regulation

The Bahamas displays its dedication to the growth of its financial sector by adhering to all international regulatory principles and participating in multilateral organisations established to set and monitor standards for regulation and Anti-Money Laundering and Countering of Terrorist Financing (AML/CFT). Regulators in The Bahamas are subject to independent assessments conducted by the Caribbean Financial Action Task Force and the International Monetary Fund.

viii Immigration

The Bahamas has a flexible immigration policy that encourages companies to develop Bahamian talent but recognises the needs of international firms, individuals and families

to recruit additional human resources abroad. Such policy provides non-Bahamians with the opportunity to apply for economic permanent residency. The minimum residential investment threshold for application for permanent residency is BD\$750,000; for accelerated consideration an investment of BD\$1.5 million or greater enables the application to be considered within 21 days.

II TAX

All individuals, whether international or residing in The Bahamas, may benefit from the tax regime in The Bahamas. When using Bahamian structures, persons need not worry about income, capital gains, gift or succession taxes in this jurisdiction. The few taxes imposed in The Bahamas include the following:

- a* 10 per cent value added tax (VAT) on the purchase of real estate;
- b* 12 per cent VAT on the purchase of certain goods and services; exemptions to VAT on certain financial services and products are offered to individuals outside of The Bahamas, such as life insurance policies;
- c* although we have no corporate taxes, businesses (excluding bank and trust companies) operating in The Bahamas pay business licence fees; and
- d* customs duties which, owing to recent initiatives to stream-line the tax system in The Bahamas, have recently decreased.

Notably, the city of Freeport (the Port Area) on the island of Grand Bahama is a free-trade zone, which incentivises investments by offering all of its licensees exemption from most custom duties, real property taxes and inventory taxes.

i Issues relating to cross –border structuring

Confidentiality and the right to privacy remain of paramount importance within the realm of private wealth services in The Bahamas, even as the jurisdiction experiences pressure to increase regulatory transparency at the expense of such confidentiality and right to privacy. For example, when cooperating with foreign jurisdictions to improve international compliance as encouraged by the Organisation for Economic Co-operation and Development (OECD) standard for tax information exchange, requests for the disclosure of information from foreign regulatory bodies will only be complied with if such requests are in accordance with a relevant tax information exchange agreement (TIEA). Each request is vetted and The Bahamas reserves the right to deny any such request for the reasons hereinafter described.

In addition, any company incorporated under the laws of any foreign jurisdiction may continue as a Bahamian company under the International Business Companies Act 2000 (IBCA).³

ii Regulatory issues relevant to high net worth individuals generally or that impact the general market of private wealth services

The OECD has established standards on transparency and exchange of information for tax purposes, and has strongly encouraged countries to adopt these standards in order to

³ Section 84, International Business Companies Act 2000 (Chapter 309, Statute Law of The Bahamas, Revised Edition 2009).

be regarded as cooperating in matters of tax information exchange transparency. In full cooperation with the OECD, The Bahamas has signed 34 TIEAs that provide for the exchange of information upon request, and is in negotiations for several additional agreements. Most TIEAs are based on an OECD model agreement, entitled 'Agreement on Exchange of Information on Tax Matters'. A TIEA is not an automatic information exchange between the two signatory jurisdictions; only upon request will information be exchanged, and each TIEA sets specific guidelines for such requests. The Bahamas may decline a request for tax information where:

- a* it is believed that the requesting party has not exhausted all avenues in their own jurisdiction;
- b* the request was not sufficiently specific;
- c* the request was not made in accordance with the TIEA; and
- d* the disclosure of the requested information would be considered contrary to the public policy of The Bahamas.

The Bahamas entered into an intergovernmental agreement with the United States, following the passing of the United States Foreign Accounts Tax Compliance Act (FATCA), to improve international tax compliance for accounts established in The Bahamas that involve US persons. Bahamian financial institutions will provide automatic reporting to the Bahamas Competent Authority. By way of the Automatic Exchange of Financial Account Information Act, The Bahamas has also put into effect automatic exchange reporting with several other jurisdictions deemed to have implemented sufficient safeguards to protect the confidentiality and security of the reports exchanged.

III SUCCESSION

The rules of succession in The Bahamas are closely modelled after those of the United Kingdom, with the added benefit of the absence of succession taxes. By virtue of the Wills Act 2002, The Bahamas codified the value it places on testamentary freedom. An individual may dispose of his estate, consisting of both movable and immovable property, as provided in a validly executed will. After the lifetime of such individual, taking possession of such deceased person's property situated in The Bahamas requires applying to the Bahamian Courts for a Grant of Probate.⁴ Where an individual dies without a will in a common law jurisdiction, the Court will issue a grant of letters of administration in respect of his or her estate to the surviving spouse or to such other persons according to law, vesting in an administrator powers and duties similar to those of an executor.⁵

i Relevant cross-border developments

Where there has been a grant of probate or a grant of letters of administration (or its respective equivalent) in a foreign country regarding a deceased person having property in The Bahamas, the personal representatives would then obtain a resealing of the foreign grant by the Bahamian Courts in order to administer or dispose of the portion of the estate of such deceased person that is situated in The Bahamas.⁶

⁴ Section 7, Probate and Administration of Estates Act 2011 (PAEA).

⁵ Section 8, PAEA.

⁶ Section 26, PAEA.

ii Applicable changes effecting personal property

The statute law of The Bahamas is silent on the impact of pre-nuptial and post-nuptial agreements. Therefore, as a common law jurisdiction, the case law of the United Kingdom and The Bahamas gives direction on these matters. The Supreme Court case of *M v. F*⁷ confirmed that the general position in The Bahamas is that a pre-nuptial agreement will be upheld where such agreement was entered into freely and voluntarily by both parties having full appreciation of its implication, and where it would be fair to give effect to that contractual arrangement. This position is consistent with the judicial trend the United Kingdom.⁸

Civil partnerships and same-sex marriages are not legally recognised in the jurisdiction.

IV WEALTH STRUCTURING AND REGULATION

i Commonly used vehicles for wealth structuring

International business companies

An international business company (IBC) is a versatile corporate entity, incorporated under the IBCA, designed to facilitate the operation of legitimate business anywhere in the world with the additional benefit of tax neutrality from a Bahamas perspective. The flexibility and cost-effectiveness of an IBC lends to a wide variety of uses such as holding companies, investment funds, family offices, private trust companies and captive insurance companies.

IBCs are required to maintain a registered office and appoint a registered agent that is licensed under the Banks and Trust Companies Regulation Act or the Financial and Corporate Service Providers Act 2000.⁹ Such registered agent has regulatory and compliance obligations of its own. An IBC is not required to file an annual return; however, it is required to pay an annual fee which is based on the size of its authorised capital. Also, an IBC may have to demonstrate certain substance requirements.

Trusts

Generally, trusts are a well-recognised vehicle for wealth structuring in The Bahamas. The Supreme Court of The Bahamas has an abundance of experience deciding matters of equity. Trust legislation in the jurisdiction introduced strong protective statutory provisions favouring the preservation of a trust. For example, the fundamental trust legislation, The Trustee Act 1998, allows a settlor of a trust to retain certain discretionary powers without invalidating such trust. Notably, these discretionary powers include:

- a* the power to revoke the trust or trust instrument;
- b* the power to add or remove trustees, protectors or beneficiaries; and
- c* the power to give trustees investment directions.¹⁰

Other unique features found in complementary trust legislation include:

- a* the Trusts (Choice of Governing Law) Act 1989, which enables trusts governed by the laws of The Bahamas to be administered anywhere in the world notwithstanding

7 [2011] 2 BHS J No. 13.

8 *Radmacher v. Granatino* [2010] UKSC 649.

9 Section 38, IBCA.

10 Section 3, Trustee Act 1998 (Chapter 176, Statute Law of The Bahamas, Revised Edition, 2009).

the domicile of the settlor, the beneficiaries, the assets. As a result, the Act provides protection for assets held in such trusts from forced heirship claims or the enforcement of other foreign law rules; and

- b* the Rules Against Perpetuities (Abolition) Act 2011, which abolished the rule against perpetuities in the jurisdiction.

There is no system of registration for trust instruments and supplemental documents.

Asset protection trusts

A foreign settlor may place his or her personal assets in a Bahamian trust, making his or her personal assets subject to the terms of the trust. The Fraudulent Dispositions Act 1991 provides significant creditor protection of assets placed in a Bahamian trust that has been in existence for two years or more. When a creditor commences an action seeking to apply assets held in a Bahamas trust to the liability of a settlor, the burden of proof is on the creditor to evidence that the transfer of assets to such Bahamas trust was intentionally fraudulent.

Purpose trusts

The Purpose Trust Act 2004 created a new trust product in The Bahamas that allows capital or income of any property that might have fixed interests, discretionary interests or a combination of both to be held upon trust for non-charitable purposes. Such trust, referred to as an authorised purpose trust, may be a trust for one or more authorised non-charitable purposes and one or more individuals, corporations or charitable purposes. While the beneficial interest of the trust property may not be vested in any legal person, the trust instrument designates an authorised person who will have rights to enforce the terms and provisions of a trust by making certain applications to the court including administrative proceedings, proceedings for breach of trust and also rights to information.

Private trust companies

A private trust company (PTC) is a company formed for the exclusive purpose of acting as trustee of a specific trust, or group of trusts. The key distinction between PTCs and professional trust companies is that PTCs can be tailored to suit the needs of a particular family. Generally, the primary allure of PTCs is that they enable families to exercise a greater level of control over the administration of their trusts. PTCs may also appeal to individuals desiring to add an extra layer of confidentiality regarding their financial affairs or otherwise desiring the freedom to hold risky illiquid assets. Further, PTCs may solve any trustee succession issues because PTCs have the advantage of perpetual existence and can serve as trustee indefinitely. PTCs are not ideal for every client but can offer significant advantages for high net worth individuals seeking trust services.

Foundations

A foundation is a separate legal entity, capable of suing and being sued, which is established by a charter and subsequently registered. A foundation is a hybrid of a company and a trust and can be used as a vehicle for the holding of private assets endowed on the foundation for the benefit of purposes, identified persons or classes of persons, in accordance with the objects or purposes specified in the charter. The Foundations Act 2004, as amended from time to time, provides for the creation of a private foundation in The Bahamas.

Once assets are transferred by the founder to the foundation by way of an endowment, they cease to belong to the founder and do not become the property of any beneficiary until they are distributed. The founder can control the foundation by appointing a foundation council to manage the foundation. The founder may be a member of such foundation council or reserve powers to himself or herself. Distribution and specific purposes may be expressed in a confidential letter or memorandum. The registration process requires that a fee of BD\$125–BD\$500 be delivered to the Registrar of Foundations, along with certain information, including the name of and the purposes and objects of the foundation. It is important to note that the charter and articles do not need to be filed with the registrar. Initial assets, which must be at least BD\$10,000 or the equivalent in any other currency and that could consist of cash, shares or other assets, should be endowed immediately following the registration of the foundation.

Partnerships

Partnership arrangements are governed by the Partnership Act and any agreement negotiated between partners; such partnership agreement may override the provisions of the Partnership Act. In The Bahamas, there is no requirement for partners to be domiciled in the jurisdiction in a general partnership arrangement. Partnership is simply two or more persons carrying on a business in common with a view of profit. The cost for establishing a partnership varies based on the level of complexity of the arrangement and the fees for professional services rendered concerning advisory needs of the partners and the preparation of any relevant documents. Each partner in a firm shares in the profits of the partnership activities and well as in the liability and debts of the partnership.

ii Anti-money laundering regime and other key aspects of regulation of service providers dealing with private wealth

To sustain itself as a reputable international financial centre well-equipped to manoeuvre and compete in an increasingly regulated global environment, The Bahamas has committed to complying with international standards for financial centres and to implementing effective countermeasures to emerging trends in money laundering, terrorism and other related activities. As a member of the United Nations, the Commonwealth of Nations, the Organization of American States and Caribbean Community, The Bahamas is better equipped to adhere to international standards and anticipate regulatory trends.

The Bahamas is also a member of the Caribbean Financial Action Task Force (CFATF), the Caribbean sub-group of the Financial Action Task Force (FATF). The CFATF conducts peer assessments of its members' AML/CFT laws, policies and procedures and reviews the extent to which countries comply with the FATF's 40+9 Recommendations for preventing money laundering and countering the financing of terrorism. The jurisdiction's efforts to assess and strengthen its AML/CFT framework are ongoing.¹¹

In 2000, the government of The Bahamas enacted nine new laws relating to anti-money laundering. These new laws provided more comprehensive and enhanced supervision of financial institutions, corporate service providers and IBCs and established a more synchronised system of deterrence against money laundering and other criminal activities within the financial sector. The new laws are as follows:

11 'Regulation'. Bahamas Financial Services Board, www.bfsb-bahamas.com/theindustry/regulation.

- a* the Banks and Trust Companies Regulation Act 2000;
- b* the Central Bank of The Bahamas Act 2000;
- c* the Financial Intelligence Unit Act 2000;
- d* the Proceeds of Crime Act 2000;
- e* the Financial and Corporate Service Providers Act 2000;
- f* the Financial Transactions Reporting Act, 2000;
- g* the International Business Companies Act 2000;
- h* the Evidence (Proceedings in other Jurisdictions) Act 2000; and
- i* the Criminal Justice (International Cooperation) Act 2000.

Additionally, in 2004, Parliament enacted the Anti-Terrorism Act 2004, which addresses several of the FATF's Special Recommendations. The anti-money laundering legislation in The Bahamas is considered to be as advanced as that of any other Organisation for Economic Co-operation and Development member country.

The following are the primary regulatory agencies in The Bahamas.

Central Bank of The Bahamas

The Central Bank of The Bahamas (the Central Bank) is the central financial institution in the jurisdiction, playing the lead role among the country's regulatory agencies. Its stature within The Bahamas is reinforced by its long-standing presence in the jurisdiction, which has placed The Bahamas in the position to have been regulating banks and trust companies since 1965. As supervisor of banks, the Central Bank promotes the soundness and integrity of the banking and financial system through the effective application of international regulatory and supervisory standards.¹²

The Central Bank fills the traditional roles as issuer of legal tender, banker to both domestic banks and the government, and regulator and supervisor of the banking sector. The Central Bank also fosters confidence in the financial system by implementing policies and standards that are in keeping with international best practices for supervision and regulation; by maintaining the external value of the Bahamian dollar, which is fixed at a 1:1 parity with the United States dollar; by compiling financial statistics; and by promoting monetary stability and a sound financial structure.

Securities Commission of The Bahamas

Since its establishment in 1995, the Securities Commission of The Bahamas (SCB) has dedicated its efforts to contributing to the growth and development of a financial services sector by identifying the evolving demands of our regulatory landscape and by responsively adapting and modernising its technology, facilities, employees and work processes and procedures. The mandate of the SCB involves the formulation of principles:

- a* to regulate investment funds, securities and capital markets;
- b* to maintain surveillance over investment funds, securities and capital markets safeguarding fair and equitable dealings; and
- c* to create and stimulate conditions to encourage methodical advancement and evolution of the capital markets in The Bahamas.

12 'About Us'. *Central Bank of The Bahamas News RSS*, www.centralbankbahamas.com/about.php.

The SCB also advises the Minister of Finance regarding investment funds, securities and capital markets.

The SCB is well-positioned to maintain awareness of such aforementioned evolving regulatory demands as a member of the following international, regional and national bodies: the International Organization of Securities Commissions; the Council of Securities Regulators of the Americas; the Offshore Group of Collective Investment Scheme Supervisors and the Group of Financial Services Regulators.

While the regulatory duties of the SCB does have a compliance component concerning adherence to the laws of The Bahamas and the promotion of satisfactory disclosure and fair dealing, the SCB is not concerned with and does not intend to be concerned with the endorsement of the merits of any investment. The SCB is responsible for ensuring the accuracy and comprehensive nature of information required to be disclosed and that such information is provided in a timely matter.

Insurance Commission of The Bahamas

The Insurance Commission of The Bahamas (ICB) is responsible for the prudential regulation of all insurance activity in or through The Bahamas. It is concerned with the ongoing surveillance and control of insurers, agents, brokers, salespeople, underwriting managers and external insurers. The ICB's mandate includes promoting and encouraging sound and prudent insurance management and business practices and advising the Minister of Finance on insurance matters.

It is the directive of the ICB to undertake all of the due diligence necessary to guarantee that companies interested in operating in The Bahamas are reputable and of high-quality. It is also the supervisory responsibility of the ICB to ensure that it safeguards the interests of the policyholders associated with such companies. The ICB has developed a risk-based supervisory methodology, and a principles-based approach that allows flexibility.

The Bahamas is a member of the International Association of Insurance Supervisors, which is recognised as the standard-setting body for insurance regulators. The Bahamas is also a member of the Group of Offshore Insurance Supervisors and a member of the Caribbean Association of Insurance Supervisors. Organisations such as these aim to instill a consistent and frequent exchange of regulatory information that helps the regulator to draft and enhance world-class legislation.

V OUTLOOK AND CONCLUSIONS

It would be inappropriate to risk leaving the reader with the impression that The Bahamas does not have its challenges in maintaining its status as a noteworthy international financial centre. Like many other similar jurisdictions, The Bahamas has faced various strictures from the OECD, FATF, FATCA, Common Reporting Standard and the myriad rules and directives promulgated by or under the foregoing. This has resulted in centres like The Bahamas having to reassess how they will function in order to comply with the international norms of the larger, developed, onshore countries, including signing on to the requisite TIEAs. At the same time, The Bahamas has had to refashion itself, no longer as a total tax-free environment with bank secrecy, but as an internationally compliant jurisdiction that continues to conform to the transparency and best practices expected by the global financial community. The goal

is that The Bahamas will shed the beleaguered image of being a haven for providing sinister means for hiding wealth. Ultimately, The Bahamas should emerge stronger for being an esteemed, well-regulated jurisdiction.

ABOUT THE AUTHORS

EARL A CASH

Higgs & Johnson

Specialising in trusts and estates and banking law, Dr Earl A Cash, Ph.D. is a partner and chair of the private client and wealth management practice group of Higgs & Johnson and services major trust companies in The Bahamas. He has been a member of the Florida Bar since 1979, and The Bahamas Bar since 1982.

Earl spent the 1990s as a temporary stipendiary and circuit magistrate for night court in the Bahamas, and served as a member of the ethics committee and of the disciplinary tribunal of the Bahamas Bar Association. He is ranked as a leading lawyer by legal directories *IFLR1000*, *Chambers Global*, *Chambers High Net Worth* and *WWL: Private Client*.

Earl has lectured and written articles on the Trustee Act and related legislation. His publications include articles in *International Financial Law Review*, *Journal of International Planning* and *Trust and Trustees*. He has made contributions to the text, 'Asset Protection: Domestic and International Law and Tactics'.

Earl has lectured at the College of The Bahamas and University of Miami in Business Law and Literature, and has served as chairman of the board of trustees of the University of The Bahamas.

NIA G ROLLE

Higgs & Johnson

Nia G Rolle is an associate in the private client and wealth management practice group of Higgs & Johnson, specialising in wills, estate planning and matters related to trust law and company law.

Nia obtained a Bachelor of Laws Degree with Honors from the University of the Kent in 2016. She participated in the mentorship programme as an academic peer mentor in public law and volunteered at the Kent Law Clinic, while pursuing her LLB (Hons). She went on to complete the Bar Professional Training Course at BPP University in London in 2017. In that same year, she obtained the ADR-ODR Accredited Civil-Commercial Mediator accreditation.

Nia was called to the Bar of England and Wales and the Bar of the Commonwealth of The Bahamas in 2017. She became an associate of the firm in 2018 following the completion of one year of pupillage.

HIGGS & JOHNSON

Ocean Centre

East Bay Street

Nassau

The Bahamas

Tel: +1 242 502 5200

Fax: +1 242 502 5250

ecash@higgsjohnson.com

nrolle@higgsjohnson.com

higgsjohnson.com



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