



# FOCUS

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## Provisional Liquidation: A Neglected Tool in the Insolvency Toolbox

Tara Cooper Burnside



While the overall economic damage resulting from COVID-19 remains to be seen, one thing is certain – the pandemic has dealt a devastating blow to the global economy. Many businesses, some of which were relatively healthy pre-COVID-19, now find themselves in a liquidity crunch and at risk of insolvency.

For companies in The Bahamas facing financial distress, it is important for directors to be aware of their duties and the tools available to them, while taking steps to stabilise the company's business.

It is elementary that company directors

owe statutory and fiduciary duties to act honestly and in good faith with a view to the best interests of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. As a general rule, directors' duties are owed to the company and the company alone. However, where the solvency of the company is questionable, the duties of directors are extended and directors must have primary regard to the interests of the company's creditors, as a whole.

Against the backdrop of COVID-19, this

means in practical terms that directors must not permit the company to enter into transactions with a view to preferring one creditor over other creditors, or avoiding an obligation that may be owed. Additionally, where the writing is on the wall and it is clear that insolvency is unavoidable, the directors must take every reasonable step to minimise the loss to creditors.

One step which is apt to be considered by a company in financial difficulty is a provisional liquidation for the purpose of restructuring the company's debt, a little used tool since it was introduced by the Companies (Winding up Amendment) Act, 2011 ("the Winding up Act"), which came into force in April 2012. With the introduction of this legislation, a company may, after the presentation of a winding up petition, apply to the court for the appointment of a provisional liquidator on the basis that the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors. The Winding up Act provides that a provisional liquidator shall have the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he was

appointed. The court may limit the powers of a provisional liquidator in such manner and at such times as considers fit."


This type of company-led liquidation is commonly known in other offshore jurisdictions as "soft touch" or "light touch" provisional liquidation in which limited powers are conferred on the provisional liquidators and the directors retain sufficient control of the company's affairs to pursue a restructuring and return the company to solvency. The implications of this tool are significant. First, there is no formal or statutory corporate rescue procedure in The Bahamas such as can be found in other common law jurisdictions. Second, prior to 2012, seeking the appointment of a provisional liquidator solely to facilitate a corporate rescue was not permitted. Additionally, the provisional liquidation procedure invokes the statutory moratorium on proceedings against the company, including proceedings which may be brought by a disgruntled creditor.

The type of restructuring which may be sought within the context of a provisional liquidation may vary and includes an injection of new money by an investor, a purchase of the company's distressed debt or a consensual work out. It is also

possible that provisional liquidation may be used to pursue a restructuring outside The Bahamas; for example, through parallel Chapter 11 proceedings in the United States.

Companies who wish to take advantage of this tool may do so by presenting their own winding up petition to the court pursuant to section 190 of the Winding up Act. Once that petition is presented, the company may apply, ex parte, for the appointment of a provisional liquidator with limited or "light touch" powers on the grounds mentioned above. Further, upon the appointment of the provisional liquidator, the hearing of the petition may be adjourned.

A "light touch" provisional liquidation will not prevent secured creditors from realising their security. However, it is widely recognised in other jurisdictions as a robust and flexible restructuring option which may enable a company in financial difficulty to continue as a going concern.

Bahamian companies in financial distress and their directors would do well to avail themselves of this far too neglected insolvency tool. 

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Tara Cooper Burnside is a partner in the firm's Insolvency & Restructuring practice group. She has detailed knowledge of the Bahamian insolvency regime and has worked on a number of cross-border insolvencies and restructurings. She is a Fellow of INSOL International. [tcooper@higgsjohnson.com](mailto:tcooper@higgsjohnson.com)



Litigation partner, Tara Archer-Glasgow, will be speaking at the upcoming ACI/C5 Fraud, Asset Tracing & Recovery Miami virtual conference scheduled for 28—30 October 2020. She will join practitioners from the UK, U.S. and key offshore jurisdictions to work through a case study of a complex multi-party, multi-jurisdictional matter. We invite you to register for the conference ([here](#)) and use the Registration Code S10-596-596L21.S to receive a 10% discount off of the conference fee.

# Light Touch Regulation Needs Solid Foundation

Sharmon Y. Ingraham

The suite of products offered in The Bahamas financial services industry includes Private Trust Companies (PTCs), private foundations and executive entities. In the jurisdiction these products are also subject to light regulatory controls. However, the fact that these products may be lightly regulated should not be equated with lax or no supervision. The Bahamas is committed to maintaining best practice within a well-regulated financial services industry. In that context, the industry focuses on ensuring that the products offered, while meeting the needs of those using such products, adhere to best practice and are properly regulated. Notwithstanding the reduced regulatory requirements in respect of PTCs, private foundations and executive entities, there are regulatory mechanisms and controls implemented to ensure such vehicles are compliant under Bahamian law and best international standards in the industry.

## ***Private Trust Companies (PTCs)***

Enabled via a 2006 amendment to the Banks and Trust Companies Regulation Act, (Chapter 316, Statute Law of The Bahamas) and specific subsidiary legislation, PTCs are designed to reduce red tape and to be lightly regulated. PTCs may be companies, limited by shares or guarantee, incorporated under the Companies Act, Chapter 308, or the International Business Companies Act, Chapter 309. In keeping with its reduced regulatory profile, PTCs are required to have a minimum share capital of \$5,000 and are assessed reduced licence fees in comparison

with institutional trust companies. PTCs are exempt from the requirement to have the transfer of its shares pre-approved by the Central Bank of The Bahamas (the Central Bank) as is required of licensed banks and trust companies. PTCs are also exempt from certain other regulatory requirements including obtaining a trust licence from the Central Bank.

However, the legislation requires PTCs to have a Registered Representative and a Special Director as mechanisms in the administration, oversight and monitoring of such entities. The Registered Representative is a valuable link in the regulatory scheme over PTCs, while the position of Special Director is directed at the due administration of the PTC. Registered Representatives are required to be in the jurisdiction and either a licensee of the Central Bank or a duly registered financial and corporate services provider approved by the Central Bank to act as a Registered Representative. To qualify as a Registered Representative an entity is also required to maintain a minimum share capital of \$50,000. The legislation also sets minimum criteria for a Special Director of a PTC. Specifically, Special Directors are required to possess no less than five years' experience in a discipline relevant to the administration of trusts. Such disciplines include law, finance, commerce, investment management and accountancy; specialties necessary in the proper administration of trust structures.

In the PTC regulatory regime

Registered Representatives are the primary contact between the Central Bank and the PTC. Accordingly, the Registered Representative is expected to have certain information and documentation on the PTC. The information required to be maintained by the Registered Representative include client due diligence documentation (retained for designated persons, settlors, vested beneficiaries and protectors among others), documentary support that the entity meets the statutory requirements to be a PTC, documentation establishing the PTC including memoranda and articles of association, trust and designating instruments and curriculum vitae for each Special Director. The Registered Representative is also required to maintain the share register, annual compliance certificates, declarations on maintenance of accounting records, certificates of good standing and current client due diligence records. The Registered Representative must also make an annual certification that the PTC continues to meet the statutory requirements.

Consequently, the Central Bank may request of the Registered Representative documents and information on each PTC it is affiliated with, as well as issue directives governing the PTC and the Registered Representative and undertake onsite inspections. To the extent there is any contravention of the requirements and directives of the Central Bank, or the Central Bank considers that the business of the PTC is being conducted in a manner

detrimental to The Bahamas sanctions may be levied against the PTC and its Registered Representative.

### ***Private foundations***

Private foundations were included in The Bahamas' financial services tool kit by the 2004 enactment of the Foundations Act, Chapter 369D. In accordance with the provisions of the Foundations Act a Bahamian private foundation is an entity with separate personality, resident and domiciled in the jurisdiction. Such entity is required to be duly registered with the Foundations Registry.

The Foundations Act also requires private foundations established under the legislation to have a foundation agent or a secretary with responsibility for certain statutory duties under the legislation. A foundation agent is required to be a duly licensed financial and corporate services provider or a trust company licensed under the Bank and Trust Companies Regulation Act, Chapter 316, and not precluded from acting in such capacity under the Foundations Act. Among the factors which may preclude an entity from acting as a foundation agent is the existence of a conflict of interest in respect of the founder or beneficiary of the foundation or arising from a personal relationship with a foundation council member.

The Foundations Act requires the foundation agent to perform the statutory duties assigned to it under the Foundations Act as well as adhere to other duties which may be prescribed by any other written law. In this connection, the Foundations Act also establishes that the regulator which has oversight of a foundation's agent will have corresponding oversight of the

foundation. To this end, if the foundation agent is a licensee of the Central Bank, the foundation would be subject to the oversight of the Central Bank. The statutory duties imposed on the foundation agent by the Foundations Act include client due diligence in respect of the foundation. The foundation agent is required to provide to the Registrar of Foundations a registration statement detailing certain prescribed particulars. The prescribed information includes the name, purpose or object, and duration of the foundation. The constitutional documents and amendments thereto of the foundation are also to be retained by the foundation agent. The foundation agent is further required to provide registered office services to the foundation and to receive service of legal process or other notices on behalf of the foundation. The foundation agent is required to ensure the foundation is compliant with the legislation and provide a declaration thereof to the Foundations Registry. The foundation agent is further tasked with the monitoring of changes in the prescribed information and amendments of the constitutional documents of the foundation and is obliged to notify the Foundations Registry accordingly.

The foundation agent is subject to a statutory duty of care under the Foundations Act. The foundation agent is therefore required to act honestly and in good faith in the best interests of the foundation, exercising the care, diligence and skill of a reasonable person in comparable circumstances.

### ***Bahamas executive entities***

Another component in the tool kit of

financial services in The Bahamas is the Executive Entity. The Bahamas Executive Entity (the BEE) was created by the Executive Entities Act, 2011. The BEE is "a legal person established by Charter", for the purpose of performing executive functions in private wealth structures and has the capacity to sue and be sued in its own name. The Executive Entities Act defines "executive function" as:

- "(a) any powers and duties of an executive, administrative, supervisory, fiduciary and office holding nature including, but not limited to, the powers and duties of (i) an enforcer, protector, trustee, investment advisor and holder of any other office ... of any trust; and (ii) the holder of any office ... of any legal person; and
- (b) the ownership, management and holding of ... executive entity ... and trust assets".

The Executive Entities Act requires an executive entity agent to be appointed in respect of each BEE and, for the duration of the existence of the BEE, it is required to have an executive entity agent appointed. The executive entity agent must be a duly licensed financial and corporate services provider or a trust company licensed under the Bank and Trust Companies Regulation Act. The executive entity agent must also consent in writing to its appointment to act as agent in respect of the BEE.

The executive entity agent is required to undertake the statutory duties imposed upon it by the Executive Entities Act and any other regulatory duties imposed by relevant legislation. The statutory duties




imposed under the Executive Entities Act include ensuring the BEE is compliant with the legislation; undertaking necessary client due diligence, and ensuring proper documentation is maintained in respect of the BEE. Additionally, the executive entity agent also serves as the principal point of contact between regulators and the BEE. Accordingly, the executive entity agent is the designated recipient for service of any notice or proceedings in respect of the BEE.

The Executive Entities Act also imposes upon the executive entities agent statutory duty of care. The executive entities agent is therefore required to act honestly and in good faith in the best interests of the

foundation, exercising the care, diligence and skill of a reasonably prudent person in comparable circumstances.

### **Conclusion**

The light touch regulatory control of the above type of organisations is effectively buffered by the presence of a regulated entity which provides services to the organisation. The regulatory supervision of each of the above bodies intersect through either a licensee of the Central Bank or a licensed corporate and financial services provider, bodies who are themselves subject to regulatory oversight. In place of direct regulatory control by governmental authorities, PTCs, private foundations

and BEEs are monitored and supervised by regulated agents of their choosing and not required to directly interface with the regulators. This separation does not dilute the regulatory control over the bodies, however. Accordingly, well-managed Central Bank licensees or corporate and financial services providers will ensure that the all regulatory requirements when acting in the capacity as Registered Representative of a PTC, foundation agent of a private foundation or executive entity agent of a BEE are adhered to and its files are kept current, because their reputations are jeopardised by anything less. 

***\*\*First published in International Investment (2020)***



Sharmon Y. Ingraham is a Senior Associate in the firm's Private Client & Wealth Management Practice Group where her practice includes advice to trust companies on matters concerning trust administration and creation, estate administration, private client wealth management, wills, company law and international commercial contracts.  
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## Lauded as an Excellent Firm in Chambers High Net Worth (2020)



Higgs & Johnson is 'an excellent firm with high-level capabilities' according to the recently released legal directory, Chambers High Net Worth (2020). Published by Chambers & Partners, the guide ranks in the area of international private wealth and noted that the firm has in-depth expertise in offshore trust and private wealth matters with 'a great tradition in that area'. Market commentators stated that 'they have always been a strong firm and they have a really heavyweight group of lawyers.' The firm received the highest ranking (Band 1) and was recognized as being 'one of the big boys on the trust side.'

### **Chambers Commentary for Ranked Attorneys**



Senior Partner, **Philip C. Dunkley, QC**, is praised as being 'a very, very good lawyer with a huge reputation.' He is recognised for his experience handling big-ticket trust and private wealth disputes with one offshore expert reporting that 'he still operates in some very big cases here.'



Partner and Chair of the Private Client & Wealth Management practice group, **Dr. Earl A. Cash** is described as 'a solid lawyer' with a loyal client base. Market experts commented: 'He is very, very diligent, always responsive and an excellent lawyer.'

# Risk & Redundancies: the Case of Kayla Ward v The Gaming Board

Jonathan Deal



In *Kayla Ward & Others v The Gaming Board for The Bahamas* Supreme Court Action No. 2017/CLE/gen/1506 (dated 17th February 2020, unreported), the Supreme Court of the Commonwealth of The Bahamas considered (i) the interrelationship between section 29 of the Employment Act (the “EA”), (ii) the redundancy provisions introduced by the Employment (Amendment) Act 2017 (the “Amendment”) and (iii) wrongful and/or unfair dismissal within the context of a restructuring exercise effected by the Gaming Board for The Bahamas (“the Gaming Board”).

Thirty-six (36) plaintiffs (the “Plaintiffs”) brought proceedings against the Gaming Board seeking damages for breach of contract and/or wrongful dismissal and/or unfair dismissal and, in some cases reinstatement, after their employment was terminated by the Gaming Board between October 2017 and February 2018. This note

focuses particularly on the unfair dismissal claims of two categories of Plaintiffs, viz.: those Plaintiffs that had managerial/supervisory status (the “Managerial Plaintiffs”) and those Plaintiffs that were part of The Bahamas Public Services Union (the relevant bargaining agent) (the “Bargaining Agent Plaintiffs”) (together the “Relevant Plaintiffs”).

An action for unfair dismissal is a statutory cause of action which may be invoked by an employee in circumstances where there is an issue in relation to the substantive or procedural fairness of their dismissal. The expression “unfair dismissal” itself is not defined in the Employment Act. Save in certain cases which are deemed unfair by statute, the fairness of a dismissal must be assessed in accordance with the substantial merits of the case. The remedies, which the court may award to an aggrieved employee who has been unfairly dismissed, include reinstatement, re-engagement and

compensation.

The Relevant Plaintiffs alleged that, although their dismissal had not been expressly characterised as such by the Gaming Board, their dismissal had in substance been a redundancy and appropriate procedures had not been followed by the Gaming Board. The Relevant Plaintiffs received termination letters that indicated that their dismissal was the effect of a restructuring exercise aimed at achieving organisational efficiency. The background to their dismissal was that the regulatory needs of the industry had become “more technocentric than labour intensive”.

The Amendment introduced enhanced provisions regulating redundancy, lay offs and short-time working which were incorporated into Part VI of the EA. Section 26 of the EA (as amended) states that an employer may lawfully dismiss an employee on the ground of redundancy provided that the employer is compliant with the

provisions of Part VI of the EA. An employee is deemed to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to:

- the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
- the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or is expected to cease or diminish.

Section 26A of the EA (as amended) stipulates a procedure to be followed when an employer is considering or has determined that employees will be made redundant. In broad terms, the procedure involves informing the relevant trade union or employees' representative of prescribed matters, consulting with the relevant trade union or employees' representative on prescribed matters and consulting with and informing the Minister of Labour.

[N.B. Without prejudice to the statutory provisions, in this case the Bargaining Agent Plaintiffs also

benefitted from express provisions in an Industrial Agreement entered into between the Gaming Board and the Bargaining Agent which addressed redundancy situations.]

The Gaming Board's defence to the Relevant Plaintiffs' claims was (essentially) that the Plaintiffs had been dismissed in accordance with section 29 of the EA. Therefore, there had been no unfair dismissal. Section 29 of the EA prescribes minimum periods of notice and severance pay which, in the absence of more favourable contract terms, must be provided by employers when terminating an employee without cause.

The Supreme Court of the Commonwealth of The Bahamas held that the Relevant Plaintiffs had been made redundant as the Gaming Board had embarked upon a restructuring exercise in an effort to decrease its staffing on account of a change in the requirements of its business for administrative work.

The Court found on the evidence that the provisions of section 26A of the EA (as amended) and (in relation to the Bargaining Agent Plaintiffs,) Article 25 of the Industrial Agreement had not been complied with by the Gaming Board. The Court affirmed the view expressed in persuasive authority that "consultation is one of the pillars of modern industrial relations practice..." and held that the Gaming

Board's default made the dismissals of the Relevant Plaintiffs unfair.

On the issue of remedies, the Court ordered that the Relevant Plaintiffs be reinstated if they so wished pursuant to section 42 of the EA. The Court remarked that, if the Gaming Board could not find any suitable positions for the Relevant Plaintiffs, it could dismiss them on the ground of redundancy, but this time ensuring that it complied with the provisions of section 26A. In addition, the Court found that the Relevant Plaintiffs were entitled to compensation (consisting of a basic award and a compensatory award) pursuant to sections 45 to 48 of the EA.

Kayla Ward provides a salutary reminder of the importance of abiding by mandatory statutory procedures and binding contractual procedures when effecting dismissals. It is also a striking instance of the Court ordering the relatively uncommon remedy of reinstatement. Going forward, employers would be well advised to carefully consider the potential application of the provisions of Part VI of the EA whenever considering the potential dismissal of employees in circumstances where such dismissal would amount to redundancy. <sup>(1)</sup>



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## NEW LOGO LAUNCH



Higgs & Johnson is proud to launch a refresh of its brand with the unveiling of a new logo for the Firm and its affiliates, H&J Corporate Services Ltd. and H&J Fiduciary Services Ltd. Lauded as one of the leading law firms in The Bahamas, the rebrand reflects Higgs & Johnson's commitment to being a world-class offshore provider of legal and professional services which is recognised globally for excellence and integrity.


In its 72 years of existence, the Firm has grown alongside the needs of its clients from a single office to a leading corporate and commercial law firm, and in this time the logo has changed in tandem with this growth. The evolution of the Firm's brand identity throughout its history highlights that Higgs & Johnson is as at the center of a connected and ever-changing world. While the colours incorporated in the logo maintain ties with the Firm's past, the new logo features a bold design that symbolizes both the Firm's present and future.

Co-Managing Partner, Surinder Deal noted, 'We have created a brand identity that reflects our high standards with priority given to exceeding clients' expectations. Despite an increasingly complex business environment, we remain steadfast in our commitment to continue our founders' spirit of excellence and integrity.'

Leading legal directories have consistently ranked the Firm in the top tier referencing it as 'one with an astute legal view of the local environment (IFLR1000)' with its attorneys being described as the 'authority figures on the matters they work on (Chambers Global)' and 'strong advocates of their client's business (Legal 500 Caribbean)'. The modern approach of the updated brand identity is meant to embody strength and innovation.

'It is imperative that we embrace the future', stated Vivienne M. Gouthro, partner and the Co-chair of the Firm's marketing committee. 'With a focus on innovation, our new logo represents our dedication to remaining on the cutting edge of legal and business technologies.'

In conjunction with the new logo, Higgs & Johnson is also introducing its updated corporate philosophy – 'Excellence. Service. Innovation.' The Firm stands on these three pillars thereby facilitating measurable value for clients in helping them achieve their business and personal goals.

The reinvention of the logo symbolizes the ever-evolving spirit of Higgs & Johnson and its commitment to honesty, transparency, excellence and professionalism. The Firm will continue striving to exceed the expectations of every client by adding value, increasing the depth of expertise at all levels of the Firm and expanding its reach. 



## Aviation Attorney Appointed Deputy Chairman of AAIA



Higgs & Johnson aviation attorney, **Keith O. Major, Jr.**, has been appointed Deputy Chairman of The Aircraft Accident Investigation Authority ([AAIA](#)), the independent aviation accident investigation authority of the Bahamas.

“On behalf of Higgs & Johnson, I wish to congratulate Keith on his appointment as Deputy Chairman of the Board”, said Co-Managing Partner, **Oscar N. Johnson, Jr.** “We resolutely support the engagement of our Attorneys in the civic affairs of our country and are pleased he has been selected to serve in this manner.”

“I am sincerely thankful to the Government of The Bahamas for providing me this opportunity to render service to my community in an area that I am extremely passionate about,” noted Keith O. Major, Jr. “I am of the firm belief that the sky is truly the limit with respect to Bahamian aviation; and I look forward to making my contribution in this new capacity.”

Keith is the first Bahamian to obtain an LL.M. in International Aviation Law, completing his program requirements with straight A’s and the top score among his cohorts in both Private and Public International Aviation Law. He has recently authored commentaries on aviation law topics including: drones, ‘hacking’ and air accident investigations in The Bahamas. Keith provided The Bahamas chapters in both the Legal 500 Aviation Country Comparative Guide (2020) and Lexology Getting the Deal Through – Air Transport (2021).

## Firm Welcomes New Associates



Sharon Rahming-Rolle joined the **Litigation** practice group working with Partner, Tara A. Archer-Glasgow.



Susie Bethel joined the **Real Estate & Development** practice group working with Partner, Stephen J. Melvin.

## Tara Archer-Glasgow Listed in Euromoney’s Expert Guides



Litigation partner, **Tara Archer-Glasgow**, is listed as one of the top Litigation practitioners in The Bahamas by Euromoney’s Expert Guides. The annual guide compiles the world’s most talented and reputable women of diverse legal practice areas. Tara is the only woman in The Bahamas to be included this year from the 30 practice areas that feature in the guide. Additionally, Tara was published in the Women in Business Law Expert Guide (2020 Edition) with her article – The Bahamas: Employment Challenges with COVID-19 .