FOCUS

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Liquidation Expenses: The Use of Trust Property for Payment

Tara Cooper Burnside

The Supreme Court of The Bahamas has recently provided guidance on the ability and extent to which the fees and expenses of the liquidator may be paid from trust property. Such guidance has emanated from Justice Winder and Justice McKay in two separate decisions relating to Pacifico Global Advisors Limited (in liquidation) ("Pacifico") delivered within the period of six months.

Pacifico is a Bahamas based broker dealer registered with the Securities Commission of The Bahamas since 2012. It was placed into voluntary liquidation on 2 October 2019 and was subsequently ordered to be wound up under the supervision of the Court by a Supervision Order granted on 28 October 2019.

Prior to the commencement of liquidation, Pacifico provided discretionary portfolio management and investment advisory services to its clients. As a part of its service offering, Pacifico promoted a number of sub-funds which were segregated accounts (together the "Sub-funds") of Lyford Diversified Global Fund, SAC ("Lyford Diversified"), a segregated accounts company which operated in The Bahamas as an open-ended investment fund, and for which Pacifico acted as investment manager and custodian.

Fifteen (15) of the Sub-funds were

placed into receivership under the Segregated Accounts Companies Act shortly before Pacifico was placed into liquidation. This gave rise to an interesting twist with respect to the fees and expenses of the liquidator, which is discussed below. For ease of reference, the Sub-funds placed into receivership are hereafter referred to as the "Sub-funds in Receivership".

At the commencement of its liquidation, Pacifico's financial situation as assessed by the liquidator was as follows. First, the majority of the assets held by Pacifico comprised assets held for the benefit of its clients, as custodian. Second, there were four (4) categories of such clients, namely (i) clients who held investments in the Sub-funds in Receivership, (ii) clients who held investments in a Sub-fund which was not in receivership, (iii) clients who held investments outside of the Sub-funds entirely and (iv) clients who held investments both in and outside the Sub-funds. Third, the assets held by Pacifico in the Sub-funds in Receivership comprised 90% of the total assets held in its name.

In the first decision, McKay J considered an application by Pacifico's liquidator for an order, inter alia, that 90% of the costs of the liquidation be paid from assets held by Pacifico in the Sub-funds in Receivership. One of the arguments advanced by the liquidator was that such assets constituted 90% of the total assets in Pacifico's name and were trust assets which had required detailed analysis by the liquidator and his team, as a part of the liquidation, so as to identify the relevant beneficial owners in order for the assets to be properly distributed to them.

In The Bahamas, it is well established that the Court has an inherent equitable jurisdiction to order liquidators' fees and expenses to be paid from trust property held by a company in liquidation provided such fees and expenses are reasonably incurred in returning the trust property to those beneficially entitled to it. It is also established that the Court has statutory power under section 204(3) of the Companies Act (as amended). Section 204(3) states:

"(3) Where in the course of the reasonable exercise of his functions as liquidator in relation to assets which the company in liquidation held upon a trust, expressed or otherwise, the liquidator –

(a) identifies or attempt to identify;

(b) recovers or attempts to recover;

(c) realizes or attempts to realize;

(d) protects or attempts to protect; or

(e) distributes such assets to the person or persons beneficially entitled,

the liquidator to the extent of such activities (or other activity in relation to such assets considered by the court to be beneficial to those entitled to them) shall be regarded as having acted in the administration of trust assets and the liquidator, subject to the approval of the court, shall be entitled to be indemnified out of those assets in respect of costs that are allocable to the said activities."

The liquidator therefore relied on the common law and statutory power of the Court.

In determining the liquidator's application, McKay J first considered whether the assets held by Pacifico were in fact "trust assets" and made a number of findings as follows. Firstly, the Court found that the directors of Lyford Diversified placed the Sub-funds into receivership by resolutions passed on 7 March 2019 and 8 April 2019, and the receivership was thereafter continued under the supervision of the Court on the application of the Receiver. Secondly, the Court found that by 28 May 2019, Pacifico had been terminated in its role as investment manager of the Sub-funds by the Receiver, after which Pacifico instructed its custodian bankers to transfer the assets of the Sub-funds in Receivership to certain accounts at Deltec Bank and Trust Ltd ("Deltec"). Pacifico was placed into voluntary liquidation on 2 October 2019 during the course of such transfer. Thirdly, the Court found that it had been agreed between the Receiver and Deltec that Deltec would be authorised to disburse the assets of the Sub-funds in Receivership to the persons entitled in cooperation with the Receiver. Such agreement was embodied in a Consent Order granted by the Court under which the Court directed that the only deduction to be made from the assets of the Sub-funds in Receivership should be the costs and expenses of the Receiver, as determined by the Court. Finally, the Court found that, given the termination of Pacifico as investment manager of the Sub-funds, Lyford Diversified did not intend for the assets of the Sub-funds in Receivership to remain with Pacifico, with the result that no trust was established in respect of those assets.

In coming to this conclusion, the Court noted that the liquidator wrongly disregarded the Receiver and Deltec, both of whom were capable to answer any questions of the liquidator in respect of the assets of the Sub-funds in Receivership. In addition, the Court noted that the liquidation and disbursement of the assets of three of the Sub-funds in Receivership had already been achieved in accordance with the protocol stipulated in the Consent Order. It therefore appeared that the liquidator's detailed analysis of those assets was unnecessary. As McKay J put it, the liquidator acted "on a frolic of his own" in conducting himself as he did. The liquidator's application for an order that the costs of the liquidation be paid from assets held by Pacifico in the Sub-funds in Receivership was accordingly dismissed.

In the second application, Pacifico's liquidator again sought an order that the costs of the liquidation be paid from assets held by Pacifico which he regarded as "trust assets" but on this occasion the application specifically excluded the assets held by Pacifico in the Sub-funds in Receivership. The specific order sought included an order that the Court formally sanction the liquidator deducting or causing to be deducted from the trust accounts/assets held by Pacifico (excluding assets in the Sub-funds in Receivership) (i) such costs in the liquidation that are solely attributable to the identification, preservation, protection, recovery and distribution and administration of those trust assets and (ii) a percentage of the general liquidation costs (i.e. costs not solely attributable to the trust assets) since the trust assets currently constitute approximately 79% of the assets in Pacifico's name and the general liquidation costs maintain the liquidation process and thereby enable the liquidator to attend to the trust assets.

In determining the second application, Winder J found that section 204 of the Companies Act (as amended) codified the common law position that where the company's assets are insufficient to adequately compensate the liquidator for the skills and tasks performed in relation to client trust assets, the liquidator's costs should be paid out of the trust assets. He also accepted that the liquidator had demonstrated an entitlement to receive payment for services provided directly towards the benefit of the trust assets concerned. The Court, therefore, granted an order permitting the liquidation costs solely and directly attributable to the administration of the trust assets to be deducted from those assets, subject to the caveat that the such costs must accord with the fees which Pacifico would otherwise have levied for its services had it not been placed into liquidation.

With respect to the general costs of the liquidation, Winder J accepted that the liquidator was permitted to receive a contribution from the trust assets but cautioned that trust assets cannot be "unduly burdened" with the general liquidation costs in circumstances where such assets are merely in Pacifico's custody as custodian. Winder J indicated that in his view the percentage could not exceed 15% but reserved the Court's decision in this regard as the application did not at that stage require an assessment of the percentage to be allocated.

Regrettably, as a result of these decisions of Winder and McKay JJ, the liquidator of Pacifico has found himself in an unenviable position. Not only is the payment of his fees uncertain but he is potentially exposed for expenses incurred by him to the extent that the assets of Pacifico are insufficient. The lessons to be learned include the following. A liquidator of a segregated accounts company should have due regard to any parallel receivership of a segregated account and cooperate with the receiver accordingly. In the case of any doubt, a liquidator would be wise to seek directions from the Court before acting in respect of assets subject to the receivership. Additionally, where a company is possessed of trust assets by virtue of a custodian relationship, a Court may limit the amount of liquidator's fees and expenses attributable to the administration of those trust assets to the costs that would have ordinarily been paid to if the company had not been placed into liquidation.

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NFTs: Authenticity, Accessibility, and Equitability in the Art World

Kamala M. Richardson

In March 2021 tongues in the international art world were set wagging when Christie's auction house sold Beeple's digital collage "Everydays: the first 5,000 days', compiled by the artist from 5,000 images curated over a 13 year span, for a whopping $69 million as an NFT. However, what is truly astounding about this sale is not the price fetched for the work of art, but the highly publicized convergence of digital art and crypto-tokens backed by one of the world's oldest and most reputable auction houses, therefore lending credibility to the transaction.

NFTs or non-fungible tokens are units of data created and stored on blockchain technology. While the mere mention of blockchain establishes a mental link to cryptocurrency in the minds of most people, NFTs and cryptocurrency are not one and the same. The commonality between NFTs and cryptocurrency begins and ends at the blockchain. Yes, both NFTs and cryptocurrency are stored on blockchain, an immutable public digital ledger that records the provenance of an NFT or unit of cryptocurrency. However, NFTs are digital tokens which certify ownership of underlying real world or virtual assets. Unlike, their fungible counterparts (i.e. money or cryptocurrencies such as Bitcoin and Dogecoin), NFTs are not interchangeable, and therefore cannot be traded on a like for like basis. The reason for this is that NFTs derive their value from their underlying assets, the respective values of which can be as varied as the array of images in Beeple's collage. Artists can tokenize their digital works as NFTs for sale on the crypto-market. The tokenization of the art work does not convert the digital art work itself into an NFT but instead links the virtual location of the original digital work to the NFT, such that the owner of the NFT can view the artwork using the NFT as the access token.

Authenticity

The market for forged artwork thrives. Unfortunately, the financial perils of the sale of forged artwork may fall upon parties to the sale who were not culprits of the forgery. This was the cautionary tale emanating from the litigation in the United Kingdom case of Fairlight Art Ventures LLP v Sotheby's & others [2020] EWCA Civ 1570. In that case, an art investment company was held liable to repay its share of the $10 million sale proceeds for selling a Frans Hals forgery on consignment to Sotheby's which had in turn sold it to a collector. At trial, one of the presiding judges commented that "the law has to fall on someone; obviously it did not fall on the forger". Famously, in the US, the Andy Warhol Art Foundation disbanded its Authentication Committee in 2012 after facing a number of lawsuits concerning the provenance of works attributed to Warhol, after the Authentication Committee had already opined on the provenance of those works and the opinions were relied upon in sales of those works. In common law jurisdictions, if a buyer suspects that they have purchased a forgery, their recourse against the seller typically lies in the law of misrepresentation (if there is any actionable misrepresentation at all). Adding to discussions regarding the authentication of art is that fact that in most jurisdictions, there is no public register of origin or title to artwork which a prospective buyer can refer to when contemplating the purchase of notable works of art. Where digital art work is concerned, the risk of accepting a forgery has been lessened to a degree by the tokenization of digital artwork as NFTs. The immutable and public nature of the blockchain makes the task of establishing the provenance of digital artwork less cumbersome and less speculative for a prospective buyer. Buyers of tokenized digital art are given added comfort in their due diligence process by being able to review the blockchain to determine the origin of the NFT linked artwork and view a record of each sale of it thereafter.

Accessibility

The accessibility of prized artwork has long been subject to the control of intermediaries, placing a divide between artists and buyers who may not wish to engage with traditional intermediaries such as auctions houses or galleries. However, the advent of NFTs has broadened artists' opportunities to secure sales for their work by allowing them to sell directly to the market of buyers. NFTs have built-in smart contracts which enable the artist and the buyer to agree the terms of sale and possible resale of the digital artwork. Smart contracts are self-executing; meaning all or some of the performance of the contract is automated, therefore requiring little or no human intervention. Some commentators have championed this phenomenon as the "democratization of art", in which we see not only a shift away from the lack of transparency in art sale transactions to one of total transparency, but also the free trading of art on the open marker. It should be born in mind that smart contracts are not written form contracts but are a type of algorithm which provide for a pre-determined outcome to an event which is coded as "if/when…then". For example, when buyers offer the sale price for an NFT, the NFT is transferred to the buyer and funds are transferred to the seller, automatically. Given this, while the sale of art work through NFT smart contracts provides a novel means of conducting art sales, it may still be worthwhile for high value NFT art sales to be underpinned by not only the smart contract but also a written supplementary agreement which defines the roles, responsibilities, representations and warranties of the seller and buyer in the transaction and allocate risk appropriately.

Equitability

Not only do NFT self-executing smart contracts make accessibility to art more tangible, they can also be used to ensure that artists are paid fairly for their work, particularly on the secondary resale market. The concept of droit de suit or artist's resale royalty rights began to take shape in law in the late 19th century. One of the most famous examples of the inequities which shaped this concept was the sale of Jean-François Millet's painting L 'Angelus which sold for a staggering 553,000 francs on the secondary market after his death. During his lifetime, Millet had sold the painting for only 1,000 francs doing little to alleviate the poverty stricken and destitute circumstances in which he and his family lived. After his death, his family received no benefit from the resale. This is said to have led to the introduction of droit de suite in French law which is the inalienable right of the artist, or heirs of their estate to receive a portion of the proceeds of the resale of the artist's work. The Berne Convention for the Protection of Literary and Artistic Works established in 1886 to create a level playing field for artist's rights among convention signatories also contains droit de suite provisions at Article 14ter. Nonetheless, this provision is optional and as such signatories are not obliged to incorporate droit de suite in their national legislation. In light of this, there are a number of signatory countries which have chosen not to provide this automatic right to royalties upon the resale of an artist's work in their country's legislation. NFT's provide a means of addressing this issue. It is possible for the NFT smart contract to be encoded to automatically deduct a percentage of the resale price of a piece of digital artwork from all subsequent sales of the NFT and pay it over to the NFT creator or artist.

The introduction of NFTs is likely to have a profound effect on the way business is conducted in the art world. Though their use is a relatively recent development, NFTs seem to have positioned the art world for a paradigm shift in which artists can exert greater control over the sale of their work and reap the majority of the financial benefit. As further development is spurred it will be interesting to observe the way in which technology, art and law converge and begin to influence one another in this space.

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Succession Planning in The Bahamas: The International Business Company and Shareholders' Agreements

Ian S. Winder

Onshore, The Bahamas is known as a preferred forum for succession planning among high-net-worth individuals. Moreover, as an international financial centre, The Bahamas benefits from industry leading banks and trust companies that tailor their business to meet the demands of their clients. The most common form of succession planning in The Bahamas typically involves the formation of a trust. Whilst the trust structure does benefit many clients, inevitably there are those who, for whatever reason, wish to retain legal ownership in their assets through a company. The Bahamas has a versatile and adaptable regime that can suit a range of clients' desires for their estate strategy.

International Business Companies

In The Bahamas, there are two types of companies: companies formed under the Companies Act, 1992 (a "domestic company") and companies formed under the International Business Companies Act, 2000 (an "IBC"). Domestic companies are generally used by Bahamian citizens; therefore, this article does not focus on these vehicles. Instead, focus is placed on the IBC, a corporate vehicle initially created to facilitate the business of offshore individuals and companies. An IBC has fewer administrative requirements than its domestic company counterpart. Generally, IBCs are easy to incorporate and have a flexible corporate structure. The following are some requirements for an IBC:

1. it must have at least one director and one shareholder (a director need not be a Bahamian resident or a shareholder of the IBC);
2. there is no maximum or minimum capital requirement and no requirement to conduct audits; and
3. no filing requirements except filing registers of directors and officers (and any amendments thereto within twelve (12) months of the appointment of any director or officer) and filings and reporting obligations that may arise as a result of the Commercial Entities (Substance Requirements) Act, 2018.

IBCs have proven to be an effective and efficient vehicle for managing offshore activities. Usually, the shares in an IBC would be owned by a domestic company, another IBC or by a company in another offshore jurisdiction. Practically, beneficial owners on the advice of their attorneys and financial advisors utilise various ownership structures that suit their individual needs. An IBC's flexibility affords the beneficial owners the option to change the structure of the company when needed.

Memorandum of Association and Articles of Association

The Memorandum of Association (the "Memorandum") is the constitutive document of the IBC that sets out its structure, powers and limitations. The Memorandum identifies, among other things, the authorised share capital, the number of shares and the classes or series of shares with their respective share entitlements. By contrast, the Articles of Association (the "Articles") operate as a contract that binds the company and its shareholders and the shareholders between themselves. This is particularly beneficial in succession planning as the Articles, when filed with the Companies Registry; also bind each member's heirs, personal representatives and assigns. The Articles generally offer a certain predictability regarding its administration and the interaction of its members. Both the Memorandum and the Articles can be amended at any time, subject to their respective terms and such amendment being filed with the Companies Registry within twenty-eight (28) days of the passage of the same. Beneficial owners can take comfort in knowing that they can create the preferred mechanisms for amendment that would be applicable to the IBC and govern the relationship of the shareholders. Such amending power can be fortuitous since circumstances often change on short notice.

Shareholders' Agreements

The shareholders of an IBC may decide to enter into a supplemental contract among themselves; this is commonly known as a shareholders' agreement. Such shareholders' agreement operates in tandem with the Memorandum and the Articles of the IBC. Frequently, the objective of a shareholders' agreement is to regulate how its shareholders relate to one another. As the Memorandum and Articles are both public documents that are filed with the Companies Registry, the shareholders may elect to include information that they desire to remain confidential because while the International Business Companies Act, 2000 mandates that a notice of a shareholders agreement be filed at the Companies Registry, such shareholders agreement itself does not have to be filed. Moreover, that agreement can be a fertile source for the protection of minority shareholders.

Some specific issues that are relevant to succession planning to be included in a shareholders' agreement might be:

- conditions and restrictions on how the shares in the IBC are transferred; and
- the different classes of shares of the company and their respective rights.

The transfer of shares

In any plan for successive ownership in a company, the transfer of shares is the most salient issue. In drafting appropriate clauses in any shareholders' agreement, the intentions and objectives of the shareholders must be taken into consideration. If the shareholders wish to have a long-term business amongst themselves (and their heirs), they can take a restrictive approach regarding the transfer of any shares. For example, they may decide that any transfer (including one to a current shareholder) shall be subject to vote amongst the shareholders whereby seventy-five percent (75%) of the vote is required to approve the transfer. While this may be considered repressive, it is effective in managing the succession of shareholders.

Similarly, the shareholders may also desire to include the imposition of pre-emptive rights. This would require that where a shareholder desires to transfer their shares, they must first offer their shares to the other shareholders by notice in writing. The failure to adhere to this provision could render any transfer ineffective thereby controlling the succession of membership in the IBC.

Similarly, the shareholders may desire to include a provision in the shareholders' agreement to require that in the event of the death of a shareholder the person entitled to a deceased shareholder's shares be required to transfer the shares upon receipt of written notice. This prevents the undesirable scenario of permitting outsiders and unknown persons into the membership.

In order to avoid the issue of a difference of opinion in the value of the shares, most comprehensive Articles or shareholders agreements will contain a method of calculating the value of shares prior to the transfer of such shares, which would normally be conducted by an independent third party. This inclusion of a provision of this nature ensures that the estate of a shareholder is paid the appropriate value for the shares of the deceased shareholder.

Classes of shares

The shares of an IBC can be divided into different classes, with different rights attaching to each share class. Typically, there are management shares which carry voting rights in an IBC, and one or two lower classes of shares that do not carry any voting rights.

Should the initial shareholders chose to retain control, while allowing new shareholders voting rights, such initial shareholders could the right to appoint a director to the board of directors. This can be supplemented by provisions limiting the number of directors that can be appointed to the board of the IBC.

Classification of shares can be an ingenious mechanism to preserve control for a particular person or group.

In conclusion, there are many challenges that shareholders can face in creating a company that is intended to be a long-term investment vehicle. The IBC procures for shareholders the framework to implement their succession goals. When paired with a comprehensive shareholders' agreement tailored to meet the financial objectives for future generations the IBC becomes an appealing and discriminating vehicle for successful wealth transfers.

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H&J News

Partners Recognized as Leading Female Transactional Lawyers

Higgs & Johnson is pleased to announce that Partners, **Vivienne M. Gouthro** (left) and **Christel Sands-Feaste** (right), have been recognized by IFLR1000 in its list of Women Leaders for 2021. IFLR1000 is a legal directory that lists the world's leading financial and corporate law firms. Women Leaders are identified by IFLR1000 as the leading female transactional lawyers in the world with impressive track records, who are consistently recommended by clients and peers for the quality of their advice and service.

In extending their congratulations IFLR1000 noted, '*Vivienne and Christel have expertise and experience of working on complex deals and have risen to hold leadership roles with their firms and practices. Although all IFLR1000 Women Leaders are also IFLR1000 Leading Lawyers regardless of their gender, we understand the need to promote the firms working hardest to nurture and retain female talent*.'

Noted for '*giving prompt and clear advice*' by IFLR1000, Managing Partner of the Freeport office and Chair of the Maritime & Aviation group, Vivienne is ranked in the 'highly regarded' category of IFLR1000 and is a corporate and commercial lawyer with over 25 years experience specialising in ship and international finance and extensive experience in real estate and development and private client and wealth management.

Christel Sands-Feaste, Chair of the Firm's Financial Services and Securities and Investment Funds Practice Groups, is ranked by the Guide for the 9th consecutive year in the 'highly regarded' category and noted for her '*broad range of expertise and experience.*' Christel is a highly experienced commercial lawyer with over 20 years' experience advising clients in The Bahamas and internationally on corporate and commercial matters, asset financing, mergers and acquisitions, financial services, securities offerings, securitizations and investment funds.

Co-Managing Partner, **Sterling H. Cooke** praised both partners stating, '*Vivienne and Christel are two members of our world class team of Attorneys here at Higgs & Johnson, who lead with distinction in their various roles within the Firm. In addition to having a total of almost 50 years of combined experience, they, together with other Partners in the Firm, are leading the way for other female attorneys.'*

Higgs & Johnson is committed to advancing diversity and investing in its female attorneys and staff. 47% of the Firm's Partnership is female with more than half of them Chairing or Co-Chairing Practice Groups. We boast of having had a female Co-Managing Partner and having seasoned female professionals currently holding senior operational posts, including our Chief Executive Officer and Human Resource Manager. Our Firm ensures inclusion of the younger female attorneys and staff members in the operation of the Firm as co-chairs and participants in the management teams. Higgs & Johnson believes an inclusive Firm with diverse leadership improves the Firm's ability to provide clients with innovative and world class services.

Litigation Chair Speaks at Asset Recovery Seminar

Partner and Chair of the Litigation practice group, **Tara Archer-Glasgow**, joined an international panel of experts for a highly engaging session entitled, *The Good, The Bad and the Outright Ugly in Asset Recovery Strategies.* She discussed the importance of developing an effective asset recovery strategy and key factors that result in a successful outcome for the client. This was the penultimate webinar in the Baker & Partners 2021 Financial Crime Series.

BFSB Virtual Landfall

The Bahamas Financial Services Board hosted a virtual Landfall that featured commercial partners, **Christel Sands-Feaste** and **Portia J. Nicholson** as speakers. Christel discussed developments in the Investment Funds regime along with Wendy Warren. Portia J. Nicholson in conjunction with Brian Jones and Christina Rolle spoke on FINTECH developments. The live Q&A was facilitated by the Board's CEO and Executive Director, Tanya McCartney.

STEP MOOT CHAMPIONS

The Higgs & Johnson team were declared the winner of the STEP Moot 2021. The team comprised Partner, N. Leroy Smith and Associate, Andre W. Hill as advisors; and Associates, Nia G. Rolle and Jonathan Deal as team associates.

2021 Project Bahamas Top 48 Millennials

Higgs & Johnson attorney, **Keith O. Major, Jr.** was a recipient of the 2021 Project Bahamas Top 48 Millennials award. Project Bahamas is an organization that seeks to heighten awareness about emerging leaders.

"On behalf of the partnership, I wish to congratulate Keith on this achievement," said Co-Managing Partner, **Oscar N. Johnson, Jr.** "This recognition comes as no surprise given his work ethic and dedication to the pursuit of law and we are delighted that he has been named in the Top 48 of leading Bahamian millennials."

Under the theme, The Road to 48 - Celebrating Our Best, Keith was recognized as a Bahamian Millennial who is excelling in his field and contributing to the innovative and sustainable development of The Bahamas.

"I am thankful to my nominators, references and the organizers for establishing this program. I appreciate the recognition and wish to use this opportunity to encourage every Bahamian to work in silence, strive to operate in your gift/niche and let's all continue to build a better and stronger Bahamas!"

Keith is the Co-Deputy Chair of the Maritime & Aviation practice group, the Deputy Chairman of The Aircraft Accident Investigation Authority (AAIA) and the first Bahamian to obtain an LL.M. in International Aviation Law.