

## FOCUS on The Cayman Islands

## HIGGS & JOHNSON EXPANDS INTO THE CAYMAN ISLANDS

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*The information contained in this newsletter is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This newsletter can in no way serve as a substitute in such cases.*

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*Partners of  
Higgs & Johnson  
and Higgs  
Johnson Truman  
Bodden & Co  
celebrate the  
merger with a  
client cocktail  
reception held  
in Grand  
Cayman.*

Higgs & Johnson was pleased to announce its expansion outside of The Bahamas into the Cayman Islands by a merger with Truman Bodden & Company of Grand Cayman effective 1 January 2009. The firm will practice in the Cayman Islands for a twelve-month initial period under the name "Higgs Johnson Truman Bodden & Co" and thereafter be known as "Higgs & Johnson".

Higgs & Johnson proudly celebrated its 60<sup>th</sup> Anniversary last year, having been founded in January 1948. It is the largest full-service corporate and commercial law firm in The Bahamas and has for more than a half-century served international financial service providers, real estate developers and private clientele on matters of Bahamian law.

Truman Bodden & Company is located in the heart of George Town, Grand Cayman, where it has been practicing law for more than 35 years and prides itself on providing prompt, efficient, valuable and personal service. Its founder, Mr. Truman Bodden, stated that "we are pleased to be joining Higgs & Johnson, which we believe will

enhance and broaden the range and depth of the legal services we provide for our clients." The merging of these prestigious law firms showcases the first law practice to straddle both The Bahamas and the Cayman Islands.

Central to the decision to merge the two reputable firms was the identification of business synergies available between The Bahamas and the Cayman Islands as leading financial centres and the opportunity to offer clients complementary services across jurisdictions. The firm will continue to concentrate in civil and commercial law, including business transactions, litigation, banking and trust company matters, securities, real estate transactions and private client business. The Bahamas practice of Higgs & Johnson brings strength in complex litigation, banking and estate planning vehicles (trusts and foundations), while the Cayman practice contributes expertise in mutual funds, offshore investment vehicles, captive insurance and capital markets transactions.

Mr. Chris Narborough of the

*cont'd pg 2*

## Higgs & Johnson Expands into the Cayman Islands Cont'd



Cayman Islands will serve as Country Managing Partner of the Cayman Office while Mr. John K F Delaney will continue as Managing Partner for The Bahamas based offices in addition to overall responsibility for both jurisdictions.

Mr. Delaney noted that "Expanding to the Cayman Islands is a logical step for Higgs & Johnson. There are several similarities between the jurisdictions that would give the firm important economies of scale in several financial services related practice areas, yet the difference in business emphasis between the jurisdictions – The Bahamas being better known for private client business while Cayman is for institutional business – would give Higgs & Johnson the opportunity to expand the depth of its product specialization and its market, amongst other synergies."

Mr. Narborough, who has years of practice experience in Saudi Arabia and the United States, stated that the merger "will help to raise the profile of our firm. We are excited to join with one of the leading firms of The Bahamas. There has been a history of close links between our

two jurisdictions as regards banks and other financial services businesses and we look forward to extending those links to the practice of law."

Following regulatory approval, this merger would also bring together the corporate services interests between H&J Corporate Services Ltd. of The Bahamas and Trulaw Corporate Services Ltd. of the Cayman Islands. Trulaw will trade as "H&J Trulaw Corporate Services Ltd." for the initial period and thereafter be known as "H&J Corporate Services (Cayman) Ltd."

Higgs & Johnson is committed to remaining at the forefront of the profession, providing clients with quality legal services. The firm will have 5 office locations: in Nassau and in Lyford Cay on the island of New Providence; Freeport on the island of Grand Bahama; Marsh Harbour, on Abaco Island, in The Bahamas; and in Grand Cayman in the Cayman Islands. The firm is headquartered in The Bahamas at Ocean Centre on the Montagu Foreshore, Nassau.

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## Practical & Legal Issues Regarding the Purchase of Real Estate in the Cayman Islands

There are many attractive properties in the Cayman Islands for those looking to acquire a new home, place of business and/or an investment opportunity. Perhaps, of particular interest to purchasers from the United States, we do not have title insurance in the Cayman Islands, but we **do** have a central Land Registry where all land is registered with guaranteed title (i.e., a purchaser can assume the vendor's title as reflected on the land register to be accurate). It is, nonetheless, always recommended that proper legal advice be sought when acquiring property.

Some issues which may arise in the purchase of real estate follow:

### Conflicts of Interest

Conflicts can so often arise in transactions between the interests of the vendor and the purchaser, which at the outset may appear to be very simple. Therefore, advice should always be sought from independent Attorneys-at-Law.

### Use of a Corporate Vehicle

The purchaser may elect to form a company for the purpose of purchasing property in the Cayman Islands. Companies which have bearer shares will not be permitted to own real estate. All exempted companies (similar to the International Business

*cont'd pg 3*

## ...Purchase of Real Estate in the Cayman Islands Cont'd

Companies of other jurisdictions) must apply to the Financial Secretary for permission to own real estate.

### Pre-contract Investigations

It is not advisable to embark on negotiating and settling terms of the contract without making certain essential investigations as to the state of the property and the land register. Specifically, it is important to ensure that the person who states that he is the owner of the property is in fact the registered proprietor. The so-called "owner" may only have an equitable interest if he has entered into an agreement to purchase the land. Alternatively, it may be discovered that the registered proprietor has died. In such a case, where the deceased registered proprietor held as a joint proprietor, his share will automatically pass to the survivor and can be dealt with quite easily by the survivor, who will file a "Deletion on Death of Joint Proprietor" form at the Land Registry. However, if he was a proprietor in common with the survivor then the interest of the deceased proprietor would devolve in accordance with the terms of his Will or in accordance with the rules governing intestacy.

It is also important to ascertain whether the intended use of the property will be permitted. For example, a developer contemplating the construction of a condominium may be restricted by the size of the land or by other planning restrictions. Then, there may be restrictive covenants which prevent the intended use.

Thorough preliminary investigations will also reveal rights of third parties over the land – whether by way of mortgages, cautions, rights of way, other easements, licences, etc. Where the property in question is part of a strata scheme (akin to cooperative developments in other jurisdictions), the enquiries should expand to include an inspection of the by-laws and the relevant strata plan.

### Preparing the Contract

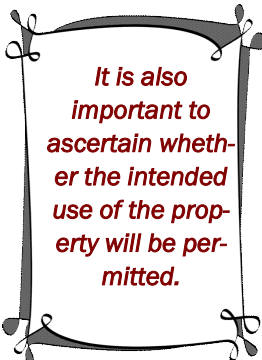
The importance of a contract for sale, which fully and comprehensively incorporates the party's wishes, cannot be over-emphasised. Such a tailor-made document will prevent much of the confusion and uncertainty, which can accompany the sale of property and enable a smooth conclusion of the contract. Parties intending to be exploratory in their negotiations should be particularly careful in their correspondence and the words "subject to contract" should accompany all written communications which could be construed as 'offers' or 'acceptances'.

If a commercial type of venture is intended (for example, the purchase of several condominiums as a rental investment) then there may be separate considerations regarding the obtaining of Trade & Business and Local Companies (Control) Licences. If applicable, the contract (as it relates to completion) should be expressed to be "subject to the purchaser obtaining all necessary licences".

### Stamp Duty

The payment of stamp duty is usually an obligation placed upon the purchaser and will be assessed on a non-Caymanian purchaser or a company at 6% or 7½% (depending on property's location) of the true market value of the property at the date of acquisition. Properties along the "Seven Mile Strip", as well as some other parts of the West Bay district (especially those parcels with water frontage) and most of commercial George Town are subject to this higher 7½% stamp duty. Caymanian purchasers (including persons with Caymanian Status) will also be obliged to pay 7½% in the previously described areas; but are entitled to a reduced 4% as stamp duty in the 6% areas. Caymanian purchasers may be entitled to further concessions, by way of application to the Financial Secretary's office, if they are first time purchasers of land or dwelling structure. The law stipulates a specific time frame for paying these duties.

*cont'd pg 4*



*It is also important to ascertain whether the intended use of the property will be permitted.*

## ...Purchase of Real Estate in the Cayman Islands Cont'd

If one purchases land in Cayman Brac (the second largest of the Islands), there is an option to apply to the Financial Secretary for a waiver of stamp duty, provided that development of the property will take place within two years of acquisition.

Any attempt to evade the payment of stamp duty is regarded as a criminal offence and is classified as an attempt to defraud the government of revenue. There are, however, legitimate methods of reducing the amount of stamp duty payable. Where buildings are being sold with furnishings, one may quite legitimately price the furnishings separately and produce an itemized inventory of the contents/chattels for inspection by the Lands & Survey Department. It is good practice to have both the vendor and purchaser initial such an inventory.

### Mortgage Financing

Many banks in the Cayman Islands offer attractive financing packages in relation to the purchase of real estate. The loan will usually be protected by way of a registered Charge over the real estate. Stamp duty will be assessed at 1½ % of the sum being secured by the Charge if this exceeds CI\$300,000 and at 1% if the sum to be secured is below CI\$300,000. If mortgage financing is essential to the completion of the purchase, it is vital that the contract for purchase state that completion is "subject to the purchaser obtaining financing."

### Cautions or Applications for Official Search

After entering into the agreement to purchase property, purchasers are recommended to protect their interest initially by way of a registered

Caution on the basis of a signed contract; or closer to the date fixed for completion by way of an Application for Official Search (often referred to as a Stay of Registration). The Application for Official Search will require the consent of the registered owner of the property; and a well drafted contract will establish, among other things, that, if requested by the purchaser, the vendor will give his consent to such an Application. The registered Caution puts the public on notice of the equitable interest that the purchaser has in the property as a result of the contract between the vendor and purchaser.

### The Section 6(4) Certificate

If the property being purchased is a part of a strata development, it is essential to obtain, prior to completion, what is commonly known as a Section 6(4) Certificate from the strata corporation. This certificate will confirm all assessments owed (or prepaid) by the vendor and will allow the parties to make any necessary adjustments in the closing statement. If this route is not taken, the purchaser may find himself legally inheriting the previous owner's debt, since the new owner and the former owner are jointly and severally liable for any unpaid assessments. Consequently, the purchaser may be sued by the strata corporation for any unpaid assessments which arose prior to his ownership.

### Conclusions

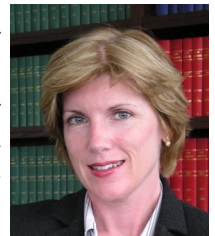
The above issues are in no way meant to be exhaustive, nor are they intended to constitute legal advice. Rather, the importance of obtaining the assistance of legal counsel in each case cannot be overstated.

*Any attempt to evade the payment of stamp duty is regarded as a criminal offence and is classified as an attempt to defraud the government of revenue.*

## Attorneys Listed in The International Who's Who of Insolvency & Restructuring Lawyers 2009



H&J Senior Partner, Mr. Philip Dunkley (pictured left) and HJTBCO Associate, Ms. Colette Wilkins (pictured right) have both been listed in the International Who's Who of Insolvency & Restructuring Lawyers 2009. Mr. Dunkley specializes in complex commercial and chancery litigation and Ms. Wilkins, an experienced litigator, has advised on a wide range of company and commercial matters.





## PARADISE PROTECTED: CAYMAN ENVIRONMENTAL LAWS

The occasional visitor to the Cayman Islands cannot help but be seduced by their natural beauty. It is an oft repeated refrain that much of Grand Cayman's beauty lies beneath the Caribbean Sea and so it may be. Much can be taken for granted, especially over years of living here and becoming accustomed to the warm climate, azure skies and aquamarine waters. However, there is a responsibility upon the people of the Cayman Islands to look after this rich treasure and conserve it for the enjoyment of future generations of Caymanians and visitors alike. This is, perhaps, of even greater importance, bearing in mind the relatively small size of the landmass of the Cayman Islands. If proper protection is not put in place, the Islands could lose much of their allure in a very short space of time.

The Government of the Cayman Islands has taken this responsibility very seriously and has passed laws relating to the protection of the Islands. They include planning laws, marine conservation, coastal protection and environmental conservation. Because it would take some time to provide details of and to discuss fully how each of these laws operates, this commentary will be restricted to those salient features in the development and planning system of the Cayman Islands that would positively impact the preservation of the Islands' inheritance for future generations.

### Marine Conservation

The Cayman Islands consists of three islands: Grand Cayman, and 89 miles to the east, Little Cayman, and Cayman Brac. These limestone peaks of a submerged mountain range called the Cayman Ridge, border the deepest part of the Caribbean, The Cayman Trench. This topography provides some of the best snorkelling and diving in the Caribbean. The crystal clear waters of our shores and the marine life and coral must be protected. In 1999, the UK Government issued the overseas territories White Paper, *Partnership for Progress and Prosperity*. This White Paper recognised that responsibility for environmental issues in the Overseas Territories rested

with the local governments, but that the UK Government had the responsibility to support these local efforts. This concept was embodied in the environment charters; Cayman's Charter was signed by the UK Minister for the Overseas Territories and by the Hon. McKeeva Bush on 26 September 2001.

Cayman's first commitment was to develop a detailed action strategy to implement the principles of the Charter, and the first commitment of the UK Government was to help build capacity to support integrated environmental management. From its marine parks system to the many reserves held and managed by the National Trust of the Cayman Islands to the species-based conservation organizations such as the Orchid Society, the Cayman Islands have demonstrated a commitment to conserving natural resources. This is effected, for example, by the Marine Conservation Regulations and Marine Conservation Law which include such matters as replenishment zones, no diving zones, and environmental zones. There are also regulations relating to public moorings around each of the environmental areas designed to reduce damage to coral. Such areas are marked with white buoys which may be identified by their blue stripe and yellow pickup line and may be used free of charge. The penalties for breach of these laws and regulations can be severe. By way of example, a conviction for a breach of the Marine Park Regulations could result in a fine of CI\$500,000.00 and one year in jail. Upon conviction, forfeiture of the vessel or other equipment could also be ordered. Further, spear fishermen must also beware of the regulations relating to lobsters and other sea life and must note the closed season. There is a spear gun limit of three fish per licensed person per day.

### Planning

The development and planning system regulates the development and use of land in the public interest and represents a significant instrument for protecting and enhancing the environment. This system contributes

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*There are also regulations relating to public moorings around each of the environmental areas designed to reduce damage to coral.*

## Paradise Protected: Cayman Environmental Laws Cont'd

to preserving scenic coastline, natural heritage and, generally, the natural environment and beauty of the Islands. The Development and Planning Law (the "Planning Law") established a Central Planning Authority and sets out its constitution and duties. Those duties include securing consistency and continuity in the framing and execution of a comprehensive policy approved by the Executive Cabinet. The Planning Law also provides for a Development Plan, which includes maps and descriptive matter in the form of a planning statement, which illustrates proposals with particularity for different parts of the Islands. The Development Plan deals with, among other things, defined sites for proposed roads, for public and other buildings, for airfields, parks, pleasure grounds, nature reserves and open spaces. The Development Plan (1997) is the current Development Plan for the Cayman Islands which contains the policy followed by the Central Planning Authority.

The core purpose of the Planning Law is the control and development of land. The process for obtaining planning permission for the development of land is set out in the Planning Law, which must be read together with the Development and Planning Regulations. Development is defined in the Planning Law, and broadly means the carrying out of building, engineering or other operations in, on, over or under any land, the making of any material change in the use of any building or other land, or the subdivision of any land. An application for planning permission must be made to the Central Planning Authority. The Planning Law does have an appeal process for those disappointed applicants who do not obtain planning permission and who feel aggrieved by the decision of the Central Planning Authority. The appeal process is contained in the Development and Planning [Appeals] Rules. There is a Planning Appeals Tribunal, which listens to appeals, with a further appeal in certain circumstances to the

Grand Court of the Cayman Islands.

The Planning Department processes applications for planning permission, but also deals with building control issues, strategic planning and policy development. In addition, there is a petroleum inspectorate. There are clear rules and regulations relating to zoning in the Islands, which permit different types of development ranging from commercial zones to hotel and tourism and residential neighbourhoods, which can be high density or low density. Essentially developers of land in the Cayman Islands cannot simply develop land at their whim. They must comply with detailed planning regulations, which are strictly enforced by the planning officers and which complement stringent building regulations. As an example, it is probably fair to say that the damage caused by Hurricane Ivan in 2004 brought about a review of building codes and policies which reduced the damage wrought by hurricanes in the future.

### Coastal Works

The Cayman Islands Department of the Environment under the Ministry of Tourism, Investment and Commerce issues guidelines with regard to the submission of applications for Coastal Works. Persons who want to construct in, on or over waters at or seaward of the main high water mark in, on or over Crown-owned canals must apply for a Coastal Works License. Typically, these applications relate to the construction of seawalls, docks and jetties, launching ramps, subways and groynes. It is illegal to conduct coastal works without a license. Unauthorized structures may be ordered to be removed. Offenders may incur fines and/or be subject to prosecution. Submissions for after-the-fact applications may incur additional fees.

### The Environment

In recent years, global warming and the state of the planet have become an increasingly vital issue. Former United States Vice President Al Gore, in particular,

*cont'd pg 7*



## Paradise Protected: Cayman Environmental Laws Cont'd

attracted a great deal of attention to this matter in the film, *An Inconvenient Truth*, and as a result shared in winning a Nobel Prize. Much is being done to protect and preserve the environment, including an environmental impact study on the effects of re-development of the George Town Port. As a consequence of the foregoing emphasis on the environment, Cayman still retains its beauty, and those who live here can take comfort in knowing that it is, indeed, a paradise protected.

## Historical Glimpse of Cayman & It's Ship Registry

Located in the Western Caribbean the Cayman Islands are a remote group of islands. Grand Cayman, the largest and most populous, is some 150 miles south of Cuba, 180 miles west of Jamaica and 480 miles south of Miami, Florida. Cayman Brac and Little Cayman lie 89 miles to the east-northeast of Grand Cayman. The three islands form the peaks of a submarine mountain. Their advantageous location plays an important role in the Islands' development as a highly competitive tourism and international financial center.

Columbus first discovered the islands in 1503 and the earliest settlers were said to be shipwrecked marooned sailors, buccaneers and deserters from the English army in Jamaica. Since early 1906, when one fifth of its population was away at sea in the merchant navy, the Islanders earned a reputation worldwide for expert seamanship. The shift towards tourism and banking began in the 1950s, when the airport on Grand Cayman was opened, dramatically altering and shaping the future of the Island.

British possession of the Cayman Islands was formally recognised in 1670 in the Treaty of Madrid, and Justices of the Peace were commissioned by the British-appointed Governor of Jamaica, who carried out the administration of the islands' affairs during the 18th and 19th centuries. The Islands' legal system is modeled on that of the United Kingdom, and all statutes regulating business matters and procedures are based on English Law. The ultimate court of appeal is the Privy Council in London.

The Cayman Islands is a British Overseas Territory, politically stable and self-governing, with a democratically elected legislature. In the Islands there is no direct taxation levied on either individuals or

companies. In addition to tourism, the Government earns its primary revenue from import duty, stamp duty on local real estate transactions and the incorporation and annual fees which are levied on companies, banks, trust companies, management companies, mutual funds and insurance businesses operating in the Islands. Ranked as the fifth largest banking center in the world, the Cayman Islands can boast of having approximately 550 registered banks and trust companies, over 38,000 registered companies and a large range of insurance and other corporate services.

The Cayman Islands, U.K. and U.S. governments co-operate closely in the campaign against money laundering and drug trafficking. Consequently, the Cayman Islands maintain an excellent relationship with the U.S. coastguard. Yachts registered in jurisdictions less reputable than the Cayman Islands have been subject to rigorous and expensive safety inspections by the U.S. coastguard on entering U.S. waters.

### Ship Registration

Currently, the Cayman Islands is a category 1 British Registry and therefore is qualified to register vessels of all sizes and classes, from small pleasure yachts, mega-yachts to bulk-carriers. George Town, Cayman Islands, has been a British Registry Port since 1904, following the passing of the British Merchant Shipping Act in 1894. In those days the Register comprised a few wooden sailing schooners often locally built. Today the Port of George Town is modern and developed. The Islands have a strategic location

*cont'd pg 8*

*Their advantageous location plays an important role in the Islands' development as a highly competitive tourism and international financial center.*

## Historical Glimpse of Cayman & it's Ship Registry Cont'd

location which is on the trade and cruise liner route to and from the Gulf of Mexico. All kinds of vessels including demise charters and vessels under-construction are registered in George Town under the Merchant Shipping Law (2005 Revision).

Ships and yachts registered in the Cayman Islands are entitled to the rights and protection of U.K. maritime law and, as a consequence, are permitted to fly the British Red Ensign (with the Cayman Islands crest in fly). A great number of yacht owners prefer to have their yachts registered under this flag, because of its reputation as a first class port of registry.

The current Merchant Shipping Law (2005 Revision) (as amended) expands the range of countries whose citizens qualify to be owners of Cayman Islands vessels to: British citizens; British Overseas Territories and Crown Dependencies citizens; British Overseas citizens; British subjects; Cayman Islands citizens; persons who under the Hong Kong (British Nationality) Order 1986 are British Nationals or citizens of a Member State of the European Union, European Economic Area or countries or dependencies of such Member States or Countries; corporate bodies; shipping entities or foreign incorporated companies or companies registered in or having a place of business in the United Kingdom or any of its Overseas Territories or Crown Dependencies, a Member state of the European Union or European Economic Area, including any overseas country, territory or dependency of such a Member State or an approved country and its overseas territories and dependencies, foreign companies

as defined in Section 203 of the Companies Law (2007 Revision) carrying on business within the Islands which comply with all the requirements of foreign companies under that Law, and a person from a country included in the Third Schedule to the Money Laundering Regulations (2006 Revision) which includes the United States of America.

Cayman provides for more than one port of registry; namely George Town on Grand Cayman, The Creek on Cayman Brac and Bloody Bay on Little Cayman. A Certificate of Registry can be issued for an indefinite period or for a specified period at the discretion of the Registrar of Shipping, and there can be interim registration of vessels. Cayman offers revised levels of liability and increased levels of compensation for oil pollution damage as well as for incidental and connected purposes. Also, registration of both traditional private pleasure yachts and commercial yachts is permitted. The requirements for private pleasure yachts remain unchanged from those that pertained prior to the 2005 Law.

Commercial yachts and ships are subject to international conventions governing manning, safety and pollution. These are general rules which, however, vary for different classes of vessels. The Cayman Islands' comprehensive and modern maritime legislation allows more flexibility in the application of such rules than any other British register. Clearly, ship registration in the Cayman Islands has enjoyed a constant pattern of growth, and this is most visible at international yacht shows, where many vessels can be seen flying the Cayman Islands Red Ensign Flag.

*A Certificate of Registry can be issued for an indefinite period or for a specified period at the discretion of the Registrar of Shipping, and there can be interim registration of vessels.*

## HIGGS & JOHNSON WELCOMES NEWEST PARTNER



Higgs & Johnson welcomes its newest Partner (pictured left), Christel Sands-Feaste to the Firm. She joins the firm's Commercial Law, Securities and Private Client Practice Groups. Christel has extensive legal experience in corporate and commercial law, international trust and company administration and has acted in all aspects of commercial transactions including mergers and acquisitions, asset financing, private placements of offshore securities, investment fund structuring and creation and estate planning. Christel has represented both domestic and foreign clients in a variety of businesses including the financial services and hospitality industries.



## Higgs & Johnson Celebrates Cayman Expansion

A) (L-R) Rose Ferguson - Citi Hedge Fund Services (Cayman), Ltd, Samuel Bulgin - Cayman Attorney General, H&J Partner Tara Archer



B) HJTBCO along with H&J staff assist at the reception.



C) (L-R) H&J Global Managing Partner John Delaney receives gift from Managing Partner – Cayman Chris Narborough



D) (L-R) H&J Partners Christel Sands-Feaste, Surinder Deal & Tara Archer



E) (L-R) HJTBC Associate Carolynn Vivian & H&J Partner Sterling Cooke

Higgs & Johnson, celebrated their expansion into the Cayman Islands with a client cocktail reception hosted by its Cayman office on Tuesday, 27 January 2009 at Luca one of Grand Cayman's premier restaurants on the famous Seven Mile Beach. Higgs & Johnson in The Bahamas and the Cayman Islands - already well known for providing legal services to the financial services community in particular - will embrace a number of synergies to provide enhanced convenience and quality of service to clients in both jurisdictions as well as international clientele.

The client cocktail reception was well attended by local clients reacting enthusiastically to the merger. All of the Bahamas-based partners joined their Cayman-based colleagues in attendance for the evening festivities.

Introductory remarks were made by Chris Narborough, Country Managing Partner - Cayman. Global Managing Partner, Bahamas-based John Delaney, spoke on behalf of Higgs & Johnson and introduced the full partnership to guests. Distinguished guest speaker was the Honourable Charles Clifford, Minister of Tourism, amongst other dignitaries present. He extended congratulatory remarks on the merger and gave a warm welcome to the Bahamian partners. Hon. Clifford offered full support of the Cayman Islands Government to this pioneering Caribbean partnership and his words were well received by all those present.

Guests were wined and dined throughout the evening and serenaded by outstanding local entertainment.



Nassau  
Lyford Cay  
Freeport  
Marsh Harbour  
Cayman Islands

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# Higgs & Johnson Celebrates Cayman Expansion

F) (L-R) George Ebanks—GM Int'l Sales Ltd & HJTBCO Country Managing Partner Chris Narborough



G) H&J Global Managing Partner John Delaney gives opening remarks



H) (L-R) H&J Partner Earl Cash; Hon. McKeeva Bush - Cayman Leader of the Opposition; HJTBCO Partners Gina Berry & Philip Boni



I) (L-R) Ormond Williams - Head of Cayman National Bank; Margaret Thompson - Bank Vontobel; Truman Bodden - HJTBCO Consultant



J) (L-R) H&J Partners Vivienne Gouthro (Freeport); N Leroy Smith (Lyford Cay)



K) (L-R) H&J Marketing & Communications Coordinator Antonia Burrows & HJTBCO Business Development Executive Vicki Chatfield



# Higgs & Johnson Partner Appointed Vice Chair



Higgs & Johnson congratulates its partner Tara Archer (pictured left) on being appointed Vice Chair of the IBA Consumer Litigation Committee. Ms. Archer has extensive legal experience concentrated in the areas of international and commercial litigation, law of insolvency, banking and compliance law, employment law and admiralty law. She provides legal advice and counsel to major international and local financial service providers and corporations regarding cross-border and multi-jurisdictional litigation, asset-tracing and recovery matters and internal operations.

## Case Report: Zeller vs British Caymanian Insurance Company Limited [2008] CILR 11

*Zeller v BCIC* [2008] CILR 11 is a Privy Council case, heard on appeal from a decision of the Cayman Islands Court of Appeal (hereafter “Court of Appeal”), which has helped to clarify the law on an insured’s duty to disclose material facts (the doctrine of *uberrima fides* or “utmost good faith”) relating to insurance contracts. The dissenting *dictum* of Taylor, J.A (of the Court of Appeal) was essentially upheld, and the decisions of the Cayman Islands’ Grand Court and Court of Appeal majority were overturned. Clearly, the ultimate outcome of this litigation would have been different had the Insured not appealed to the Privy Council.

### Facts

Mr. Zeller (the “Appellant” and “Insured”) moved from the United States (hereafter “US”) to Grand Cayman in November 2001. He was a healthy, active man who moved to Grand Cayman, having felt it was an ideal place for him to enjoy his hobbies of extreme free diving, scuba diving and sailing. He also felt that Grand Cayman would be a place where he could hold down a good job.

Subject to exceptions, Cayman law provides that employers must provide employees with a standard health insurance contract. The Appellant sought coverage under his employer’s group policy. Therefore, it became necessary for the Appellant to complete British Cayman Insurance Company Limited’s (hereafter the “Insurer” and “Respondent”) “Group Enrolment Information Form with a Health Questionnaire”, which he did, disclosing details of his existing health policy (in the US) which had no exclusions. In the questionnaire, he disclosed that (aside from a thyroid problem) he was otherwise in good health and specifically denied having any heart trouble. So, the Insurer provided insurance coverage to the Applicant, excluding his hypothyroidism and all related conditions thereto.

As it turns out, Dr. Pecsok (the Appellant’s doctor in the US) informed him, prior to coming to Grand Cayman, that he was asymptomatic for any type of heart disease. Dr. Pecsok also informed the Appellant that he did have a heart murmur and high cholesterol, and advised that the Appellant work on his diet and exercise. However, no medication was suggested nor prescribed, aside from mentioning that the Appellant would need to take an anti-

biotic if he underwent dental treatment. Before leaving the US, Mr. Zeller had an examination by Dr. Pecsok, where he (Mr. Zeller) was told he was in good health.

When in Grand Cayman, for immigration purposes, the Appellant was examined by Dr. Madden, who found him to be in good health with no evidence of cardiac disease and to have normal blood pressure. About a year and three months later (in Grand Cayman) the Appellant visited Dr. Last for a refill on his thyroid medication. On that visit, Dr. Last discovered a loud heart murmur, so referred him to Dr. Coy (a physician) and Dr. Lamelas (a surgeon) in Miami. The medical trip to Miami led to the Appellant later undergoing major surgery, replacing the aortic valve and effecting a complex repair to the mitral valve a few months later. The Appellant made a claim to have the medical and hospital charges for this expensive surgery covered by the Insurer.

Both Dr. Coy and Dr. Lamelas made reports referring to the Appellant as having “a history of aortic and mitral valve regurgitation” and a “long history of known valvular pathology” (*Zeller v BCIC* [2008] CILR 11 at 17). However, these statements turned out to be false and were corrected. But these statements seemed to prompt the Insurer to make a detailed investigation of the Appellant’s medical history. This ultimately led to the Insurer writing to the Appellant repudiating liability under the insurance policy, although no grounds upon which the Insurer was relying were identified, until legal proceedings were issued and the Insurer provided such grounds in its defence and counterclaim.

### Trial Before The Grand Court of the Cayman Islands

Mr. Zeller sought a declaration in the Grand Court that the Insurer’s cancellation of the health insurance contract was invalid and that the Insured deserved damages for breach of contract. Levers J, at first instance, held that the insurance contract was *uberrimae fidei* (one to be entered into with the utmost good faith with full and frank disclosure on the part of the Insured). Therefore, Mr. Zeller was under

Subject to exceptions, Cayman law provides that employers must provide employees with a standard health insurance contract.

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a duty to disclose any information that a reasonable man would have thought material. Having failed to do so, he was in breach of his duty to disclose. Levers J. did not find the questionnaire to be ambiguous, so there was no need for the Insurer to ask specific questions to make a condition material; Mr. Zeller's subjective belief that conditions were not material was irrelevant. The insurance contract was thus voidable, because his misrepresentation or non-disclosure induced the Insurer to insure him.

### Appeal to the Cayman Islands Court of Appeal

The Court of Appeal (Zacca P. & Forte, J.A., with Taylor J.A. dissenting), for essentially the same reasons as Levers J., upheld the appeal that the insurance contract was voidable. The majority held that (the contract being *uberimae fidei*) Mr. Zeller was not under a duty to disclose what he subjectively believed to be material, but rather what a reasonable man would have thus objectively considered material. After all, he did not explain that a heart murmur and a raised level of cholesterol had previously been detected. Forte J.A. (who delivered the majority judgment) felt that a reasonable person acting in the utmost good faith would have disclosed the heart murmur and raised cholesterol (regardless of whether Mr. Zeller believed that the heart murmur or elevated cholesterol were diseases or illnesses).

Lord Bingham (in *Zeller v BCIC* [2008] CILR 11 at 20) summed up Taylor, J.A.'s dissenting judgment in the Court of Appeal as follows:

"Taylor, J.A. noted that there was no evidence to connect either the heart murmur or the raised cholesterol level with the heart problem for which Mr. Zeller had ultimately had to undergo surgery, and that the insurer's complaint about raised blood pressure had not been pursued on appeal. There was, he observed, no suggestion that Mr. Zeller had had any obligation of disclosure beyond responding to the questionnaire completely and correctly to the best of his knowledge and belief. His evidence was that except for his thyroid condition, which had been effectively controlled by medication, his health had been excellent, as evidenced by his engagement in extreme sports. It must, on the evidence be concluded that Mr. Zeller had not believed that what he had been told by his doctor of his heart murmur and cholesterol level was information of the type the questionnaire sought... The murmur which the doctor had heard on two occasions did not cause the doctor to regard further investigation as necessary... Taylor, J.A. found that the two material findings were not covered by any of the insurer's questions

and it had waived disclosure of them. On correct reading of the form Mr. Zeller was guilty neither of misrepresentation nor non-disclosure."

### Appeal to the Privy Council

A five panel Judicial Committee of the Privy Council (Lord Bingham of Cornhill, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Caswell and Sir Henry Brooke) unanimously decided this case, with Lord Bingham delivering the actual judgment. The main issue to be determined by the Privy Council was whether Mr. Zeller, "if he honestly believed he was answering the questions truthfully, was guilty of non-disclosure" (*Zeller v BCIC* [2008] CILR 11 at 21 *per* Lord Bingham). Lord Bingham continues that a health insurance "applicant is expected to exercise his judgment on what appears to him to be worth disclosing. He does not lose his cover if he fails to disclose a complaint which he thought to be trivial but which turns out later to be a symptom of some much more serious underlying condition" (in *Zeller v BCIC* [2008] CILR 11 at 22).

### Conclusion

The Privy Council thus held that the disclosure necessary, under the doctrine of *uberrima fides* for health insurance contracts, is to be what a reasonable man would honestly disclose, based on what he subjectively and honestly thought material in relation to the questions posed, excluding what was thought to be trivial at the time, even if it later proves to be serious. In so holding, the Privy Council rejected the objective reasonable man test, favoured by the Cayman Islands' Grand Court and its Court of Appeal majority, for a subjective test.

As a result, the onus now shifts to insurers to phrase questions properly and thoroughly in order to collect material information from applicants rather than relying on full disclosure of anything and everything by applicants.

This case is not an erosion of the doctrine of *uberrima fides*, but rather helps clarify the boundaries where the applicant's duty of disclosure stops and what insurers must do to elicit the material information needed to determine whether or not to provide insurance coverage. In fact, this could be seen as restoring a proper balance in favour of the insured to avoid potential abuse of the doctrine of *uberrima fides*; so that insurers do not use the doc-

**Levers J. did not find the questionnaire to be ambiguous, so there was no need for the Insurer to ask specific questions to make a condition material.**