



FOCUS

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FOCUS chats with Mr. Charles Littrell - *Inspector of Banks & Trust Companies, Central Bank of The Bahamas*



Focus is pleased to have interviewed the new Inspector of Banks and Trust Companies at the Central Bank of The Bahamas, Mr. Charles Littrell. A national of Australia, he leads the Bank Supervision Department and continues the Central Bank's financial sector supervisory capacity building program. We trust you will enjoy our brief visit with Mr. Littrell and his shared insights into the mandate he has been given and his role within the Bank.

The Role

What is the role of the Inspector of Banks and Trust Companies? How does it differ from the roles of other key regulators in the banking industry?

The Central Bank's Bank Supervision Department, led by the Inspector, is

responsible for understanding the financial and behavioural risks associated with our supervised financial institutions. When emerging or actual risks fall outside our tolerance, we take action designed to return the relevant institutions to a lower risk profile. Our approach is similar to other regulators, though prudential regulators tend to enjoy more freedom to engage with supervised institutions before any laws or regulations have been broken. In this sense, we are less like the police or a sports referee, and more like shepherds of a flock.

The Mandate

What are the key issues driving the evolution of banking supervision legislation globally?

On the prudential safety side, we are close to finishing 15 years of intensive rule-making, arising first from Basel II and IFRS introductions and amendments, and then from the regulatory reactions to the 2007—2009 financial crisis. We continue to deal with the long wave of international regulation on behavior, notably anti-money laundering, counter-terrorist financing, and the like. Our hope is that the volume of new international rules will now slow, which will give the Central Bank of the Bahamas breathing space in which to consider and where sensible rationalize our regulations and guidance material.

What are the strategic priorities for your department? How are these measures expected to improve the health and stability of the banking sector?

As we have necessarily built a more complex rules environment over the past 15 years, we have also built a more complicated operating environment. We are now looking to simplify not only our rule set but our operating procedures, which will improve response times to industry, and free up supervisory time for new priorities.

More attention to AML/CFT is high on the new priority list. Although we will continue to focus upon prudential safety, there will be more of a balance with reputational and behavioural supervision.

Ideally, we will achieve a regulatory and supervisory regime which is easier for the banking industry to understand and comply with.

Your mandate includes a charge to “maintain the Bank’s current transition to the latest international supervisory standards of the Basel Committee on Banking Supervision (Basel III).” Where do you expect to focus most of your time in respect of meeting this agenda?

Many of the remaining Basel Committee rules are more complex than is required for the Bahamian jurisdiction. We are likely to implement a local rules text that, while fully compliant with the Basel rules text, is appreciably simpler.

How vulnerable is our banking system today to the threats of money laundering and terrorist financing?

Every national banking system is vulnerable to these threats, including here in The Bahamas. The Central Bank

and other regulators, plus the Bahamian banking industry, devotes considerable resources to managing these threats. I expect that this jurisdiction’s reputation for managing AML/CFT risks will improve over the next few years—though in this area one can never declare victory.

What measures are being taken by the Central Bank against the threat posed by de-risking to correspondent banks in The Bahamas?

We are monitoring the issue, and encouraging local banks to maintain multiple correspondent banking relationships. De-risking is a global fact of life, and The Bahamas is clearly exposed to this risk. Our main response will be to ensure that The Bahamas is seen as a relatively low risk for AML/CFT exposure, which should encourage the major international banks to become somewhat more open to correspondent banking relationships here.

Where do you see the opportunities for the banking sector to grow?

This is more a question for the people who run the industry than for the regulator. We intend to pursue and maintain strategies that support a sound, compliant, competitive, and efficient Bahamian banking sector. This is a necessary but not complete foundation for industry growth.

How do regulators maintain a balance between the requirements for enhanced due diligence requirements and the necessity to maintain the ease of doing business in the jurisdiction?

With great difficulty. We are working with industry, and will likely increase this effort, to more clearly define acceptable and fully compliant processes, without

adding more cost than is necessary. But the global requirements in this area, and associated costs, will continue to increase.

How has the function of banking supervision changed worldwide since the global financial crisis of 2008?

The function hasn’t necessarily changed, but for many countries bordering the North Atlantic, the process has changed. The regulatory framework has become more conservative, and the supervision has become more intrusive. In this sense, American and European supervision now looks more like Asia/Pacific and Latin American supervision, which have in general not changed as much since the 2008 crisis. These regions learned from their 1990s crises, and those lessons proved highly valuable in 2008.

On A Personal Note...

What attracted you to this role here in The Bahamas?

It is an exciting professional challenge, my colleagues are a joy to work with, and The Bahamas is far from a hardship posting. 🇧🇸

Non-Profit Organisations in the Cayman Islands

By Jo-Anne Stephens

The Non-Profit Organisations Law, 2017 (the “Law”) came into effect on August 1, 2017. The Law is intended to meet Financial Action Task Force (“FATF”) Recommendations which require countries to protect against terrorist financing by knowing the non-profit organisations (“NPO”) that are operating in the country and by monitoring the NPO’s that represent the largest portion of the industry.

FATF is an inter-governmental body that sets standards and promotes effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing and other related threats to the integrity of the international financial system. Cayman is a member of the Caribbean Financial Action Task Force (“CFATF”), a FATF-styled regional body that is committed to implementing the FATF Recommendations.

The Law will be in place ahead of the CFATF’s December 2017 evaluation of Cayman’s anti money-laundering and counter-financing of terrorism regime. Entities Affected

A “non-profit organisation” includes a company or body of persons, whether incorporated or unincorporated, or a trust:-

- established or which identifies itself as established primarily for the promotion of charitable, philanthropic, religious, cultural, educational, social or fraternal purposes, or other activities or programmes for the public benefit or a section of the public within the Cayman Islands or elsewhere; and
- which solicits contributions from the public or a section of the public within the Cayman Islands or elsewhere.

The Law does not apply to:

- an NPO which has a government entity as its principal regulator;
- an NPO established as a trust, the trusteeship of which comprises or includes a trust company licensed or registered to carry on trust business or a controlled subsidiary thereof registered under the Banks and Trust Companies Law (2013 Revision); or
- any other entity that Cabinet may, by Order, exempt.

An NPO shall not solicit contributions from the public or any section of the public within the Cayman Islands or elsewhere, unless it is registered or exempt from the obligations to register under the Law.

Companies that fall under section 80 of The Companies Law (2016 Revision) (which is the existing regime for registration of non profit companies) will be required to register under the Law if they meet the criteria. Once registered under the Law, a section 80 company will no longer be subject to the conditions imposed by Cabinet under section 80 registration, including registration costs and approval of change costs. Businesses that are not currently designated under section 80 of the Companies Law may qualify for the NPO register if they meet the Law’s criteria.

Registration

The registration process should take approximately 30 days. The Registrar of Non Profit Organisations retains the discretion to refuse for the reasons set out below:

- the NPO does not meet the statutory definition;
- the NPO is established for illegal purposes;
- the NPO does not have a connection with the Cayman Islands;

- the information contained in the application is manifestly incorrect;
- the name of the NPO:-
 - (i) is identical to a name by which a non-profit organisation in existence is already registered or so nearly resembles such name or translated name so as to be calculated to deceive;
 - (ii) contains the words “royal”, “imperial” or “empire” or, in the opinion of the Registrar suggests, or is calculated to suggest the patronage of Her Majesty or of any member of the Royal Family or connection with Her Majesty’s Government or any department thereof in the United Kingdom or elsewhere;
 - (iii) contains profane language;
 - (iv) contains the words “gaming”, “lottery”, “bank”, “insurance” or any similar word which is restricted in use by the laws of the Cayman Islands or in the opinion of the Registrar connotes any such activities or any derivative of any of such words or of such similar words, whether in English or in any other language, or in the opinion of the Registrar suggests or is calculated to suggest any of such activities; or
 - (v) is different from the name in which the entity was established if the entity was established as a company, trust, partnership, foundation, or church established under the Churches Incorporation Law (2007 Revision).

A register of non profit organisations will be established and maintained by the

Registrar of Non Profit Organisations and shall contain the following in relation to the NPO:

- its name, address in the Cayman Islands, telephone number and e-mail address, if any;
- its purposes and activities;
- the identity of the person who owns, controls or directs the NPO;
- the date of its registration under the Law and if applicable, the date on which its registration was cancelled; and
- such other information as the Registrar considers appropriate.

The register will be open for public inspection, on such terms as the Registrar thinks fit.

Financial Statements and Annual Returns


The controller of the NPO (who may be

the trustee, the director, the general partner etc) shall cause to be prepared proper financial statements which show and explain all the transactions of the organisation and disclose at any time with reasonable accuracy the financial position of the company. If the organisation has gross annual income of two hundred and fifty thousand dollars and remits 30% or more of the gross annual income outside of Cayman, it is required to have its financial statements reviewed in accordance with internationally accepted standards by an independent qualified accountant who for neither profit or reward undertakes the review or a licenced accountant.

A controller of a non-profit organisation shall ensure that within six months of the end of the financial year, annual returns:-

- are prepared in relation to the non-profit organisation;

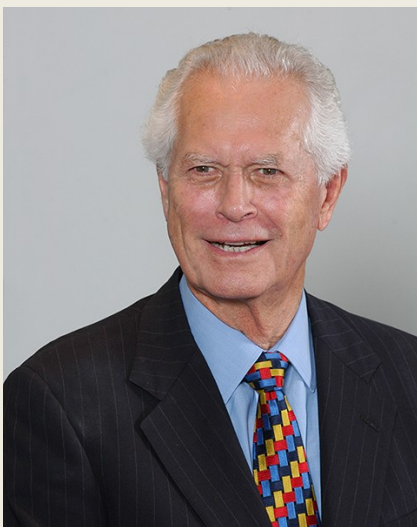
- contain such particulars as may be prescribed; and
- are submitted to the Registrar.

The Law is welcome to streamline the NPO registration process. For example, registrations under the Law are required to occur within 30 days, rather than the current, extensive timeframe for section 80 approvals, and changes will be filed by notice to the designated registrar, rather than by the current Cabinet approval process for section 80 companies. The fees associated with the Law are less than those associated with the current section 80 regime. Additionally, the Law will make the Cayman Islands compliant with international standards. 



Mrs. Jo-Anne Stephens is a member of the Firm's Private Client & Wealth Management practice group. Her practice areas include Commercial Transactions, Estates, Commercial & Trust Litigation and Trusts.
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The Firm Bids Farewell to Former Senior Partner



It is with great sadness that the partners, management and staff of Higgs & Johnson respectfully say farewell to our esteemed former Senior

Partner, Sir Geoffrey A. D. Johnstone, who passed away on 4 August, 2017 at age 89.


Sir Geoffrey joined the firm in 1950 and took on the mantle of Senior Partner in 1968, leading the firm with distinction until his retirement in 1998.

He was a leader in the community, advancing the legal profession as President of the Bahamas Bar Association (1973-1975). On the national stage, his service to The Bahamas was exemplary.

Sir Geoffrey was appointed a Companion of the Most Distinguished Order of St. Michael and St. George (CMG) by Queen Elizabeth II in 1994, and was later made Knight Commander

of the Most Distinguished Order of St. Michael and St. George (KCMG) during the Queen's Birthday Honours in 2002.

"We are all beneficiaries of his leadership and mentorship," says the firm's current Senior Partner, Philip Dunkley, QC. "He had an impressive scholarly wit and infectious sense of humour. We are deeply grateful for his 48 years of untiring commitment to the firm and his lifetime of service to our nation".

The name Sir Geoffrey A.D. Johnstone will always be synonymous with Higgs & Johnson and will forever be respected and remembered by the legal and business communities of The Bahamas. 



Franchising in The Bahamas

By Tara Archer-Glasgow & Audley D. Hanna, Jr.

There are currently no specific franchising laws or regulations in force in The Bahamas nor are there any proposals to implement such legislation. Accordingly, parties to a franchise agreement enjoy contractual freedom to agree on:

- the duration of the contract, which may be indefinite;
- the currency in which payments such as dividends and franchise fees may be made, provided that any remittance of a foreign currency outside of The Bahamas has been approved by the Exchange Control Department of the Central Bank of The Bahamas;
- the law governing the contractual relationship. If the parties do not choose a governing law, then the courts will apply conflict of laws rules to determine the proper law of the contract;
- how to regulate transfers of the business or of any interest in or assets of the franchise business - There are no restrictions on a franchisor's ability to restrict transfers by a master franchisee, or on the master franchisee's ability to restrict transfers by a sub franchisee;
- how to settle disputes - If there is an arbitration clause or dispute resolution procedure within the contract, the Courts will decline to hear any dispute unless the requirement for arbitration or dispute resolution is waived by all relevant parties to the contract or there has been compliance with such requirements; and
- how to terminate the relationship, which may be by (i) mutual agreement, (ii) expiration of the term of the franchise agreement, (iii) unilateral termination, or (iv) termination due to breach of the terms and conditions of the franchise agreement.

Franchise agreements are, however subject to the general common law and equitable principles which apply to

contracts in general.

Disclosure

While, in some jurisdictions, franchise agreements are subject to requirements for the disclosure of certain material information between the parties, there are currently no such requirements in The Bahamas. However, franchisors and franchisees are bound by contractual principles relating to fraud and misrepresentation.

Additionally, while there are no governmental filing or registration requirements, a Bahamian franchisor or franchisee will be subject to local regulations which apply generally to business operations. These include organizing the required business structure, registration with the National Insurance Board, obtaining a Tax Identification Number (“TIN”) (where the business is projected to generate BSD\$100,000.00 or more in gross revenue per annum), and obtaining a business licence in accordance with the Business License Act, 2010. Further, if a non- Bahamian franchisor seeks to engage in a franchising arrangement using a direct franchising structure, a joint venture, or a subsidiary/branch arrangement, then that franchisor must file this structure with The Bahamas Investment Authority and the Exchange Control division of the Central Bank of The Bahamas prior to any other approvals being granted.

Taxes

The Bahamas has no withholding, personal income, capital gains, estate, gift, or inheritance taxes; as such, many of the taxes which impact upon

franchises in other jurisdictions do not arise in The Bahamas. However, like other businesses operating in The Bahamas, parties to a franchising agreement are subject to business licence tax, real property tax (on owned land or leases over seven years), stamp duty, Value Added Tax (“VAT”) and customs duties. The application and prescribed rate of stamp duty depend on the franchising structure in place and the nature of transactions. For example, funds remitted outside of The Bahamas under a master franchising arrangement or master development arrangement are subject to stamp duty on each remittance at the rate of 1.5% of the amount remitted or transferred. Where the amount remitted over a period of one year is more than \$500,000.00 and funds have been converted from Bahamian dollars to a foreign currency prior to being remitted, the stamp duty is 5.00%. VAT of 7.5 % is charged on all supplies of goods and services. The franchising agreement must include provision as to which party will be responsible to pay VAT.

Franchisees must pay customs duties when importing goods into The Bahamas, unless the franchisee is exempted from paying customs duties or is located in the Port Area in Freeport, a free trade zone under the administration of the Grand Bahama Port Authority, Ltd..

Specific Terms

As set out above, the parties to a franchise agreement are, in general, free to agree any terms they consider appropriate. Common clauses include


provisions for tax gross up, non-compete; venue for resolution of disputes; and the nature, amount and frequency of fees.

Tax gross up clauses are used to account for possible future changes in the law which may impose a tax not initially contemplated by the parties or not existing at the time of the agreement.

Non-compete clauses are enforceable to a ‘reasonable extent’ where the clause has a short duration (e.g.12 months) and reasonable geographical scope. In determining whether to enforce a non-compete clause, the Courts will consider all the circumstances of the case, particularly the prevailing industry norms.

When parties enter into franchise agreements in a foreign language, all legal documents which require recording in The Bahamas or which are to be used in Bahamian legal proceedings must be written in English. The Memorandum and Articles of Association of a company to be incorporated in The Bahamas must be written in English to be filed with the Companies Registry.

The nature and scope of fees in franchise agreements are unlimited. The parties may agree that fees be paid by way of royalties, periodical fees, fixed fees, etc. However, any clause which imposes a penalty fee for non-performance or breach may not be enforceable in a Bahamian court unless it represents a reasonable pre-estimate of loss.

In all of the circumstances, The Bahamas is a favourable jurisdiction for franchising as parties have considerable contractual freedom with relatively little interference in the form of statutory regulation. 



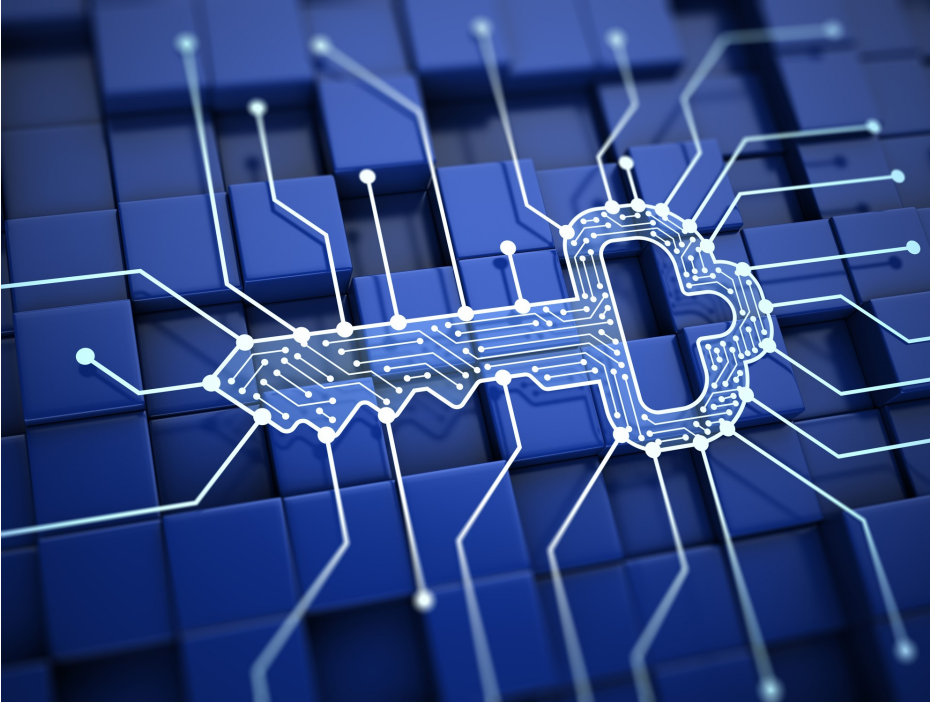
Mrs. Tara Archer-Glasgow is a member of the Firm’s Litigation Practice Group. She has extensive legal experience concentrated in the areas of commercial litigation, banking and compliance law, employment law and admiralty law. tarcher@higgsjohnson.com



Mr. Audley D. Hanna, Jr. is a member of the Firm’s Litigation Practice Group. He has a particular focus on employment law, admiralty law, insurance law, intellectual property litigation, and personal injury litigation. ahanna@higgsjohnson.com

Data Protection in the Cayman Islands

By Francine Bryce



The much anticipated Data Protection Law (the “Law”) which was passed on June 5, 2017 is yet to come into effect, with the commencement date now set for January 2019. However, until then it is important that individuals and entities who are ordinarily resident or engaged in some activity in the Cayman Islands understand how the Law might affect them and what, if any, changes may be required in preparation for its commencement.

Purpose of the Law

The purpose of the Law is to control the way personal information is obtained, recorded, stored and handled as well as to provide rights for the protection of this information. No longer will it be acceptable for organizations to simply collect and store in their databases, personal information about their employees, customers and contractors,

for example, without ensuring that proper safeguards, policies and procedures are in place for the information to be processed fairly and in the manner prescribed under the Law.

How does the Law affect you?

The Law provides a legal framework for the processing of personal data by a data controller, who is a person, firm or company who, alone or jointly with others determines the purposes, conditions and manner in which any personal data is, or is to be, processed.

The Law applies to any data controller that is (a) established in the Cayman Islands and the personal data is processed in the context of that establishment; or (b) is not established in the Cayman Islands but the personal data is processed in the Cayman Islands otherwise than for the purposes of transit of the data through the Islands.

Personal data has been widely defined as data relating to a living individual who can be identified. It includes data such as a living individual’s location, online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the living individual. There are certain conditions which the Law prescribes for the processing of sensitive personal data which includes ethnic origin, religious beliefs, physical and mental health, proceedings for any offence committed or alleged to have been committed and the disposal of or sentence in any such proceeding.

Except for a number of exemptions (including exemptions pertaining to national security, health, education, social work, journalism, legal proceedings, legal professional privilege and trusts) the Law will affect a wide cross section of individuals and entities across all industries – once they are involved in the processing of an individual’s personal information in the Cayman Islands.

Basic Requirements for Data Processing

Under the Law, a data controller has the legal obligation to ensure that it adheres to the following data protection principles in processing personal data:

- Personal data should be processed fairly (having regard to the method by which the personal data is obtained including the reliability of the source)
- Personal data should be obtained only for one or more specified lawful purposes, and should not be further processed in any manner

incompatible with that purpose or those purposes.

- Personal data must be adequate, relevant and not excessive in relation to the purpose or purposes for which it is collected or processed.
- Personal data should be accurate and, where necessary, kept up to date.
- Personal data processed for any purpose should not be kept for longer than is necessary for that purpose.
- Personal data must be processed in accordance with the rights of data subjects under the Law.
- Appropriate technical and organizational measures should be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
- Personal data must not be transferred to a country or territory unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.


Know your rights

The individual to whom the personal data relates is entitled to certain rights which include a right to:

- be informed by a data collector whether their personal data is being processed and by whom;
- request in writing their personal data and the source of the personal data held by the data controller;
- be informed of any decision which significantly affects the individual and which was made solely on the basis of the processing by automatic means of the personal data for the purpose of evaluating the individual's performance at work, creditworthiness, reliability, conduct or any other matter relating to the individual;
- require the data controller to ensure that no decision is taken by or on behalf of the data;
- require the data controller to cease processing or not to begin processing or to cease processing for a specified purpose or in a specified manner, the individual's personal data;
- receive compensation for damages

suffered by reason of a data controller's contravention of any requirement under the Law; and

- file a complaint with the Commission about the processing of personal data which is not carried out in compliance with the Law.

While some individuals and companies may have already implemented systems that are compliant with the Law, others will need to conduct an assessment of the way they obtain, record and carry out any operation on personal data, whether it relates to employees, suppliers or customers. Data protection policies and best practice guidelines will need to be adopted to ensure for example, integrity of stored personal data, validation and authentication procedures to protect against unauthorized access, disclosure controls, backup and archiving, data destruction process as well as the appointment of an information compliance officer who will be responsible for monitoring and ensuring compliance under the Law. 




Mrs. Francine Bryce is a member of the firm's Commercial practice group. She focuses on aspects of corporate and commercial law including investment funds and securities, banking, corporate and finance transactions.
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Attorneys Published by Cambridge University Press

The Bahamas is one of 32 jurisdictions examined in the new publication Attorney-Client Privilege in the Americas: Professional Secrecy of Lawyers published by Cambridge University Press. In the text, Higgs & Johnson partner Vann P. Gaitor leads a team of five attorneys, including two of



the firm's associates Lashay Thompson and Felix Beneby, in a chapter discussing the history, scope and limitations of the common law doctrine in The Bahamas. The book was featured at the Caribbean Association of Law Librarians Conference hosted in Nassau, The Bahamas in July 2017. 

MEETING WITH THE MINISTER OF FINANCIAL SERVICES, TRADE & INDUSTRY AND IMMIGRATION IN THE BAHAMAS



Attorneys met with the new Bahamian Minister of Financial Services, Trade & Industry and Immigration, The Hon. Brent Symonette, M.P. to discuss ways of improving financial services and potential policy changes in the Immigration Department. Pictured (l—r): Partners, Sterling H. Cooke and Tara Archer-Glasgow, Global Managing Director, Oscar N. Johnson, Jr., Minister Symonette and Partner, Christel Sands-Feaste.

PARTNERS SPEAK AT INDUSTRIAL TRIBUNAL



Global Managing Director, Oscar N. Johnson, Jr. (left) and Litigation Partner, Tara Archer-Glasgow (right) were presenters at The Bahamas Industrial Tribunal seminar 'A Day of Solidarity', which marked the Labour Day holiday and celebrations in the country.

NEWEST ASSOCIATE ADMITTED TO CAYMAN BAR

Allyson Speirs (center), was admitted to practise as an attorney-at-law in the Cayman Islands by the Hon. Mr. Justice Charles Quinn, QC (right) on the application of Higgs & Johnson. The admission application was made by Partner, John Harris (left), to whom Allyson was principally assigned during her period of Articles at the Firm.



Financial Services Chair Featured



Christel Sands-Feaste, Partner and Chair of the Financial Services and Securities practice groups, authored an article entitled 'Bahamas Charts a Clear Path' in

The Bahamas Investor, July - December 2017 issue.

Attorney Authors Bahamas Chapter on Trusts

Theo Burrows, Associate in the Private Client & Wealth Management practice group, has authored The Bahamas chapter in 'A Practical Guide to



the Transfer of Trusteeships, Third Edition' published in August, 2017.

Newest Attorneys



Anastacia Hepburn joins the Litigation practice in The Bahamas. Her focus is on civil and commercial litigation.

Jade Fowler joins the Litigation practice in The Bahamas. Her focus is on trust



Andre Hill joins the firm's Commercial Transactions practice group where his practice centres on finance, and banking.