

# THE BAHAMAS

## Law and Practice

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## 1. GENERAL

### 1.1 General Characteristics of the Legal System

The Bahamian legal system is based on the English common law, supplemented by legislation promulgated by the parliament of the Commonwealth of The Bahamas. Court proceedings in The Bahamas are conducted through an adversarial system of civil procedure. Legal arguments are made by a combination of oral and written submissions.

### 1.2 Court System

There are a number of courts in The Bahamas which deal with various kinds of dispute. The ambit of the tribunals/courts' jurisdiction are defined by statute.

The Industrial Tribunal has the power to hear and determine trade disputes, register industrial agreements, hear and determine matters relating to the registration of such agreements, make orders or awards, and award compensation on complaints brought before it in accordance with the Industrial Relations Act of 1970.

Magistrates' Court hears small civil claims where the value of the claim does not exceed BSD5,000. It also handles investigation of all charges of indictable offences and tries summary offences.

The Supreme Court is the second highest court in The Bahamas. The Supreme Court is the court of first instance for civil matters, where the claim exceeds BSD5,000.

The Court of Appeal is the highest resident tribunal in The Bahamas. It has jurisdiction to hear and determine appeals from judgments, orders and sentences made by the Supreme Court. There are also instances where certain decisions from either the Magistrates' Court or various tri-

butals are appealable directly to the Court of Appeal.

The Judicial Committee of the Privy Council in London, England, is the final appellate court of the Commonwealth of The Bahamas. Appeals to the Judicial Committee of the Privy Council may be made from decisions of the Court of Appeal in all matters where an appeal is permissible.

### 1.3 Court Filings and Proceedings

Court proceedings in The Bahamas are generally open to the public, although the open justice principle is not absolute. In circumstances where it is necessary to avoid prejudice to the administration of justice, courts can order that proceedings be heard in camera (in private).

In accordance with Order 60, Rule 3 of the Rules of the Supreme Court, any person can search, inspect and take a copy of any originating process, judgment, order made by the court and, with the leave of the court, any other documents. However, applications can be made to the court to seal court records or anonymise judgments to protect confidential information from public disclosure.

### 1.4 Legal Representation in Court

Lawyers entitled to practise in The Bahamas are categorised as "counsel and attorney" and are officers of the Supreme Court. The statutory qualification for admission to practice in The Bahamas is:

- (i) a call to the Bar of England, Scotland, Northern Ireland or the Republic of Ireland, or of such other country as may be specified;
- (ii) admission to practice as a solicitor in any of the above countries; or
- (iii) receipt of a Legal Education Certificate from the Council of Legal Education of the West Indies.

Before being admitted to practise, applicants who meet requirement (i), (ii) or (iii) above must also serve a period of “pupillage” for 12 months under the tutelage of a lawyer in actual practice in The Bahamas. All applicants for admission to practice must be Bahamian citizens and must not have been disqualified or suspended from practice in the courts of any place outside The Bahamas.

The Bar Council may agree to the special admission of a person who is not a Bahamian citizen for the purpose of conducting specific legal proceedings, so long as the person is qualified as above. Also, a non-Bahamian citizen entitled to practise before a court of unlimited jurisdiction in any country may become a “registered associate” and agent of a Bahamian counsel and attorney.

## 2. LITIGATION FUNDING

### 2.1 Third-Party Litigation Funding

There is no absolute prohibition of litigation funding by a third party. However, the activity of litigation funding is significantly restricted by the common law principles governing the torts of champerty and maintenance, which still apply in The Bahamas. Those principles attempt to prevent officious or wanton intervention in the litigation of others, in which the intermeddler has no interest whatsoever, and where the assistance which he or she renders to the other party is without justification or excuse.

Until there are legislative provisions which address whether litigation funding is permitted, the developments in English common law cases on third-party funding are likely to be of persuasive authority in the courts of The Bahamas. While the courts of The Bahamas have examined the effect of these cases on the assignment of causes of action, there have been no decisions

approving or disapproving arrangements for or specific terms of litigation funding. The assignment of a cause of action to a third party will be permitted only if it can be shown that the third party as assignee has a genuine commercial interest in taking the assignment and enforcing it for his or her own benefit.

While case law has relaxed the courts’ approach to the issue of whether the principles of champerty and maintenance would invalidate a third party’s assistance in pursuing an action for profit, it would still be advisable for third-party litigation funders to obtain the sanction of the court on a case-by-case basis prior to entering into the arrangement.

### 2.2 Third-Party Funding: Lawsuits

There are no stipulations as to which types or forms of action or suit may or may not receive third-party funding.

### 2.3 Third-Party Funding for Plaintiff and Defendant

As recognised by the Privy Council in *Massai Aviation Holdings, Aerostar Limited v The Attorney General and Bahamasair Holdings Limited* (2007) UKPC 12, the object of the law of champerty and maintenance was originally designed to protect vulnerable defendants who might be unable to resist unmeritorious claims pursued against them. The law later developed to also protect vulnerable plaintiffs who might be induced to part with some of the proceeds of their action in order to obtain funding to pursue it.

To the extent that the modern developments in English common law have deemed litigation funding arrangements permissible as not having offended the rules of champerty and maintenance, there have been no distinctions between their availability to plaintiffs or defendants, and

a court in The Bahamas is unlikely to prefer validating one over the other.

## **2.4 Minimum and Maximum Amounts of Third-Party Funding**

Since the scope and level of third-party litigation funding has not been addressed by legislation in The Bahamas, there are no specific guidelines on the types of costs to be funded by third parties.

## **2.5 Types of Costs Considered under Third-Party Funding**

See **2.4 Minimum and Maximum Amounts of Third-Party Funding**.

## **2.6 Contingency Fees**

Contingency fees are not permitted in The Bahamas.

## **2.7 Time Limit for Obtaining Third-Party Funding**

Since the scope and level of third-party litigation funding has not been addressed by legislation in The Bahamas, there are no specific guidelines on the time limit by which funding should be obtained.

# **3. INITIATING A LAWSUIT**

## **3.1 Rules on Pre-action Conduct**

The Rules of the Supreme Court do not contain any pre-action protocols prior to the commencement of proceedings. While it is a usual practice for a demand letter to be sent by the plaintiff to the potential defendant before initiating proceedings, this step is not mandatory, nor is there an obligation on the potential defendant to respond to a pre-action letter.

## **3.2 Statutes of Limitations**

The limitation periods for different causes of action are set out in the Limitation Act, 1995. For

instance, actions founded on simple contract or on tort (not involving personal injuries) must be brought within six years. An action for damages in respect of personal injuries and actions under the Fatal Accidents Act must be brought within three years.

The limitation period begins to run from the date on which the cause of action accrued. In claims founded upon contract, the limitation period will run from the date of the breach of contract. In actions founded upon tort, the limitation period runs from the date when the act causing the damage occurred.

The Limitation Act, 1995 provides for the extension of the limitation period in cases of disability, acknowledgement, part payment, fraud and mistake.

A limitation defence must be specifically pleaded by a defendant. The court is not entitled of its own motion to bar a claim which is not brought within the prescribed limitation period.

## **3.3 Jurisdictional Requirements for a Defendant**

Generally, the jurisdictional requirements to hear a dispute in The Bahamas are based on whether the parties and/or the dispute have sufficient nexus to The Bahamas. For example, the parties are domiciled in The Bahamas, a tort occurred in The Bahamas, a contract is governed by Bahamian law or a company involved in the dispute was incorporated in The Bahamas.

## **3.4 Initial Complaint**

Proceedings for most causes of action are commenced by a generally endorsed writ of summons (writ), requiring the defendant(s) to enter an appearance in the action within 14 days of being served with the writ. Once a defendant has entered an appearance, the writ is then followed

by a statement of claim, which provides detailed particulars of the plaintiff's claims.

Pursuant to Order 5, Rule 3 of the Rules of the Supreme Court, proceedings by which an application is to be made to the Supreme Court under any statute must be commenced by an originating summons, unless expressed otherwise. There are also certain other proceedings which are considered appropriate to be commenced by originating summons. The originating summons stipulates the claim and is supported by an affidavit.

Further, proceedings may be commenced by originating motion or petition only if required by the Rules of the Supreme Court or by any statute.

The originating process may be amended without the leave of the court after it is filed, but before service on the defendant. After service on the defendant, the leave of the court is required to amend the originating process.

### 3.5 Rules of Service

Generally, a writ or other originating process must be served personally on each defendant by the plaintiff or his or her agent. The court may make an order for substituted service of the originating process or any other document. Further, a writ is deemed to be duly served on a defendant where his or her attorney endorses on the writ a statement that he or she accepts service of the writ on behalf of the defendant.

Order 11, Rule 1 of the Rules of the Supreme Court stipulates the cases in which service of a notice of a writ outside of the jurisdiction of The Bahamas is deemed permissible with the leave of the court. An application for the grant of leave for service of a notice of a writ outside of the jurisdiction must be supported by an affidavit stating:

- the grounds on which the application is made;
- that, in the deponent's belief, the plaintiff has a good cause of action; and
- the place or country where the defendant is.

### 3.6 Failure to Respond

If a defendant fails to enter an appearance to the originating process, judgment in default of appearance may be entered against such defendant, either with or without the leave of the court, depending on the type of action. A defendant may apply to set aside a judgment entered in default of appearance on the ground that the judgment was irregular or that the defendant has a good defence on the merits to the plaintiff's claim.

### 3.7 Representative or Collective Actions

In The Bahamas, representative actions may be commenced where numerous persons have the same interest in any proceedings, subject to certain exceptions. At any stage of the representative proceedings, the court has the discretion, on an application by the plaintiff, to appoint any one or more of the defendants to represent all, or all except one or more, of those persons in the proceedings.

### 3.8 Requirements for Cost Estimate

Rule 10(3) of the Bahamas Bar (Code of Professional Conduct) Regulations states that attorneys should provide clients with a fair estimate of their fees and disbursements, pointing out any uncertainties involved.

## 4. PRE-TRIAL PROCEEDINGS

### 4.1 Interim Applications/Motions

It is possible for parties to make interim applications before the substantive hearing of a claim.

Interim (or interlocutory) applications include those dealing with management/procedural issues, evidential disputes, the striking out of portions of pleadings or the claim in its entirety, costs, injunctive relief, contempt proceedings, etc.

#### **4.2 Early Judgment Applications**

Parties can make an application for early judgment, called an application for summary judgment, on some or all of the issues in dispute. Such an application is made by the plaintiff where there is no reasonable prospect of success of the opposing party and there is no other compelling reason why the case should be disposed of at trial. Conversely, a defendant can apply to strike out a part of or the entire claim made against him or her. These applications can be made at any time, but the parties are encouraged to make them as early on in the proceedings as possible.

#### **4.3 Dispositive Motions**

As stated above, the most common motions made prior to trial which could dispose of the action (or portions thereof) are an application by the plaintiff for summary judgment and an application by the defendant to strike out the claim.

#### **4.4 Requirements for Interested Parties to Join a Lawsuit**

Generally speaking, it is for the plaintiff to decide which causes of action to pursue and which parties to claim against. However, where a defendant seeks to be indemnified and asserts that any blame attributed to him or her must be covered by another party, the defendant may add a “third party” to the action. Should a party who was not named in the proceedings wish to become a party, it can apply to be joined to the proceedings on the basis that it is an interested party and/or necessary for the determination of the issues before the court.

#### **4.5 Applications for Security for Defendant’s Costs**

A defendant may apply for an order that money be paid into court to secure any possible cost order, should the plaintiff’s claim be unsuccessful. The power to order security for costs is discretionary, but it is usually ordered where the plaintiff is non-resident without any assets in the jurisdiction.

#### **4.6 Costs of Interim Applications/Motions**

See **11. Costs**.

#### **4.7 Application/Motion Timeframe**

Ordinarily, the applicant will write to the opposing counsel to agree a number of convenient dates and thereafter make an application to the court for a hearing date for the application during the agreed upon dates. In the event the application is urgent, the applicant can write to the court directly and seek to have the application heard ex parte.

### **5. DISCOVERY**

#### **5.1 Discovery and Civil Cases**

Discovery is available in civil cases in The Bahamas in the form of document disclosure, production and inspection. It does not include witness testimony, as oral evidence is generally given at trial. Discovery is administered by the litigants, and parties may agree to dispense with or limit the scope of the discovery of documents. Where such an agreement is made, the costs of the discovery process can be curbed.

#### **5.2 Discovery and Third Parties**

As a general rule, the court has no power to order the discovery or production of documents as against a person who is not a party to the action. However, within certain limits, the right to obtain discovery has been extended, upon



application by a party, against a person who is not a party in form, but is a party in truth and substance.

### 5.3 Discovery in this Jurisdiction

Where discovery is to be made with or without an order of the court, the parties concerned must make and serve on the other party/parties a list of the documents which are or have been in their possession, custody or power relating to any matter in question in the cause.

### 5.4 Alternatives to Discovery Mechanisms

A party may make an application to the court pursuant to Order 26 of the Rules of the Supreme Court seeking leave to serve, within a period to be specified by the court, on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter. Further, Order 27 of the Rules of the Supreme Court empowers a party to give notice in its pleadings or otherwise in writing that the party admits the truth of the whole or any part of the case of any other party in the proceedings. An example of such a notice would be a Notice to Admit Facts.

### 5.5 Legal Privilege

The concept of legal privilege is recognised in The Bahamas. However, with respect to disclosure, the fact that a document is privileged does not exempt a party from disclosing its existence.

Pursuant to the Bahamas Bar (Code of Professional Conduct) Regulations, attorneys have a duty to hold in strict confidence all information received in the course of the professional relationship from or concerning the client. There is no statutory distinction between external and in-house counsel.

### 5.6 Rules Disallowing Disclosure of a Document

The only documents which are not to be disclosed are those which are not relevant to the matter and those which are not and were never in the possession, custody or power of the party or the party's agent. Further, where there is an order for limited discovery or relating to specific documents, only documents within the terms of that order must be disclosed.

## 6. INJUNCTIVE RELIEF

### 6.1 Circumstances of Injunctive Relief

Among the forms of injunctive relief which the Supreme Court will frequently grant are Mareva injunctions, Anton Piller orders, Norwich Pharmacal orders and anti-suit injunctions. An overarching principle is that the court will not grant a free-standing injunction where no cause of action lies against the party to be restrained. Unless there is jurisdiction to obtain some substantive relief against the defendant in the courts of The Bahamas, a court will not grant interim injunctions over a defendant's assets in The Bahamas.

The general circumstances under which the court will grant injunctive relief remain governed by the principles laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The court must consider:

- whether there is a "serious issue to be tried";
- the balance of convenience in favour of or against the grant of an injunction;
- whether damages would be an adequate remedy for the party seeking the injunction; and
- whether the party to be enjoined would be adequately compensated by an undertaking in damages given by the applicant.



An applicant for a freezing order to secure assets must show a “good and arguable case”, which is a slightly higher threshold than the above-mentioned “serious issue to be tried”.

The court will exercise its discretionary jurisdiction in equity to grant Norwich Pharmacal relief by requiring a third party to make disclosures of information leading to the identity of a wrongdoer or to trace or preserve assets. It is not necessary that the respondent is itself a wrongdoer, but sufficient that he or she is mixed up, involved or otherwise participated in the wrongdoing, whether innocently or not, and has information which is relevant.

With regard to anti-suit injunctions, the Privy Council has set out the principle that a court should not purport to interfere with any foreign court, but may act personally upon a defendant by restraining him or her from commencing or continuing proceedings in a foreign court. Based on that principle, courts in The Bahamas have been prepared to grant anti-suit injunctions where they were satisfied that the party over whom they had in personam jurisdiction had conducted the foreign proceedings in a manner which was vexatious, oppressive or unconscionable.

## **6.2 Arrangements for Obtaining Urgent Injunctive Relief**

Although there are no formal rules governing audiences outside of the normal business hours of the court’s operation, judges of the Supreme Court have in practice accommodated quick and urgent hearings for injunctive relief at times outside of normal business hours and/or in places in which the judge is reasonably accessible outside of the court room. Additionally, due to the COVID-19 pandemic, judges are advised in the Court Coronavirus Mitigation Protocols to conduct urgent interlocutory applications remotely (ie, by teleconference, video link, live television

link and internet link). However, the discretion remains with the individual judge to determine which matters are suitable for remote hearings.

## **6.3 Availability of Injunctive Relief on an Ex Parte Basis**

While injunctive relief can and in many instances is obtained without notice to a defendant, the principle formulated by the Privy Council is that the courts should not entertain applications of which no notice has been given unless either (i) giving notice would enable the defendant to take steps to defeat the purpose of the injunction, or (ii) there has been no time to give notice before the injunction is required. Where an application proceeds without notice to the defendant, the applicant is under a more compelling duty to make full and frank disclosure. Failure to meet this duty provides the defendant with a strong ground to apply for the injunctive relief to be set aside.

## **6.4 Liability for Damages for the Applicant**

In the event that the court determines that the order for injunctive relief ought not to have been made and if a defendant succeeds in discharging the order on that basis, the court also has the jurisdiction to make a finding of liability and assess damages if it is proved by the defendant that they suffered loss or damage as a result of the injunctive relief.

There are certain exceptions to the general principle that the court requires an undertaking in damages to be given when obtaining an injunction. Further, the court will require security of the undertaking in damages where the defendant can show that there is a sufficient risk of loss which is unlikely to be compensated, unless it was caused by the grant of the injunction, and that such loss can be properly quantified or estimated.

## 6.5 Respondent's Worldwide Assets and Injunctive Relief

The primary use of the Mareva injunction is to grant injunctive relief against the worldwide assets of the respondent.

## 6.6 Third Parties and Injunctive Relief

The courts in The Bahamas have applied the English common law principles developed in *TSB Private Bank International v Chabra* [1992] 1 WLR 231 which allow injunctive relief to be obtained not only against parties to the cause of action, but also against third parties who hold and control assets for and on behalf of the wrongdoer.

## 6.7 Consequences of a Respondent's Non-compliance

There are a number of options open to a litigant where a party enjoined fails to comply with the terms of an injunction, including obtaining an unless order. However, the primary consequence of a breach of an injunction is that an application for contempt of court may be pursued. The forms of punishment for a finding of contempt are varied, ranging from the refusal of audience to fines and imprisonment for continued and sustained breaches of injunctive orders.

## 7. TRIALS AND HEARINGS

### 7.1 Trial Proceedings

Civil trials in The Bahamas are in the first instance heard before a single judge and are generally open to the public. Written witness statements and expert witness statements are exchanged prior to the trial and stand as evidence-in-chief. At the trial the witnesses affirm the contents of their statements and are then tendered for cross-examination. Counsel for the parties may make opening addresses to the court and, at the end of the trial, closing submissions. Although the judge may render his or her judgment or rul-

ing immediately upon the conclusion of the trial, it is usual for judgment to be reserved to a later date to enable the judge to consider the transcript of the proceedings, the evidence and the legal submissions.

### 7.2 Case Management Hearings

The court has a duty to actively manage cases. A case management hearing takes place upon the close of pleadings prior to all civil trials. After the close of pleadings, the action is referred to a case management conference before the judge who will hear the trial.

### 7.3 Jury Trials in Civil Cases

In The Bahamas, civil cases are in practice not heard by a jury, although the Rules of the Supreme Court do make provision for a trial before a judge with a jury.

### 7.4 Rules that Govern Admission of Evidence

The admission of evidence at trial is governed by the Rules of the Supreme Court and the Evidence Act. Generally, evidence may be given of facts relevant to any fact in issue. Oral evidence must be the direct evidence of a witness. Subject to certain exceptions, hearsay evidence must not generally be admitted in evidence.

### 7.5 Expert Testimony

Expert evidence may be given in certain circumstances where, inter alia, the court has to form an opinion on:

- the identity or genuineness of handwriting;
- a point of foreign law, science, art, trade or manufacture; or
- any other subject requiring special skill or knowledge.

At the case management hearing, directions are given for the filing and exchange of expert reports and expert witness statements in

advance of the trial. The experts are subject to cross-examination at trial.

### **7.6 Extent to Which Hearings Are Open to the Public**

Interlocutory applications before a registrar of the Supreme Court are heard in chambers and are not open to the public, although the parties may be present. Interlocutory applications before a judge may be heard in chambers or in open court.

As a general rule, trials are open to the public. An application can be made for a trial to be held in camera if the applicant can demonstrate to the court that a public hearing is likely to lead to a denial of justice.

### **7.7 Level of Intervention by a Judge**

Judges may and often do ask questions of counsel, the factual witnesses and the expert witnesses during the conduct of the trial.

### **7.8 General Timeframes for Proceedings**

The timeframe from the commencement of an action to trial is dependent upon a number of factors. The length of the trial depends on the complexity of the issues, the number of parties involved, the number of factual and expert witnesses and the volume of the documentary evidence.

## **8. SETTLEMENT**

### **8.1 Court Approval**

Once parties have agreed to settle their dispute, there are various ways to discontinue the court proceedings. While court approval is generally not necessary, parties often wish to have their settlement blessed by the court in the form of a Tomlin order (see **8.3 Enforcement of Settlement Agreements**).

Where parties do not feel the need to put the settlement before the court, they will generally execute an agreement detailing the terms of the settlement and simply file a notice of discontinuance.

### **8.2 Settlement of Lawsuits and Confidentiality**

The terms of a settlement can remain confidential, whether it be contained in a Tomlin order or by virtue of the terms of the settlement agreement.

### **8.3 Enforcement of Settlement Agreements**

Where parties have agreed to settle proceedings via a Tomlin order, that order will provide the court with the terms upon which either party may resume the proceedings before the court in the event that either party breaches the terms of the settlement agreement.

### **8.4 Setting Aside Settlement Agreements**

In order to set aside a settlement agreement, the applicant must show that the agreement was entered into as a result of fraud, a misrepresentation, undue influence or duress.

## **9. DAMAGES AND JUDGMENT**

### **9.1 Awards Available to the Successful Litigant**

The remedies available to a successful litigant may be either legal, equitable or statutory.

Generally, damages are the legal remedy awarded by a court in The Bahamas.

The most common equitable remedies are specific performance, rescission, rectification, injunctions and declaratory relief. In a dispute

involving a breach of trust, equitable remedies may include an accounting of profits by the trustee and the tracing of ownership interests.

Actions may also be brought pursuant to specific statutes – for example, the Companies Act or the Employment Act.

## 9.2 Rules Regarding Damages

As a general rule, damages under Bahamian law are compensatory. There is no limit (statutory or otherwise) on the amount of damages which a claimant can recover. The parties can, however, agree to limit the damages which can be recovered.

Damages are recoverable provided that they were caused by the defendant's actions or inaction, are foreseeable and not too remote. The plaintiff also has a duty to take reasonable steps to mitigate the losses suffered.

Aggravated damages may be awarded when there is something which under contract or tort would justify more than a nominal award. Exemplary or punitive damages may be awarded when the sum intended to be awarded as aggravated does not adequately address the character of unacceptable conduct. However, to date, aggravated or exemplary damages have not been awarded in a personal injury action in The Bahamas.

## 9.3 Pre- and Post-Judgment Interest

The Civil Procedure (Award of Interest) Act of 1992 provides for the award of both pre-judgment and post-judgment interest.

It is within the discretion of the court as to whether pre-judgment interest on a debt or damages is in fact awarded and, if so, at what rate and for what period of time.

Post-judgment interest runs on every judgment debt. The rate of interest, as fixed by the Civil Procedure (Rate of Interest) Rules, 2008, is the prime rate of the Central Bank of the Bahamas plus 2% per annum.

## 9.4 Enforcement Mechanisms of a Domestic Judgment

The Rules of the Supreme Court afford the following means by which a judgment for the payment of money may be enforced: a writ of fieri facias, garnishee proceedings, a charging order, the appointment of a receiver and/or a writ of sequestration. In enforcement proceedings the plaintiff becomes the judgment creditor and the defendant becomes the judgment debtor.

## 9.5 Enforcement of a Judgment from a Foreign Country

The procedure to be adopted for the enforcement of a foreign judgment in The Bahamas is dependent upon the country in which the foreign judgment was obtained.

The provisions of the Reciprocal Enforcement of Judgments Act (REJA) have, to date, been extended to the following countries: Barbados, Bermuda, Jamaica, Leeward Islands, St Lucia, Trinidad, British Guiana (Guyana), British Honduras (Belize), Australia and the UK.

A judgment or order in civil proceedings given or made by certain superior courts of one of the countries listed above may be registered and enforced under the REJA by the judgment creditor making an application to the Supreme Court within 12 months of the date of the foreign judgment. Once registered, the foreign judgment becomes a judgment of the Supreme Court.

If the judgment was obtained in a country to which the REJA does not extend, enforcement in The Bahamas may only be achieved under the common law, which requires the satisfaction of

six specific conditions. If those conditions are satisfied, the proceedings are then conducted by the plaintiff serving a writ on the defendant, in which the foreign judgment is pleaded as the basis for the claim. If the defendant enters an appearance, the plaintiff may apply for summary judgment on the ground that the defendant has no defence to the claim.

## **10. APPEAL**

### **10.1 Levels of Appeal or Review to a Litigation**

Appeals to the Supreme Court may come from the Magistrates' Court or a number of tribunals. Also, an appeal from a judgment, order or decision of a registrar lies to a Supreme Court judge in chambers. With the leave of the Supreme Court, an application for judicial review may be made with respect to proceedings before a magistrate or tribunal.

Subject to an exhaustive list of exceptions, the Court of Appeal has jurisdiction to hear and determine all appeals from any judgment or order of the Supreme Court made in or incidental to civil proceedings. Similarly, in criminal proceedings, the Court of Appeal has jurisdiction to hear appeals from a person convicted of a criminal offence in the Supreme Court pursuant to an exhaustive list of grounds of appeal.

All appeals to the Privy Council must be made with leave to appeal from the Court of Appeal or special leave from the Privy Council.

### **10.2 Rules Concerning Appeals of Judgments**

With respect to appeals from a magistrate to the Supreme Court, the magistrate must inform the party to whom the decision is adverse that it has a right to appeal and what steps must be taken to appeal.

As stated at **10.1 Levels of Appeal or Review to a Litigation**, subject to an exhaustive list of exceptions, the Court of Appeal has jurisdiction to hear and determine all appeals from any judgment or order of the Supreme Court made in or incidental to civil proceedings. For criminal appeals to the Court of Appeal from a Supreme Court conviction, a person may only appeal on one or more specific grounds.

Leave to appeal to the Privy Council will only be granted upon:

- entering into "good and sufficient security" within 90 days from the date of hearing the application for leave to appeal; and
- any other conditions which may be imposed.

### **10.3 Procedure for Taking an Appeal**

Appeals to the Supreme Court must be brought by originating motion. The notice of this motion must state the grounds of appeal and whether the appeal is against the whole or part of the decision. The notice must be served and the appeal entered within 28 days after the date of the judgment, order, determination or other decision being appealed.

Civil appeals to the Court of Appeal must be brought by notice of motion. Appeals against interlocutory orders must be made within 14 days of the order and appeals against final orders within six weeks of the order.

For appeals to the Privy Council, they must be brought by petition from the intending appellant pursuant to leave to appeal obtained from the court appealed from or pursuant to special leave granted by the Privy Council within 21 days of the date of the judgment to be appealed from.

## 10.4 Issues Considered by the Appeal Court at an Appeal

Appeals to the Supreme Court are by way of rehearing, and the Supreme Court has the power to receive further evidence on questions of fact and draw any inferences of fact.

Appeals to the Court of Appeal and the Privy Council are also by way of rehearing. The Court of Appeal and the Privy Council have full discretionary power to receive further evidence on questions of fact in the case of an appeal from a judgment after a trial or hearing of any cause or matter on the merits, but no further evidence can be admitted except on special grounds or with respect to matters which occurred after the trial or hearing.

## 10.5 Court-Imposed Conditions on Granting an Appeal

On an appeal to the Supreme Court, the court can impose conditions on the granting of the appeal by amending the grounds of appeal or make any other order which it deems just to ensure the determination of the real question on the merits. The Court of Appeal has the same power.

When the Privy Council hears applications for special leave to appeal, they typically impose an order for security for costs.

## 10.6 Powers of the Appellate Court after an Appeal Hearing

After hearing an appeal, the Supreme Court has the power to give any judgment or decision or make any order which should have been made by the body before whom the matter was first brought. It also has the power to remit the matter for rehearing.

After hearing a civil appeal, the Court of Appeal may make an order confirming, reversing or varying the judgment or order appealed against or

order a new trial. The Court of Appeal has the power to give any judgment and make any order which ought to have been made, and to make any further or other order which it deems necessary. It can also order a new trial or set aside a finding or judgment of the court below.

As the final court of appeal, the Privy Council has the same powers as the Court of Appeal after the hearing of an appeal.

## 11. COSTS

### 11.1 Responsibility for Paying the Costs of Litigation

The award of costs by the court (whether in interlocutory applications or in the trial of the action) is ultimately an exercise of the court's discretion. However, this discretion should recognise that "costs follow the event" – ie, the unsuccessful party will normally be ordered to pay the costs of the successful party. This principle should only be departed from in exceptional circumstances.

The court can either fix costs (ie, order a specific amount to be paid) or seek the parties to agree costs, failing which ordering the costs to be taxed. Upon costs being awarded, parties should attempt to settle the amount of costs in the first instance. If the parties cannot come to a settlement position, the successful party's/parties' bill(s) of costs is/are sent to a taxing master, who will hold a taxation, following which he or she will make a ruling on the costs to be paid by the unsuccessful party. Any award of costs is subject to a review and thereafter an appeal.

Once the costs have been taxed and certified, the paying party must pay the costs promptly.



### **11.2 Factors Considered when Awarding Costs**

In exercising its discretion on costs, the court is required to have regard to all the circumstances but, in particular, the conduct of the parties (before as well as during the proceedings), whether a party was only partly successful and any admissible settlement offers which were made.

### **11.3 Interest Awarded on Costs**

Once an award of costs has been made, it attracts the same rate of interest as a civil judgment pursuant to the Civil Procedure (Award of Interest) Act of 1992.

## **12. ALTERNATIVE DISPUTE RESOLUTION (ADR)**

### **12.1 Views of ADR within the Country**

In The Bahamas, alternative dispute resolution (ADR) is considered a progressive way of settling disputes in a quick and efficient manner. Although all forms of ADR are utilised, arbitration is the most popular method as it is enforced and governed via the Arbitration Act, 2009 (“the Act”) and is conducted in accordance with globally recognised standards.

### **12.2 ADR within the Legal System**

Pursuant to the Rules of the Supreme Court, the court has the case management power to conduct a dispute resolution conference between the parties at the close of pleadings. This can lead to a mediation or other ADR process, with a view to arriving at a settlement before the trial starts. Although the parties are directed to mediate and are encouraged to negotiate a settlement, there are no sanctions against a party who refuses to participate in ADR. However, the objection by a party to engage in ADR may be taken into consideration on the issue of costs.

Mediation and arbitration clauses are treated as binding in The Bahamas and will only be overturned in exceptional circumstances. In the case of an arbitration agreement, the Act vests the Supreme Court with the statutory power to stay proceedings in order to enforce the agreement to arbitrate.

### **12.3 ADR Institutions**

The Bahamian court system promotes ADR pursuant to provisions of the Rules of the Supreme Court, which dictate its procedure through enabling legislation in relation to ADR methods such as arbitration. Organised institutions which offer and conduct forms of ADR include ADR Bahamas and the Chartered Institute of International Arbitrators.

## **13. ARBITRATION**

### **13.1 Laws Regarding the Conduct of Arbitration**

Under the Act, arbitration is a legislatively backed form of ADR with the support of the Supreme Court and the Court of Appeal, which are vested with enforcement jurisdiction. The conduct of arbitration as well as its recognition and enforcement are also supported by the Rules of the Supreme Court, which set out the procedure for appealing from or enforcing an arbitration award.

### **13.2 Subject Matters Not Referred to Arbitration**

There are no restrictions in relation to disputes in civil proceedings.

### **13.3 Circumstances to Challenge an Arbitral Award**

Under the Act, a party to an arbitration can apply to the court to challenge the award of a tribunal on three grounds:



- a challenge as to the substantive jurisdiction of the tribunal;
- a challenge as a result of a serious irregularity; or
- an appeal on a question of law.

A challenge can be made where The Bahamas is the seat of the arbitration or, if no seat has been designated or determined, by reason of another connection with The Bahamas if the court deems it appropriate.

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

In addition to the Act, The Bahamas has given effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 by enacting the Arbitration (Foreign Arbitral Awards) Act, 2009, which mandates that a foreign award made pursuant to the New York Convention will be enforceable in The Bahamas, either by an action or in the same way as domestic orders are enforced.

Under the Act, a domestic arbitration award may, with the leave of the court, be enforced in the same manner as a judgment or order of the court. Generally, a domestic judgment or order of the court will be enforced under Order 45 of the Rules of the Supreme Court, which states that a judgment or order can be enforced by a writ of fieri facias, garnishee proceedings, a charging order, the appointment of a receiver, an order of committal and, where necessary, a writ of sequestration.

## 14. OUTLOOK AND COVID-19

### 14.1 Proposals for Dispute Resolution Reform

There are plans for reform in both the traditional court system and alternative dispute resolution

in The Bahamas. Regarding litigation reform, the Chief Justice of The Bahamas is aiming to revamp the Supreme Court Rules, some of which are 40 years old, in a bid to develop “an entirely new and modern foundation” for handling civil and commercial cases. The aim is to reform the procedures which govern how Bahamian courts deal with civil cases as part of a wide-ranging and across-the-board transformation of the judicial system. This will improve access to justice and the speed at which matters are dealt with, along with helping to reduce legal costs and cut the long-standing case backlog which continues to undermine the efficiency of the courts.

Additionally, the new Civil Procedure Rules which are presently being considered will cover everything from greater case management powers for judges to cross-border procedures, international co-operation and greater use of ADR and mediation.

The new Supreme Court Rules were due to be enacted in April 2020. However, with the presence of COVID-19 and various emergency orders mandating curfews, lockdowns and closures, the enactment has been delayed.

Regarding reforms for ADR in The Bahamas, the government laid in the House of Assembly the Arbitration (Amendment) Bill, 2018 and the International Commercial Arbitration Bill, 2018. Once those bills have been passed, the legislation will bring further certainty and clarity for those interested in using The Bahamas as a venue for arbitration matters.

The Arbitration (Amendment) Bill, 2018 will rename the Arbitration Act of 2009 “The Bahamas Domestic Arbitration Act”, which will govern domestic arbitration. The International Commercial Arbitration Bill, 2018 will incorporate key provisions of the Model Law of the United Nations Commission on International Trade Law (the

“UNCITRAL Model Law”). The UNCITRAL Model Law covers all stages of the arbitral process, from the arbitration agreement to the recognition and enforcement of the arbitral award, and reflects a worldwide consensus on key aspects of international arbitration practice, accepted by numerous countries irrespective of their legal or economic system. The relevant provisions of the UNCITRAL Model Law have been included in the Schedule of the International Commercial Arbitration Bill, 2018 to indicate which provisions of that Bill align with the corresponding provisions of the UNCITRAL Model Law, thus making it easier for persons using the legislation.

Once these bills have been gazetted, they will facilitate international commercial arbitration in The Bahamas. Through the incorporation of the UNCITRAL Model Law into the Bahamian legislation, The Bahamas will position itself to become a centre for international commercial arbitration, thereby creating opportunities for new business and additional foreign investment.

#### **14.2 Impact of COVID-19**

COVID-19 has prompted the judiciary of The Bahamas to pivot in its operations. The pandemic has given rise to the judiciary issuing Coronavirus Mitigation Protocols and Practice Directions. The objectives of these protocols are:

- to protect the safety and health of judicial officers, staff, law enforcement officials, members of the Bar and all public users of the courts; and
- to keep the judiciary operating to provide continued access to justice as it discharges its mission, which is a critical function in a democratic society.

The judiciary has also overhauled its website in an effort to take advantage of the use of technology, which reduces the need for persons to physically attend the premises of the courts.

There are now mechanisms on the judiciary’s website which enable counsel to apply for hearing dates and submit documents to the court, amongst other things. Pursuant to Practice Direction No 2 of 2020, emails are now preferred to letters. This diminishes the necessity for persons to come and physically deliver letters to judicial offices, which promotes social distancing initiatives.

Court hearings are now facilitated through videoconferencing mediums, such as Zoom and Webex, wherever possible. Practice Direction No 3 of 2020 and the Coronavirus Mitigation Protocols 5.0 presently govern the procedure of virtual/remote hearings. They provide guidance with respect to the format which electronic hearing bundles are to take, the appropriate attire for counsel and the mode/procedure which the virtual/remote hearing will follow. It is important to note that the rules give the presiding judge the authority to adjust the mode/procedure of any hearing before him or her.

On 30 March 2020, the government of The Bahamas passed the Emergency Powers (COVID-19) (Special Provisions) Order, 2020 (the “Special Provisions Order”), which suspends any limitation of time provided under the Limitation Act up to 30 days after the cessation of the state of public emergency issued by the Governor General pursuant to the Emergency Powers Act. There has been much debate as to whether the Special Provisions Order is still in effect. This is because the first proclamation of a state of emergency under which the Special Provisions Order was issued expired on 29 June 2020, and a new proclamation of a state of emergency was issued by the Governor General and came into effect on 30 June 2020.

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## Trends and Developments

### *Contributed by:*

*Sean Moree, Knijah Knowles and Erin Hill  
McKinney, Bancroft & Hughes see p.25*

### **An Update on Litigation in The Bahamas**

The COVID-19 pandemic required drastic modifications to the litigation process by both the judiciary and legal practitioners, which appear to have permanently altered the landscape of litigation in The Bahamas. The courts and litigants have had to rapidly adapt and respond to the dynamic and unpredictable environment of the COVID-19 era, taking into consideration the various guidelines from The Bahamas' Ministry of Health, international organisations and the various orders promulgated under the Emergency Powers (COVID-19) (Special Provisions) Order, 2020. Both litigants and judicial officers had to swiftly reinvent work processes and migrate to the use of remote platforms in order to discharge their respective duties during this time. The result created a largely digital, remote judicial system – one which is a vastly different legal environment than persisted before the pandemic.

### **COVID-19 protocols**

Unfortunately, due to the COVID-19 pandemic, productivity on the civil side of the Magistrates' Court was significantly interrupted as in person court hearings and trials were suspended for long periods of time. However, such trials and hearings have now resumed.

Since the beginning of the pandemic, most of the civil hearings in the Supreme Court and Court of Appeal have been held via Zoom or Webex or by telephone, or without an oral hearing and determined on the basis of the filed court documents. Additional reforms to the Supreme Court due to the COVID-19 pandemic include:

- an automated process to obtain hearing dates;

- a digital recording system to record hearings and expedite the receipt of transcripts;
- an online e-document delivery platform to deliver documents to judges and registrars;
- an online appointment mechanism to inspect Supreme Court files and documents; and
- an online COVID-19 help desk.

### **Modernisation of the judiciary**

The chief justice in his speech at the 2021 opening of the legal year stated that his plan for the court system this year could be succinctly expressed as “reform and modernisation”.

The judiciary began significant reforms to modernise the Bahamian court system long before the COVID-19 pandemic. Examples of such reforms include:

- a digitisation project which aims to digitise all court documents covering the last 30 years;
- a specific judicial unit to target the backlog;
- the introduction of a Commercial Court; and
- the design and implementation of a customised electronic payment system in the Magistrates' Family Court to upgrade and automate the process of making and receiving payments for maintenance, child support and other matters under court orders.

Of particular note is the judiciary's work to introduce a user-friendly technology platform known as the “Integrated Case Management System” (ICMS) which will provide the gateway for the widespread automation of court procedures and processes. It will enhance access to the administration of justice by providing for e-filing, e-scheduling, e-payment, e-notices, e-probate and other customised subject-matter applica-

tions. Currently, some of the services such as e-payment are already available. As of March 2021 persons using the courts in New Providence are now able to conduct cashless transactions by using a credit card or debit card to pay (i) fees for filing court documents; (ii) fines imposed by the court; and (iii) traffic tickets.

The aim is for ICMS to strengthen the institutional capabilities of the judiciary and transform the delivery of court services in The Bahamas by also implementing the following changes:

- reducing the disposition cycle for cases;
- providing the wider accessibility for litigants or their attorneys to monitor developments in their court cases;
- provide online court services for the public which will reduce time spent in courtrooms and court Registries; and
- reduce the backlog of cases in the court system.

#### *Overhaul of the Crisis Management Legislative Framework in The Bahamas*

Despite the COVID-19 pandemic, three new pieces of legislation were enacted in 2020 following the Central Bank of The Bahamas' policy mandate to overhaul the Crisis Management Legislative Framework in The Bahamas:

- The Banks and Trust Companies Regulation Act, 2020;
- The Central Bank of The Bahamas Act, 2020; and
- The Protection of Depositors (Amendment) Act, 2020 (collectively referred to as the "Acts").

The Acts are clearly important for the financial services industry but also to those involved with commercial litigation involving banks or trust companies in The Bahamas. In order to assist banks and increase confidence in the financial

services industry, the Acts provide the Central Bank with the power to resolve failing banks and improve governance.

#### *New Civil Procedure Rules (CPR)*

Perhaps the most important reform to the Bahamian legal system will be the new Rules of the Supreme Court which will be introduced and based on an adapted and updated version of the Civil Procedure Rules (CPR) used around the Commonwealth. The current Rules of the Supreme Court of 1978 (the RSC) were promulgated more than 40 years ago and were based on the former UK Rules of the Supreme Court which were in force at that time.

The new CPR will bring significant reform to the conduct of civil and commercial litigation in The Bahamas, specifically as they relate to case management, the court's control and preparation of evidence and the cost regime. There will also be an overhaul of the current discovery process as there will be a modified and narrower criterion for documents to be disclosed. The new CPR will focus on the overriding objective to deal with cases justly and at proportionate costs.

The Bahamian CPR was intended to become effective in 2020; however, delays caused primarily by the COVID-19 pandemic have pushed back this timetable. It is now expected that the CPR will be circulated for consultation by the end of this year and made effective sometime in 2022.

#### *New and important decisions made in The Bahamas*

In April 2021 the Privy Council in RAV (Bahamas) Ltd and another v Therapy Beach Club Incorporated [2021] UKPC 8 clarified the meaning of serious irregularity with Section 90 of the Arbitration Act. Specifically, the question to the Privy Council related to whether, in advancing a challenge under Section 90 of the Arbitration Act, an



applicant must expressly and separately allege that serious irregularity has caused substantial injustice, and in order to uphold a challenge under Section 90 of the Arbitration Act (and remit the award for reconsideration), the court must expressly and separately consider whether serious irregularity has caused substantial injustice.

The facts of this matter concern a parcel of land on the island of Bimini which was leased from RAV (Bahamas) Ltd (RAV) to Therapy Beach Club Incorporated (“Therapy”) for the operation of a restaurant and beach club. A dispute ensued and RAV commenced separate proceedings in the Supreme Court alleging, inter alia, that the lease was void. However, RAV evicted Therapy before the Supreme Court rendered its judgment.

An arbitration was held between RAV and Therapy to resolve their disputes. The arbitrator held that RAV was wrong to have evicted Therapy and awarded Therapy a mixture of general and special damages. In the Supreme Court, Winder J held that there had been serious irregularity on the part of the arbitrator in relation to the preparation of the award and the quantification of damages. Winder J’s decision was subsequently overturned by the Court of Appeal of the Bahamas.

The Privy Council allowed the appeal and affirmed that where an applicant sought to appeal an arbitration award on the basis of a serious irregularity, the Supreme Court, in determining whether a serious irregularity occurred, must focus on whether due process was afforded the parties and not the correctness of the decision reached. Additionally, an irregularity in the process will only amount to a serious irregularity if the court considers that it has caused or will cause substantial injustice.

Another new and important decision in The Bahamas relates to Belgravia International Bank & Trust Company Limited v Bretton Woods Corporation, Sigma Management Bahamas Ltd, Frank R Forbes SccivApp No 75 of 2021 (ruling currently unrecorded) (“Belgravia”). In October 2021 the Court of Appeal in Belgravia confirmed that an extension of time is required prior to lodging an appeal whenever the notice of appeal is not filed within 14 days of the interlocutory order/judgment. Barnett, P held that there was no ambiguity in Rule 11 of the Court of Appeal Rules and that time begins to run on the date that the order of the court below is pronounced or made.

This ruling is important because as leave to appeal is required for interlocutory orders/judgments, it is extremely difficult (perhaps usually impossible) to obtain leave and then lodge the appeal within 14 days. This then means that an application for an extension of time will almost invariably be required. On an application for an extension of time within which to appeal, the court must consider the length of the delay, the reasons for the delay, the prospects of success and the prejudice, if any, to the respondents. The Court of Appeal stated that “these factors are to be considered by the court and it is an abrogation of the responsibility of the court when considering the four factors in general and the prospect of success in particular to accept without analysis of the intended appellant’s grounds, the view, expressed or assumed, of the court below”.

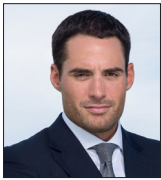
The Court of Appeal held that this case had no prospects of success and refused leave to extend the time within which to appeal.



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# THE BAHAMAS TRENDS AND DEVELOPMENTS

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