

Offshore information: more than expected

Contrary to the commonly-held misconception of offshore jurisdictions as secretive black holes of information, in reality, the major offshore jurisdictions of Bermuda, BVI and the Cayman Islands maintain a host of information on companies, trusts and other structures, which is available to sufficiently interested third parties. In this article we consider what information can be obtained in these jurisdictions by the general public, private litigants and foreign bankruptcy appointees. As will be seen, asset-tracers will be well-advised to take advantage of the wealth of information on offer in these jurisdictions at an early stage of any investigation.

Publicly available information

Bermuda, BVI and Cayman all have separate regimes governing what information is available to the general public. At a minimum however, the general public can obtain the following information on a company, via a search of the government register of companies, in each of the jurisdictions: the company's name and registration number; its date of incorporation; what type of company it is (ie exempted or local); the name and address of the company's registered office/agent; and the company's current status (ie whether it is active, struck-off or dissolved). While it is rare, documentation available from a public search of the register can sometimes disclose or confirm the identity of the directors, shareholders or ultimate beneficial owners of companies.

Bermuda sets the standard in regard to public information. A search of the Bermuda Registrar of Companies will additionally provide: the company's certificate of incorporation and memorandum of association; information on the company's directors, including their full names and addresses; particulars of any mortgages or charges registered against the assets of the company (if registered); certain documents related to winding up proceedings if commenced; and other miscellaneous documents such as prospectuses filed pursuant to public offerings of shares, certificates of amalgamations or

mergers and certificates of continuance, discontinuance or dissolution.

In addition, the public has a right to inspect and take copies of both the register of members and register of directors and officers maintained at the company's registered office. The register of members will include the names and addresses of each shareholder, the number of shares they hold, whether they are paid or unpaid and the dates on which each shareholder became or ceased to be a shareholder. The registered office (and Registrar of Companies) is also required to maintain a beneficial ownership register, however it is not open to public inspection.

In BVI, filing the register of members with the BVI Registry of Corporate Affairs is optional. However, on the rare occasions that a company chooses to do so voluntarily, the register of members is available for public inspection. There is a requirement to file the register of directors and beneficial ownership information for all companies with the BVI Registry of Corporate Affairs, but these are not open to public inspection.

The Cayman Islands has recently followed suit and introduced a public register of directors which can be searched by the general public for a nominal fee. Shareholder information, although maintained, is not open to public inspection. Similarly, beneficial ownership information is maintained but not available for public inspection.

Although beneficial ownership registers are not available for public inspection, the information maintained in Bermuda, BVI and Cayman has the advantage over jurisdictions such as the UK, where beneficial ownership information is not verified, and Delaware where beneficial ownership information is not provided at all, in that it is verified via robust 'know your client' protocols required by law.

Each of the jurisdictions has a financial services regulator responsible for the regulation of various financial industries (the Bermuda Monetary Authority, the BVI Financial Services Commission and the Cayman Islands Monetary Authority). These regulators hold a significant amount of information on entities carrying on a regulated business. Although the information is not generally available to the public, the filing obligations imposed by the regulators ensure that substantial records are maintained for all regulated businesses.

Information available to private litigants (including foreign bankruptcy appointees)

In addition to the substantial information that is publicly available, private litigants, including foreign bankruptcy appointees, have powerful avenues by which to obtain a host of non-public information via the Courts.

First, is the general obligation of litigants to give disclosure of all documents relevant to the litigation at hand. The disclosure obligations in Bermuda, BVI and Cayman are considerably broader than civil law jurisdictions in which litigants are typically only required to disclose documents on which they intend to rely. Bermuda and Cayman employ the broadest test of relevance whereby litigants are required to disclose all 'documents' (which is defined to include any medium that is capable of recording written or acoustic information) that *may* directly or indirectly advance or damage either party's case. In practice this casts an extremely wide net, particularly as there has been no movement to introduce proportionality curbs or other restrictions on general discovery. BVI relies on a slightly narrower test of relevance in which litigants are only required to disclose documents that directly advance or damage either party's case.

Giving discovery in this manner is a mandatory obligation, which litigants cannot escape. Failure to comply is a contempt of Court for which various sanctions are available to the Court to compel compliance.

Private litigants' ability to obtain in depth documentary information is complimented by the availability of requests for further information or

interrogatories (ie written questions to the opposing litigant) and domestic and foreign oral depositions.

General discovery does have its limitations however as it does not pertain to third-parties, which in many instances will be a rich source of information and primary target (as is the case with corporate service providers and fiduciary services businesses: see below). This limitation however is remedied by the ability to obtain 'Norwich Pharmacal' relief against third-parties pursuant to the powers established in seminal English case of *Norwich Pharmacal Co v Customs and Excise Commissioners*.

A Norwich Pharmacal order is a disclosure order made against parties who have somehow been mixed up in wrongdoing, whether innocently or otherwise. Once made, the order requires the respondent to produce documents that have been listed in the order (typically by category or description). Compliance with a Norwich Pharmacal order is again mandatory, with non-compliance constituting a contempt of Court for which there are penal sanctions.

In order to obtain Norwich Pharmacal relief, the applicant must show that:

- 1 A wrong has, or arguably has, been carried out by a wrongdoer
- 2 The relief is necessary
- 3 The respondent against whom the order is sought (i) was somehow involved in or facilitated the wrongdoing, and (ii) is likely to be able to provide the information sought

There are a number of advantages to the Norwich Pharmacal jurisdiction that make it a particularly powerful information gathering tool. These include:

- The fact that applications will be determined on an ex parte basis with no notice to the respondent in situations where there is a risk of information being destroyed or concealed if advance notice was given. Such ex parte applications will typically be accompanied by a seal and gag order, which prevents the respondent from tipping-off the wrongdoer
- That the respondent is generally an independent third-party with no motivation to protect the wrongdoer and is therefore willing to provide the information (particularly as a condition of obtaining the relief is that the applicant provides an undertaking to pay the costs of compliance with the order). Seal and gag orders are particularly useful in this regard as they prevent the wrongdoer from instructing the respondent to oppose the order

- The ability to obtain orders against professional corporate service providers and fiduciary businesses which by law, and the nature of their business, are required to maintain a substantial amount of information on their clients (typically exempted companies, limited partnerships, trusts and other financial vehicles). This information will often include, but is not limited to: documents providing details of ultimate beneficial ownership, including KYC information; corporate records, trust deeds and other governing documents; financial records; client communications, instructions, invoices and payment receipts; and information on directors, officers and other third-party service providers engaged by the subject entity

The Norwich Pharmacal jurisdiction has existed since 1973 however has become particularly utilised, with much success, in offshore jurisdictions in recent years. The BVI courts have been granting Norwich Pharmacal orders on a regular basis for years. The Cayman Islands have seen a marked increase in this type of order in recent years. This may be due to recent case law clarifying that compliance with an order does not require a separate application by the respondent under Cayman's confidential information disclosure laws, thereby making the process more streamlined and efficient. Although Bermuda is yet to produce a reported decision granting Norwich Pharmacal relief, the availability of such relief has been cited with approval.

Recent examples in which Harneys have obtained Norwich Pharmacal relief include:

- Obtaining substantial disclosure for a Brazilian trustee in bankruptcy from Cayman and BVI corporate and fiduciary service providers. The disclosure allowed the trustee to complete the chain of beneficial ownership to establish the debtor's ownership of assets of substantial value, which he had attempted to conceal from his creditors
- Obtaining a Norwich Pharmacal order in the Cayman Islands for Arcelormittal USA LLC, to assist in the enforcement of a \$1.5bn arbitral award against the Essar Steel group of companies
- Successful disclosure applications in BVI to assist the trustees in bankruptcy of a number of banks that had gone into liquidation as a result of fraud, including Banco Cruzeiro do Sul
- Confirming, through a successful Norwich Pharmacal application, the ownership and control of a BVI company registered as the owner of a São Paulo office block, enabling the Brazilian

lawyers to freeze one of the most valuable pieces of real estate in Brazil

Assistance provided to foreign bankruptcy appointees

In addition to the information gathering powers afforded to private litigants generally, foreign bankruptcy appointees are aided by the ability to gain 'recognition' in Bermuda and/or Cayman. Recognition is the process by which the offshore Courts recognise the onshore appointment of a bankruptcy appointee over the affairs of a debtor such that it is as if they had been appointed by the local Court.

Once recognised, the foreign appointee is able to avail him or herself of the assistance of the local Courts and the powers generally available to locally appointed liquidators. The foreign appointee will be able to exercise all local powers whether or not the same power is available to the bankruptcy appointee in the jurisdiction of appointment.

These powers generally include:

- The power to compel persons in possession of company property, including documents and other information, to deliver the property to the bankruptcy appointee
- The power to compel persons suspected of having company property to attend an oral examination conducted by the bankruptcy appointee under oath

Although general recognition of foreign bankruptcy appointees is not available in BVI, assistance on an application-by-application basis is available to insolvency officers appointed under the laws of a number of specified jurisdictions. These jurisdictions include USA, UK, Hong Kong amongst others. While no Latin American jurisdictions are specified, it may be possible for LatAm bankruptcy appointees to obtain assistance from the BVI Courts if the appointee has been recognised in one of the specified jurisdictions, for example, pursuant to Chapter 15 in the USA.

Taking stock

When one considers the totality of information available in Bermuda, BVI and Cayman, it is not difficult to see that any perception of these jurisdictions as clandestine hideouts for fraudsters is entirely misplaced. Leaving aside the substantial corporate information that is maintained, and generally made public, the Courts in these jurisdictions have a proven track-record of assisting the victims of fraud by (i) making robust use of the information gathering tools available, particularly the Norwich Pharmacal jurisdiction, and (ii) providing

assistance to foreign bankruptcy appointees so as to ensure a seamless onshore-offshore transition. As such, and in light of the prominence of Bermuda, BVI and Cayman entities in global financial structures, asset-tracers will be well-advised to conduct offshore investigations as early as possible.

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