



Offshore Forensic Investigations and Asset Tracing

Introduction

Offshore companies incorporated in jurisdictions such as the British Virgin Islands (BVI) and the Cayman Islands (Cayman) are used all over the world by businesses and individuals of diverse interests and backgrounds. They are trading companies and holding companies. They stand on their own or are part of structures of varying complexity. In any event, they are very popular and it is not unusual for a liquidator in a multi-jurisdictional liquidation or a claimant tracing assets over international borders to encounter an offshore company. One intriguing feature of many offshore companies is that they do not have to make a public disclosure of their register of members or register of directors and in practice, most offshore companies do not. Consequently, there is now a myth that when liquidators and/or claimants encounter an offshore company in the course of an investigation, they have reached an impenetrable brick wall. While it is true that neither offshore legislative regimes nor judicial practices tend to favour a breach of what is otherwise confidential information, and/or gratuitous information-gathering exercises, they do provide a number of options for discovering information about the offshore company provided the right circumstances exist. Such options are the tools of the forensic liquidator and asset tracer alike.

Information

Typically, offshore companies are required by the law of the jurisdiction where they are incorporated to keep certain information (whether in written and/or electronic form). In the BVI and Cayman, for example, companies are required to keep their memorandum and articles of association, register of members, register of directors, copies of notices filed at the Registry, copies of all resolutions and minutes of all meetings of directors, members, committees of directors, committees of members, an imprint of the common seal and financial records sufficient to show and explain the

company's transactions and that will enable the financial position of the company to be determined with reasonable accuracy.

The BVI Business Companies Act (BVIBCA) requires that copies of all of these records except for the financial records have to be kept at the registered office of the company within the BVI. The Companies Law of the Cayman Islands (CLCI) requires only that the register of directors and officers and register of mortgages be maintained at the registered office.

Disclosure

Even though a good bit of information may be available at the registered office this information cannot usually be accessed by persons who do not have an ownership or management interest in the company except in very exceptional circumstances¹, and even then it is still subject to the discretion of the directors, albeit challengeable in Court.

Of course, when proceedings are commenced against a company registered in BVI or Cayman, the local court can require full disclosure of relevant information.

Registered Agent/Office as a Third Party

In certain cases, however, the identities of all wrongdoers are not known by the claimant. Thus, it may be useful to consider the duties of the registered agent. Further, not every Company is compliant with its duty to keep records, which is another reason why it can be very useful to turn to what the agent itself is obliged to do. The registered agent of the company is required by law to carry out a certain standard of due diligence in respect of each company in its portfolio, which includes obtaining information on beneficial ownership of each company. That duty is only delegable in limited circumstances and so, at risk of being in violation of statute within the jurisdiction in which it operates, the Registered Agent is a good target for information and relief ordered by the Court.

¹ Both directors and members have a right under BVI law to inspect certain records of the company. In the case of a director, this right extends to all the records of the company. In the case of a member, this extends only to constitutional documents, the registers of members and directors and the minutes of meetings and resolutions of those classes of members of which he is a member. Failure by the company to give effect to these inspection rights can be enforced by a court order.

Disclosure Orders

In appropriate cases, a *Norwich Pharmacal Order*, which requires a third party to disclose documents, may be obtained against the registered agent of a BVI or Cayman company. These orders are made in an expanding number of cases where information could assist in proving that the person against whom the order is sought knows the identity of an alleged wrongdoer.² In both jurisdictions, the court is very careful to make sure that this regime is not abused so that, for example, an order will not be made where the identity of the wrongdoer is already known or disclosed from another source. However, this weapon in the armoury of pre-action information where there is no specific court rules permitting such disclosure, is the Court's equitable jurisdiction to assist those who may be wronged in getting to a position where they may be able to get relief from such wrongdoing.

A disclosure order can also be made against a BVI and Cayman company where a freezing order has been made against it by the Court. Restrictions are usually placed on the use of information obtained in this way to ensure that it is not used for any purpose other than in the proceeding in which the order was made.³ Ancillary disclosure orders to such injunctions mean demands for information can be backed by a very real threat of contempt proceedings and, as a tool to recover vital information in the tracing of assets, is invaluable.

Receivers

There have also been cases (albeit rare) where the BVI or Cayman courts have granted an interim receivership order to assist in securing assets of a company pending trial. In such a case, an officer of the Court seeks out the assets of the company and takes what steps he thinks are necessary to secure them. In order to make such an order the Court will have to be satisfied that the circumstances to justify a freezing order exist and that the additional protections afforded by a receivership order and any potential prejudice to the Respondent can be justified in the circumstances of the case.

² The practical application of the order in Cayman must be considered in the light of the Confidential Relationships (Preservation) Law, whereby it is a criminal offence to disclose confidential information in certain circumstances. In consequence, before a third party acts on an order to give disclosure, it is first obligated to apply to the Court to seek directions in connections with such disclosure.

³ Recent developments in the BVI suggest that the circumstances in which a freezing order can be sought without the need to bring main proceedings are expanding

Investigations

The BVIBCA and CLCI also make provision for a member⁴ to apply to the Court for an investigation order in certain cases of fraud. Here, the Court has a wide range of powers including authorising the inspector to enter premises, requiring any person to produce documents or records, conduct hearings and prepare a report which is to be sent to any person the Court designates.

International Cooperation

Insolvency

Courts may make certain orders in aid of foreign insolvency and reorganisation proceedings from certain designated countries. These orders include orders to restrain proceedings, for delivery up of property to a foreign representative, for appointment of an interim receiver, to stay, terminate or make any order in relation to a local insolvency proceeding and to make such other order or grant such relief as the Court considers appropriate. In practical terms, this provision can be of great assistance when a liquidator is appointed over a BVI or Cayman company in a foreign jurisdiction. If not available, the liquidator would be well advised to seek a local liquidation order as a matter of priority but he may also need to cooperation of the local Court to otherwise facilitate the liquidation.

Foreign Proceedings: Evidence, Judgments and Service of Documents

In appropriate cases, it is also possible to use the provisions of the *Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 1970* as enabled by the laws of the BVI and Cayman to get a court order such as for the examination of witnesses locally, for the production and inspection of documents and for the preservation, custody or detention of property. Orders from certain countries can be enforced through the provisions of local statute or by an action on a foreign judgment. Service of foreign process is routinely done by local firms and process servers and through the *Convention on Service Abroad of Judicial and Extra-Judicial Documents*.

Conclusion

Typically, the law and practice in offshore jurisdictions such as the BVI and Cayman strives to strike a fair balance between liberty on the one hand and justice on the other. It encourages diversity in the use of offshore companies but discourages sharp practices and, in so doing, has available tools to assist in bringing wrongdoers to account while protecting legitimate business from malicious interference.

⁴ Under the BVIBCA, the Registrar may also bring the application.



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