

Not-so-secret 'secrecy' jurisdictions: information that can be obtained in connection with potential litigation

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Both the Cayman Islands and British Virgin Islands (BVI) are often viewed as "offshore hubs of secrecy", with information about a company being considered impossible to obtain. In fact, it is possible to obtain far more publicly available information than many people realise and both jurisdictions have extensive information gathering and asset preservation tools to assist third parties to find out more about a company, its assets and/or its financial position in connection with potential litigation.

Publicly available information

In the Cayman Islands and BVI, it is possible for various searches to be run, quickly and easily:

1. A search on the online companies registry (Cayman Online Registry Information Service in the Cayman Islands; Virtual Integrated Registry and Regulatory General Information Network in the BVI) will reveal certain information about a company, including the date on which the company was incorporated; the name and address of its registered office; its current status (i.e. whether it is active, struck-off or dissolved); the type of entity; and in the BVI, share/capital information.
2. Recent developments now allow a search to be made for the current directors of an active company.
3. If a company is suspected to have been involved in litigation or (for example) the subject of a winding up petition, an online search can be conducted for originating processes and any judgments or orders given in those proceedings.
4. Both Cayman and BVI have registered land and searches may therefore be made on a parcel of

land to confirm ownership.

5. Both Cayman and BVI have maritime registers in relation to which the ownership of vessels may be checked.

In the BVI, it is possible to obtain certain documents from the BVI Registrar, including the certificate of incorporation and any certificate of change of name; the memorandum and articles of association and any amendments or restatements. If the BVI company has elected to make the following publicly available, it would also be possible to obtain the Register of Directors, Register of Members and the particulars of security created by the company over any of its assets.

Beyond this, in order to obtain further information about a company and its assets, there are a number of potential Court applications which could be made, which we discuss below.

Norwich Pharmacal orders

A powerful discovery tool is the *Norwich Pharmacal* jurisdiction, which allows an applicant to obtain disclosure from a third party who has become "mixed up" in wrongdoing.

In the Cayman Islands and the BVI, exempted companies (for example not companies that conduct only local business) are required to have a registered office and a registered agent physically present in the Islands. The registered agent handles the basic administration of the company and all of its filings and will therefore hold a substantial amount of information about that company, including KYC, beneficial ownership information and corporate records. This makes such service providers prime targets for *Norwich Pharmacal* applications, particularly given that the Courts have accepted that the mere fact of being the registered agent is sufficient to establish that the services provider was "mixed up" in the apparent wrongdoing.

Both the Courts of the Cayman Islands and BVI have taken a broad and flexible approach to granting *Norwich Pharmacal* orders, and in recent years, such applications have been used in novel situations, including to assist applicants to decide whether or not there is a sound basis for bringing proceedings, and to obtain information in order to enforce a foreign arbitral award overseas. It is also possible to obtain *Norwich Pharmacal* relief in Cayman and the BVI notwithstanding those jurisdictions having statutory regimes for obtaining evidence for use in foreign proceedings. This is an important departure from the position in the Courts of England and Wales.

Bankers Trust orders

Another powerful discovery tool is a *Bankers Trust* order, which allows a party to obtain discovery from banks (or other fiduciaries) where there is a *prima facie* case of fraud, and disclosure is required in order to trace and preserve assets in support of a proprietary claim.

A *Bankers Trust* disclosure order is generally granted in exceptional circumstances, where the

applicant is able to satisfy the Court that there is compelling evidence that the applicant was defrauded or otherwise wrongfully deprived of its assets; that there is good reason to believe that the assets held by the third-party institution belong to the applicant; delay may lead to dissipation of the assets; there is a real prospect that the disclosure sought may lead to the location or preservation of the assets; and the information disclosed will be used only for tracing the applicant's assets.

Ancillary disclosure orders in support of injunctive relief

The Cayman and BVI Courts recognise that disclosure has long been a standard feature of freezing orders and that it is the imposition of disclosure obligations that really makes the order effective, enabling the applicant to see, and if necessary, take further steps to protect the assets claimed.

In order to obtain a freezing injunction and ancillary disclosure order in support of local proceedings, an applicant must show: (i) it has a good arguable case for damages on the merits; (ii) that there is a real risk that, unless restrained, the respondent will take steps to dissipate the assets to avoid enforcement of any judgment against it; and (iii) that it is just and convenient in all the circumstances for the injunction to be granted.

It is now also possible to obtain a freezing injunction, and ancillary disclosure orders, in support of foreign proceedings. In the Cayman Islands, this jurisdiction was placed on a statutory footing in 2014, and in the BVI, by way of amendment in 2021.

In order to obtain this relief, an applicant needs to establish: (i) that there are foreign proceedings (actual or prospective); (ii) which give rise to a judgment which would be enforceable locally; and (iii) that there is a good likelihood of assets within the jurisdiction. If that can be established, and the criteria for seeking injunctive relief is met, the court will then consider whether it is "unjust or inconvenient" (in Cayman) or "inexpedient" (in the BVI) to grant the order. In practice the exercise will always be fact sensitive and the considerations (principles of fairness and convenience) are likely to be the same.

From a practical step, even if the disclosure reveals that there are not, in fact, any assets in the jurisdiction this does not vitiate the injunction and the disclosure may reveal other jurisdictions in which assets are held (or have been moved to).

Conclusion

In addition to obtaining information which is publicly available about a company, the Courts in Cayman Islands and BVI will assist victims of wrongdoing to obtain information they need to support a claim and/or trace assets, often relatively quickly.

For further information or assistance with information gathering tools in the Cayman Islands

and/or BVI, please reach out to your usual Ogier contact or one of the authors of this article.

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