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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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One of the common themes consistent throughout offshore frauds that occur is that the assets themselves are not offshore. Fraudsters rarely leave big sums in bank accounts offshore just to earn minimal interest. They want to enjoy the fruits of their fraud, be they luxury homes, private planes, yachts, or even expensive private education.

However, the use of offshore entities to obscure the ultimate beneficial owner or fraudster is still prevalent, and the information held offshore is often critical to asset tracing and recovery.

The Cayman Islands has been referred to as a haven for fraudsters due to its perceived bank and incorporation privacy; however, the Cayman Islands' status as a leading international offshore banking and financial centre often generates actions before the Grand Court involving complex issues, financial disputes and the recovery of substantial assets for creditors or victims of fraud.

The body of legislation in the Cayman Islands is derived largely from English law, supported by English common law precedent. Thus, as in other common law jurisdictions, there are a number of legal remedies for the disclosure of information and to prevent the dissipation of assets.

However, every fraud investigation and asset recovery case has its own unique nuances, and to be an asset recovery "expert" is based on a unique understanding of which strategy or legal remedy is best suited to a particular situation. Certain situations may call for letters rogatory or the use of bilateral treaties, whilst others may call for private civil action or arbitration in a financial dispute. Insolvency mechanisms can also be used when a claimant seeks an order to appoint a provisional liquidator to secure the remaining assets for the benefit of creditors, particularly in cases where fraud or misconduct is alleged.

Recovering assets for the victims of fraud, is often vastly more complex than attempting to recover assets for a simple debt judgment, particularly where fraudsters have sought to subvert the ultimate destination of funds with the assistance of unethical facilitators. When assessing a case and a potential asset recovery strategy, it is critical to select the remedy that has the greatest opportunity to bring in recoveries. It is also important to select a team that understands the nuances of "offshore", the local jurisdiction, and is someone whom the court respects. What options are available will depend on a number of factors and it is key to ensure that you are receiving advice based on your counsel's broader knowledge and experience of asset recovery, and not, for example, based only on their expertise in recovering assets within an insolvency context. Asking for an advisor's experience in asset recovery for a wide range of fraud cases will elicit such a response.

It is to the advantage of prospective plaintiffs that the Grand Court has become adept at

leveraging the tools available to it in both criminal and civil mechanisms to permit the restraining and recovery of assets; as noted by FBI Acting Deputy Assistant Director (Criminal Investigative Division), Steven M. D'Antuono, who recently discussed before the US Senate Banking, Housing, and Urban Affairs Committee in May 2019 the "immense value" of beneficial ownership information shared by United Kingdom Overseas Territories and Crown Dependencies, including the Cayman Islands. Further, the Cayman Islands has demonstrated its capabilities in a number of high-profile civil recovery disputes, including *Ahmad Hamad Algosaibi & Brothers Company (AHAB) v Al-Sanea & Ors*, *Carlyle v. Conway*, various recovery actions for and against various feeder funds to the Ponzi scheme perpetrated by *Bernard L. Madoff Investment Securities LLC's* ("BLMIS") in 2009, the *Sphinx Group of Companies* and *Sextant Strategic Global Water Fund Offshore Ltd. et al.*

Thus, where it is believed that the perpetrators have used corporate vehicles in the Cayman Islands to conceal their proceeds of fraud, the Grand Court can be considered an advantageous forum for the application of legal remedies to assist in the tracing and recovery of stolen assets.

Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

The Cayman Islands' status as a leading international offshore banking and financial centre often generates actions before the Grand Court involving complex issues and substantial assets.

The body of legislation in the Islands is derived largely from English law, supported by English common law precedent. The Grand Court is a Superior Court of Record of First Instance, having unlimited jurisdiction in both criminal and civil matters. As such, it exercises within the Cayman Islands similar jurisdiction as is vested in or capable of being exercised in England by Her Majesty's High Court of Justice and its divisional courts.

Judges of the Grand Court are appointed from amongst persons who must have the same qualifications as required for appointment to the English High Court of Justice or Courts of equivalent jurisdiction throughout the Commonwealth of Nations. In addition to the purely judicial functions, the Chief Justice is also the Central Authority for the purposes of the Mutual Legal Assistance Treaty (MLAT).

The Grand Court has a specialist Financial Services Division, which deals with cases concerning mutual funds, exempt insurance companies, financial services regulatory matters, trusts, corporate and personal insolvency, enforcement of foreign judgments and arbitral awards, and applications for evidence pursuant to letters of request from other jurisdictions.

Appeals from the Grand Court are heard in the Cayman Islands Court of Appeal, which generally sits three or four times a year. The Court of Appeal has a bench of approximately six justices of appeal, all of whom are recruited from outside the Islands and are usually sitting or retired superior court judges or justices of appeal from other Commonwealth nations. Appeals from the Court of Appeal are to the Privy Council in London.

As a common law jurisdiction, the main causes of action include the following:

- breach of contract;
- fraud;
- tort; and
- suit in equity (e.g., unjust enrichment).

Generally, the time frame imposed by the Limitation Law (1996 Revision) for bringing civil claims in tort (apart from defamation and personal injuries) and contract is six years from the date of accrual of the cause of action. Time limits may be extended in cases of fraud or deliberate concealment of the facts giving rise to a claim. As in other common law countries, it may be possible for a claimant and a defendant to mutually agree to a 'standstill', which would extend the statute of limitations. This may provide the defendant advance notice that the claimant will file a claim and therefore allow both parties an opportunity to resolve their differences without the limitations period becoming an issue.

There are no formal or mandatory pre-action steps that must be undertaken prior to the issue of proceedings, although most civil cases are commenced by the issue of a writ by the plaintiff or commenced by an originating summons.

Use of disclosure remedies

there are a number of legal remedies for the disclosure of information and to prevent the dissipation of assets.

Norwich Pharmacal order

A Norwich Pharmacal order is typically pre-action and is granted against a third party that has been innocently mixed up in wrongdoing, to force the disclosure of documents or information, which may identify another person (for example, a wrongdoer or a potential beneficiary), or to identify the nature of the wrongdoing, both of which may be the subject of subsequent legal proceedings.

To the extent the disclosure identifies additional wrongdoing by the third party, it may be possible

to use those documents, but that cannot be the purpose for which they were sought. Moreover, one can, where appropriate, apply for a 'gag order' when seeking disclosure, which directs the party not to disclose that they have been ordered to provide information to a third party. This is particularly helpful where the respondent is a bank or a professional who may have duties to give notice to their clients of such matters.

However, as in England & Wales, in order to obtain a Norwich Pharmacal order, applicants will need to show:

- that there is a 'good arguable case' that a wrongdoing has occurred;
- that the person against whom the disclosure request is sought is involved, albeit possibly innocently, in the wrongdoing as more than a mere witness;
- that the respondent is likely to have the information sought (i.e., it is not a fishing expedition); and
- that the order must be necessary and proportionate, and in the overall interests of justice.

Bankers Trust order

As the name implies, Bankers Trust orders are used to obtain information from banks. Following *Bankers Trust v Shapira* (1980) 1 WLR 1274, the court can order discovery when there is good reason to believe (e.g., as a result of tracing) that property held by the bank is, in fact, the property of the claimant and when documents produced by the bank will be used solely for the purpose of tracing money and not for any other purpose. It does require that the claimant gives an undertaking in damages, and the claimant to undertake to pay any and all expenses resulting from the bank giving discovery.

Interim relief

Interim relief to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud are available through Mareva injunctions (freezing orders) to prevent dissipation of assets and Anton Piller orders.

Mareva injunction

Mareva injunctions freeze the assets of a party pending further order or a final resolution of the court. To the extent the respondent is in a common law jurisdiction and he or she seeks to move or transfer assets without approval of the court, he or she can be found in contempt and, in some extreme cases, be denied the ability to provide a defence until he or she complies.

In addition, a Mareva injunction will normally compel an accounting from the respondent of his or her assets. However, the court can require that the party applying for the order provide security or a bond, also known as a cross-undertaking. The rationale for this is that because it is such a draconian remedy, if the claim is not successful then the respondent may be entitled to damages for financial or reputational loss caused by having the injunction placed upon him or her.

Anton Piller order

An Anton Piller order can be obtained providing the right to search premises and seize evidence that is the subject matter of the dispute *ex-parte* (without warning the defendant). It can prevent the destruction of relevant evidence, and is particularly useful in ensuring electronic evidence on computers or mobile devices is preserved. In order to obtain an Anton Piller order, the following must be demonstrated:

- that there is *prima facie* evidence of the wrongdoing;
- that the potential or actual damage is very serious;
- that there is clear evidence that the respondent has incriminating evidence in his or her possession; and
- that there is a real possibility the respondent may destroy this material if he or she were to become aware of the application.

Insolvency

The use of insolvency processes and/or the court appointment of a receiver (particularly in jurisdictions that follow common law) can be particularly advantageous in investigating cases of fraud, corruption or misappropriation of assets. Whilst perhaps not foremost in the minds of many, it is a tried and tested method, and is appropriate for both insolvent and solvent companies. As in the case of a solvent company, it would be considered in the public interest for the company in question to be wound up, having been complicit in, or used as a vehicle for, fraudulent misconduct. In addition, as a stakeholder in the liquidation, fraud victims have a greater level of insight into the investigation and strategy being employed.

Thus, if a fraud has been perpetrated, the applicant or victim can seek to have a company wound up on a "just and equitable basis" by the court, particularly if it believes that it is necessary to prevent the dissipation or misuse of the company's assets. Once a liquidator is appointed, he can secure the remaining assets for the benefit of creditors and commence an investigation into the circumstances of the fraud. Often an application for a just and equitable winding up can be made *ex-parte*. Such an application is often used to avoid any "tip off" to the fraudsters which can lead to the further dissipation of assets, and has

been used in the Cayman Islands for a number of high-profile cases.

Insolvency proceedings begin by petition. It is the plaintiff's (or petitioner's) responsibility to serve the other parties with the originating process once it has been issued by the court office. Within insolvency mechanisms a useful cause of action available to a liquidator, under statute and with the authority of the court, is the ability to challenge transactions that have not benefited the company, such as unfair preference claims (e.g., gifts or transactions to related parties), wrongful or fraudulent trading and transactions at undervalue; these remedies are only available within the context of a liquidation.

Case triage: main stages of fraud, asset tracing and recovery cases

In assessing a case and the asset recovery strategy, it is critical to select the remedy that has the greatest opportunity to bring in recoveries. Litigation is not a guarantee of asset recovery, even with a successful judgment; however, working in conjunction with legal counsel is critical for reasons of privilege and to ensure proper legal advice is received regarding the strategy. What options are available will depend on a number of factors:

1. What information is already available, and which may help in finding further information. For example, are you looking for information to assist with proving the fraud, information on assets, to depose a potential witness/target, pursue an asset or potentially litigate against another party?
2. Where do the fraudsters reside or operate? Where do they spend their time? How do they live?

   The more information is available about the fraudster the easier it is to identify what may be the easiest assets to recover initially, and therefore the potential targets for information and assets.
3. What jurisdictions are you considering, and in particular whether they are civil law or common law?

There is often a logical order to pursuing assets, as evidence from one jurisdiction may be necessary to provide evidence to pursue an asset in another jurisdiction. There may be certain local legislation or nuances that legal counsel will need to navigate.

Whilst each fraud investigation and asset recovery assignment will be unique in what information and documentation is available, ideally the first port of call is the marshalling preserving and documenting of any evidence that does exist, including all email, electronic and financial data. A review of emails and working documents through key word searches on an e-discovery platform may reveal intentional conduct, consciousness of guilt, plans to defraud or unknown businesses or shell companies. Examination of financial data will help determine the flow and destination of funds and therefore assets, using proprietary data analytical tools to identify outliers and anomalies.

Sometimes the starting point will be based on an investigation of publicly available information only. Depending on the jurisdictions identified we will undertake research into various information databases, such as corporate registries, litigation filings, and also review online information such as media reports, and social media profiles.

Triangulating client documentation, open source intelligence with corporate records and available publicly held documentation may reveal

related party transactions and the ultimate destination of funds. The findings in this phase will assist the team in developing a strategy for further investigation.

Once exhausted and at the appropriate juncture we may turn to appropriate discovery tools such as a Norwich Pharmacal order or Bankers Trust order (as referred to above), to get behind the wall of shell entities we have been unable to penetrate or to obtain additional information on the flow of funds. With sufficient investigative work, the next stage will normally be the service of the claim.

Parallel proceedings: a combined civil and criminal approach

Parallel proceedings in civil and criminal matters that are based on the same set of facts are permissible; however, a court may stay a civil proceeding if a defendant would be unjustly prejudiced by providing information in said proceeding that may incriminate him or her in future or current criminal proceedings.

Of instructive authority is the case of *Panton v Financial Institutions Services Limited* [2003] UKPC 8, in which the Privy Council concluded that in order to obtain a stay of parallel civil proceedings, the defendant would have to show that he or she would suffer unjust prejudice in the ongoing criminal proceedings if they were to continue, taking into account competing considerations between the parties.

The burden of proof (should there be a stay in proceedings) will lie with the defendant, who must point to a real and non-notional risk of injustice: 'A stay would not be granted if it was deemed to be simply to obtain a tactical advantage by a defendant in criminal proceedings.'

The Director of Public Prosecutions is the only person formally entitled to bring criminal asset recovery proceedings and, as such, private prosecutions or class action suits are not available in the Cayman Islands.

Key challenges

A challenge for victims of fraud is the ever increasing costs of funding a claim, particularly for victims who have lost significant, and life-changing sums. Whilst in recent years there has been an increase in litigation funding to assist in bringing a claim to fruition, in the Cayman Islands, traditionally, the Grand Court has restricted funding for insolvent liquidation estates; Liquidators have a statutory power to sell the 'fruits of an action' to a third-party funder, subject to the approval of the court.

Although the doctrines of maintenance and

champerty have yet to be formally abolished in the Cayman Islands, the court in *A Company v A Funder* (November 2017), being mindful of the law of maintenance and champerty in other common law jurisdictions, concluded that overall, a proposed funding agreement was legitimate on the basis that "*it did not corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse*" (J Segal). The court will consider, in particular, the relationship between the funder and the claimant, and the ability of the funder to control or interfere with litigation strategy.

In my personal view, I would like to see it more readily available for third-party funders to assist in bringing claims, which would otherwise not see the light of day due to the financial constraints of fraud victims. The financial impact of fraud does not just apply to individuals, but to entities too; fraud can have debilitating effects on a company; on its profits, consumer confidence, and in severe cases its reputation and the cutting of its workforce or its entire collapse. Allowing fraudsters to enjoy the spoils of their illicit gains whilst innocent victims are left to deal with the devastating repercussions cannot be a just or equitable outcome.

Cross-jurisdictional mechanisms: issues and solutions in recent times

The Grand Court recognises the need to respect and cooperate with judges in other jurisdictions and commands similar respect in return. As a result, cross-border asset recovery in the Cayman Islands, particularly when dealing with other common law jurisdictions should not faze a victim if considering whether to pursue stolen

assets. However, some caution may be necessary if the need to recognise orders or deal with civil law countries arises.

Both the Grand Court and the Court of Appeal have referred to the well-known English decision in *Rio Tinto Zinc Corp. v Westinghouse*, in which the English court observed that *"it is the duty and pleasure of the English court to do all it can to assist the foreign court, just as the English court would expect the foreign court to help it in like circumstances"*. Indeed, the Grand Court has consistently adopted that approach. High-profile examples of cross-border cooperation include the case of *Bank of Credit and Commerce International (BCCI), Ahmad Hamad Algosaibi & Brothers Company (AHAB) v Al-Sanea & Ors, Carlyle v. Conway*, various feeder funds to the Ponzi scheme perpetrated by *Bernard L. Madoff Investment Securities LLC's* ("BLMIS") in 2009, the *Sphinx Group of Companies* (with investor claims exceeding US$730 million and assets in the estate amounting to US$530 million) and *Sextant Strategic Global Water Fund Offshore Ltd. et al.*

The Grand Court can also use any of the common law tools to order the disclosure of documents for use in proceedings in another jurisdiction to assist with asset preservation and evidence gathering, including those referred to above: Norwich Pharmacal and Bankers Trust orders, Mareva injunctions and Anton Piller orders. Although it should be noted that a "person" cannot be compelled to give any evidence under an order that they would not have been compelled to give in civil proceedings in the Cayman Islands or in the country where the requesting court exercises its jurisdiction.

Information can also be obtained through courts in other jurisdictions under The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 subject to their being a contracting state party.

When dealing with criminal matters, whether in support of matters overseas or originating from the Cayman Islands, the main avenue for provision of assistance by the Cayman Islands is the Under the Criminal Justice (International Cooperation) Law (2015 Revision) (CJICL). When assisting in investigative matters from other countries, mutual legal assistance is to be provided at the investigative stage of a matter where the conduct would constitute an offence in the Cayman Islands. The registration or enforcement of confiscation orders made by courts of other jurisdictions is governed by the Proceeds of Crime Law (2019 Revision) (PCL). The Cayman Islands can also implement legal tools provided within any of the United Nations conventions or other international treaties to which it is party. Although dual criminality is generally a requirement in all cases, technical differences in the categorisation of offences should not pose an impediment to mutual legal assistance.

The Cayman Islands is also party to the Asset Recovery Inter-Agency Network for the Caribbean (ARIN-CARIB), launched in 2017 to establish a network of contact points in the region and focus on all aspects of asset recovery activities and assistance. The network is an informal cooperative group used among member countries for the expedient sharing of information, and use of multiple tools to trace, freeze or seize assets of an international criminal organisation. This can be useful for the process of asset recovery in providing information that can be used in a formal mutual legal assistance or letter rogatory process.

The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (EPOJ) enables the Grand Court to provide assistance to foreign courts in obtaining evidence in both criminal and civil cases. Requests are made through letters rogatory and can be requested by any country. As a successful example of a matter involving letters rogatory, the Cayman authorities acted proactively in the matter of Vladimiro Montesinos, the former chief of intelligence and main advisor of former Peruvian President Alberto Fujimori, and who is serving multiple sentences for human rights crimes, corruption and arms and drugs trafficking. Former president Alberto Fujimori is himself serving a 25-year sentence for corruption and authorising death squad killings (Published on – StAR Stolen Asset Recovery Initiative – Asset Recovery Watch

(2017)). The authorities took "*recourse to restrain the money itself in rem out of concern that the local laws were also being violated, instead of awaiting a judgment in personam which may never have been forthcoming because of the fugitive status of the perpetrator and which would have to be also enforced to recover the proceeds which would have no doubt taken flight within the restraint*". This action resulted in the repatriation of some $44 million dollars to Peru, without a trial between the parties having to take place (see the Cayman Islands Government webpage on Enforcement of Judgments in Practice).

Finally, in relation to cases which have utilised the insolvency mechanism for asset recovery, the Chief Justice in May 2018 issued a new Practice Direction to strengthen court-to-court cooperation in cross-border insolvency and restructuring cases, being the guidelines adopted in the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases and the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. Whilst the Cayman Islands has not adopted the UNCITRAL Model Law, it should be noted further work is being undertaken by UNCITRAL to improve the recognition of asset tracing and recovery mechanisms between common and civil law jurisdictions, which may be beneficial for awards obtained in the Cayman Islands (https://uncitral.un.org/en/assettracing, an invitation only event for experts to: (a) examine both criminal and civil law tracing and recovery with a view to better delineating the topic while benefitting from available tools; (b) consider tools developed for insolvency law and for other areas of law; and (c) discuss proposed asset tracing and recovery tools and other international instruments. This author was one of the experts invited to participate).

Technological advancements and their influence on fraud, asset tracing and recovery

Investigative technology continues to improve with the advancement of automated and machine learning software, innovative use of algorithms to identify anomalies, outliers and previously difficult to obtain information, and the improvement of document management systems and e-discovery platforms; all of which assist the investigation teams to analyse massive amounts of structure and unstructured data which can be presented to end users and, in particular, the court in a robust and defensible way.

Specifically, to the Grand Court, it has video conferencing equipment in many of its court rooms to enable, in appropriate circumstances, the cross-examination of foreign witnesses and hearings to be conducted by advocates in different time zones. This was particularly demonstrated in the case of *Ahmad Hamad Algosaibi & Brothers Company v Saad Investment Company Limited and Others,* in which a 129-day trial was conducted. During the trial, software allowed for a live audio feed and a real-time transcript that was simultaneously accessible around the world. In court, the legal team and the judge had access to electronic trial bundles with 'personalised' versions of marked up documents displaying evidence which included over 250,000 documents for consideration.

The Cayman Islands has recently developed as a jurisdiction of choice for companies conducting token generation events or ICOs (Initial Coin Offerings) including the largest ever ICO to have taken place in 2018, with USD$4.1 billion raised. Whilst no specific legislation has been passed by the Cayman Islands Government as yet, the Ministry of Financial Services warns that "*persons engaged in virtual asset services in or from within the Islands are therefore reminded that they are subject to, and are required to comply fully with, the provisions of the AMLRs and all other applicable laws".*

As such, any case of fraud relating to an ICO, token sales, token exchanges, that took place in the Cayman Islands, would be subject to the current regulatory and legal framework as per the below:

- The Monetary Authority Law.
- The Securities Investment Business Law.
- The Proceeds of Crime Law.
- Anti-Money Laundering Regulations.
- The Mutual Funds Law.
- The Electronic Transactions Law.

In addition, recent FATF recommendations regarding the regulation and supervision of virtual assets and the provision of virtual asset services urge countries and obliged entities to comply with its recommendations to prevent misuse of virtual assets (VAs) for ML and terrorist financing; the Cayman Islands is a member of the Caribbean Financial Action Task Force (CFATF).

However, some key challenges with dealing with cryptocurrency frauds, in particular the use of "mixers" to launder money remain; although it should be noted that those challenges are not limited to the Cayman Islands. For example, "mixers" which are used to try to prevent such tracing, by making it difficult or impossible to identify the source of a transaction, can obfuscate the tracing of funds. The basic premise of a mixer is the pooling of cryptocurrency, and then taking back coins of the same value but which will have originated from a different source (or sources) than the ones they brought to the mixer. Ultimately, users are relying on the mixer service or exchange not to disclose the source of each bitcoin or any information about its users. Currently, it is estimated that around $2.5 billion has been laundered through cryptocurrency from proceeds of crime, although that is dwarfed by the approximately $1 trillion per year is laundered in fiat currency (Bitcoin Money Laundering Statistics (2020 Updated)).

Recent developments and other impacting factors

In the case of *Ahmad Hamad Algosaibi & Brothers (AHAB) v Saad Investment Finance Corporation Ltd and Others*, 2018, the Grand Court held that although the law may infer necessary transactional links to give rise to a tracing claim where there is a scheme 'specifically designed' to subvert the ability of creditors to recover misappropriated funds, the general rule remains that it is necessary to establish a chain of transactions to trace funds.

The Court then went on to make a number of other important observations for the law of tracing, in particular with regard to jurisdiction where it held that given the alleged misappropriations took place in Saudi Arabia, the proper law governing AHAB's equitable claims was Saudi law. As Saudi law does not recognise a proprietary remedy in these circumstances, it was not possible for AHAB to establish a proprietary base on which to establish its tracing claim.

Thus, dealing with a lack of appropriate legislation in the originating country may be an issue with asset tracing claims. As such, careful consideration of a basis for a tracing claim will need to be considered.

Director Registry

Other impacting factors include the introduction of new legislation in the Cayman Islands, which grants any person the ability to inspect a new 'list of names' of the current directors of a Cayman Islands company and a list of names of the current managers of a Cayman limited liability company upon payment of a fee. Any inspection must be at the offices of the Registrar in person and will be subject to such conditions as the Registrar may impose.

Ultimate Beneficial Ownership Register

Most of the British Overseas Territories have announced their intention to introduce a public register of beneficial ownership once the European Union countries establish their own public registers. In the interim, service providers in the offshore jurisdictions are updating their current records and in some jurisdictions, there is a new requirement (for instance the Cayman Islands) that the register of members specify, with respect to each category of shares, whether such category of shares carries voting rights and, if so, whether such voting rights are conditional.

Economic Substance Law

The Cayman Islands, along with most other British Overseas Territories have also brought in legislation that requires certain entities incorporated in those jurisdictions to have demonstrable economic substance in those jurisdictions. "Relevant entities" that carry on activities offshore must satisfy an economic substance test. This can include evidence that it is conducting

core income-generating activities on the Islands, that it is directed and managed in an appropriate manner on the Islands, and that having regard to its economic activity.

The legislation and guidance is yet untested and many incorporated entities are entering contracts with service providers to rent office space, retain accounting records, hold annual general meetings and carry out other local activity to address these new requirements. To the extent discovery is being considered, these requirements may provide other options for collecting relevant and useful information on the entity's operations and who controls the entity's business affairs.

The above developments in the legislation of the offshore jurisdictions means there is or will be in the future further opportunities for collecting information and relevant documents in the investigation of fraud and illicit activity. There is, however, a negative consequence of the above. We have observed various entities winding up their entities in the British Overseas Territories as owners and management consider other means to conceal or at least not make so readily available the details of directors and beneficial owners of a company. The explanation for many of these closures is cost, but it could perhaps be more sinister than that.

Angela Barkhouse is a financial crime investigator and international asset recovery practitioner with a diverse range of clients in banking, government, HNWI's, law firms and corporations. With 15 years of professional experience, Angela has investigated bribery, corruption, malfeasance, conflicts of interest, embezzlement, stolen wealth, identified stolen assets, and made cross-border asset recoveries utilising a range of asset recovery tools in support of criminal and civil litigation.

Angela has also acted as an independent expert upon international projects in anti-corruption and asset recovery, (for example on behalf of the UNDP in Tunisia) and contributes to articles and policy papers on the same. She is recognised as an expert in asset recovery by *Who's Who Legal 2019* as "tenacious" and "fearless", and for her "imaginative and innovative investigative strategies". Angela is a Fellow of the Association of Certified Chartered Accountants, a Certified Fraud Examiner and Insolvency Practitioner, and holds degrees in Applied Accounting (BSc) and Criminal Justice Policy (MSc).

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