

## Confidentiality in the BVI and Cayman Islands

The issue of confidentiality in offshore financial centres is high on the agenda in the financial press. Whether it is banking secrecy or the disclosure requirements governing the establishment of offshore companies and trusts; legislation seeking to obtain information is at odds with the long established common law duty of confidentiality.

There are entirely legitimate reasons for confidentiality when establishing BVI and Cayman Trusts structures. In this article, first published in *Private Investor* magazine in 2011, **Lawrie Kearns** of Harneys' Trusts Department reviews disclosure requirements on the establishment of BVI and Cayman Companies and Trust structures together with the rights of Trust beneficiaries to obtain information.

### COMPANY INCORPORATION

Both the BVI and Cayman have well developed companies law and responsive legislation which results in a great number of incorporations in both jurisdictions each year.

The British Virgin Islands is one of the largest centres for business company formations with in excess of 900,000 companies being incorporated since the enactment of the International Business Companies Act ("IBCA") in 1984.

The flexibility available with a BVI company have made it one of the most popular vehicles involving complex private wealth structuring and succession planning; structured finance and securitisation; IPOs and listings on stock exchanges together with joint ventures.

In January 2007, the Business Company Act ("BCA") replaced the IBCA and from 1 January 2011 it will replace the Companies Act. The BCA provides that the Register of Members, Register of Directors and all Minutes and Resolutions by the company are kept only with the Registered Agent under confidential due diligence and do not appear on the public record. In particular:

- shareholder information (Registrar of Shareholders) must be kept on file with the Registered Agent, where it is confidential and accessible only by the members of the company;
- details of the company beneficial owners, directors and shareholders are not publicly available;
- the only documents held on public record are the Memorandum and Articles of Association, and normally they do not contain any indication as to the actual shareholders, directors or the beneficial owners of the company;
- Company Management (Nominee) services can be used if the owner of an offshore IBC wishes to maintain reasonable secrecy as regards his real controlling position over the particular offshore company. A Nominee would

- effectively shield the beneficial owner of the offshore company from public scrutiny and an obvious relation to the given company;
- similarly, the services of Nominee Shareholder can be used to reach the desired level of confidentiality.

The BCA requires the company to keep records that are sufficient to show and explain the company's transactions and will, at any time, enable the financial position of the company to be determined with reasonable accuracy. These records are not public documents.

The Cayman Islands has recently enacted the Companies (Amendment) Law 2011 which enhanced the Companies Law (2010 Revision) enabling, amongst other things, Cayman Islands companies to hold treasury shares and improve the merger and consolidations regime within the structure.

With respect to confidentiality protection the legitimate interests of clients are safeguarded. The Registrar is able to release only the name, type of company, the date of registration, the address of its registered office, and the status of the company. Therefore, as with BVI companies shareholders and directors information is not available for public inspection.

Except where assistance to law enforcement agencies to combat illicit activity is mandated or authorised, disclosure of information by government officials, professional agents, attorneys and accountants and their employees is prohibited.

## **BVI AND CAYMAN TRUSTS**

Trust law in both the BVI and Cayman is based on principles drawn from English Trust law. General principles of equity apply in both jurisdictions, as supplemented by local legislation.

The Trustee Act ("TA") in the BVI was originally based upon the English Trustee Act 1925 but has been supplemented by the Trustee (Amendment) Acts 1993 and 2003.

Similarly, the Cayman Islands Trust Law 1967 is based upon the English Trustee Act 1925 with the Trust Law (2009 Revision) ("TL") being the main source of legislation.

Pursuant to the TA and TL, deeds creating trusts or other deeds executed by trustees, settlors and beneficiaries under powers and discretions contained in the trust deed do not have to be filed or registered publicly. There is a common law duty of confidentiality with the trust deed being treated as a private document. The trustee is under a duty to keep trust information confidential and has wide discretion with respect to confidentiality. Further, the fiduciary responsibilities of trustees impose obligations of confidentiality.

In many jurisdictions the duty of confidentiality has been codified. In Cayman and BVI the relevant legislation is The Cayman Islands' Confidential Relationships (Preservation) Law ("CRPL") and the BVI Banks and Trust Companies Act 1990

(Amended 1995). These acts enforce the common law notion of confidentiality. The CRPL extends the duty of confidentiality owed by a bank to its customers to other professional relationship and introduces criminal sanctions for the breach of such a duty unless disclosure occurs in accordance with the provisions of the CRPL. The CRPL recognises the duties of accountants, lawyers, bankers, government officials, and financial professionals to maintain confidentiality of the identity and business of their clients. If a person is in possession of confidential information (however obtained) and either divulges it or attempts, offers or threatens to divulge it, or willfully obtains or attempts to obtain confidential information, he will be guilty of an offence and liable on summary conviction to a fine of CI\$5,000.00 and to imprisonment for two years.

Where a trustee is in possession of relevant confidential information from a third party (i.e. where the beneficiary is not able to assert that he has a proprietary right to the information) and does not have the consent of that third party to divulge the information, then CRPL may apply. In those circumstances, the trustee should not disclose information to a beneficiary without an appropriate Court Order.

Despite the extensive confidentiality code in offshore jurisdictions such as Cayman and BVI increasingly there is a desire from law enforcement agencies to pierce the veil of confidentiality. In particular, anti-money laundering legislation and financial regulation impose an obligation on trustees to report suspicious activity. Such initiatives are designed to counteract international crime and impose criminal sanctions on trustees who do not adhere to the legislation. In addition, many International Finance Centres ("IFCs") have responded to G-20 criticism by signing up to tax information exchange agreements in order to meet the internationally agreed tax standard.

Clearly, it is vitally important for the reputation of a trustee and IFCs to demonstrate that they meet the highest possible professional standards when advising clients and discharging their duties.

## **CONFIDENTIALITY AND BENEFICIARIES**

It should also be noted that beneficiaries have the right to hold trustees accountable and as such they have a right to information, particularly should the beneficiaries have a proprietary interest in the trust property. The trustee, as a fiduciary, has a duty to account to the beneficiaries for his stewardship of the trust. This interest of the beneficiary needs to be weighed up against the confidentiality of the settlor who may have deliberately established an offshore trust due to the enhanced levels of confidentiality it offers. In particular, it may be the Settlor's wish that beneficiaries not be aware of the existence of the trust, the size of the assets or the extent of an individual's entitlement.

In Cayman STAR trusts, the beneficiaries may be persons or purposes or both. The settlor specifies in the trust instrument who has standing to enforce the STAR trust, and that person is known as the enforcer. Enforcers need not be beneficiaries, and section 100(1) of the Trust Law states "A beneficiary of a STAR trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property". Therefore, it is the

enforcer, rather than any beneficiaries, of a STAR trust who have the right to disclosure of appropriate trust information and the same principles applying to disclosure to beneficiaries of an ordinary trust will apply to the enforcer.

Whilst trustees have a duty to provide information to beneficiaries arising out of their fiduciary obligation to account with their administration of the trust property no beneficiary has an automatic right to disclosure of trust documents or trust information. There will often be compelling reasons to refuse disclosure, not least due to confidentiality reasons. It follows that a balancing of the competing interests of the settlor and beneficiaries is required.

## CONCLUSION

Both Cayman and the BVI offer well regulated and sophisticated company and trust legislation. This together with common law principles makes both jurisdictions popular when selecting a jurisdiction for asset structuring. The company legislation together with trust principles of confidentiality enables the establishment of trust structures which protect and maintain private wealth.

*The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.*

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