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# CAYMAN ISLANDS

*Adam Crane, Nicosia Lawson, Shula Sbarro and Nia Statham*<sup>1</sup>

## I OVERVIEW

The Cayman Islands is a major offshore financial centre. As of the second quarter of 2023, there were over 29,000 mutual funds and private funds registered in the Cayman Islands (the majority of which, save for maintaining a registered office within the jurisdiction as required by the Companies Act (2023 Revision) (the Companies Act)) conduct business elsewhere.<sup>2</sup> The jurisdiction is the number one domicile for hedge funds and the second-largest jurisdiction for captive insurance.<sup>3</sup> While the Cayman Islands financial services industry plays a significant role in the global economy (e.g., because of tax neutrality), it is unsurprising that Cayman Islands corporate structures have been used for nefarious purposes and have featured in some of the most notorious international fraud scandals such as the BLMIS (Bernie Madoff), *AHAB v. Saad* and the 1MDB fraud scandals.

The Cayman Islands' judiciary and legal profession are well equipped and experienced in all matters concerning multi-jurisdictional fraud disputes. The Cayman Islands legal system is based on the English common law and statute. Therefore, case law from England and various Commonwealth jurisdictions is persuasive.

While the jurisdiction is often seen by outsiders as being shrouded in secrecy, the reality is that there is publicly available information that could be useful in facilitating the recovery of assets. This includes the identities of the directors of a company, land registry records, the aircraft registry and vessel transcripts for maritime vessels registered in the jurisdiction.

Victims of wrongdoing will have recourse through the courts of the Cayman Islands (the Cayman Court)<sup>4</sup> to assist with asset recovery efforts, including, but not limited to, freezing orders and disclosure orders. The Cayman Court has recently confirmed that there is a strong public interest in allowing victims of fraud to vindicate their rights and to deter the use of Cayman Islands corporate structures and professionals to facilitate the

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1 Adam Crane is a partner, Nicosia Lawson and Shula Sbarro are senior associates and Nia Statham is an associate at Baker & Partners.

2 According to the Cayman Islands Monetary Authority's (CIMA) 'Mutual Fund, Private Funds, and Administrator Statistics' <https://www.cima.ky/investment-statistics> (12 July 2023).

3 According to CIMA's 'Fact Sheet – December 2022', [https://www.cima.ky/upimages/publicationdoc/CIMAFACETSHEET-De\\_1683223361.pdf](https://www.cima.ky/upimages/publicationdoc/CIMAFACETSHEET-De_1683223361.pdf) (16 July 2023).

4 The Cayman Court definition constitutes references to the first instance court, the Grand Court of the Cayman Islands, as well as its specialist Financial Services Division (i.e., the FSD) and the Cayman Islands Court of Appeal. The final appellate court for the Cayman Islands is the Judicial Committee of the Privy Council ('Privy Council') in England.

commission of fraud<sup>5</sup>. The Cayman Court will also construe legislation and rules in a manner to avoid denying or impairing a litigant's right of access to justice and to avoid conflicting with the 'recognised public interest in protecting the reputation of the Cayman Islands as a well-regulated financial centre'.<sup>6</sup>

## II LEGAL RIGHTS AND REMEDIES

### i Civil and criminal remedies

#### *Civil remedies*

The Cayman Court routinely deals with complex and multi-jurisdictional matters. The time frame for each case depends on the complexity of the matter, the court's availability, and the level of opposition. The *AHAB v. Saad* litigation, which commenced in 2009, was the largest matter litigated in the Cayman Islands and was based on claims of fraud, conspiracy, dishonest assistance and knowing receipt. The trial lasted more than 120 days over the course of more than one year, and resulted in a 1,300-page judgment. The matter was appealed to the Cayman Islands Court of Appeal (CICA), and was heard between 21 May 2019 and 20 June 2019, resulting in a 276-page appeal judgment released about 2.5 years later in December 2021.

#### *Breach of trust*

A person in a position of trust (a trustee) owes fiduciary and other duties to a person for whose benefit the trustee holds the property (a beneficiary). A trustee must: (1) act bona fide when dealing with the trust; (2) take steps to preserve and protect the assets of the trust and exercise care and skill in administering the trust; (3) make investment decisions as a prudent person would for another person whom they are morally obligated to; (4) not profit from the trust; and (5) avoid conflicts of interest with the trust. A breach of trust may lead to a claim for restitution or monetary compensation.<sup>7</sup> A claim for deceit may also give rise to a breach of trust.

Liability for having assisted in a breach of trust is not restricted to the person whose breach of trust or fiduciary duty causes the original diversion of money or who assisted with the original breach, but extends to everyone who consciously assisted in the continuing diversion of the money. The Cayman Court will likely consider the state of mind in cases where there has been a breach of fiduciary duty and the defendant has received the proceeds of fraud. The state of mind of a company that has received the proceeds of fraud is determined by whether the person who was the directing mind (e.g., a director) and will of the company knew that the funds received were the proceeds of fraud. The attribution of the state of mind of a director to the company depends on the nature and factual contexts of the claim in question.

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5 *In the matter of Norwich Pharmacal Relief* (FSD 295 of 2022 (IKJ)) (Unreported, 15 December 2022) at 13.

6 *In the matter of Atom Holdings* (FSD 54 of 2023 (IKJ)) (Unreported, 18 May 2023).

7 *Kuwait Ports Authority et al v Port Link GP et al* (CICA (Civil) Appeals Nos. 02 and 03 of 2022) (Unreported, 20 January 2023).

### ***Breach of fiduciary duty***

Fiduciary and other duties are not codified in the Cayman Islands, but derive from English common law.

Directors (whether *de jure*, de facto, shadow, nominee, executive or non-executive) owe fiduciary duties (and non-fiduciary ones, such as the duty of care, skill, and diligence) to the company to which they are appointed. These fiduciary duties include to act bona fide (loyally, honestly and in good faith in what they consider to be in the best interests of the company); to act for the proper purpose of the company and not for some personal or collateral, or some other improper purpose; to have unfettered discretion in the future exercise of their powers; and to avoid conflicts of interest between their duty to the company and their personal interests or duty owed to another person.

The elements of a claim for breach of fiduciary duty include:

- a* a duty must be owed;
- b* there was a breach of that duty; and
- c* damages or loss were caused by the breach.

The trustee of a trust also owes fiduciary duties to the trust. Among other things (like a director of a company), a trustee must act bona fide, in the best interests of the trust, and with unfettered discretion; and must exercise care and skill in their judgment, and act in good faith when dealing with the trust. The general partner of an exempted limited partnership (ELP) owes a duty of loyalty and good faith to act in the best interests of the ELP and its limited partners. An agent also owes a fiduciary duty to their principal because the relationship is one of trust and confidence.

When fiduciaries misuse their powers, the claim for breach of duty belongs to those whom they owe their fiduciary duties, (e.g., to the company in the case of a director, and to the beneficiaries, in respect of a trustee). The company may sue a director for breach of duty by the director for wrong done to the company. Without an action by the company against the director, a shareholder of the company may bring a derivative action against the director on behalf of the company and in the company's name. In the case of a trustee, because contracts are made in the trustee's name, not the trust's, a third party with whom a trustee has contracted with in relation to the trust may be able to make a claim against the trustee personally.

### ***Personal claims***

If it is alleged that a third party received money or assets that represent the proceeds of misappropriated funds, a claimant may bring a proprietary claim as well as a personal claim, such as a claim for unjust enrichment, dishonest assistance or unlawful means conspiracy, against the third party. A successful claim may result in an award for damages or equitable compensation. In a liquidation, the claim would rank *pari passu* with other unsecured creditors of the relevant respondent in respect of any such damages or compensation.<sup>8</sup>

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8 *AHAB v. SAAD Investments Company Limited et al*, 2021 (2) CILR 704 at 958.

*Unjust enrichment*

At common law, a claimant has a right to restitution against a defendant where it can be shown that:

- a* the defendant was enriched;
- b* the defendant's enrichment was at the claimant's expense;
- c* the enrichment was unjust; and
- d* there are no available defences.<sup>9</sup>

A claim for restitution for unjust enrichment seeks to restore parties to the position they were in before the defendant was enriched.

*Conspiracy*

A claimant may be able to bring a conspiracy claim if they have suffered consequential loss or damage by the unlawful action (or lawful action with unlawful means) of two or more persons combined to act in an unlawful manner.<sup>10</sup>

*Dishonest assistance*

A proprietary claim may be brought against a third party, where the claimant's property is misappropriated in breach of a fiduciary duty owed to the claimant.<sup>11</sup> A claimant may bring a claim for dishonest assistance if it can be shown that: (1) the claimant was owed a fiduciary duty but the person who owed the fiduciary duty breached that fiduciary duty; and (2) the third party induced, or assisted, the breach of a fiduciary duty and did so dishonestly. The claimant must also show that by receiving monies, the third party was aware of the misappropriation at the time of assistance. A mere receipt of funds cannot constitute 'assistance' for a claim of dishonest assistance. It is immaterial that the third party received any of the misappropriated funds in breach of trust or a fiduciary duty.

If the misappropriated property is traceable into the hands of a third party (other than a bona fide purchaser for value), the claimant may bring a proprietary claim to recover property (or its traceable proceeds) from the third party.<sup>12</sup>

*Knowing receipt*

A claimant may also rely on the equitable remedy of knowing receipt at common law.

Where a third party receives property with the knowledge that the property was transferred in breach of trust, a duty is imposed on the third party to treat the property as though they are a trustee of the property and to restore it to the trust.

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9 *ibid* at 698.

10 *ibid* at 702.

11 *ibid*.

12 *ibid*.



The effect of a claim for knowing receipt is to prevent a party from receiving and retaining property, for their own benefit, to which they are not entitled, knowing that the transfer to them was of property which beneficially belonged to a third party or claimant. To establish knowing receipt, it must be shown that:

- a there was a disposal of the claimant's assets in breach of a fiduciary duty;
- b the defendant beneficially received the assets which are traceable to the claimant's assets; and
- c the defendant has knowledge that the assets they received are traceable to the breach of a fiduciary duty.<sup>13</sup>

### ***Proprietary/tracing claims***

In some cases, misappropriated funds are funnelled through elaborate schemes to disguise fraudulent transactions and to obstruct tracing. When such funds are misappropriated in breach of a fiduciary duty, a claimant can bring a proprietary claim to recover their property (or the traceable proceeds) from the third party.<sup>14</sup>

### ***Fraudulent dispositions***

Where a victim of fraud believes that a transaction was made at an undervalue and with an intent to defeat obligations owed to them, they may apply for an order to set aside the transaction under the Fraudulent Dispositions Act (1996 Revision). Section 4 of the Fraudulent Dispositions Act provides that 'every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced'. It is an essential element of such a claim under the Fraudulent Dispositions Act that the transaction was intended to defraud the victim. A six-year limitation period applies from the date of the relevant disposition.<sup>15</sup>

### ***Deceit***

A claimant may seek damages in deceit against a defendant. In an action for deceit, the claimant must establish that:

- a representations were made by or on behalf of the defendant;
- b with knowledge of the falsity of those representations or recklessness as to their truth or falsity;
- c that the defendant intended the claimant to rely on those representations; and
- d the reliance by the claimant on those representations resulted in loss and damage to the claimant.

### ***Fraudulent misrepresentation***

Where a person is induced to enter a contract on the reliance of an untrue statement that causes the person to suffer loss, they may make a claim for misrepresentation at common law. It must be shown that a false statement, whether implied, by words or conduct, or both, was made by or on behalf of the defendant knowing that the statement was false or reckless as to

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13 *Autumn Holdings v. Renova Resources* 2017 (2) CILR 136.

14 *AHAB v. SAAD Investments Company Limited et al* (CICA (Civil) Appeal 15 of 2018) (Unreported, 21 December 2021).

15 Section 4(3) of the Fraudulent Dispositions Act.

whether the statement was true or false, and the defendant intended for the claimant to rely on the false statement. Inducement occurs when the person is ‘materially influenced by the misrepresentation merely in the sense that it had some impact on his thinking or “was actively present to his mind”’.<sup>16</sup> Inducement is presumed thereafter.<sup>17</sup>

In general, there are two types of remedies available to a victim of fraudulent misrepresentation:

- a rescission; and
- b damages (in contract or in tort, depending on the circumstances of the case).

## ii Defences to fraud claims

The respondent to a fraud claim may resist those claims by relying on one or more defences. A typical defence to a fraud claim is the limitation period for bringing the claim. The Limitation Act (1996 Revision) describes the ordinary time limits for different classes of actions. For example, an action based on a simple contract has a limitation period of six years from the date on which the cause of action occurred; actions in tort have a six-year limitation period; and actions to recover immovable property have a limitation period of 12 years.

There is no period of limitation for actions by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy to; or to recover from the trustee trust property, or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to their use.

Deceit claims must be brought within six years of the date the cause of action occurred.<sup>18</sup> In respect of actions based on fraud, or deliberate concealment of relevant facts upon which a claimant can rely, or claims for relief from the consequences of a mistake, the limitation period will not begin to run until the applicant has discovered or could have reasonably discovered the fraud, concealment or mistake.<sup>19</sup>

The deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to the deliberate concealment of the facts involved in that breach of duty.

The defence of illegality may apply in circumstances where the claim is founded upon the claimant’s own criminal or immoral act (e.g., fraud, dishonesty or breach of the law) or where the claimant lacks clean hands and is disallowed from relying on equitable remedies. There are strong public policy grounds to refuse the enforcement of an illegal arrangement. The Cayman Court is likely to allow the defence if allowing the claim to proceed would conflict with public policy and cause damage to the integrity of the Cayman Islands’ legal system.

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16 *Chitty on Contracts* (34th Edition) at paragraph 9-047; *Ross River v. Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch) at paragraph 202.

17 *BV Nederlandse Industrie Van Eiprodukten v. Rembrandt Enterprises Inc* [2020] Q.B. 551 at paragraph 25.

18 Section 4 of the Limitation Act (1996 Revision).

19 Section 37 of the Limitation Act (1996 Revision).

### III SEIZURE AND EVIDENCE

#### i Securing assets and proceeds

There are a few procedures that should be considered where a party is seeking to seize or secure assets or the proceeds of a fraud in the Cayman Islands. The context and timing will likely determine the appropriateness of the procedure ultimately utilised.

The main four procedures available in the Cayman Islands both for domestic matters and to assist foreign proceedings are:

- a* freezing injunctions (*Mareva* injunctions) and proprietary injunctions;
- b* *Anton Piller* orders;
- c* appointment of provisional liquidators; and
- d* appointment of receivers.

#### ***Freezing injunctions (Mareva injunctions) and proprietary injunctions***

Freezing injunctions, *Anton Piller* orders and the appointment of receivers are considered draconian as they have the effect of freezing all assets upon the order being made or compelling the surrender of access to and control of property. Both the appointment of provisional liquidators and the appointment of receivers are usually the procedures used in an insolvency context, but are powerful tools in combating fraud, especially if fraudulent activity is ongoing.

Proprietary injunctions seek to preserve assets which a claimant may have a legal or equitable claim against. For that reason, a claimant need not prove a risk of dissipation. But a claimant must prove the following:

- a* there is a serious issue to be tried on the merits;
- b* the balance of convenience favours granting an injunction; and
- c* it is just and convenient to grant the injunction.

Freezing injunctions are designed to freeze assets, in effect securing them from further dissipation for a period to be determined, pending a further order, or often pending the outcome of either foreign or domestic proceedings. Those seeking freezing injunctions often also seek ancillary or specific disclosure orders.

An applicant seeking to obtain a *Mareva* injunction must establish that:

- a* they have a good arguable case on the merits of their claim;
- b* there is a real risk that any judgment would go unsatisfied because of dissipation of the assets by the defendant unless the defendant is restrained by the court from disposing of the assets; and
- c* it would be just and convenient in all the circumstances to grant the freezing order.<sup>20</sup>

An applicant is typically required to give a cross-undertaking in damages, and the Cayman Court may order the fortification of the undertaking. In this regard, the Cayman Court will consider where the parties and assets are based before considering whether a payment into court is required.

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<sup>20</sup> *Scully Royalty Ltd et al v. Raiffeissen Bank Int* (CICA (Civil) Appeal 21 of 2020) (Unreported, 30 December 2021).

A proprietary injunction and freezing injunction can both be obtained with worldwide effect, and can be obtained both pre- and post-judgment.<sup>21</sup> Worldwide injunctive relief may be more readily available in circumstances where the applicant has proprietary or tracing claims, in comparison to an applicant seeking to enforce a monetary judgment.<sup>22</sup>

It is also possible to seek *Chabra* relief against third parties (non-cause of action parties).

### ***Anton Piller orders***

*Anton Piller* orders, which are available in the Cayman Islands, permit an applicant to inspect a respondent's premises to facilitate a search and seizure of documents or other items, or to obtain information (copy documents or computer hard drives). *Anton Piller* orders are used where there is a need to preserve evidence which may be at risk of destruction. Given the intrusive nature of such relief, there is a heavy burden on an applicant to establish:

- a* an extremely strong prima facie case;
- b* that there is serious potential or actual damage to those applying for the relief; and
- c* the evidence shows that those against whom the relief is sought possess incriminating documents or other evidence and that there is a real possibility or clear likelihood that the documents or other evidence may be destroyed if the order is not granted.<sup>23</sup>

### ***Appointment of provisional liquidators***

Provisional liquidations are another powerful tool to combat fraud and assist in asset recovery efforts. A provisional liquidator may be appointed after the presentation of a winding-up petition, but before a final winding-up order is made. A provisional liquidator's powers are set out in the appointment order. In the context of fraud, a company's directors are likely to be stripped of their powers, and the provisional liquidator would be given a full set of powers by the Cayman Court to take control of the company. The Companies Winding Up Rules (2023 Consolidation) Order 4, Rule 1(2) states that a company is entitled to four days' clear notice of an application to appoint a provisional liquidator under Section 104 of the Companies Act, unless exceptional circumstances justify the application being made *ex parte*. For example, an applicant may be able to proceed on an *ex parte* basis where providing notice would enable the alleged wrongdoers in control of assets to defeat the object of the applications entirely or to some significant extent, including: (1) the dissipation and misuse of assets; (2) inappropriate actions by the company's principals; and (3) the risk of destruction or fabrication of documents and records. An applicant must comply with the duty to provide full and frank disclosure.

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21 *Samir Bandali v. Coinpayments Inc et al* (G 51 of 2021 (RWJ)) (Unreported, 9 November 2021) citing Gross LJ at paragraph 40 in *Emmott v. Michael Wilson & Partners Ltd* [2019] EWCA Civ 219. See also *Banco Intl de Costa Rica SA v. Banana Intl Corp* 2018 (2) CILR 125.

22 *Hampshire Cosmetic Labs Ltd. v. Mutschmann*, 1999 CILR 21 at p. 34.

23 *Anton Piller KG v. Manufacturing Processes Ltd* [1976] CH. 55 at 62.

Under Section 104 of the Companies Act, a creditor or a contributory (or in limited circumstances, CIMA) may make an application to appoint a provisional liquidator where:

- a there is a prima facie case for making a winding-up order; and
- b the appointment is necessary to prevent:
  - the dissipation or misuse of a company's assets;
  - the oppression of minority shareholders; or
  - mismanagement or misconduct on the part of the company's directors.

An applicant must also establish that they have standing as a creditor or contributory to bring the winding-up petition and application for the appointment of a provisional liquidator. In the Cayman Islands, standing as a creditor is quite broad and can include conditional and contingent creditors.<sup>24</sup>

To ensure an appointment will have effect outside the jurisdiction of the Cayman Islands, the provisional liquidator is likely to need to apply for recognition of their appointment in one or more foreign jurisdictions. The procedural steps for obtaining recognition will depend on the foreign jurisdiction, and consideration must always be given to this aspect in advance, to ensure that the desired effect of the appointment aligns strategically.

### ***Receiverships***

A receiver may be appointed with respect to proceedings before the Cayman Court under Section 11 of the Grand Court Act (as revised).<sup>25</sup> A receiver may also be appointed for proceedings that have already been commenced or are to be commenced outside of the Cayman Islands where the proceedings are capable of giving rise to a judgment that is enforceable in the Cayman Islands.<sup>26</sup>

The appointment of a receiver is typically aimed at taking control of a company's assets until the Cayman Court has determined the matter, preventing the dissipation of assets. The Cayman Court may also sanction the receiver to collect and deal with certain assets. This application can be made in parallel with a freezing injunction where it is considered that the freezing order may be insufficient to prevent the dissipation of assets.

A receiver may be appointed where the applicant establishes:

- a a good arguable case on the merits;
- b a real risk of unjustified dissipation; and
- c that it is just and convenient to grant the requested relief.

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24 See *In the Matter of Atom Holdings* (FSD 54 of 2023 (IKJ)) (Unreported, 18 May 2023) for an analysis of the standing issue for contingent creditors.

25 The Cayman Court has the same authority as the English High Court pursuant to the (UK) Senior Courts Act, 1981.

26 Section 11A of the Grand Court Act.

### **Official liquidation**

Another alternative is to petition a company to be wound up and appoint official liquidators. This can be based on insolvency grounds or on a just and equitable basis (the need for an investigation or the company was formed for fraudulent or illegal purposes). The need for an investigation is considered to be a free-standing basis upon which to wind up a company on just and equitable grounds in the Cayman Islands.<sup>27</sup>

Once appointed, official liquidators are empowered to investigate the affairs of a company and have strong statutory tools to: (1) compel certain individuals involved with a company to provide a statement of affairs; (2) compel 'relevant persons' (i.e., directors, officers, service providers, etc.) to turn over property to the official liquidator or to be subjected to an oral or written examination; and (3) to seek an order compelling any person holding property or documents belonging to a company to turn the property or documents over to the official liquidator.<sup>28</sup>

#### **ii Obtaining evidence**

As for obtaining evidence, save as referred to already above, there are further options including:

- a* *Norwich Pharmacal* orders;
- b* *Bankers Trust* orders; and
- c* letters rogatory.

Which relief (or combinations of them) would be the most appropriate will depend on the specific circumstances of the matter.

#### ***Norwich Pharmacal orders***

*Norwich Pharmacal* orders are generally made pre-action, but can be made post-judgment,<sup>29</sup> and are granted against third parties who find themselves innocently involved in a fraud or some kind of wrongdoing. The aim of this type of relief is to obtain disclosure of documents or information held by that third party which may then be used in subsequent substantive proceedings.

To obtain this type of relief, an applicant must demonstrate that:

- a* a wrong must have been carried out, or arguably carried out, by a wrongdoer;
- b* there must be a need for an order to enable action to be brought against the wrongdoer; and
- c* the person against whom the order is sought must be:
  - mixed up in so far as to have facilitated the wrongdoing; and
  - able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

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27 *In the Matter of Principal Investing Fund I Ltd* (FSD 268 of 2021 (DDJ)) (Unreported, 29 September 2021).

28 See sections 101 to 103 and 138 of the Companies Act.

29 *Essar Global Fund Limited and Essar Capital Limited v. ArcelorMittal USA LLC* (CICA (Civil) Appeal 15 of 2019) (Unreported, 3 May 2021).

Sealing and gagging orders are often sought before or along with *Norwich Pharmacal* orders to prevent ‘tipping off’ and to give an applicant time to take necessary actions following the receipt of the materials disclosed under the *Norwich Pharmacal* order.

In the Cayman Islands, these types of orders are often sought against a company’s registered office, which holds beneficial ownership, ‘know your customer’ records and other due diligence information that a *Norwich Pharmacal* order can seek to obtain.

### ***Bankers Trust orders***

*Bankers Trust*<sup>30</sup> orders are aimed at third-party banks and other organisations to obtain disclosure which will assist in tracing and preserving assets. This relief is granted in exceptional circumstances where:

- a* there are good grounds for concluding that the money or assets about which the information is sought, belonged to the claimant;
- b* there must be a real prospect that the information sought will lead to the location or preservation of the assets;
- c* the order should, so far as possible, be directed at uncovering the particular assets that are to be traced, and should not be wider than is necessary in the circumstances;
- d* the applicant’s interests in obtaining the order must be balanced against the possible detriment to the respondent in complying with the order, including any infringement, or potential infringement, of rights of privacy or confidentiality; and
- e* the applicant must provide undertakings, first of all to pay the expenses of the respondent in complying with the order; second, to compensate the respondent in damages (should loss be suffered as a result of the order); and third, only to use the documents or information obtained to trace the assets or their proceeds.<sup>31</sup>

### ***Letters rogatory***

Under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the Evidence Order), a party may seek to obtain evidence for use in overseas litigation, including, but not limited to, orders for:

- a* the examination of witnesses (orally or in writing);
- b* the production of documents; and
- c* the inspection, photocopying, preservation, custody, or detention of any property.

The Cayman Court has jurisdiction to make orders with respect to criminal and civil proceedings.

## **IV FRAUD IN SPECIFIC CONTEXTS**

### **i Banking and money laundering**

The Cayman Islands has established and maintains a regulatory framework consistent with international standards. Some of the relevant legislation includes:

- a* the Proceeds of Crime Act (2020 Revision) (POCA);
- b* the Anti-Money Laundering Regulations (2023 Revision);

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30 *Bankers Trust v. Shapria* [1980] 1 WLR 1274 (CA).

31 *LMN v. Bitflyer and Others* [2022] EWHC 2954 (Comm).

- c* the Anti-Corruption Act (2019 Revision); and
- d* the Securities Investment Business Act (2020 Revision).

Where a business is registered and regulated by CIMA, CIMA has the authority and powers to examine the affairs of the company's business, and by extension, may identify assets for recovery.

The Cayman Islands' Financial Reporting Authority (FRA) also has responsibility for identifying specific assets and tracking particular activities or transactions, under the POCA. The FRA's functions are performed through the director of the FRA.

Financial services providers and their employees can face criminal liability under the POCA for money laundering and related offences.

The Director of Public Prosecutions (DPP) is permitted under Section 77 of POCA to recover property that is, or represents, property obtained through unlawful conduct. Under this section, the DPP may also forfeit cash or property that has been obtained or is intended to be used in unlawful conduct. Recoveries under this section are commenced by the DPP initiating civil proceedings before the Cayman Court and are not dependent on whether any proceedings have been brought for an offence in connection with that property.

## **ii Insolvency**

The Companies Act sets out a number of fraud-related provisions that aim to recover assets for an estate (and its stakeholders) and to penalise individuals for fraud-related offences.

### ***Fraud in anticipation of winding-up***

Where a company is ordered to be wound up or passes a resolution for voluntary winding-up, any person who was an officer, professional service provider, controller of the company, voluntary liquidator or restructuring officer, can be held liable on conviction to a fine of five years' imprisonment, if they, with the intent to defraud the company's creditors or contributories,<sup>32</sup> within the 12 months immediately preceding the winding-up:

- a* concealed company property (with a value of more than US\$10,000) or any debt due to or from the company;
- b* removed any part of the company's property to the value of US\$10,000 or more;
- c* concealed, destroyed, mutilated, or falsified documents affecting or relating to the company's property or affairs;
- d* made any false entry in any documents affecting or relating to the company's property or affairs;
- e* parted with, altered, or made any omission in any document affecting or relating to the company's property or affairs; or
- f* pawned, pledged, or disposed of any company property obtained on credit and has not been paid for.

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32 Section 134 of the Companies Act.



### ***Transactions in fraud of creditors***

Any officer, restructuring officer, controller or professional services provider who made or caused to be made a transaction (as defined) of the company's property or concealed or removed any part of the company's property with the intent to defraud the company's creditors or contributories can be held liable on conviction to a fine and five years' imprisonment.<sup>33</sup>

### ***Fraudulent trading***

Section 147 of the Companies Act provides a powerful remedy, which is untested before the Cayman Court. This provision states that if during the winding-up of a company, it appears that any business of the company was carried on with the intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose, the liquidator may apply to the Cayman Court for a declaration that any persons who were knowingly parties to the carrying on of the business in a fraudulent manner are liable to contribute to the company's assets as the Cayman Court thinks proper.

### ***Voidable preference and fraudulent dispositions***

Section 145 of the Companies Act permits a liquidator to apply to the Cayman Court for an order to set aside any conveyance or transfer of property by a company that occurred in a six-month period immediately preceding the company's winding-up, in favour of any creditor at a time when the company is insolvent with a view to give that creditor a preference.

Section 146 of the Companies Act permits an official liquidator to apply to the Cayman Court to set aside any disposition of property where the disposition of property was made at an undervalue with the intent to defraud the company's creditors. There is a six-year limitation from the date of the transaction.

### ***Other considerations***

*Re Real Estate and Finance Fund*<sup>34</sup> dealt with an application to restore an exempted company dissolved following a voluntary liquidation on the basis that the dissolution should be set aside because the winding-up was vitiated by fraud. Section 159 of the Companies Act allows for the restoration of a struck off company. But there is no provision that specifically provides for restoration of a company that has been dissolved. The common law and the Cayman Court's inherent jurisdiction were successfully relied upon in this case. After a fraud was found to have occurred (transactions made to accounts for personal gain), the Cayman Court found that this aspect completely undermined the statutory procedure for voluntary liquidations and granted the restoration. This is a valuable development of the law in the Cayman Islands for creditors or liquidators, in circumstances where there has been a fraud and the company was utilised to facilitate that fraud and was then dissolved. This development will help recover assets that have been dissipated or concealed.

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33 Section 135 of the Companies Act.

34 (FSD 135 of 2023 (IKJ)) (unreported, 6 July 2022).

### iii Arbitration

The relevant legislation for arbitration proceedings and the enforcement of domestic and foreign arbitral awards in the Cayman Islands are the:

- a Arbitration Act (2012 Revision) (the Arbitration Act); and
- b Foreign Arbitral Awards Enforcement Act (1997 Revision) (FAAEA).

The Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act 1996, and governs arbitration within the Cayman Islands and for recognising New York Convention<sup>35</sup> and non-convention awards. The FAAEA<sup>36</sup> is designed to deal with New York Convention awards.<sup>37</sup>

In the Cayman Islands, there is no legal reason why contentious matters relating to fraud cannot be referred to arbitration. The Arbitration Act provides a discretion for the Cayman Court to carve out the fraud element, so that it may be dealt with separately by the court rather than within an arbitration.<sup>38</sup> The Cayman Court can revoke the authority of the arbitrator and order that the agreement will cease to have effect, so far as may be necessary to enable that question of fraud to be determined by the Cayman Court. Following an arbitral award, the Cayman Court can also set aside an award if it is found that the award made was induced or affected by fraud, corruption or misconduct of an arbitrator<sup>39</sup> and there is clear evidence of an arguable case for setting aside.<sup>40</sup> Section 7(3) of the FAAEA provides that the enforcement of a New York Convention award may be refused if it would be contrary to Cayman Islands' public policy to enforce the award.

### iv Fraud's effect on evidentiary rules and legal privilege

In civil cases, the standard of proof is on a balance of probabilities. This standard does not change when alleging fraud in civil cases. Allegations of fraud must be specifically pleaded and be supported by cogent evidence.<sup>41</sup> It is often hard to prove the subjective state of mind of the wrongdoer in fraud cases, and the Cayman Court is usually invited to draw inferences from the evidence. Also, when going through the discovery process in fraud cases, it is imperative that disclosure lists and evidence are properly analysed.

#### ***Crime/fraud exception***

As to both legal advice privilege and litigation privilege, the position is similar to that in the United Kingdom, which is that communications, instructions and information exchanged for the purposes of giving and receiving legal advice are protected by legal professional privilege. That said, where communications and documents exist as a result of fraud then those documents and communications are likely to be subject to the crime/fraud exception, where they are no longer afforded the protections of privilege.

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35 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

36 The FAAEA gives effect to the New York Convention.

37 *In re China CVS (Cayman Islands) Holding Corp*, 2019 (1) CILR 266; *In the matter of Ren Ci & Ors* (FSD 210 of 2022); Arbitration Act, Section 4.

38 Arbitration Act, Section 74(2).

39 *ibid*, Section 75.

40 *In re China Hospitals Inc*, 2018 (2) CILR 335.

41 Grand Court Rules, Order 18, Rule 8(1).

**v Fraud as a defence to enforcement of judgments granted abroad**

It is possible to rely on fraud as a common law defence to the enforcement of judgments granted abroad but it is a difficult defence to succeed on, as the defendant must show that there was a fraud upon the court.<sup>42</sup>

Although not concerned with the enforcement of a foreign judgment, it is also worth noting that the English Supreme Court in *Takhar v. Gracefield Developments Ltd* recently confirmed (subject to certain qualifications) that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial that led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment.<sup>43</sup>

The relevant principles in English law that govern applications to set aside judgments for fraud were summarised in *Royal Bank of Scotland plc v. Highland Financial Partners lp* as follows:

- a* there has to be a ‘conscious and deliberate dishonesty’ in relation to the relevant evidence given, or action taken, statement made or matter concealed that is relevant to the judgment sought to be impugned;
- b* the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be ‘material’; and
- c* the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.<sup>44</sup>

Separately, and as noted above in Section IV.iii, it is also possible for an arbitral award to be set aside in the Cayman Islands where the respondent can satisfy the court that the making of the arbitral award was induced or affected by fraud, corruption or misconduct on the part of the arbitrator.<sup>45</sup>

**V INTERNATIONAL ASPECTS**

**i Conflict of law and choice of law in fraud claims**

The Cayman Court has jurisdiction ‘to entertain a claim *in personam* only if a defendant is served with process in the circumstances authorised by and in the manner prescribed by statute or statutory order’.<sup>46</sup> Order 11, Rule 1 of the Grand Court Rules permits service out of the Cayman Islands with leave of the court provided that the circumstances of the claim fall within the enumerated gateways.

The Cayman Court will have regard to the doctrine of *forum non conveniens* where a dispute arises as to the forum. Where a party wishes to assert that the Cayman Islands is best placed to bring a claim, the Cayman Court must be persuaded that it is best placed to deal with the allegations of a fraud on a just and convenient basis. For example, relevant factors may include the *situs* of shares in a company or where the company mainly operates (if applicable).

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42 *Elliot v. Cayman Islands Health Service Authority* [2007 CILR 163] (April 20th, 2007).

43 *Takhar v. Gracefield Developments Ltd* [2020] UKSC 13 at [54] [*Takhar*].

44 *Royal Bank of Scotland plc v. Highland Financial Partners lp* [2013] 1 CLC 596 and paragraph 56 of *Takhar*.

45 Arbitration Act, Section 75(1)(vi).

46 *TCo v. AA, BB, CC, DD, EE (A Minor)* (FSD 188 of 2017 (RPJ)) (Unreported, 13 March 2018).

As for assisting overseas governments, although the Cayman Court broadly has no jurisdiction to recognise or enforce foreign sovereign acts in the Cayman Islands. The question of what constitutes a foreign sovereign act will depend on the substance of the right sought to be enforced and the central interest of the foreign government in seeking to bring an action. For example, the Cayman Court may enforce an action by a foreign government where the foreign government asserts proprietary rights on behalf of private parties as part of a regime to compensate victims of fraud.<sup>47</sup>

In international civil fraud proceedings, reciprocity is a key factor for the Cayman Court in determining whether to grant assistance. For example, an injunction to freeze Cayman bank accounts in execution of a request under a mutual legal assistance treaty may not be granted where there is no clear equivalent power to order a forfeiture under Cayman law.<sup>48</sup>

## **ii Collection of evidence in support of proceedings abroad**

As mentioned above in Section III.ii, applicants may seek to obtain information and evidence in support of proceedings abroad under the Cayman Court's *Norwich Pharmacal* and *Bankers Trust* jurisdiction, as well as under the Evidence Order. In *Essar Global Fund & Essar Capital Fund v. ArcelorMittal*, the Cayman Islands Court of Appeal held that there was no overlap between the *Norwich Pharmacal* jurisdiction and the Evidence Order regime if the *Norwich Pharmacal* jurisdiction is confined to its proper scope (the equitable remedy of discovery).<sup>49</sup>

The Cayman Court may grant certain orders under Section 242 of the Companies Act to a trustee, liquidator or other official appointed in respect of a debtor in foreign bankruptcy proceedings. These orders include requiring a person in possession of information relating to the relevant business or affairs of a debtor to be examined by, and produce documents to, that foreign representative.

## **iii Seizure of assets or proceeds of fraud in support of the victim of fraud**

As discussed in detail in Section III.i, there are a range of tools available to applicants to seize assets or the proceeds of a fraud in support of victims of fraud. These include:

- a* freezing (*Mareva*) injunctions and proprietary injunctions;
- b* *Anton Piller* orders;
- c* the appointment of provisional liquidators; and
- d* the appointment of receivers.

The seizure of digital assets is less straight forward, as digital assets may be stored in cold wallets (in which case, physical seizure of the cold storage device through an *Anton Piller* order may be possible), or in hot wallets, which may require entering into a series of transactions before a custodian can take possession of the relevant private keys. In those circumstances, specialist advice will need to be sought.

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<sup>47</sup> *TMSF v. Merrill Lynch Bank & Trust Co (Cayman) Ltd*, 2008 CILR 267.

<sup>48</sup> *In re Sherman*, 1996 CILR 33.

<sup>49</sup> *Essar Global Fund & Essar Capital Fund v. ArcelorMittal USA LLC* (CICA (Civil) Appeal 15 of 2019) (Unreported, 3 May 2021).

**iv Enforcement of judgments granted abroad in relation to fraud claims**

To the extent not already discussed in Section V.i, a foreign judgment will generally be treated as incapable of recognition in the Cayman Islands where:

- a* the foreign judgment was obtained by fraud;
- b* the foreign court was not competent;
- c* the foreign judgment arose in circumstances contrary to natural justice; or
- d* the foreign judgment is contrary to Cayman public policy.<sup>50</sup>

The Cayman Court also has no jurisdiction to recognise *in personam* judgments of a foreign court if it would be contrary to public policy to do so (for example, where this would involve recognition of a foreign sovereign act (discussed above)).<sup>51</sup>

**VI CURRENT DEVELOPMENTS**

The well publicised European Court of Justice (CJEU) decision, joined Cases C-37/20 and C-601/20 (*WM and Sovim SA v. Luxembourg Business Registers*) delivered on 22 November 2022, has far reaching implications that affect not only European Member States but also the Cayman Islands and other major offshore jurisdictions. In summary, the CJEU declared that public access to beneficial ownership information interfered with the fundamental right to respect for private life and to the protection of personal data. Traditionally, offshore jurisdictions have been heavily criticised for their secrecy, which can help shield fraudulent activities. In an attempt to address these concerns, the Cayman Islands recently made certain current company director information accessible to the public for a fee. At any rate, while not binding on the Cayman Islands, this CJEU decision is heavily persuasive and will require the jurisdiction to balance counter-secrecy measures with the fundamental human right to privacy and data protection. Fortunately, beneficial ownership information can be acquired through the disclosure mechanisms outlined above.

Closer to home, a first instance *ex tempore* judgment was handed down by the Cayman Court on 7 July 2023 in *Re Atom Holdings (in Provisional Liquidation)* FSD 54 of 2023, where the Cayman Court considered, in *obiter*, that CIMA could be a petitioner (or be substituted as a petitioner if the existing petitioner's standing is challenged and defeated) to seek to wind up a non-regulated Cayman domiciled entity, where a public interest ground could be made out. The *Re Atom Holdings* case is believed to be the first liquidation involving a cryptocurrency exchange in the Cayman Islands.

The Cayman Islands has been quiet in comparison to other jurisdictions such as the United Kingdom, British Virgin Islands and Singapore in relation to cryptocurrency and other digital asset cases. But the Cayman Court will likely face more digital asset disputes soon and may have to grapple with the novel legal and practical issues already being dealt with in other jurisdictions.

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50 *Lakatamia Shipping Co Ltd v. Su* (Grand Ct.), 2017 (1) CILR 416.

51 *TMSF v. Merrill Lynch Bank & Trust Co (Cayman) Ltd.*