

Offshore does not mean off-limits when it comes to obtaining information during litigation. **Andrew Bolton** explains how to fill in the blanks

Donald Rumsfeld, the former US defence secretary, speaking at a press briefing in 2002, famously said: "As we know, there are known knowns: there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know."

His remark has since been both mocked for its tortured expression and praised as a neat distillation of a complex philosophical truth. He was actually speaking about the situation in post-invasion Afghanistan, but he might equally have been talking about the conduct of a complex piece of cross-border litigation. In litigation, there are sometimes 'unknown unknowns' – those facts that emerge completely out of the blue, which the participants never even realised they did not know, or needed to know, and that blow the case off track. Clearly an expert litigator will want to reduce this category to a minimum by thinking through and imagining as many scenarios as possible. But the greatest scope for improving one's client's position must lie in the area of the known unknowns – those pieces of information that we know we do not have, but also are aware that we ought to have.

In a world where commercial transactions are often international in nature, this information may be held in a wide variety of jurisdictions. In particular, given the importance of offshore financial centres to the free flow of capital and the efficient conduct of international business, it is not surprising that when a transaction ends up in litigation, very often some of the sought-after information resides in such jurisdictions. When it comes to getting hold of it in those cases, it is commonly assumed that numerous obstacles will be encountered and, in particular, that issues of confidentiality or secrecy will stand in the path of

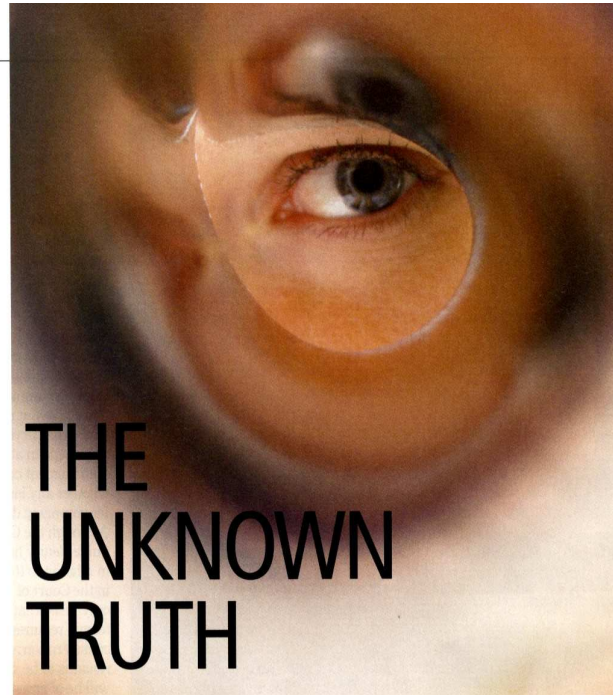
those seeking the information.

In the case of the leading offshore centres of the Caribbean, namely the Cayman Islands and the British Virgin Islands (BVI), as well as of Bermuda, the Channel Islands and the Isle of Man at least, this is not the case. The key lies in understanding the differences in the legal and administrative systems of the territory concerned, knowing where the relevant information will reside (which may be somewhere different from the situation in the UK) and using the tools available to obtain it.

It is true that in many offshore jurisdictions less information is available from official, public sources than in the UK. For example, a company search in the Cayman Islands will reveal only the date of incorporation, the legal category to which the company belongs, the address of the registered office and whether the company is in good standing with the registry (or has, for example, been struck off). In Bermuda, a search will provide a little more, including the names of the directors, but in most such jurisdictions details of the shareholders are not obtainable from a company search.

This is not necessarily as large a difference from 'onshore' practice as it appears: often in onshore jurisdictions the details held by the registry are out of date, or only reveal the names of nominees. The common approach of the offshore financial centres (OFCs) is to require the register of members to be maintained at the registered office of the company, or by its registered agent, rather than at the registry. For example, section 96 of the BVI Business Companies Act lists a number of documents that must be kept by the registered agent.

In some cases, such as in the Cayman Islands in the case of an 'ordinary resident' company, these registers are open to public inspection, but generally access will be limited to members of the



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company or, for some information such as that relating to mortgages and charges, to creditors.

There is, however, a much wider category of information that would likely not be publicly available in any jurisdiction. It is worth noting in this context that in all the OFCs referred to above, stringent anti-money laundering regulations are in force. These require various service providers to obtain (and retain) extensive client identification evidence including details of the ultimate beneficial owners of companies, the settlor and beneficiaries of trusts, the purchasers of land, and so on. In addition, banks will have records of deposits and payments that may be crucial in tracing assets, and there may be many other sources of information specific to a particular case. The question, therefore, is how to get access to this wealth of information.

Unlike some jurisdictions, none of the OFCs mentioned here imposes any restriction on the ability of foreign lawyers or office holders to come and take evidence from anyone in their territory who is willing and legally free to give it. Where, however, compulsion will be required, there are two main possibilities.

Where the information is needed as evidence for the purposes of

proceedings in England, a letter of request from the High Court to the court of the relevant territory will often be productive. Between sovereign states, these are governed by the Hague Convention on the Taking Abroad of Evidence in Civil and Commercial Matters of 18 March, 1970. Since the six OFCs addressed in this article are not sovereign states but dependencies of the UK, their status under the convention depends on the UK having expressly extended the Convention to them. This has happened in the case of Jersey, Guernsey, the Isle of Man and the Cayman Islands (in all of which either the UK's Evidence (Proceedings in Other Jurisdictions) Act 1975 has been extended to the territory by Order in Council, or free-standing local legislation largely mirrors it), but for some reason it has not been formally extended to the BVI or Bermuda. However, this is immaterial, as the BVI has implemented it by statute and Bermuda by rules of court.

It follows that where the necessary conditions are met, the local courts of all six offshore jurisdictions referred to here will give effect to a letter of request from the High Court, or indeed any other court. The requirements, which will be familiar to practitioners involved in cross-

border disputes, are in essence that there must be a formal application to the receiving court, made pursuant to a formal request, which must come from the court or tribunal with jurisdiction in the relevant country, for evidence in civil proceedings that have been instituted or are in contemplation. 'Fishing' is not allowed and no order made on a letter of request can require someone to do something that could not be required in local proceedings in the territory concerned.

Each element of those requirements has given rise to specific case law in the various OFCs (as it has in England and Wales), and it pays to obtain local advice on the formulation of the letter of request even before the High Court or other foreign court is asked to issue it, so as to be as sure as possible that the receiving court will give effect to it. Overall, however, the attitude of the courts of all these OFCs is to help wherever possible. Deemster Doyle of the High Court of the Isle of Man summarised that approach saying:

"Here on the Isle of Man, we are all citizens of the Island but we are also citizens of the global community in which we live, work and contribute. We need to recognise our international as well as our local responsibilities. If the English High Court requires assistance then the Manx High Court, if it has jurisdiction and subject to any necessary safeguards, should not, in a proper case, be slow to provide such assistance."

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The other, and very widely used, means of compulsorily obtaining information from persons based in OFCs, is the disclosure order based on the well-established Norwich Pharmacal and Bankers Trust principles or as an ancillary order to

an asset-freezing injunction. These are recognised and accepted by all six of the territories discussed here, and can be a very powerful device, for example enabling a claimant to gain access to the information as to beneficial ownership required under the anti money laundering legislation. Indeed, in Jersey a recent decision of the Court of Appeal (*Macdoel Investments and others v Federal Republic of Brazil* [2007]) appeared to widen the Norwich Pharmacal principle beyond the limits that apply to it in England, saying "the courts of Jersey are in no sense bound by the scope of the jurisdiction that may have been delineated *de facto* by the circumstances of these cases. Nor are these courts constrained by the limits which may be placed on the application of the principle in the different social and economic conditions that may prevail from time to time in England and Wales."

In none of the jurisdictions considered here is 'secrecy' likely to be a real problem. In the Cayman Islands the person in possession of the information may need to make

a further application to court under the Confidential Relationships (Preservation) Law for directions as to whether and how the disclosure should be made. But while the court will wish to protect the private information of uninvolved third parties from being disclosed if possible, its approach over many years has been to permit disclosure in the vast majority of cases. The statute itself nowadays operates more as a mechanism for approving disclosure than as a 'secrecy law' and is highly likely to be replaced soon with more up-to-date data protection and privacy legislation.

While, therefore, some guidance may be needed through the subtly differing local procedures and requirements, when it comes to obtaining from reputable offshore centres information necessary for multi-jurisdictional disputes, 'known unknowns' can indeed be turned into 'known knowns.' Offshore definitely does not mean off-limits.

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