

# Obtaining evidence in the Cayman Islands

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There are many avenues open to an applicant seeking to obtain evidence in the Cayman Islands. This note considers various mechanisms for obtaining evidence to be used in legal proceedings or investigations, including letters of request, *Norwich Pharmacal* orders, *Bankers Trust* orders, and Anton Piller orders.

## Requirement to Retain Information

The Cayman Islands is the world's leading domicile for offshore hedge funds, and a premier jurisdiction for offshore investment vehicles, special purpose vehicles and other corporate structures. The regulatory framework for Cayman Islands entities means that large volumes of corporate information can be found here. For example:

- the Cayman Islands Monetary Authority (**CIMA**) requires<sup>1</sup> regulated entities to ensure their records are up to date and accessible. Records relating to transactions are required be kept for a minimum of 5 years after the end of a business relationship;
- the law in Cayman has long required companies to retain beneficial ownership details. They must keep evidence of the identity of every beneficial owner holding 10% interest or more<sup>2</sup>; and
- new legislation came into force on 1 July 2017 requiring certain Cayman Islands companies to maintain a formal beneficial ownership register containing details of the individuals who ultimately own or control more than 25% of the equity interests of a company, or have rights to appoint or remove a majority of its directors, together with details of intermediate holding companies through which such interests are held.

## Letters of Request

The Cayman Court has regularly granted letters of request from overseas courts, pursuant to the Evidence (Proceedings in Foreign Jurisdictions) (Cayman Islands) Order 1978 (the **Order**). The Order extends relevant sections of the UK Evidence (Proceedings in Other Jurisdictions) Act 1975 to the Cayman Islands and gives statutory effect to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (otherwise known as the **Hague Evidence Convention**). To obtain an order, the applicant must show that: the evidence sought is to be obtained in the Cayman Islands; the application is made pursuant to a request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside the Cayman Islands; and the evidence to which the application relates will be used in active or contemplated proceedings in the requesting court.

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<sup>1</sup> CIMA Statement of Guidance: Nature, accessibility and retention of records

<sup>2</sup> Pursuant to the Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands published by CIMA

Specifically, the Court may make orders for:

- the written or oral examination of witnesses;
- the production of documents;
- the inspection, photographing, preservation, custody or detention of any property;
- the taking of samples of any property and the carrying out of experiments with any property;
- the medical examination of any person; or
- the taking and testing of samples of blood from any person.

The Grand Court should grant the order unless it deems the application to be frivolous, vexatious or an abuse of process.

### **Norwich Pharmacal Orders**

A *Norwich Pharmacal Order* (**NPO**) is a disclosure order against a third party involved in wrongdoing. NPOs are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

NPOs are a flexible type of relief in the sense that they may be obtained pre-action, during the course of an action or post-judgment. A defendant may also seek information via a NPO if he can demonstrate that he needs the information in order to plead his defence.

The Grand Court may grant *Norwich Pharmacal* relief if the following conditions are satisfied<sup>3</sup>:

- a wrong must have occurred, or it must be arguable that a wrong has occurred;
- the NPO is necessary to enable an action to be brought against the wrongdoer; and
- the respondent is not just a witness to the wrongdoing, but is somehow involved in the wrongdoing and is at least likely to be able to provide the information sought.

### **Bankers Trust Orders**

A *Bankers Trust order* (**BTO**) can be a powerful tool for tracing and recovering assets in circumstances where there is a *prima facie* case of fraud and the relevant information is required to recover, trace, or preserve assets to support a proprietary asset-tracing claim. A BTO can be used to compel a third party to disclose details of financial activities which might ordinarily be protected by its duties of confidentiality. BTOs are useful for tracing funds in cases where fraud can be easily proved, urgent action is required to trace assets and the request for disclosure is not too wide.

Where it is not possible to obtain a BTO, *Norwich Pharmacal* relief may be available to identify the proper defendant to an action or obtain information to plead a claim.

Gagging orders are often sought in conjunction with NPOs and BTOs. The Grand Court has an inherent jurisdiction to grant gagging orders to restrain a respondent against whom an *ex parte* disclosure order is made from communicating with the intended defendant regarding the disclosure order.

### **Anton Piller Orders**

A search and seizure, or *Anton Piller order* (**APO**), is a mandatory interim injunction designed to preserve evidence or property which is (or may be) the subject of an action, or which may answer a question arising from an action. APOs require a defendant to allow the applicant's representatives to enter its premises and search for, copy, and remove documents, information or material. A defendant who fails to comply with an APO may be held in contempt of court.

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<sup>3</sup> In *Braga v Equity Trust Company (Cayman) Ltd et al*, Smellie CJ relied on the speech of Lord Slynn in *Ashworth Hospital Authority v MGN Ltd*<sup>3</sup> summarising the principles to be satisfied to obtain an NPO

An applicant may seek an APO where he believes that a less intrusive order would be insufficient because the defendant would destroy evidence in contravention of the order. Because the procedure for obtaining an APO does not give the accused party the ability to oppose the application, APOs are only issued exceptionally and if the following criteria are satisfied:

- there is a strong *prima facie* case against the defendant;
- the actual or potential damage to the applicant is serious; and
- there is clear evidence that the defendant has relevant materials and there is a real possibility it may destroy such material before an *inter partes* application can be made<sup>4</sup>.

### Confidential Information Disclosure Law

Cayman's Confidential Relationships (Preservation) Law, viewed by some as an obstacle to obtaining information, has been repealed and replaced by the Confidential Information Disclosure Law, 2016 (CIDL). The CIDL reflects Cayman's continued commitment to enhanced principles of transparency and information sharing. For further details please refer to our guide to the CIDL which can be found [here](#).

### Pretrial Depositions

In addition to the options discussed above, the Grand Court Rules specifically provide for pretrial oral discovery or depositions<sup>5</sup>. A party may make an application for discovery by oral examination after discovery of documents has taken place or has been deemed unnecessary by the court in accordance with the court rules. Further, the court must be persuaded that oral discovery is necessary either for disposing fairly of the matter at hand or for saving costs. Whilst this procedure is not used frequently, it is available in appropriate circumstances to obtain evidence and assist with trial preparation.

### Conclusion

There are a variety of ways a party may obtain evidence that is located in or connected with the Cayman Islands, and the Cayman courts are adept at dealing with the types of applications discussed in this guide. Parties seeking information or evidence should take advice and carefully consider all of the options available to them.

## Contacts

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<sup>4</sup> Ibid in which it was held that "There are three essential pre-conditions for the making of such an Order... First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made."

<sup>5</sup> GCR O.24, rule 16

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED