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International Fraud & Asset Tracing 2022

Introduction
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INTRODUCTION

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Global Overview

It is with great pleasure that we introduce this latest edition of the Chambers *International Fraud & Asset Tracing* guide. This publication provides the latest legal know-how in relation to civil law fraud, causes of action, evidence gathering, worldwide freezing injunctions, third-party disclosure, damages principles and enforcement.

Fraud litigation can be a very wide label covering a variety of disputes, but all fraud cases involve a few key areas. Firstly, there is the importance of identifying and securing assets – fraudsters tend to be sophisticated in hiding and moving assets, often through different forms, and without regard for borders (indeed, often deliberately through multiple jurisdictions in order to try to mask their trail). Unless action is taken at an early stage to lock down those assets, there may well not be anything to fight about through litigation. It is no good having a judgment, but no assets to enforce against.

Secondly, there is the issue of identifying the right defendants. In cases where the identity of the wrongdoer is not known, this could mean identifying them through, for example, Norwich Pharmacal orders which require an innocent third party involved in a fraud (such as a bank) to provide documents or information. Although, there is also well-established jurisprudence of bringing claims against unknown persons, that is only useful if you have already secured the assets – otherwise, you are faced with a judgment against an unknown person and therefore no hope of enforcing your judgment. Identifying the right defendants can also mean working out which other parties might be possible defendants: are there individuals or corporates who assisted in the fraud – for example, banks making payments, or accountants involved in a transaction? Might there be arguments that the person who now has the assets holds them on trust for the victim of fraud?

Finally, there is gathering the evidence. That can involve the use of investigators or forensic accountants, but might also mean recourse to the courts – for example, through third-party disclosure orders, potentially in different jurisdictions to the one where the fraud occurred.

It is the job of the fraud litigator to pull all this together, and often to do so across a number of different jurisdictions and in a very compressed timeframe. For this reason, a guide such as this one will be of great value to practitioners in this space.

The Landscape for Fraud and Asset Tracing

The world is currently in a state of great uncertainty and turmoil as a result of, amongst other things, the effects of the pandemic and the Russian invasion of Ukraine. The global economy is still fragile, and this is all likely to lead to many fraud disputes and related asset-tracing work.

Furthermore, the unprecedented reaction of a number of Western countries to the Ukraine invasion through wide economic sanctions has the potential to significantly change the landscape for fraud litigators. Whilst the sanctions regime itself is primarily a criminal regime, it has brought into the public gaze the use of complex offshore structures, such as trusts and offshore companies, by individuals to hold assets. This has led to a media and political debate about these structures, as well as action against them.

For example, on 8 April 2022, the European Union introduced measures which prohibit EU trust and company service providers from pro-

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viding administration services to trusts and similar structures connected with (whether as settlors or beneficiaries) Russian nationals (although not if they are a national of or have residence in an EU member state). From 10 May 2022, the sanctions expand further and there is a prohibition on providing trustee or other fiduciary services to trusts and similar structures connected with Russian nationals.

This is an extremely wide-ranging move, which is not limited to sanctioned individuals, but applies to any trust structures connected with Russian nationals (albeit not including those living in the EU or with EU nationality). On the face of it, therefore, a trust would be caught even if it had no Russian beneficiaries, but had a Russian national settlor, who, many years ago, settled the trust (and in doing so divested himself of ownership interest). It seems inevitable that action such as this is likely to result in assets moving out of the EU to jurisdictions which are less likely to take such action. This transfer of assets may well result in litigation, because a large-scale movement of assets can often lead to things going wrong, but, for fraud lawyers, it also means that there might be a number of new jurisdictions in which they need to take an interest.

Furthermore, it is possible that there will be a more profound impact of sanctions. The way in which the sanctions have been implemented may mean that there is a concern about relying too heavily upon the mainstream Western banking and financial system, on the basis that to do so creates vulnerability. That may lead to the development of alternative systems: there is already anecdotal evidence that there has been a large flow of money from Russia to Dubai through cryptocurrency networks. Crypto obviously existed long before the sanctions were put in place, but the sanctions regimes may be a catalyst which increases the use of cryptocurrency networks as a means of fund transfer. It is therefore essential that fraud lawyers keep on top of these developing trends, and that courts adapt to them.

Convoy Collateral

In this regard, the decision of the UK Privy Council in Convoy Collateral v Broad Idea International is potentially very significant for fraud lawyers. It amounts to a restatement of the law in relation to freezing orders, one of the most powerful weapons in the toolkit of a common law fraud lawyer.

Strictly speaking, the case dealt with the question of whether it was possible for the BVI courts to grant standalone freezing orders against a party in aid of proceedings taking place outside the BVI. The BVI court had held in 2010 that it was possible (the so-called "Black Swan decision"), but the Court of Appeal in Convoy Collateral had overturned that decision. The Privy Council held that the Court of Appeal was wrong to do so. However, that was, to some extent, overtaken by events because the BVI House of Assembly had introduced a statutory basis for such freezing orders.

The more interesting point was about freezing orders and injunctions more generally. Lord Leggatt, who gave the leading decision, restated the law in relation to freezing orders and overturned the long-criticised decision in The Siskinawhich had held that the English courts had no power at common law to grant a freezing order unless it was ancillary to an accrued cause of action. Lord Leggatt stated that: “[t]he law took a wrong turning in The Siskina, and the sooner it returns to the proper path the better”.

Lord Leggatt went on to make clear that freezing orders, and other similar injunctions are an equitable remedy which have a degree of flexibility to keep up with changes in society, including the

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way in which business is done, and funds are moved. He stated that, in his view, "[I]t would be unjustifiable insularity for an English or other domestic court to put obstacles in the way of a claimant who wishes, with the court's aid, to enforce a foreign judgment against a defendant's assets".

Whilst this was a Privy Council decision, and therefore not strictly binding on the English courts, given the eminence of the Tribunal (involving six of the most senior English judges rather than the usual panel of five justices), it is inevitable that it will be given significant weight in the English courts. It will also be highly significant in common law jurisdictions across the world. It is therefore to be expected that the coming years will see further developments and flexibility in the development of freezing orders, and other weapons against fraudsters, in order to combat the acts of fraudsters.

An example of the flexible approach, and the speed with which courts can react, is shown in the case of Danisz v Person Unknown. An individual, Ms Danisz, invested circa GBP27,000 in Bitcoin through a website called Matic Markets Limited. In December 2021, she asked to withdraw her investments, but the request was refused. She became suspicious and commissioned an expert report which led her to conclude that Matic was a fraudulent operation. She then applied ex parte for a freezing order, which was granted on 5 January 2022 (only a month after she had first requested the money). The judge granted a worldwide freezing order, as well as a disclosure order, to help to identify the fraudsters, and reporting restrictions to prevent the fraudsters becoming aware of the injunction. In doing so, the judge noted that "this is a form of transaction whereby, at the click of a mouse, an asset can be dissipated". The speed with which the court granted the relief, and the recognition of the way in which modern-day fraudsters can whip assets away at a moment's notice, demonstrates how the courts are adapting and developing new tools for fraud practitioners.

We hope that this guide will prove useful to all clients and practitioners.

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Seladore Legal is a disputes-only law firm specialising in major and complex litigation and arbitration, with a particular emphasis on multi-party, multi-jurisdictional disputes. By specialising solely in litigation, the firm minimises the prospect of commercial and legal conflicts of interest. Seladore Legal Limited is made up of experienced litigators who have previously worked at other top-tier UK, US and international law firms and who regularly act in significant commercial disputes across a range of different sectors.

CONTRIBUTING EDITOR

Simon Bushell is the senior partner at Seladore Legal, specialising in international commercial litigation and arbitration, including civil fraud and asset tracing. Simon has over 32 years' experience in high-stakes commercial litigation. He acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in co-ordinating parallel cross-border disputes and proceedings.

CO-AUTHORS

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Kevin Kilgour is a partner at Seladore Legal. He is a commercial disputes lawyer with experience of litigation, mediation and arbitration. He has acted for clients in a wide range of sectors, including technology, telecommunications, logistics, banking and real estate development. Kevin has particular experience of acting in relation to complex contractual disputes, tort claims (including fraud and economic torts), shareholder and joint venture disputes, and has acted on a number of CIS-related matters. He regularly advises on applications for peremptory relief, including freezing injunction applications in a number of common law jurisdictions.

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