



# Asset Recovery Magazine

**ISSUE 1**

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# INTRODUCTION

Asset recovery has rapidly developed into its own distinct practice area in recent times. The march of modern technology and practices has simply allowed fraudulent and corrupt practices to take on different guises and approaches. Often developing ahead of enforcement agencies and the innately slow moving international law.

Asset recovery is at essence a multi-disciplinary practice encompassing the whole gambit of legal practice and strategy. It is inherently international in the modern world and requires specialised knowledge of the common and civil law litigation tool box. Varying tactics are employed utilising these tools including insolvency, investigative approaches, forensic accounting techniques, and tapping into the emergence of litigation funding.

An Asset recovery specialist can come from a variety of backgrounds and firms bringing their own unique skills to bear.

We are delighted to bring you the first edition of the quarterly Asset Recovery Hub eMagazine, where we will be bringing you the latest insights from around the globe in the context of the developing practice of Asset Recovery.

**The Asset Recovery Hub Team**

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# STRATEGY AND THE MARCH OF THE MODERN WORLD

## STRATEGIC CONSIDERATIONS IN ASSET RECOVERY PLANNING

**Charli Whitlock**

Control Risks

### Introduction

An investigation into fraud, bribery or corruption is without a doubt complex and burdensome. It is all too easy for companies to get distracted by the investigative outcome, rather than considering where the money went or how to recover associated losses. Yet, in our experience, planning asset recovery sooner rather than later gives companies a better chance of minimising and reclaiming financial losses. In doing so, companies should consider the legal mechanisms available to them and the strategic objectives they wish to achieve in the short mid and long term before initiating an asset recovery plan.

### Initial decision-making

The decision to engage in any form of financial recovery should not be taken lightly. Good legal advice is essential for companies throughout the recovery process. We always advise our clients to consult closely with their lawyers before making such decisions. Recent cases on which we have worked have shown how effective use of both legal and investigative resources can maximise the chances of an

effective outcome and provide guidance on the potential implications for the company throughout the process. Companies can often commence their asset recovery strategy as soon as they have engaged with legal teams. In our experience, this can further expedite the recovery process.

For example, a company that has been subject to fraud may not realise the value of gathering information from sources within its organisation to obtain potential intelligence connected to the offender's assets. A recent case proved this approach can be useful in initial asset recovery planning. The company was able to identify

**“PLANNING ASSET RECOVERY SOONER RATHER THAN LATER GIVES COMPANIES A BETTER CHANCE OF MINIMISING AND RECLAIMING FINANCIAL LOSSES.”**

not only UK assets held by the main offender, but also those in other jurisdictions, solely through its company network.

In addition, companies can make good use of their investigative resources by undertaking public records research to begin to either establish or verify assets held by the perpetrator(s). These assets can then be compared with the quantified loss as a result of the fraud. Furthermore, investigators can conduct analysis of any corporate assets to establish the financial standing of that particular asset. These elements can help to inform the company of the best approach to its overall asset recovery strategy, and can also support the legal team in prioritising freezing injunctions.

### Civil vs. criminal proceedings

UK-based companies have an obligation to report acts of bribery to law enforcement in line with guidance under the UK Bribery Act 2010. Such reports can result in proceedings by law enforcement or regulatory bodies. Where a fraud has occurred within an organisation, companies are not obliged to report offences to the police. However, many do because

company directors often see a criminal prosecution as the desired outcome.

Nonetheless, although criminal proceedings come at no cost to the victim, they are typically less predictable in terms of outcome. Meanwhile, compensation orders (for victims) can only be granted post-conviction, which may not always be sought by prosecutors[1]. The compensation

**“UNDERSTANDING THE DIFFERENCES IN LEGAL PROCEEDINGS IS A KEY CONSIDERATION FOR VICTIM COMPANIES WHEN DECIDING ON THE LEGAL AVENUES AVAILABLE.”**

granted is also subject to the court’s considerations as to the outcome of any civil proceedings, whether a sentence of imprisonment has been handed down, and the funds available to the defendant. [2] This process can be frustrating and risky for a company waiting to retrieve its financial losses if pursuing criminal prosecution alone. Meanwhile, a criminal prosecution also relies on meeting the criminal burden of proof. Prosecutors may amend the charges to encourage defendants to enter guilty pleas, thereby avoiding a lengthy and costly trial.

This in turn may affect the value of compensation awarded.

In most cases, companies will opt for civil proceedings instead of or in parallel with criminal proceedings if recovering losses is a high priority. However, although quicker, this comes at a price, and is a costly avenue for companies to pursue. Nevertheless, the company will have more control over civil proceedings, which focus more on compensation for damages[3]. Neither system takes precedence over the other, except in cases where the perpetrator(s) may face risk of prejudice from either or both proceedings.[4]

Once civil proceedings are under way, the disclosure process may assist in identifying further assets owned by the perpetrator(s). Disclosed financial documentation can also be used as the basis for an asset trace, again working with investigators, where money illegally facilitated or stolen by the perpetrator can be tracked to their assets. This may be a more suitable strategy for a company wanting to know exactly where its money has ended up. This can be especially useful when dealing with cases of long-term fraud or where multiple perpetrators have been involved.

Understanding the differences in legal proceedings is a key consideration for victim companies when deciding on the legal avenues available. We have observed this in recent investigations where assets have been disposed of in the time it took for our clients to make this decision which in turn impacted the retrieval of losses they had suffered.

**Conclusion**

There are substantial advantages in pursuing civil proceedings either instead of or in conjunction with criminal proceedings if asset recovery is a desired outcome for the company. Through a better understanding of the legal impact on objectives after the fraud, companies can maintain better control of the situation and are more likely to be successful in achieving effective asset recovery. It is key for companies to be aware of the legal mechanisms and investigative preparations to inform their asset recovery strategy early on, while working harmoniously with their civil legal teams, investigators and, if applicable, law enforcement during the process itself.



1 <https://www.kingsleynapley.co.uk/services/department/dispute-resolution/civil-fraud-and-investigations/fraud-civil-vs-criminal-faqs#1>

2 Section 130 – 134, Powers of Criminal Courts (Sentencing) Act 2000

3 ‘The criminal and civil justice systems in England and Wales’, (Fraud Advisory Panel, 2015)

4 <https://www.kingsleynapley.co.uk/services/department/dispute-resolution/civil-fraud-and-investigations/fraud-civil-vs-criminal-faqs>

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# TRENDS IN FRAUDS IN THE MODERN WORLD

Caley Wright  
Maitland Chambers

**“THE FT ESTIMATES THAT FRAUD COST THE TELECOMS INDUSTRY ALONE US\$17 BILLION IN REVENUE, NOTWITHSTANDING A REDUCTION FROM 5% TO 1% OF REVENUE LOST”**

Over recent years, reports have consistently suggested that fraud is on the increase in the modern world, though it is difficult to ascertain whether that is due to an actual increase in the quantity of fraud or due to greater detection and reporting of fraud. For example, companies now spend greater sums on both internal and external fraud detection and prevention. There is certainly now greater expectancy that companies will have in place adequate fraud detection and prevention systems – from stakeholders and customers as well as regulators. Whether or not fraud is increasing, there can be

**“THE MAJORITY OF FRAUDS ARE CARRIED OUT EITHER BY ‘INSIDERS’ (I.E. EMPLOYEES OR EVEN MANAGEMENT) OF COMPANIES OR BY OUTSIDERS KNOWN TO THE COMPANY (SERVICE PROVIDERS, AGENTS OR EVEN EXISTING CUSTOMERS); THE LATTER TENDS TO BE AN UNDERAPPRECIATED THREAT.”**

no doubt that of its prevalence. The FT estimates that fraud cost the telecoms industry alone US\$17 billion in revenue, notwithstanding a reduction from 5% to 1% of revenue lost.

Advances in technology, such as AI, algorithms to identify suspicious transactions or patterns, and blockchain all have the potential to substantially reduce the scope for fraud. However, as is so often the case, the increased reliance on technology is a double-edged sword. While understanding of the importance of cyber-security has undoubtedly improved, new avenues for deception are opened up: by some estimations, up to 50% of reported fraud now relates to or involves cybercrime, with many expecting that figure to rise yet further. A substantial number of cases have appeared before the Courts in recent years which relate to hacking, including even the hacking of solicitors’ email accounts in order to redirect payments (a variation of the often-seen mandate fraud).

This leads to the question as to whether in fact, the rise of technology has changed the nature of fraud, or merely given fraudsters new avenues through which to pursue existing frauds. Certainly it appears that the majority of frauds perpetrated are, even if using technology in novel ways, recognisable as falling within existing categories, such as Ponzi schemes, mandate or identity fraud or carousel fraud.

Notwithstanding the above, it remains the case that the majority of frauds are carried out either by ‘insiders’ (i.e. employees or even management) of companies

or by outsiders known to the company (service providers, agents or even existing customers); the latter tends to be an underappreciated threat.

One undoubted conclusion from all of the above is that fraud is increasingly globalised in its inception and execution. Not only does the increase in companies’ cross-border operations make frauds much more likely to be ‘international’ in execution, the process of transferring, and thereby concealing, assets is now much more rapid and much more likely to cross national borders than has ever previously been the case. This causes a number of issues in terms of fraud litigation, in particular: the increased likelihood of jurisdiction challenges and the possibility of the need for multiple proceedings in different jurisdictions; national variations in terms of disclosure and other evidence gathering provisions; and, even if it is possible to identify and bring actions against the relevant fraudsters, increased cost and difficulty in terms of enforcement actions after the conclusion of the proceedings.



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# INTERVIEW: THE ROLE OF INVESTIGATORS IN ASSET RECOVERY

**Peter Pender-Cudlip**  
GPW

*Asset recovery hub recently caught up with Peter Pender-Cudlip, Co-Founder of GPW + Co, to see how the role of the investigator has changed in recent times.*

## Q: How is the role of investigators changing in asset recovery?

Peter Pender-Cudlip: Three trends stick out for me. First, the breadth of asset recovery situations where investigators are retained. Nowadays we get instructed to provide investigation services across a range of recovery matters including contentious insolvency and trust litigation, investor state disputes, non-performing loans, complex cross-border commercial disputes, state related corruption as well as the more traditional fraud, breach of contract and matrimonial cases. Second, similar to the legal community, asset recovery has emerged as a specialist practice area for investigators. The complex and cross border nature of cases makes it difficult to dabble in asset recovery. As a result, there is a relatively small handful of investigators who consistently do this type of work globally and do it well. Third, lawyers and investigators are collaborating much more closely. Often success on asset recovery comes only where legal, investigation and forensic accounting teams work seamlessly together. For example, investigators identifying assets against which lawyers can obtain a local freezing order; providing evidence to support a United States application for discovery under 28 USC Section 1782., finding a jurisdictional hook to enable proceedings to be launched in a new, more user friendly jurisdiction or developing evidence to underpin an alter ego argument on SOE asset enforcement.

## Q: What is the secret to successful asset recovery?

Peter Pender-Cudlip: I often say investigators get paid to 'pull a rabbit out of the hat'. But like any good magic trick a lot of dedication goes in behind

the scenes. Large scale asset recoveries require persistence, extensive case experience to know what does and doesn't work, sound judgement (there are judgement calls to make along every step of the way), emotional intelligence and the ability to think laterally. When it comes to the enforcement phase, the work is very jurisdiction focused so local access and knowledge is critical.

**“OFTEN SUCCESS ON ASSET RECOVERY COMES ONLY WHERE LEGAL, INVESTIGATION AND FORENSIC ACCOUNTING TEAMS WORK SEAMLESSLY TOGETHER.”**

One of the secrets, particularly with recalcitrant respondents becoming more sophisticated in how they proactively hide their assets is to adopt a creative approach to what constitutes assets. As well as looking for the obvious real estate, company shareholdings, cars, planes, artwork etc, widening the scope to claims against third parties such as third party debtors and aiders and abettors, or targeting more esoteric assets ( such as possibly crypto currency in the future) will increase the likelihood of success.

## Q: How do you approach an asset recovery case?

Peter Pender-Cudlip: Our approach is to work very much hand-in-glove with the legal team; prioritising those assets and potential fund flows that appear most attractive from a value, enforceability and 'attention-getting' perspective. Ultimately, our job is to help the client and lawyers turn a fraud claim, a judgement debt or arbitral award into cash using intelligence and investigations to facilitate payment either through legal process or settlement.

In broad terms there are three main buckets of information in relation to assets. The first bucket, is open-source information relating to the target's assets and network. This includes the full range of proprietary and public databases, press, corporate filings, credit reports, land registries, social media as well as obscure hard-copy only archives all of which scoured for leads. There was a time when UK Companies House officials would scribble numbers associated with a registrant company on the cover sheet of the Form 363 which would turn out to be a bank account number or a telephone number which linked to a previously unknown property address. Also, there is what I call 'unintentional disclosures' where a company or individual files information for one purpose eg incorporation, to satisfy regulatory obligations and in the process inadvertently discloses information about its assets which can be exploited. It is therefore important to cast the net wide enough in asset recovery investigations to ensure every snippet of asset information is captured.

The second bucket is human intelligence which is comprised of people who know, have worked with, advised, competed, observed or otherwise transacted with the subject. Often this is a very rich vein of information. As well as drawing on our existing network, we will actively find and cultivate persons who have special knowledge of the events and transactions of interest and are unconstrained to share it with us. We would usually recommend looking at close business associates and family members. Often fraudsters and others seeking to evade enforcement won't hold assets in their name but will co-opt family and nominees and use offshore centres and corporate vehicles to obscure beneficial ownership. Probing these links and transactions and building evidence to help lawyers evidence beneficial ownership/pierce the corporate veil is another important role for investigators.

A final bucket that is relevant in some cases is information held by the target

company that can be accessed through disclosure orders, insolvency proceedings or other judicial process. Again, this can be a rich vein of information especially when mined and cross-referenced with the other data streams above.

### **Q. When would you advise an asset investigation be done? Before or after the arbitral award or judgement?**

Peter Pender-Cudlip: If possible it is always better to begin an asset investigation before judgment and we are increasingly being instructed at an early stages of the claim whether by a claimant, law firm or litigation funder. Asset due diligence is an important first step in order to assess the feasibility of the claim and therefore save time and

money in the event that the assets are either not valuable enough to meet the claim or will cost significantly more time and money to trace and recover than the claim is worth. It can also pay off to take a snapshot of the asset position at the start of proceedings in case at a later point you wish to prove dissipation. Either way, early visibility on assets

**“WHETHER PRE-ACTION OR AT ENFORCEMENT, THE SWEET SPOT IS FINDING ASSETS IN A USER FRIENDLY JURISDICTION FOR LEGAL ACTION”**

means you are ready to pounce once the award or judgement is made. Whether pre-action or at enforcement, the sweet spot is finding assets in a user friendly jurisdiction for legal action. Recently, we developed the GPW Global Asset Tracing & Enforcement (GATE) Map which shows which countries are signatories to the New York Arbitration Convention overlaid with a GPW Country rating on the accessibility of asset information. This is a handy reference tool when developing your asset recovery strategy.



## **DEALING WITH LIARS ON ALL SIDES OF A CASE**

**Caley Wright**  
Maitland Chambers

Giving evidence in Court remains a solemn event; lying in court is not therefore to be trivialised. It carries potentially serious consequences including conviction for perjury (though, as shown in the Andy Coulson prosecution, not all lies told in Court amount to perjury) or committal for contempt of court under CPR 32.14. In one particularly direct example of the consequences of lying in court, *Karbhari v Ahmed* [2013] EWHC 4042 (QB), the defendant's late application to amend his case, admitting that the defence originally pleaded was deliberately false, led the Judge to refer the matter directly to the Metropolitan Police's Economic Crime Unit.

Nonetheless, it is naïve to think that lies are not told in Court. Indeed, the number of cases where diametrically opposed but trenchantly pursued evidence is given leaves no other inference, even taking into account differences in recollection, than that at least one of the parties is lying.

There has been, perhaps in part in response to this trend, something of a shift in judicial attitudes to witness evidence. Rather than looking primarily to witness evidence (in the form of witness statements and, increasingly, at least on

central issues, examination in chief) in civil cases, Judges routinely now look to the primary documents as evidence of what has actually taken place. While the importance of contemporary documents is nothing new – see the dicta of Robert Goff LJ in *The Ocean Frost* – their role appears to have been elevated to the extent that, in at least some cases, the utility of witness evidence at all as a means of ascertaining the facts has been doubted; see the judgment of Leggatt J in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm).

More commonly, however, Judges look for external verification of a party's first-hand account, for example in the contemporary documents; all the more so where there is reason to believe the witness is lying. In *Stein v Chodiev* [2014] EWHC 1201 (Comm), in a case which turned largely on the parties' disputed accounts of meetings and oral conversations, Burton J described this process as looking for a “a hook, upon which to peg a conclusion, or to give corroboration to one side or the other, which is not dependent upon the vagaries of recollection”. In subsequent related proceedings, in which the defendants sought to set aside Burton

J's judgment on the basis it was obtained by false evidence given by the claimant, the same Judge set out what he would have done had he taken the view that both sides' evidence was dishonest; essentially, to rely even more heavily on the extrinsic evidence and inherent probabilities. In *Chodiev v Stein* [2015] EWHC 1428 (Comm) Burton J stated at [38]: “if I had been faced with a choice between two sets of oral evidence ... by parties both of whom I had cause to conclude had lied to me, or to have doubts about their credibility, I would have all the more done exactly that which I did do, namely looked for reliable corroboration of the evidence for one side or another.”

As a last resort, in the event that the trial judge takes the view that neither side's evidence is honest and there is no extrinsic factors on which the Judge can base his conclusion then it may be that the Judge can do no more than find that the claimant has failed to discharge the burden of proving the facts necessary to make out his claim and, as a result, the claim fails. Such an outcome would generally be viewed as unsatisfactory however.







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# YOUR ONLINE “DATA SELF” AND THE IMPACT ON FRAUD AND ASSET RECOVERY

**Heather Phoenix**  
Duff & Phelps

**“INSTEAD OF ONE REPLICATED DATA SELF, IT IS PERHAPS MORE ACCURATE TO ENVISAGE AN ARMY OF MORE-OR-LESS ACCURATE DATA SELVES, SPANNING ACROSS THE INTERNET.”**

As Marcus Brigstocke has happily explained to all of us in the recent Experian adverts, each one of us is represented online by a “data self” comprised of the sum of our interactions with social media and other internet companies. In reality, your data self is not an exact replica of you. Instead, depending on what data a given company or database holds about you, your data self will appear slightly differently – some data selves may be fully fleshed out, whereas others are just sketches, depending on the data aggregation capabilities of the database or company.

It is important to remember that while each individual piece of data may seem inconsequential and meaningless, particularly at the point when you chose to provide it, companies or others can use these interactions to construct an impression of you, turning the individual points of data into information that can be useful to them. Instead of one replica data self, it is perhaps more accurate to envisage an army of more-or-less accurate data selves, spanning across the internet.

These data impressions can then be exploited and sold for financial gain, both legitimately and illegitimately. Companies such as Google and Facebook, who trade your data on a daily basis, have (generally) gained your consent to do this, even if you did not really read the Terms and Conditions by which you consented. In contrast, hackers and those who profit from our data illegally have no right to access the data, but can equally be considered as data merchants. To profit from your data, hackers can sell the data to others who also wish to use your data illegally or can themselves use the data obtained to impersonate you across

multiple platforms in order to gain further information that may be valuable.

As a society, we are still coming to terms with the impact of “Big Data”. However, there is an increasing awareness of the potential value of data, both for individuals and companies. The recent introduction of the General Data Protection Regulation (GDPR) is but one marker of the increasing pressure on governments to crack down on those who wish to profit from your data without consent or any legal right; a pressure that has contributed to some ground-breaking cases for authorities.

Take the example of Grant West, recently jailed after exploiting customers of the website Just Eat, among others. West, who obtained tens of thousands of customer email addresses through various schemes, used those details to compromise accounts across multiple sites, eventually building a database of “data selves”, which he sold on the now-defunct dark net site Alpha Bay. In this case, the police seized in excess of £0.5m in assets obtained from his various scams and have stated that a further cache of cryptocurrency worth around £1.6m (at the time) remains unaccounted for. These figures also do not include the hundreds of thousands of pounds it has cost Just Eat and others. The judge in this case commented that it should be “a wake-up call to customers, companies and the computer industry to the very real threat of cyber-crime”.

As much as this should be taken as a reminder to ensure that you have secured your data with un-guessable passwords and multi-factor authentication, and that you do not click on a link you do not trust, this availability of data and fallibility in

some areas of over-sharing can also be an asset to the counter fraud and asset tracing professions. The very information that might be exploited illegally can also lawfully be used to locate those responsible, often by using similar data tracing and aggregation methods to those used by the major data vendors.

For instance, in one case of tracking information around suspected online fraud, we have seen examples of bragging on social media sites about the success of a scam that could be traced to a specific transaction, account and culprit. Eventually the bragging implicated several connected perpetrators, who were interacting with each other on social media. Collecting volunteered information in the public information domain allowed us to form a picture of the individuals behind these transactions, which can in turn be used to search for and identify additional perpetrators, repurposing the fraudsters’ methods and tools to track them down.

Ultimately, it seems safe to say that the current social consensus is that we are content to give away our data for the services that companies offer in return. The value of that data will, however, continue to give rise to attempts by fraudsters and hackers to misappropriate and resell our data selves. As counter-fraud professionals, we need to be equally conscious of the opportunities data provides for tracing and capturing that behaviour.

# CASE STUDY ANALYSIS: DIGITAL CURRENCIES

**Rupert Black**  
Burford Capital

## Intro

If you're pursuing a recalcitrant debtor or sophisticated fraudster who happens to be using cryptocurrencies such as Bitcoin, you might feel as though you've hit a dead end. How can you recover assets from someone who has specifically gone out of their way to hide their wealth in digital currencies? Well, as Burford's recent case study shows, options are available and paths to recovery exist, so long as you know who to ask and where to look.

## What is cryptocurrency?

Bitcoin (BTC) is a digital currency based on a protocol that allows data to be stored in a transparent and unalterable way in a decentralised ledger, essentially, a database that everyone has a copy of, known as the Blockchain. Bitcoin is the first example of a cryptocurrency, an asset class similar to that of traditional "fiat" currencies, but whose supply is

## Background

Our case study concerns two UK residents (for our purposes here let's refer to them as Smith and Jones) who ran a series of fraudulent schemes that netted them tens of millions of pounds. After the frauds were uncovered, Smith and Jones entered insolvency, no doubt hoping to come out clean the other side upon discharge. Needless to say, Smith and Jones were not forthcoming with the trustees and the investigation uncovered neither assets recoupable to the estate nor answers concerning the whereabouts of the millions in pilfered investor funds. If the trustees were to make any recovery, it was clear that a highly complex, long-running and expensive investigation would be required.

The trustees sought help from Burford and its team of asset recovery specialists. We have experience partnering with resource-strapped insolvency estates, in which our role typically entails identifying assets,

proxies of Smith and Jones at around the time of their bankruptcies, when they were registering other offshore businesses which were used to siphon proceeds of the fraud. We knew from their backgrounds that Smith and Jones were tech-savvy investors, so it seemed possible that they knew their BTC from their ETH, and how cryptocurrency investing and trading could make them some money.

Our suspicions were confirmed when we obtained documents which appeared to show payments, albeit nominal sums, being made by Smith and Jones to UK-based cryptocurrency exchanges. We got hold of these documents via a combination of traditional disclosure orders and overseas discovery mechanisms. What we did not understand, however, was why the exchanges also appeared to be making payments back to Smith and Jones.

**“EVERY BITCOIN TRANSACTION OF ANY SIZE IS PUBLICLY VIEWABLE, PROVIDED OF COURSE THAT YOU KNOW WHAT YOU ARE LOOKING FOR!”**

controlled by lines of code, rather than central banks. Transactions are verified using cryptography. Cryptocurrencies are typically traded via exchanges, which act as digital marketplaces connecting buyers with sellers, and stored using digital wallets.

Much has been written about the anonymity of Bitcoin and the unbreakable cryptographic verification and encryption used to secure records of transactions in the blockchain. It is no secret that this is why it is often favoured by criminals, techies and investors alike. In fact, it is precisely because of this underlying technology that every Bitcoin transaction of any size is publicly viewable, provided of course that you know what you are looking for!

formulating a legal route to recovery, and funding the ultimate recovery of those assets. In the case of our debtors, Smith and Jones, it became clear early on in our investigation that they may have squirreled away some of the fraud proceeds into cryptocurrencies. Far from being a dead-end, we uncovered actionable intelligence with the use of traditional tools in the insolvency war chest that led us to new third-parties, offshore accounts, and sight of fund flows suggestive of Smith and Jones's access to substantial liquid assets that they did not disclose to the trustees.

## Process

We had reason to suspect that Smith and Jones held undisclosed cryptocurrency assets. Our initial desk-based research identified various domains for bitcoin investment websites registered by known

We approached one of the UK-based exchanges for disclosure of all records relating to Jones, Smith and their proxies. The exchange disclosed a host of information, including bitcoin wallets, bitcoin addresses, and transaction IDs, information which (aside from the exchange) is only usually held by the holder of the Bitcoins or the parties in a Bitcoin transaction. Bitcoin addresses, for instance, are like email addresses, but instead of sending messages they are used to send and receive Bitcoin. The exchange also disclosed details of a six-figure sum deposited into the exchange from an offshore account held by third-party company incorporated in a banking secrecy jurisdiction. Crucially, the exchange disclosed that the contact on the account and the owner of the company was Smith and Jones's known proxy.

**“INFORMATION CAN BE GLEANED ABOUT CRYPTOCURRENCIES AND CAN PROGRESS YOUR INVESTIGATION, PROVIDED YOU’RE KNOCKING ON THE RIGHT DOORS!”**

**Results**

What our analysis showed was that Smith and Jones’s bagman attempted to pay a UK bitcoin exchange on three separate occasions: first, direct from his Belize bank account; second, from a Dubai account held by a third-party company; and third, via a third-party payment processor. On the first two occasions the payment was

returned because the bagman failed the exchange’s KYC and AML tests. By verifying the bitcoin addresses and transaction IDs associated with his third payment in the blockchain (at [www.blockchain.com/explorer](http://www.blockchain.com/explorer)) and cross-referencing with the payment dates we saw on various account statements, we were able to map Smith and Jones’s crypto fund flows, transactions from one wallet/address to another, during the period of their insolvencies.

**Conclusion**

Ultimately, our inkling that Smith and Jones held digital assets lead us to seek disclosure from cryptocurrency agents, such as exchanges, that ultimately lead us to previously undisclosed bank accounts, third-party companies and domains outside of the jurisdiction. This crucial intelligence

contributed to our overall understanding of Smith and Jones’s modus operandi and our global enforcement strategy, particularly when used in conjunction with the traditional powers available to insolvency practitioners.

As with most investigations, new leads typically raise more questions than they do answers, but hopefully this case study shows that Bitcoin should never be a dead-end. Information can be gleaned about cryptocurrencies and can progress your investigation, provided you’re knocking on the right doors!



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# REVERSE-VEIL PIERCING IN THE UNITED STATES: AN EMERGING CAUSE OF ACTION GAINS STEAM

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Reverse-veil piercing claims—holding a company liable for a individual’s actions if recognizing the corporate form would cause fraud or similar injustice—have gained steam in recent years, challenging the limited liability protections offered by US corporations and limited liability corporation (LLCs); much to the delight of creditors.

Traditionally, corporate veil piercing concerns attaching liability to a parent company for acts of its subsidiary, or to

the same general elements of traditional veil-piercing, reverse piercing has struggled for acceptance, and supportive precedent is often sparse.

## **Courts’ Acceptance of Claims/ Broad Equitable Test**

Courts recognizing outside<sup>[1]</sup> reverse-veil piercing claims generally apply the standards used in traditional veil-piercing analyses, namely, a unity of interest or ownership to establish that the target

company—particularly when the individual is the sole stakeholder—courts recognizing the claim focus the inquiry on a broad, fact intensive equitable standard seeking to balance the interests of justice.

Earlier this year, the U.S. Court of Appeals for the Fourth Circuit addressed a reverse-veil piercing claim and endorsed its application under Delaware law. *Sky Cable, LLC v. DirecTV, Inc.*, 886 F.3d 375 (4th Cir. 2018).<sup>[2]</sup> While the federal court’s opinion is not binding Delaware law, the opinion provides significant optimism—and persuasive authority—to creditors dealing with entities in the US’s most sophisticated and developed state court system. The ruling also bolsters a previous opinion vaguely alluding to Delaware’s acceptance of reverse claims. *Crystallex Int’l Corp. v. Petróleos de Venezuela, S.A.*, 213 F. Supp. 3d 683, 690 n.7 (D. Del. 2016), *rev’d on other grounds*, 879 F.3d 79 (3d Cir. 2018).

In *DirecTV*, the Fourth Circuit held Randy Coley liable in a fraudulent TV

## **“COURTS APPLYING THE REVERSE DOCTRINE HAVE DONE SO EVEN WHEN THE INDIVIDUAL DEBTOR HAS NO OWNERSHIP INTEREST IN THE TARGET COMPANY”**

an individual shareholder or director for a company’s debts. Reverse piercing, the inversion, is a logical mechanism to reach assets a debtor hides or transfers to a business entity. Yet despite consisting of

company is, in essence, an alter-ego of the individual. Because the traditional notions of piercing, inverted, either seldom apply or are virtually impossible to prove, i.e. that an individual is completely controlled by a

programming scheme, awarding DirecTV a \$2.3 million judgment. When unable to collect on the judgment against Coley, individually, DirecTV asked the court to reverse pierce the corporate veil of three LLCs owned by Coley in order to execute on the companies' assets. The federal district court granted the request, finding the companies were "alter egos" of Coley and that Delaware would recognize reverse veil piercing under the circumstances. In affirming the district court, the Fourth Circuit stated the law is clear "that a corporate form cannot be used as a 'shield' to hinder creditors from collecting on adjudicated claims." Reverse veil piercing, the court found, is particularly appropriate when an LLC has just a single member, as there is no concern about the effect it will have on other members who may have an interest in the company's assets.

• Nevada: *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896(2000) (lack of individual debtor's ownership in target company does not preclude reverse-veil piercing liability).

New York: *State v. Easton*, 169 Misc. 2d 282 (N.Y. App. Div. 1995) (allowing a corporation's assets to be reached through reverse piercing where the debtor did not own a single share of the corporation's stock).

### Hurdles in Reverse Veil Piercing/Innocent Stakeholders

Despite the need to crackdown on fraudsters hiding assets in businesses, the ripple effects to target company creditors, nonculpable shareholders, members, and other stakeholders, may

applied in reverse—however, no reported decision in New Jersey applying it).

Reverse-veil piercing claims are often brought during post-judgment proceedings in conjunction with post-judgment discovery and execution charging orders (redirecting limited liability company member distributions from the entity to a creditor); such discovery and reverse-veil piercing claims often go hand-in-hand with counts for successor liability (when a debtor ceases trading and a substantially similar new entity is established), and fraudulent conveyances.

In sum, despite the challenge in finding businesses to be the alter egos of their owners and directors through reverse veil piercing, it remains a powerful and useful arrow in the quiver of creditors enforcing awards throughout the US, poised to gain further acceptance.

## “REMAINS A POWERFUL AND USEFUL ARROW IN THE QUIVER OF CREDITORS ENFORCING AWARDS THROUGHOUT THE US, POISED TO GAIN FURTHER ACCEPTANCE.”

Courts applying the reverse doctrine have done so even when the individual debtor has no ownership interest in the target company, a different situation from *DirecTV*. The significance is that generally, charging orders against a LLC only allow a judgment creditor to receive the debtor's share distributions/profits from the LLC, without forcing a distribution. And by a debtor removing himself as a shareholder or member, charging orders can be of little benefit to a creditor—hence, the strong need for reverse piercing.<sup>M</sup>

Other examples where liability based on reverse-veil piercing has been recognized, includes:

- California: *Curci Investments, LLC v. Baldwin*, 14 Cal. App. 5th 214 (Cal. 2017) (reverse-veil piercing not precluded against a limited liability company (LLC) because no innocent members affected—and distinguishing from application against corporations, which claim been held inapplicable to).
- Florida: *Estudios, Proyectos e Inversiones de Centro Am., S.A. [EPICA] v Swiss Bank Corp. [Overseas] S.A.*, 507 So. 2d 1119 (Fla. 3d DCA 1987) (accepting the reverse-veil piercing doctrine in Florida).

impede the full and widespread application of reverse piercing. While third-party interests typically have little relevance in traditional veil piercing actions—as the liability extends to only one newly-liable person or entity—third-parties affiliated with targets of reverse piercing claims could bear the brunt of creditor-friendly rulings. While creditors may want to take the view that this is merely a negligible unintended consequence of dealing with unscrupulous actors, recent law sees it as a possible complete bar to liability (as found in California, *Curci Investments*). However, the opposite is also true—there are ample grounds to prevail when the debtor is the sole owner of the target, like in *DirecTV*, or the fraudster shares ownership with family members or others not at arms-length.

Other courts, such as those in New Jersey, straddle the fence as to the application of reverse piercing—holding back from cementing its acceptance, while careful not to foreclose a remedy arising from fraudulent acts. *Mitsui O.S.K. Lines v. Cont'l Shipping Line, Inc.*, No. 04-2278, 2007 WL 1959250, 2007 U.S. Dist. LEXIS 48216 (D.N.J. June 29, 2007) (identifying that the traditional corporate veil piercing can be

*Bluestone continues to be at the forefront of creditor's rights, and asset/debt recovery law in the U.S. and abroad. In addition to representing leading government agencies worldwide, the Bluestone team advises creditors and judgment/award holders of all types.*

- [1] "Outsider" reverse piercing, applies when an outside third party, frequently a creditor, urges a court to render a company liable through a judgment against an individual.

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# FREEZING ORDERS IN GUERNSEY: WHAT YOU NEED TO KNOW

**James Tee**  
Collas Crill LLP

## Background

Freezing injunctions are often used in Guernsey to preserve the assets of a defendant whilst proceedings are, or are going to be, pursued in the Guernsey Courts. It is also common for the Royal Court of Guernsey to grant freezing injunctions ancillary to proceedings and/or injunctions in other jurisdictions.

The effect of the freezing injunction is to compel the affected party from dealing with their assets that are the subject of the order, if the order is breached then they will be in contempt of court, accordingly the injunction operates in personam rather than in rem against the property.

## The Application

Generally applications for a freezing order are made *ex parte* in the first instance because there is a risk that the respondent will dissipate his assets. If the application is made *ex parte* the usual obligations of full and frank disclosure are imposed upon the applicant and his advocate because the nature of the freezing order is a draconian one. If an order is made *ex parte* the Court will set a date when the application must return on an *inter partes* basis. This is generally done with as short amount of time as possible between the two hearings.

The threshold criteria for obtaining a freezing injunction is:

1. The plaintiff has a good arguable case on a substantive claim over which the Court has jurisdiction;
2. The defendant has assets in the jurisdiction; and
3. There is a real risk of dissipation or secretion of assets which would render the plaintiff's judgment worthless.

In addition to the above if the injunction is sought in respect of foreign proceedings there is an additional limb to the above of "exceptional circumstances". The Guernsey Court of Appeal has considered this limb of the test to mean that the Court should exercise caution before granting the freezing injunction.

If the applicant is seeking a worldwide freezing injunction the Court will want

to be satisfied that the assets within the jurisdiction are insufficient to satisfy the judgment and that the respondent has assets outside the jurisdiction.

Even if the above criteria are satisfied the Court still retains a discretion that it may only grant the injunction if it considers that it is just and convenient to do so.

## Undertakings by the Applicant

The Court will typically expect the applicant to give the following undertakings when applying for a freezing injunction:

- To compensate the respondent if the court later finds that the injunction should not have been granted;
- To pay the costs incurred by any third parties in complying with the order; and
- Not to use any of the information obtained by virtue of the freezing injunction for any proceedings without the permission of the court.

Once the injunction has been ordered it must be served upon the respondent and any third party which will ordinarily be done in Guernsey by HM Sergeant. If the respondent is resident outside of the jurisdiction the applicant will need to ensure that he seeks an order granting service out of the jurisdiction in the draft order. It is important to ensure that the order is drafted carefully so that its terms cover all the assets that the applicant wants to be covered and that a penal notice is included.

## Disclosure Order

In addition to the preservation of assets an ancillary order that is made by the Court upon a freezing injunction being ordered is the disclosure of information in respect of the assets. This is likely to be a statement disclosing his assets to be supported by evidence of the same. The ancillary disclosure order is necessary to give teeth to the injunction as without it the applicant would not know what assets belonged to the respondent and if they are actually frozen.

It should also be noted that third parties that have disclosure orders made

against them are also bound as regards the freezing injunction and must not knowingly assist the respondent in removing or disposing of the assets or else risk committal proceedings.

The ancillary disclosure order is clearly of benefit to any potential creditor or IP pursuing a defendant. There is also potential for a respondent to have to disclose any interest which is held in trust which may reveal another pool of assets to enforce against that were unknown to the applicant.

## Next Steps

The freezing order will remain in force until it is varied or discharged by the court or if the respondent pays a sum equivalent to the value of the applicant's claim into court. The respondent will frequently apply to the court for variation of the order. The order will also usually specify that the respondent is not prevented from dealing with his asset in the usual course of business, although it should be noted that if the applicant is asserting a proprietary right in the asset it will be completely frozen.

## Summary

Injunctions in Guernsey are a means of assuring that the respondent is not able to frustrate any judgment in substantive proceedings both in Guernsey and other jurisdictions. Further, it can be a useful tool to ascertain the extent of the respondent's assets in Guernsey, both those directly owned and those in which he has a beneficial interest. If a proprietary interest in the asset is asserted in the substantive proceedings this may lead to the asset being completely frozen. In order to bolster Guernsey's status as an international financial centre, the Royal Court will aid foreign claimants to ensure that any judgment that they obtain around the world will not be frustrated by defendants attempting to hide their assets within its jurisdiction.

# THE MISSING BILLION: ASSET RECOVERY CHALLENGES IN INDIA

**Aakash Brahmachari**  
Raedas

In 2015, while the world's attention was focused on wars and terrorism, a small Indian commodities' trading company was quietly defrauding several banks out of more than a billion dollars. The story, which emerged in halting, incomplete headlines in the Indian business press, led to one of the most expansive private investigations in India in recent memory. And yet for those who lost funds, recovery has remained elusive.

The case looked simple. A well-known Indian business had opened a commodities trading arm which sought trade financing from a series of Indian and international banks. The banks would advance payment to sellers through an escrow account against proof of shipment, typically bills of lading. Buyers had six months to repay the banks. On its face this was reasonably standard. The company's owners had been in the market for three generations and knew the business as well; and the market knew them. What could go wrong

Within six months the commodities arm had engaged in hundreds of trades - coal from Indonesia to Nigeria, rice from India to Ghana and countless more. It wasn't long before the banks had advanced over \$1 billion to the sellers from the escrow account. But six months passed, then seven, and the repayments never arrived, as alarm grew among the banks that something was amiss. Investigators were engaged.

This was not the usual case of money gone missing. There were 200 companies scattered around the globe linked together only it seemed by hundreds of commodities trades. But examined more closely, anomalies appeared. Many had been incorporated within days of each other or shared registered addresses. Most were controlled by professional nominees. Their names also offered tantalizing clues. Some were named after cardinal directions whereas other names hinted at whatever your eye could spy from an office overlooking a beach in Grand Cayman.

East West Trading Ltd in Hong Kong was incorporated on the same day as North South Trading Pte Ltd in Singapore. Golden Sands Trading was registered at the same

address as Ocean Blue Water Trading.

The case broke open when disgruntled employees, including a former finance executive, came forward and admitted that the entire operation was orchestrated by the trading company's owners to recoup losses made by the parent company. Most of the diverted funds - nearly 60% - had been invested in a moribund real estate project owned by an Indian businessman from the UK. He was connected to the company's owners through a metal trading business they had started together in the UK in the 1990s which, coincidentally, matched the three partners' initials. The remaining funds were diverted to companies in the UK, the UAE, India and Singapore.

**“BUT ENFORCEMENT AND RETRIEVAL OF ASSETS PROVED FRUSTRATING DUE TO OVERLAPPING JURISDICTIONS AND THE COMPLEXITY OF THE SCHEME. THE WITNESSES MEANWHILE WHO HAD BEEN SO HELPFUL IN EXPOSING IT BACKED AWAY, FEARFUL FOR THEIR SAFETY.”**

The case was brought before courts in a multitude of countries. But enforcement and retrieval of assets proved frustrating due to overlapping jurisdictions and the complexity of the scheme. The witnesses meanwhile who had been so helpful in exposing it backed away, fearful for their safety.

Three years later, recovery efforts continue. But the case offers a cautionary tale and a warning to others.

First, time pressure should never hinder adequate diligence. The buyers and sellers were interconnected and many of their attributes raised red flags (such as

common incorporation dates and their ownership structure). However, these were not identified in time.

Second, witnesses must be protected. Complex fraud will rarely be fully exposed by a paper trail alone. Without witnesses, redress is much less likely.

Finally, India is desperate for a dedicated asset retrieval framework. Disputes take years to resolve in local courts and there is no workable witness protection or whistleblower scheme. Confidentiality itself can not be guaranteed.

But India is making progress. The establishment of the Mumbai and Delhi Centres of International Arbitration and the provisions of the 2016 Insolvency and Bankruptcy Act are offering new avenues for recovery. The next step can take the form of a comprehensive recovery mechanism under a dedicated asset recovery institution. These issues take greater urgency considering the increase in non-performing loans in India, estimated at over \$150 billion as at March 2018. As the country is further integrated into the global economy, cases reminiscent of this one are likely to become more common place. A dedicated asset recovery institution may be doubly useful: deterring creative fraudsters and reassuring investors.



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# FREEZING ORDERS IN JERSEY: WHAT YOU NEED TO KNOW

**Simon Hurry**  
Collas Crill

## Background

- The inherent jurisdiction of the Royal Court of Jersey (the 'Court') underpins its ability to grant an injunction. This gives the Court the flexibility to grant an injunction where it appears just and convenient to do so and on bespoke terms. Whilst not binding in Jersey, the Court has and continues to find English judgments on the subject persuasive. In relation to freezing orders, the Court's approach has generally mirrored that of the English courts.

disclosure of documentation relating to the asset base of the defendant (from the defendant directly and/or from third parties) to ensure that the freezing order can be policed.

- A freezing order can be applied for pre and post judgment, as part of substantive legal proceedings in Jersey and also in support of substantive legal proceedings in a foreign jurisdiction. It can also be applied for in connection with Jersey or foreign arbitration proceedings.

will have to: - demonstrate that it has a good, arguable case; - confirm that it has made full and frank disclosure (as set out above); - provide particulars of its claim against the defendant; - state its grounds for believing that the defendant has assets in Jersey (which can include assets held on trust); and - explain why there is a risk of those assets being dissipated. In addition to the above, the applicant will need to give an undertaking in damages, so that if the freezing order is lifted and/or the defendant succeeds in defending the substantive action, the

**“THE COURT HAS REPEATEDLY DEMONSTRATED A WILLINGNESS TO ENSURE THAT A CREDITOR’S EFFORTS ARE NOT RENDERED NUGATORY BY A DEFENDANT PUTTING ASSETS BEYOND THEIR REACH.”**

- The Court also has a statutory jurisdiction under the Jersey insolvency legislation to grant injunctions to assist the courts of a prescribed list of countries (currently the United Kingdom, the Isle of Man, Guernsey, Finland and Australia).
- Whilst this article is limited to a summary of freezing orders in a civil context, it is worth noting that the Court also has the ability to make a number of other orders which can give a creditor an advantage with seeking to recover what is due. By way of example, the granting of search and seizure (Anton Piller) orders and third party documentation production (Norwich Pharmacal) orders are well trodden paths in Jersey.

## Freezing orders

- Previously known as a 'Mareva injunction, a freezing order is probably the most common type of injunction applied for in Jersey. The effect of a freezing order is to prevent an affected party from dealing with the assets that are the subject of the order to the prejudice of the applicant. An application for a freezing order is often accompanied by a request for the

## The Application

- Typically, a freezing order will be sought on an ex parte basis (without notice to the other party or parties). The principal reason for this is that if a defendant is notified of the application beforehand, it might take steps to try and put assets beyond the creditor's reach.
- As the other parties are not represented at an ex parte hearing, the party seeking the freezing order must give full and frank disclosure of all matters in the party's knowledge which the judge needs to know about (which includes all material points against the granting of the freezing order). Non-disclosure is a common reason for a freezing order being lifted. The Court has gone as far to say that it may lift a freezing order on the grounds of innocent non-disclosure even where that disclosure, had it been made, would not have stopped the freezing order being granted. Although freezing orders are often made in haste, the Court has held that a rushed application is not an excuse for deficient disclosure.
- To apply for a freezing order, the applicant

applicant is bound to compensate the defendant for any loss suffered under the terms of the freezing order. Security for that undertaking (a payment) might be required. The applicant will also likely need to meet the legal costs of any party cited who is affected by the freezing order. Even if the above criteria are satisfied, the Court still retains a discretion that it may only grant the freezing order if it considers that it is just and convenient to do so.

## Next steps

- If the freezing order is granted on an ex parte basis, it will be necessary to serve the same on the other parties. If applicable, an order for leave to serve the freezing order out of the jurisdiction on parties outside of Jersey will need to be obtained beforehand. The matter will then return before the Court (typically on a Friday) so that the matter can be heard on an inter partes basis.
- Having been served with a freezing order, it is open to the defendant (and/or any parties cited, albeit that they are generally neutral to the application) to apply to the Court to lift or vary the freezing order.

## Reasonable living and business expenses

• Ordinarily, an allowance will be made for the defendant to use funds to pay reasonable living or ordinary bona fide business expenses and legal fees from the frozen assets unless sufficient assets are available elsewhere. An applicant can seek to extinguish a defendant's allowance in certain circumstances where a well founded proprietary claim against specific assets is made (for example, that misappropriated funds identified in a bank account belong solely to the applicant).

## Breaching a freezing order

• If the defendant and/or a party cited breaches the freezing order, they will be in contempt of court and liable to pay a fine and/or be imprisoned (although special rules apply to a bank's security and right of set-off against funds held in a bank account).

## Summary

Jersey is a reputable and highly regulated financial centre. It has a sophisticated, responsive and modern legal framework. The Court has repeatedly demonstrated

a willingness to ensure that a creditor's efforts are not rendered nugatory by a defendant putting assets beyond their reach. However, an applicant must tread carefully when seeking a freezing order. It's a powerful tool, but it carries with it potentially significant exposure should things not go to plan.



# ENFORCEMENT IN JERSEY: WHAT YOU NEED TO KNOW

**James Turnbull**  
Walkers

As an important international finance centre Jersey is used to dealing with the enforcement of judgments from other jurisdictions. This article provides an introduction to the principal options available to a foreign judgment creditor.

## Registration of a foreign judgment in Jersey

Before a foreign judgment may be enforced in Jersey it must first be recognized by the Royal Court.

The Registration of judgments made in "reciprocal" countries is governed by the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the "Law"), which provides that the Royal Court will recognize judgments made by the superior courts of the following reciprocal countries: England and Wales, Scotland, Northern Ireland, Isle of Man and Guernsey.

Where the judgment is not from a reciprocal country and so the Law does not apply, a foreign money judgment may still be enforced in Jersey by commencing fresh proceedings applying customary law principles. In order to enforce a foreign judgment under the customary law in Jersey:

- The judgment must be in *personam* rather than in *rem*;
- The foreign court that made the judgment must have had jurisdiction over the party against whom the

**“JUDGMENT CAN BE CONSIDERED TO BE FINAL FOR THE PURPOSES OF THIS TEST EVEN THOUGH IT MAY STILL BE SUBJECT TO AN APPEAL IN THE FOREIGN COURTS;”**

judgment is being enforced, for example, where the judgment debtor submitted to the foreign court's jurisdiction or the judgment debtor participated as a party in the foreign proceedings;

- The judgment must be final and conclusive and for a debt or definite sum of money. It is important to note, however, that a judgment can be considered to be final for the purposes of this test even though it may still be subject to an appeal in the foreign courts;
- The judgment must not be solely payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
- The judgment must not be impeachable under common law rules. The key grounds on which a judgment could be impeached would be if: (i) it was obtained fraudulently; or (ii) it was contrary to the public policy of Jersey; or (iii) the judgment was

made in circumstances contrary to the principles of natural justice.

Non-money judgments fall outside the scope of the Law and have historically been unenforceable under the customary law. However, more recently the Royal Court held in *Brunei Investment Agency v Fidelis* [2008] JRC 152 that in the interests of comity and to reflect modern commercial practices, the Royal Court had the discretion to enforce non-money judgments in certain circumstances. This discretion was noted as one which should be exercised "cautiously".

## Enforcement Options

Once a foreign judgment is recognized by the Royal Court it may be enforced in the same way as a Jersey judgment. The judgment may be registered in the Public Registry and provide security for the judgment creditor over any real property held by the debtor in Jersey. The Viscount, who is the executive officer of the Royal Court, is responsible for enforcing judgments against a debtor's movable property in Jersey upon request from a judgment creditor.

## Arrêt entre mains

An *arrêt entre mains* is a type of order which can be sought by a creditor against the moveable assets of a debtor in Jersey. Examples of assets that can be caught by an *arrêt* include shares in a Jersey incorporated company and debts owed

to the judgment debtor by a third party where the situs of the debts is Jersey.

An *arrêt* application is brought on an *ex parte* basis, following which an *interim arrêt entre mains* can be obtained. The interim *arrêt* acts as an immediate arrest on the assets in question and prevents the debtor from dealing with those assets. Failure to comply with the terms of the *arrêt* would place the debtor and its officers, if a corporate body, in breach of the *arrêt* and at risk of being held to be in contempt by the Royal Court. The Royal Court has wide ranging powers to punish anyone who is found to be in contempt.

The *arrêt* may then subsequently be confirmed at an *inter partes* hearing. Once the *arrêt* is confirmed the assets vest absolutely in the Viscount who is able to exercise a wide range of powers to realise payment of the debt.

## Pauline Action

The Royal Court, in *Re Esteem Settlement* (2002) JLR 53, confirmed an ability, in certain circumstances, to set aside transfers which have taken place in fraud of a debtor's creditors. This is known as a Pauline action. This can be a useful option for a creditor who is seeking to recover assets in the hands of a third party.

For a Pauline action to be successful the following key elements need to be established:

- (f) The Plaintiff must be a creditor of the alleged fraudster;
- (g) There must be a transfer of assets from the debtor to a third party recipient;
- (h) The Plaintiff must show that the debtor intended to defraud his creditors; and

- (i) The Plaintiff must establish that the transfer has caused them actual prejudice.

A creditor bringing a Pauline action must also prove that the debtor was insolvent at the time of the disposition or became so as a result of it. The test for insolvency applied in *Esteem* was the balance sheet test, although this matter was not the subject of argument and it is possible that the Court would consider arguments based on the cash flow test.

Where the third party gave cause (similar to consideration) for the assets transferred to it the creditor will need to show that the third party and the debtor were aware that the purpose of the transaction was really to defeat the debtor's creditors.

# INTERVIEW: ENFORCING LEGAL AWARDS IN ASIA

The Asset Recovery Hub recently caught up with Tom Glasgow, Chief Investment Officer (Asia) of IMF Bentham, and Bruno Vickers, Senior Director of Investigations at GPW Asia to discuss enforcing legal awards in Asia.

## Q: When and why should claimants think about enforcement?

**Tom Glasgow:** As a funder of commercial disputes, recovery is first and foremost in our case assessment. Most of our funding is 'non-recourse', which means if there is no recovery from the action, we do not receive a return on our investment. The same applies to a claimant funding their own case – if there is no ultimate recovery, the claimant may be left with significant costs and no meaningful returns.

The more you know about the respondent, the better you can strategize and assess the probable outcome in a case. This includes the likely parameters for any settlement. For example, you might have a case against a party for 100 million, but they have limited financial means and insurance cover of only 10

million. The best strategy then might be to seek an early settlement to recover as much of the insurance cover as possible, before it is used up in respondent's defence of the claim. Similarly, some cases may not be worth pursuing at all because the likely recoveries will not justify the costs. In other cases, investigation of the respondent has helped us identify strategic assets which, when targeted for enforcement, bring strong leverage for settlement.

For this reason, we always assess cases with the 'end point' in mind. This means establishing whether the respondent can meet any award or settlement and, if so, to what extent. Failing that, we need to establish whether there are assets available for enforcement in a jurisdiction where it can be done within reasonable time and cost. If there is a risk that the respondent will try to hide assets, then we will also want to consider our options to preserve them.

Too often in my experience, these matters are the last to be considered by claimants and lawyers advising on prospective claims. In many cases submitted to us for funding, there has been little or

no assessment of the respondents' financial position or the practicalities of enforcement. This mindset needs to change. It is not commercial. A great legal case is worthless if there is no meaningful end point. I always say, 'Start where you want to end up and work backwards'. Seek a view on recovery as a first step. The cost of confirming the respondent's financial position upfront is far less than fruitless legal proceedings and the strategic insights you gain can be extremely valuable.

## Q: What are some particular challenges related to enforcement and asset recovery in Asia?

**Bruno Vickers:** Our principal role as it relates to recovery on legal cases is investigating and mapping the asset position of counterparties. A significant challenge for such investigations in Asia is that the public record differs enormously by country and is generally quite thin relative to more developed economies. Formal record keeping on legal and detailed corporate matters, where it exists, can be incoherent, poorly

## “ALWAYS ASSESS CASES WITH THE ‘END POINT’ IN MIND.”

maintained and not easily searchable online. Other public sources, such as corporate websites, local press and social media, can also be misleading or prone to sensationalism or censorship.

So knowing what information is available in each country and where to get it is vital. It is also important to go beyond conventional online resources; for example, in a country like Indonesia where online information is limited we've cracked open cases by finding valuable hard copy documents hidden in obscure archives tucked away in remote rural registries.

We also need to think laterally and beyond the public record. This means finding human sources to generate leads, corroborate data and fill information gaps – whether it's a disgruntled former employee, a supplier who has not been paid, a neighbouring or competing business, these sources can be an invaluable source of insight into companies about which little information is available publicly.

Thinking laterally also means going beyond fixed domestic assets such as real estate and seeking out movable assets too like cash, vessels, financial instruments in overseas accounts, or trade receivables due from overseas vendors. Just like people have a favourite watering hole, individuals and companies across the region favour certain assets and holding structures. GPW's experience allows us to exploit these proclivities; for example, the Chinese are fond of incorporating in the BVI and buying property in Hong Kong, while Indian nationals prefer holding companies in Mauritius or real estate in the UAE and Indonesians buy property and school their children in Singapore.

A final consideration for successful recovery in this region is to look beyond the jurisdiction of the dispute or where a counterparty is based. Anyone who has tried to enforce court judgments in countries like China or India will know enforcement is rarely straight forward. Fortunately, it is unusual to find a sovereign state, company or individual operating in just one jurisdiction – also the rule of law factors that make enforcement easier in the likes of Singapore, Hong Kong or Australia are also what makes them attractive places to invest and hold assets.

### Q: What trends and developments have you seen in disputes, asset tracing and enforcement in Asia?

**Bruno Vickers:** I see three important and positive developments related to enforcement and asset investigations in Asia.

Firstly, it is encouraging to see the growing use of Asian dispute centres to resolve regional matters. Singapore and Hong Kong are now ranked third and fourth most preferred seats globally. This may be due in part to the marked increase in disputes emanating from some of the fastest growing regional markets. Many investors rushed in to countries like Vietnam and Indonesia without undertaking proper due diligence – i.e. doing more than box ticking compliance checks to look at the reputation, track record and solvency of customers, investment targets or joint venture parties. With growing trade friction and a likely global economic slowdown in the next couple of years, we expect the number of these disputes will only increase.

Secondly, we are seeing a promising trend in some countries towards more transparency – although there is a long way to go. For example, some states in India such as Delhi now have publicly searchable property registers, while in China basic corporate information is now available from online registries, albeit only in Chinese.

A final trend is the introduction of litigation funders into the market here. Funding in enforcement has been a game changer by allowing more claimants to pursue cases they may not otherwise have the means – or expertise – to carry out. We find that funders are generally more conscious of the importance of recovery from the outset and are willing to invest resources into assessing this at the outset. From our perspective this approach is an enormous benefit to claimants and to the successful management of a case.

**Tom Glasgow:** I agree with Bruno; the extent and complexity of international commercial disputes is on the rise in Asia. This is not surprising given the extent of cross-border investment into and within the region, especially in the energy, infrastructure, resources and technology sectors. China's Belt and Road Initiative is an often-cited example, but there are many more.

While global economic interests shift towards Asia, the cultural diversity in the region and a range of economic pressures gives rise to disputes, many of which result in international arbitration or cross-border insolvencies. The disputes are often complex, costly and may involve multi-jurisdictional enforcement strategies in developing countries. These are difficult matters for commercial parties navigate – they must balance the potential high costs and risks of failure against the importance of projecting a strong position and pursuing the interests of the business. Very often good claims are left aside or settled unfavourably – the risk and uncertainty is considered too high.

**“WHILE GLOBAL ECONOMIC INTERESTS SHIFT TOWARDS ASIA, THE CULTURAL DIVERSITY IN THE REGION AND A RANGE OF ECONOMIC PRESSURES GIVES RISE TO DISPUTES, MANY OF WHICH RESULT IN INTERNATIONAL ARBITRATION OR CROSS-BORDER INSOLVENCIES.”**

Related to all of this is a clear trend in the dispute finance industry: we are seeing a steady increase in the use of dispute funding by corporations, not because they lack the financial means to pursue a case, but because they wish to de-risk by sharing the costs of the dispute and benefiting from the international expertise of established funders like IMF Bentham. Essentially, companies can transfer the often-significant cost of a dispute to us, removing the downside risk from their books, while retaining the bulk of the potential upside and pursuing the company's interests aggressively. In some cases, we are helping corporates to do this across multi-national portfolios of disputes, as innovative GCs and CFOs grow to understand the risk-mitigation and cash flow benefits of dispute finance.

Our fraud and asset tracing team is ranked in Tier 1 of The Legal 500. We work on some of the largest global fraud cases, which often have wide-ranging geopolitical repercussions. These claims are not simply large in value, many of them are 'bet the company' disputes for our clients: we are brought in where reputations are at risk, where clients risk losing their lives' work, or indeed insolvency if their case were to fail.

Most of our cases are international and we regularly work with lawyers all over the world. We have particular experience of fraud cases originating from emerging markets, and cross border cases involving parallel international proceedings. We often assist foreign lawyers enforcing judgments and arbitration awards, as well as helping them and their clients freeze assets in England in support of foreign proceedings.

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# SWITZERLAND – OVERLOOKED TOOLS FOR PRE-TRIAL EVIDENCE OUTSIDE OF CRIMINAL PROCEEDINGS

**Antonia Mottironi**  
**Monfrini Bitton Klein**

This is a well-known pitfall for asset recovery practitioners: discovery orders are not available in civil law jurisdictions. Instead, victims of fraud usually request the opening of criminal proceedings in order to benefit from broad freezing and disclosure orders. Using criminal proceedings in support of civil claims is however not without risk as the public interest for the prosecution of crimes trumps, to a certain extent, over the private interests of civil plaintiffs.

granted if the trial will occur outside of Switzerland. It can be applied for the taking of oral testimony, production of physical records, in situ evidence taking, expertise, written statements from officials and statements and examinations of the parties.

The proceedings are conducted inter-partes. The parties can request to the court to take appropriate intermediary measures (e.g. a prohibition to use certain information outside of the contemplated proceedings) where there exist legitimate

Code of Criminal procedure. The DRC argued that it needed the documents contained in the criminal file because it intended to institute civil legal actions against the gold refinery company investigated by the FPO.

ADP allows the applicant to obtain “data”, not evidence or documents. Where personal data of the applicant is concerned, documents can in principle be obtained. The general prohibition of abuse of right applies and a few exceptions apply. If the applicant seeks information that it

**“USING CRIMINAL PROCEEDINGS IN SUPPORT OF CIVIL CLAIMS IS HOWEVER NOT WITHOUT RISK AS THE PUBLIC INTEREST FOR THE PROSECUTION OF CRIMES TRUMPS, TO A CERTAIN EXTENT, THE PRIVATE INTEREST OF CIVIL PLAINTIFFS.”**

Swiss law provides for a few pre-trial discovery tools outside of criminal proceedings, among which are 1) the precautionary taking of evidence in support of contemplated civil proceedings; 2) the right to information based on the Federal Act on Data Protection ADP; 3) the right to consult the bankruptcy file, in cases of criminal mismanagement.

## 1. The precautionary taking of evidence, the “Swiss § 1782”

One should not overlook a tool offered by the Swiss Code of Civil Procedure to potential plaintiffs. It provides for the possibility of taking evidence located in Switzerland at any time if the applicant shows likelihood that the evidence is at risk or that it has a legitimate interest to obtain the requested evidence. The Swiss Federal Court ruled that a legitimate interest is sufficiently demonstrated if the applicant wants to appraise the chances of success of a contemplated legal action. Precautionary taking of evidence is even

interests of any parties or third parties to protect, such as business secrets.

This domestic tool is an interesting alternative route to requesting international judicial assistance. The Swiss 1782 can be faster and the rights of the civil plaintiff are broader than under a request for judicial assistance. However, the grounds for refusing the taking of evidence are much more limited in the context of the execution of a request for judicial assistance than in the independent Swiss 1782.

## 2. The rules on data protection

In a matter *Democratic Republic of Congo v. Federal Prosecution Office of Switzerland* FPO on the plundering of gold mines, the Federal Administrative Court had to decide on the right of the DRC to access to the criminal file of criminal proceedings that were already terminated and in which the DRC had not participated. For this reason, the DRC requested access to the file on the basis of the ADP, instead of invoking the Swiss

could not obtain in pending proceedings, then it abuses of its rights and access to personal data is denied. In a landmark decision, the Swiss Federal Court already ruled that the holder of a bank account can access all its personal data, including the notes and reports of its relationship manager, as well as KYC and profiles, even if the purpose is to assess the chances of success of a civil action against that bank.

In *RDC v. FPO*, the Court concluded that in principle, the DRC is entitled to access to its own personal data for the purpose of contemplated civil proceedings against the gold refinery as it would also have the right to obtain this information during the evidentiary stage of pending civil proceedings.

However, by requesting the entire criminal file, the DRC also requested access to sensitive personal data of third parties, namely the gold refinery under investigation. Access to this data is subject to article 19 ADP. To access this data, the DRC should have however demonstrated that the gold refinery

**“ASSET RECOVERY PRACTITIONERS SHOULD CAUTIOUSLY SELECT THE EVIDENCE THEY PRODUCE IN BANKRUPTCY CASES IF THEY WANT TO AVOID TO SUFFER THE DELAYING TACTICS OF THE FRAUDSTERS THEY PURSUE.”**

refused to give access to its personal data in abuse of its rights. Where criminal charges or convictions are concerned, the threshold is very high and the holder of the personal data has to carefully examine if a public or a private interest justifies consultation by the applicant. Arguing, as the DRC did, that the personal data of a third party is sought for the purpose of a civil action against that third party is clearly not sufficient. The reason is that ADP does not aim to facilitate civil proceedings but to protect privacy.

In short, accessing a criminal file through ADP is a difficult path. This being said, the Federal Administrative Court left the issue open of a general right to access to terminated criminal cases by persons with an interest worthy of protection on the basis of the fundamental right to be heard (due process). The case still has to be decided by the FPO in this light.

**3. The discrete but powerful right to consult the bankruptcy file**

Pursuant to article 8a of the Debt Collection and Bankruptcy Act, any person able to show a prima facie interest may consult the records and the registers held by the debt collection and bankruptcy offices. Accordingly, creditors are almost automatically granted access. Case law also generally grants generous access to the shareholders.

In a decision of May 2018, the Court of Justice of Geneva ruled that a debtor (also accused of mismanagement in

criminal proceedings) against which a tort liability claim was admitted in the bankruptcy has a legitimate interest to access to the file of the bankruptcy. The scope of the right of consultation was however limited to evidence supporting the allegations of criminal mismanagement and enabling the debtor to challenge the legal standing of the creditors in the criminal proceedings. Concretely, the access to the bankruptcy file allowed the debtor to prepare its criminal defense and to anticipate its strategy, as the bankruptcy file had not been produced in the criminal file at the early stage of the criminal proceedings.

In the light of this decision, asset recovery practitioners should cautiously select the evidence they produce in bankruptcy cases if they want to avoid to suffer the delaying tactics of the fraudsters they pursue, for instance by enabling the latter to challenge the plaintiff’s status and rights.



# DISCLOSURE AND PRIVILEGE IN ENGLAND AND WALES – WHAT YOU NEED TO KNOW

**Elaina Bailes**  
Stewarts Law

*When a fraud is suspected, a business will turn to its professional advisors to investigate if wrongdoing has occurred. Witnesses will be interviewed, forensic investigators will trawl through papers and documents will pass between the business, its lawyers, and third parties. In this article, Elaina Bailes, Senior Associate at Stewarts, summarises the English law on privilege and covers four key questions fraud practitioners should ask themselves, whether trying to protect legal privilege during an investigation or later arguing for documents to be produced.*

**The law on privilege in England and Wales**

There are two main types of privilege:

- Legal advice privilege (“LAP”): this applies to confidential communications between lawyers and

**“WHILST THERE HAS BEEN MUCH DEBATE AS TO WHETHER THIS DEFINITION IS FIT FOR THE MODERN WORLD, ITS APPLICABILITY HAS BEEN CONFIRMED IN TWO RECENT CASES”**

their clients made for the purpose of seeking or giving legal advice.

- Litigation privilege (“LP”): this applies to communications between clients/ lawyers and third parties that have been produced for the dominant purpose of

obtaining advice/evidence/information in relation to litigation, where:

- Litigation was “reasonably in prospect”, and
- The contemplated real likelihood of litigation must be the sole or dominant purpose of the communications.

Whether either type of privilege covers a document will depend on the specific facts. The court will look at the content of the document, the purpose for which it was created, who it was created by and who it was provided to in order to establish whether the requirements of the tests are met.

**1. When an organisation seeks legal advice, who is the client?**

When an organisation seeks legal advice, they will generally do so by tasking certain employees to engage

with in-house or external lawyers. English law limits the “client” to those who are authorised to seek and receive legal advice on behalf of a client corporation. Importantly, authority to provide information to lawyers is not sufficient for these purposes.

The practical impact is that when conducting a fraud investigation, where factual information is provided to lawyers (such as through interviewing employees), this will likely not be covered by LAP. Be alive to the fact that potentially damaging information provided by employees may ultimately be disclosable. Similarly, those representing victims of wrongdoing should probe their opponents on the circumstances of the investigation and not assume that all communications with employees will be protected by privilege.

further before it can say with certainty if litigation is likely, that uncertainty does not mean proceedings are not in reasonable contemplation.

The impact of this recent decision is helpful to those advising at the early stage of investigations, especially if the initial tip-off is speculative. It is also helpful to those advising victims, as the bringing forward of the protection should encourage businesses to fully investigate and engage with regulators/prosecutors. This should lead to wrongdoing being uncovered and rights to redress for victims.

### 3. What evidence is required to argue a claim for privilege in the English courts?

Where a party wishes to claim that he has a right or duty to withhold

### 4. When determining questions of privilege, will the English courts apply the law of the jurisdiction where the documents were created?

Where businesses operate globally, documents will be created in many jurisdictions by local lawyers who will likely have considered their own legal principles on privilege. However, in proceedings in England and Wales, unless there are exceptional circumstances the court will apply the English law on privilege. This consideration can be crucial where the protection of privilege is wider in the foreign jurisdiction.

Practitioners should seek local advice as to the rules on privilege and disclosure in the jurisdiction in which

**“FROM A PRACTICAL POINT OF VIEW, PRACTITIONERS NEED TO GIVE CAREFUL THOUGHT AS TO HOW TO STRUCTURE EVIDENCE IN SUFFICIENT DETAIL AND AVOID PROVIDING ONLY CONCLUSORY EVIDENCE.”**

Whilst there has been much debate as to whether this definition is fit for the modern world, its applicability has been confirmed in two recent cases: *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) and *SFO v ENRC* [2018] EWCA Civ 2006.

### 2. When does litigation privilege kick-in during an investigation?

The wider protection of LP, which encompasses communications with third parties, is a useful tool for businesses and their lawyers to fully establish the facts without the risk of creating documents that will later be used against them. The question of whether litigation was “reasonably in prospect” depends on the facts of a particular case, but has recently been clarified in *SFO v ENRC*.

In this case, the Court of Appeal overturned a controversial first-instance decision, which had held that LP could not apply until the defendant knows full details of what is likely to be discovered or a decision to prosecute has been taken. The Court of Appeal held that a party will need to investigate

inspection of a document he must state he has that right/duty and the grounds on which he claims that right or duty. The court has discretion as to whether to order disclosure.

The principles as to what evidence should be provided to discharge the burden of proving a document is privilege were set out in *West London Pipeline v Total* [2008] EWHC 1729:

(1) A claim for privilege is an unusual claim in that the party claiming privilege and their legal advisers are judges in their own case, subject to the power of the court to inspect the documents.

(2) For that reason, the court must be particularly careful to consider the basis on which the claim for privilege is made.

(3) Evidence filed in support of a claim to privilege should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect.

From a practical point of view, practitioners need to give careful thought as to how to structure evidence in sufficient detail and avoid providing only conclusory evidence.

the fraud took place and where assets exist. They can then make a tactical decision about the best jurisdiction in which to commence proceedings – the English laws on privilege and disclosure may assist a party obtaining documents that they would not have access to elsewhere.

The above questions illustrate that whether a document will be privileged under English law is very fact specific. It is crucial for businesses to take legal advice to ensure that they know where they stand at every stage of an investigation.

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# DEFAULTING TRUSTEES: A BROAD BRUSH APPROACH TO INTEREST?

**Gregor Hogan**

Serle Court, Lincoln's Inn

## **Glenn v Watson [2018] EWHC 2483 (Ch)**

Once a trustee is found to be in default of his obligations, how is the beneficiary to be properly compensated and what interest ought to be paid? Nugee J recently considered this question in *Glenn v Watson* [2018] EWHC 2483 (Ch) finding that there was little authoritative guidance. Rather his Lordship considered

**“THE IMPORTANCE OF THE CASE, AND THE UNDERLYING PRINCIPLES, IS HIGHLIGHTED BY THE FACT THAT THE DIFFERENCE IN THE INTEREST RATES BEING SOUGHT BY SIR OWEN AND MR WATSON HAD A VALUE OF £20MILLION.”**

the court’s approach should be a ‘*broad brush*’ one and he relied upon industry data to find a rate of interest appropriate to the return an investing trustee would have obtained. The case is of interest for those involved in asset recovery because Nugee J applied his reasoning by analogy to a wrongdoer who held the victim’s money as a constructive trustee.

### **Background**

The judgment itself arose from a consequential hearing following Nugee J’s earlier decision in Sir Owen Glenn’s action against Eric Watson (*Glen v Watson* [2018] EWHC 2016 (Ch)). The case centred on allegations of deceit and bribery when Kea, an investment vehicle holding Sir Owen’s wealth, invested in a joint venture with Mr Watson called “Project Spartan”. Nugee J found that Kea had been induced to enter into the joint venture and provide funding of £129million by fraudulent misrepresentations by Mr Watson, in breach of fiduciary duty or as a result of illegitimate inducements given by Mr Watson.

Crucially for present purposes, Nugee

J also found (at para 540(5) of the first judgment) that, Spartan was a constructive trustee of Kea’s money and Kea was entitled to claim back the £129million on that basis. The advantage of this was that Kea would be able to claim interest not just under s.35A of the Senior Courts Act 1981 but under the Court’s equitable jurisdiction.

### **Clearing the ground**

The bulk of the decision centres on the rate of interest applicable. Before considering that, however, his Lordship held:

1. Although he had considered the question of what an appropriate rate of interest was in his first judgment, it remained appropriate to hear argument from Mr Watson’s counsel at the consequential hearing as to the correct basis for calculation ([9]-[10]).
2. There was no dispute between counsel that interest should be compounded annually ([11]).
3. Crucially, the correct analogy as the basis for determining the rate was the case of a defaulting trustee,

*'the paradigm case being where a beneficiary sued a trustee for loss to the trust fund'* ([12]). This was on the basis that Kea was an investment vehicle for trust monies, Kea had transferred £129m of those trust monies to Spartan as a result of deceit thereby rendering Spartan a constructive trustee of those monies, and had those monies not been so transferred they would have been invested by the trustee in suitable investments ([50]). Mr Watson did not *'contend that this was wrong in principle'*.

Counsel for Mr Watson, however, argued that the appropriate rate should be a "borrowing rate" (ie approximating to the cost that would have been incurred to replace the money lost), and there was support in the authorities for this proposition. Those cases, however, concerned claims by companies for losses sustained in business and could not necessarily be read across to the situation of a defaulting trustee ([33]). Indeed, Nugee J held that it was *'entirely unrealistic to assume that a conventional trust fund would borrow at all'* ([46]). Nor did his Lordship consider

figures supported reliance upon the data. Doing so, and erring on the side of caution, a rate of 6.5% was deemed appropriate ([52]-[54]).

### Discussion

This is an interesting, and welcome, review of the authorities applicable to defaulting trustees. The importance of the case, and the underlying principles, is highlighted by the fact that the difference in the interest rates being sought by Sir Owen and Mr Watson had a value of £20million. Moreover, the case emphasises the significance

## “THE BULK OF THE DECISION CENTRES ON THE RATE OF INTEREST APPLICABLE.”

### What was the appropriate rate?

Nugee J accepted the submission for Sir Owen that interest could be awarded against a defaulting trustee either as a *'convenient substitute for an account of actual profits'* ([21]) or to compensate the beneficiary for the return that ought to have been made ([22]). This was essentially an argument for interest being awarded on an "investment basis". This had a certain logic according to Nugee J because the trustee's obligation was to invest trust monies for the benefit of the beneficiaries and, where they fail to do so, the *'natural way to measure that is to award a figure that represents the rate of return that would have been made'* ([24]). That was the explanation for the traditional 4% interest applied and there was some historical evidence of this serving as a proxy for return on trust investments ([25]).

a "deposit rate", ie the rate of return in a bank account, appropriate.

As a matter of precedent and principle, therefore, a *'rate based on suitable investment return'* ought to be adopted ([47]). Following judgment at trial, Sir Owen's lawyers had produced detailed evidence as to the sorts of return that would have been made by the trust fund had it not been deceived. This had stemmed from data produced annually by ARC and STEP showing the rates of return for trust funds with varying levels of investment risk. Nugee J found the material to be *'objective and of a high quality and a good indication of real-world investment returns'* ([14]-[17]). Relying on that evidence, his Lordship held he should – within the 'broad brush' discretion afforded to him – adopt a middle path and chose a rate that struck *'a balance between caution and risk'*. The consistency between the ARC and STEP

both of giving careful thought to the sorts of remedy sought (eg one based on trustee default or a close analogy) so as to engage the broad equitable discretion and the need for concrete evidence of the sorts of investment returns available to the size of trust fund in question. Nugee J was clearly impressed by the ARC and STEP materials, which are the product of voluntary anonymised reporting by trust professionals. These could well take on increased significance following this judgment and defendants' lawyers should pay careful attention to their reliability and suitability to the particular fund in question.





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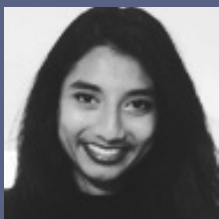


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