CDR
Commercial Dispute Resolution

ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery 2022

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I Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

Bermuda's constitution establishes the Supreme Court as the primary court of first instance and the Court of Appeal as the court with jurisdiction to hear appeals from judgments of the Supreme Court. The Judicial Committee of the Privy Council is Bermuda's final court of appeal. The common law, the doctrines of equity, and the Acts of the Parliament of England of general application that were in force in England at the date Bermuda was settled, 11 July 1612, have force within Bermuda pursuant to the Supreme Court Act 1905 (subject to the provisions of any acts of the Bermuda Legislature).

A range of remedies, familiar to practitioners in other common law jurisdictions, are available to litigants in fraud, asset tracing and recovery cases in Bermuda. These include actions for information, such as *Norwich Pharmacal* and *Bankers Trust* orders, actions to protect and guard against the dissipation of assets, such as freezing orders and other injunctive relief, and actions to enforce judgments awarded against wrongdoers, including the ability to appoint equitable receivers over assets, garnishee orders, and orders for the seizure and sale of assets in satisfaction of judgments.

Victims of fraud can make claims for unjust enrichment, breach of trust, breach of fiduciary duty, conversion, dishonest assistance, breach of contract, misrepresentation, as well as a host of other actions ordinarily available in the equitable

jurisdictions in the High Court of England and Wales and other parts of the Commonwealth.

II Case triage: main stages of fraud, asset tracing and recovery cases

Victims of fraud seeking to protect their interests and enforce their rights in Bermuda should consider the following key stages in their claim: investigation; preservation of assets; the action/claim; and enforcement. Because of the complex and often fluid nature of fraud, these issues will need to be considered in the round by any potential litigant. The particular circumstances arising in connection with a claim may require certain stages to be considered, and actions to be taken in connection with such stages; in tandem with, or in advance of, other actions. For the purposes of this article, however, we will consider these stages in turn.

Investigation

In cases of suspected fraud, the speed and accuracy with which parties are able to discover information can be crucial to the successful outcome of a claim. Such matters are paramount at the early stages of a claim in order to discover, protect and recover assets. There are several avenues available to a litigant to gather such information. The following are worth closer review.

Public sources of information

When a company is the target of an investigation or a potential action, litigants can search and obtain from the public records of the Registrar of Companies, amongst other things, the location of the company's registered office (crucial for the effective service of documents in litigation), registered charges (note that registration is voluntary), winding-up notices, share capital information, the memorandum of association, the company's name (and any previous names), and its registration number. The Companies Act 1981 obliges companies to maintain registers of both the shareholders and the appointed directors and officers of that company, which must be kept at the company's registered office, and which are generally available for inspection by any member of the public.

The Supreme Court (Records) Act 1955 also gives any person the right to request to inspect and take copies of originating process and any orders on the court file in respect of pending cases, and there is a broader right of access in respect of historic cases and material which has been referred to in open court, subject to the payment of the requisite fee and other stated exceptions.

The Public Access to Information Act 2010 also provides a right of access to information held by a government body. This can be used to great effect in a myriad of circumstances; however, certain kinds of information are subject to exemptions under this legislation.

Disclosure

Pre-action disclosure is not generally available in Bermuda and, in the context of fraud and asset tracing claims, may not always be the most desirable route for seeking and receiving disclosure of key information. *Ex parte* applications seeking the types of orders described below, when coupled with orders sealing the court file and "gagging" orders preventing the subject of the applications from "tipping off" the subject of the underlying claims, are available in Bermuda.

Norwich Pharmacal orders are available in Bermuda. If the court is satisfied that there is a good arguable case that wrongdoing has occurred, it has the power to order third parties mixed up in the wrongdoing, albeit innocently, to provide documents or information which may identify the wrongdoer. A *Norwich Pharmacal* order is sought by way of a summons supported by an affidavit on an interlocutory basis – usually *ex parte*.

Bankers Trust orders can also be sought, to require banks to provide records that would allow the assets of the ultimate wrongdoer to be traced. The Bermuda court has extended the effect of such orders beyond banks holding the proceeds of fraud, to include a defendant against whom the fraud has been alleged [*Crowley Maritime Corporation v International Marine Assurance Group Ltd* [1988] Bda LR 42]. There is no requirement to show involvement in the wrongdoing – unlike the *Norwich Pharmacal* jurisdiction.

The Bermuda courts have applied the principles set out in the case of *Anton Piller K G v Manufacturing Processes Ltd* [1976] 1 All ER CA, making orders granting plaintiffs the right to enter and search a defendant's premises for the purposes of preserving critical evidence for the trial of the substantive claim [*Crane and Dutyfree.com Inc v Booker and HS & JE Crisson Ltd.* [1999] Bda LR 51]. *Anton Piller* orders, particularly when made on an *ex parte* basis, can be extremely useful tools for litigants dealing with less than scrupulous actors in a fraud and asset tracing context.

Undertakings as to damages are ordinarily required as a condition upon which such orders are normally granted – particularly when such orders are granted on an *ex parte* basis. The ordinary rules concerning the requirement to give full and frank disclosure also apply.

Preservation of assets

Bermuda courts have jurisdiction to grant injunctive relief. Orders can be made on an interlocutory basis to maintain the *status quo* until a party's substantive rights can be ascertained. An application for an injunction can be made prior to the commencement of proceedings, after proceedings have started or after trial; for example, in aid of preservation of assets pending the enforcement of a judgment.

Interim injunctions can be granted on an *ex parte* basis or on an *inter partes* basis. The Bermuda court will assist litigants seeking to protect assets from being dissipated pending the outcome of underlying proceedings. The basis upon which the Bermuda Supreme Court's common law power to grant injunctive relief, including prohibitory injunctions requiring a party to refrain from doing something and mandatory injunctions requiring a party to do something, does not materially differ from the UK and other Commonwealth jurisdictions. This includes worldwide *Mareva* injunctions [see *Griffin Line Trading LLC v Centaur Ventures Ltd and Daniel James McGowan* [2020] SC (Bda) 29 Com].

The courts will often make orders for specific discovery concerning the assets which are the subject of a freezing order. Such orders, in addition to providing a clear picture of the assets in the defendant's possession, their location and their ownership, can also provide key insight with regard to the compliance (or not) with the terms of any order by the defendant during the progress of the substantive claim. Such orders can, and often are, endorsed with a penal notice. Non-compliance with such orders so endorsed can result in contempt of court proceedings and, ultimately, committal in some circumstances.

The claim

A party equipped with sufficient information about the target of its claim and the location and value of assets, and having taken steps to preserve those assets pending the outcome of the substantive action, can make a substantive claim in the Supreme Court.

Typically, civil proceedings brought in the Supreme Court may be commenced by writ, originating summons, originating motion or petition. In respect of claims related to fraud and asset tracing, such actions are usually founded in equity and/or the common law, and are therefore normally begun by filing a generally endorsed writ of summons which names the parties to the action and provides very brief details of the relief sought. If the defendant defends the claim, a generally endorsed writ must then be supplemented by a statement of claim in which the initiating party provides the facts upon which it relies to found its action.

A plaintiff seeking to recover assets lost can rely on actions similar to those available to litigants in England and Wales. Such actions commonly may include an action for conversion, unjust enrichment, a claim in fraudulent misrepresentation or an action for breach of trust or fiduciary duty. These claims are brought on the same footing as they would be in England and Wales and many other Commonwealth jurisdictions.

In circumstances where the vehicle used to perpetrate the wrongdoing is a Bermuda company, litigants may look to the Companies Act 1981 for relief. The Minister of Finance has a statutory power under section 110 of the Companies Act 1981, on his own volition or on the application of "that proportion of members of a company, as in

his opinion warrants the application" to appoint one or more inspectors to investigate the affairs of a company and to report on their findings. This remedy is not available in respect of exempted or permit companies.

Insolvency proceedings, allowing for the court to appoint and empower Joint Provisional Liquidators (JPLs) for the purpose of working with (or in some cases in place of) management of the company to secure the assets of the company for the benefit of its creditors, can be instituted where appropriate. Where a company is insolvent and/or it is otherwise just and equitable that it be wound up, and the petitioner in a winding-up petition can demonstrate that there is a real risk that the company's assets are at risk of dissipation to the detriment of the creditors, the Bermuda court has the power to appoint JPLs on an *ex parte* basis, whilst the underlying winding-up petition is afoot. In *Re North Mining Shares Company Limited* [2020] Bda LR 8, the Supreme Court found:

> "The appointment of a provisional liquidator can sometimes be described as a draconian measure employed by the court to paralyse the directors of a company from their ability to deal with and dispose of the company's assets. In such cases, the appointment of a provisional liquidator is ordinarily ordered on an urgent *ex parte* basis to enable swift and unforeseeable seizure of the control of the company's assets by the provisional liquidators. The underlying purpose here is to protect the interest of the company's creditors who are at risk of not being repaid their debts due to the likely dissipation of the company's assets."

The appointment of JPLs pending the winding up of a company is a discretionary measure available to the court, and the exercise of that discretion will ordinarily require there to be a good case for saying that a winding-up order will ultimately be made. [See *Raswant v Centaur Ventures Ltd & Ors* [2019] SC (Bda) 55 Com.] The Supreme Court has also confirmed that the principle that a company should take a neutral position to a winding-up petition applies to a just and equitable winding-up [see *Spanish Steps Holdings Ltd. v Point Investments Ltd.* [2021] SC (Bda) 90 Com].

Enforcement

A domestic judgment can be enforced in various ways under Bermuda law, provided the judgment is for a sum of money payable on a certain date. A writ of *fieri facias*, which is a direction to the court-appointed bailiff to seize the property of the judgment debtor in execution of the judgment to satisfy the sum of the judgment debt, together with interest and the costs of execution, can be issued. The court can also make an order for committal, grant garnishee orders and/or a writ of sequestration in aid of enforcement, amongst other things.

A money judgment entered against a party in the Supreme Court may be entered as a charge over that party's real property. An application for the appointment of a receiver over that property can be made. The Rules of the Supreme Court 1985 (RSC) also provide for an application for the appointment of a receiver over property by way of equitable execution. Provided the court is satisfied that it is reasonable to make such an appointment, taking into account the amount of the judgment debt owed and the costs of appointing the receiver, upon such an order all debts due to the judgment debtor would be paid to the receiver.

The Judgments (Reciprocal Enforcement) Act 1958 (1958 Act) allows judgments for the payment of money (including arbitration awards which would be enforceable as a judgment in the UK) from the superior courts of the UK to be enforced by registration of the judgment in the Supreme Court at any time within six years after the date of the judgment. The Governor can also declare the application of the 1958 Act to other territories. So far, orders have included many countries within the Commonwealth.

A foreign judgment which does not fall within the 1958 Act can be enforced in Bermuda under common law where the foreign court had jurisdiction over the debtor according to Bermuda's conflict of law rules. Formal pleadings must be filed in the Supreme Court. The debt obligation

created by the foreign judgment can form the basis of a cause of action. There is no requirement for the creditor to re-litigate the underlying claim which gave rise to the foreign judgment. A foreign judgment obtained where the foreign court had no jurisdiction over the debtor according to Bermuda's conflict of law rules is not enforceable in this way and fresh substantive proceedings would be necessary in Bermuda seeking to prove once again the debt.

A company truly and justly indebted to a creditor can be the subject of winding-up proceedings under the Companies Act 1981. A statutory demand which has been left at the company's registered office (for example) and which remains unsatisfied for a period of 21 days is evidence of that company's insolvency for the purposes of founding a winding-up petition.

JPLs appointed under Bermuda's insolvency regime can be provided with broad powers to, *inter alia*, set aside transactions which are voidable under the Companies Act 1981, investigate the affairs of the company, and bring actions against current or former directors of the company for breaches of directors and/or fiduciary duties, as well as other common law claims typically used to trace assets for the purposes of the enforcement of such claims.

The Bermuda courts are empowered by the doctrine of comity and Bermuda's common law insolvency regime to issue letters of request to courts in jurisdictions where the company may have assets or other relevant interests, which request that the JPLs' appointment and powers – in so far as they can in that jurisdiction – be recognised for the purposes of, *inter alia*, carrying out their role of getting in and preserving the assets of the company for the benefit of the creditors [*Re North Mining Shares Company Limited*].

III Parallel proceedings: a combined civil and criminal approach

Victims of crime can complain to the police by attending any police station. In the ordinary course, a complaint is investigated after it is made by way of initial written statement – usually recorded and taken down in the presence of police investigators.

A complaint to the Bermuda Police Service can provide a resolution for victims of fraud. The Bermuda Police Service is a highly sophisticated, well resourced, independent investigatory body with particular expertise in detecting and gathering evidence in support of criminal prosecutions. In addition to general powers of investigation, Bermuda's statutory framework provides specific powers to the Police Service allowing for the gathering of information – beyond those available to private citizens.

The Proceeds of Crime Act 1997 has been described by the Bermuda Supreme Court as being "…designed to create a comprehensive and rigorous legislative framework designed to both prohibit money laundering activities and facilitate vigorous and effective enforcement action to investigate such activities, prosecute offenders and seize the proceeds of criminal conduct". [*Fiona M. Miller v Emmerson Carrington* [2016] SC (Bda) 106 APP.]

The court in *Carrington* went on to say this about the wide range of powers provided to law enforcement under the Proceeds of Crime Act 1997:

> "… it equips the law enforcement authorities with the ability to acquire the most important tool for enforcing the Act: information. Powers which interfere with privacy rights in the public interest include the powers conferred on the Supreme Court to make production orders (sections 37-38), issue search warrants (section 39), and compel Government Departments to produce information (section 40). Customer information orders are provided for by section 41A-41G, with jurisdiction conferred on both the Magistrates' Court and the Supreme Court."

In addition to the Proceeds of Crime Act 1997, Bermuda's Companies Act 1981 provides for specific criminal offences that may be committed by directors of companies, including falsifying records and altering documents relating to the company's affairs. Other Bermuda legislation

dealing with crime in the area of fraud include the Criminal Code Act 1907 and the Bribery Act 2016.

Civil proceedings based on facts which concern a criminal complaint can be advanced simultaneously. The court retains a general discretion to stay the civil proceedings pending the outcome of the criminal complaint. When considering an application for a stay, the court will consider the fair trial rights of the defendant and, in particular, whether there is a real risk that those rights would be prejudiced. In an application for a stay, the burden for demonstrating that the rights of the defendant would be prejudiced is on the applicant [*Hiscox Services Ltd et al v Y. Abraham* [2018] SC (Bda) 68 (Civ)].

IV Cross-jurisdictional mechanisms: issues and solutions in recent times

The 1958 Act provides that judgments for the payment of money from many Commonwealth countries and territories can be enforced by registration of the judgment in the Supreme Court. A foreign judgment which does not fall within the 1958 Act can be enforced in Bermuda under common law.

The Bermuda Supreme Court has also granted interim injunctive relief in support of foreign proceedings. This jurisdiction can be usefully exercised, for example, to prevent the sale of shares in a Bermuda company by the company pending the outcome of US or Hong Kong proceedings. Provided the court is satisfied of the usual test for the granting of an injunction and the court has jurisdiction over the defendant, if the court considers that the granting of the relief sought would be considered judicial assistance the court can exercise its discretion to make such an order [*ERG Resources LLC v Nabors Global Holdings II Limited* [2012] Bda LR 30].

Where it appears necessary for the purposes of justice, the RSC Order 39 provides the Supreme Court with the power to make an order for the examination on oath before a judge, an officer or examiner of the court or some other person, at any place. Part IIC of the Evidence Act 1905 and RSC Order 70 provide a statutory footing for the Supreme Court to make an order for evidence to be obtained in Bermuda for use in other jurisdictions.

V Recent developments, technology and other impacting factors

COVID-19 has resulted in a fundamental change in the way governments, courts, litigants and their attorneys have approached these matters.

Governments around the world, including in Bermuda, implemented strict social distancing measures designed in large part to slow the spread of the virus. As a result, more businesses were required to develop business platforms and user interfaces for completely digital transactions. A rise in online payments, coupled with a decrease in in-person verification mechanisms, has required a greater degree of diligence in conducting transactions.

The Bermuda courts have developed a platform for the conduct of hearings via video conference. During strict "shelter in place" orders, the Supreme Court continued to receive and act on urgent applications for injunctions, stays and other ordinary civil remedies. Hearings were (and indeed continue to be) conducted via telephone and online video link, with decisions being rendered as quickly as possible.

The ability to search the court records, on the other hand, was suspended for a brief period. Searches at the Registrar of Companies and the Registry General have resumed in person, but the Registrar of Companies also launched an online company registry system in June 2021. This new online registry allows the public to view all corporate registers maintained by the Registrar of Companies, and statutory filings and applications can also now be made online.

The COVID-19 pandemic has also slowed government innovation in some areas, whilst resources earmarked for non-essential but welcome advancements were diverted to support essential, sometimes life-saving, programmes and government initiatives. In November 2020, the Evidence (Audio Visual Link) Act 2018 became operative, placing on a statutory footing the discretion to allow evidence by audiovisual link in court hearings exercised by the Supreme Court.

With the appointment of a Privacy Commissioner in early 2020, the Personal Information Protection Act 2016 was expected to come into force in full shortly thereafter. However, the pandemic has understandably delayed that process. Broadly speaking, in addition to providing general protections concerning the capture, processing and use of information, as companies and service providers implement more stringent protections around that information, the Act and the safeguards it will require, will assist in mitigating the risk against cybercrime to the ultimate benefit of Bermuda and its people. CDR

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We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

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We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

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Sam Stevens is counsel in the dispute resolution and insolvency team. He specialises in the resolution of complex corporate and commercial disputes, frequently with a cross-border element. He has significant experience handling a wide range of commercial litigation and arbitration matters, with a particular emphasis on shareholder disputes, civil fraud and restructuring/insolvency cases. He has represented clients in disputes in a broad spectrum of industry sectors, including banking, investment funds, insurance, energy, real estate, logistics, construction and media.

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Before joining Carey Olsen, Sam practised at the international law firms DLA Piper, Clyde & Co and Norton Rose Fulbright.

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