

PAPER SUBMITTED BY PCB LITIGATION LLP FOR THE
UNCITRAL COLLOQUIUM ON CIVIL ASSET TRACING AND RECOVERY
IN VIENNA ON 6 DECEMBER 2019

1. **INTRODUCTION**

1.1. Fraud, bribery, corruption, kleptocracy and other financial crime all take place on a massive scale and have enormous impact upon the lives of millions around the globe¹. Only a very small fraction of stolen assets is successfully recovered for the victims, and that is something that must change both to give redress to the victims and to have a deterrent effect.

1.2. We have in this paper sought to set out a number of issues that we have encountered in international fraud and asset recovery cases, which present obstacles to successful recovery. We have relied significantly on the common law position and, in particular, the position in England, where we primarily practice. However, many of the issues we have identified will apply across jurisdictions.

1.3. We have divided the issues into the following categories:

1.3.1. Representation of victims: ensuring that civil claims for the recovery of stolen assets can effectively be brought on behalf of victims.

1.3.2. Disclosure of assets/information: ensuring that information to find and recover stolen assets can be obtained quickly and cost-effectively, without tipping off the fraudster that the victims are closing in on those assets.

1.3.3. Freezing of assets: the ability to act speedily and cost-effectively to prevent assets from being dissipated pending judgment.

1.3.4. Enforceability of judgments: the ability to enforce, in locations where assets are held, judgments from the court hearing the substantive claim on a summary basis, so as to prevent delay and cost leading to dissipation and reduced recoveries.

¹ *“Bribery is an evil practice which threatens the foundations of any civilised society”*: Attorney-General for Hong Kong v Reid [1994] 1 AC 324, per Lord Templeman

1.3.5. Accountability of third parties: to provide both redress for victims and stronger preventative measures in the future.

1.4. We have when discussing the issues also suggested some possible solutions to be explored, perhaps through the development of a model law that would provide mechanisms in multiple jurisdictions to address at least some of the cross-border problems that arise.

1.5. There would need to be much more in-depth analysis as to the issues, the problems that arise in different jurisdictions, and how any multi-jurisdictional solution would work in practice. For example, there will need to be sufficient protections for the defendants and for third parties who may be affected.

2. **REPRESENTATION OF VICTIMS**

2.1. There are three particular problems that we have encountered regarding representation of victims of large-scale fraud and corruption:

2.1.1. First, where there remains wrongdoer control.

2.1.2. Second where there are a very large number of victims, each of whom may not have suffered sufficient loss by themselves to make claims and complex asset recovery commercially viable.

2.1.3. Third, where the circumstances of the victims means that action can only be taken if the lawyers can act on a contingent basis or with the benefit of litigation funding, and that may not be permitted in jurisdictions where such action is to be taken.

(1) Wrongdoer Control

2.2. A particular difficulty with cases of kleptocracy is that wrongdoer control of the state or relevant state entities prevents any effective action being taken to recover assets. Even when there has been a regime change in a particular country, there may be considerable uncertainty and instability in respect of the new regime so as to enable effective action to be taken.

- 2.3. One current example is the situation involving Libya, where there has been a protracted power struggle between different putative governments, leading to the issue of which party has proper authority to bring claims on behalf of the state. One manifestation of that has been the multi-billion dollar claims that have been brought on behalf of the state-owned Libyan Investment Authority, where there have been various individuals claiming to be the properly appointed chairman of that entity, entitled to authorise and make decisions in respect of those claims. Pending determination of that issue, the English Court has ordered the appointment of professional receivers with the ability to pursue certain claims in England.
- 2.4. Wrongdoer control occurs in respect of companies who have been the victims of fraud by directors. One solution to that issue in common law jurisdictions is the ability of a shareholder to bring a derivative claim on behalf of the company against the directors. In England, there are protections in place to ensure claims are brought in good faith in the interests of the company, namely the need to obtain permission of the court to continue a derivative claim².
- 2.5. It may be that a similar solution can be used to enable derivative claims to be pursued on behalf of a state or state entity where wrongdoer control otherwise prevents recovery of stolen assets or damages caused by bribery and corruption.
- 2.6. The right to bring such claims might be conferred upon international organisations, such as the World Bank or the IMF. Day-to-day control of the claims might be conferred upon a suitable professional receiver, approved by the court where the receiver is to take action to recover assets/damages. Protections could be put in place by the requirement to obtain permission of the court at an early stage to commence or continue proceedings with a view to ensuring the claims have sufficient merit and it is in the public interest for such claims to proceed.
- 2.7. Once appointed, it may be appropriate for the receiver to be readily recognised in other jurisdictions, in order to be able to exercise powers locally, much in the same way that an insolvency office holder may be recognised in other jurisdictions where the UNCITRAL Model Law on Cross-Border Insolvency has been adopted.

² Section 263 of the Companies Act 2006

2.8. Wrongdoer control of the relevant state or state entity may make investigation of the claims and producing evidence in support particularly difficult. This could potentially be addressed by making presumptions that have the effect of shifting the burden onto the defendant, so that the defendant will have to engage with the process of gathering evidence, e.g. disclosure of relevant documents (including documents adverse to the defendant's case).

2.9. An example in England is section 1 of the Criminal Finances Act 2017, which introduced Unexplained Wealth Orders ("UWOs"). A UWO is an order requiring the respondent to provide a statement:

2.9.1. Setting out the nature and extent of the respondent's interest in specified property.

2.9.2. Explaining how the respondent obtained and paid for the property.

2.9.3. Setting out details of any trust through which the property is held.

2.9.4. Setting out other information in connection with the property as may be required by the UWO.

2.10. To make a UWO, the court must be satisfied that:

2.10.1. There is reasonable cause to believe that:

2.10.1.1. The respondent holds the property.

2.10.1.2. The value is greater than £50,000.

2.10.2. There are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.

2.10.3. The respondent is either a politically exposed person or there are reasonable grounds for suspecting that:

2.10.3.1. The respondent is, or has been, involved in serious crime (whether in a part of the UK or elsewhere); or

2.10.3.2. A person connected with the respondent is, or has been, so involved.

(2) Multiple victims

2.11. Many frauds, such as Ponzi schemes, can be substantial in terms of overall losses to the victims, yet each individual victim may not have themselves suffered a substantial loss, sufficient to make the bringing of any claim for recovery commercially viable.

2.12. One possible solution is the bringing of a class/collective action on behalf of the victims. However, getting a group together can be time-consuming and costly³, with the result that by the time any group can be put together, the prospects of recovery have diminished due to the dissipation of assets, and the whole exercise becomes commercially unattractive. That said, there has to be recognition that for many of these types of fraud, the story will emerge publically in piecemeal fashion, such that there will always be some delay before victims are even able to consider claims, let alone put a group together for the purposes of collective action.

2.13. Another problem is that if there are disparate groups of victims, all hunting a limited pot of assets, there is greater scope for the recoveries to be eaten up by the costs of multiple lawyers.

2.14. An “opt-out” class action may address some of these points, but it is not at all clear that this would result in such claims becoming commercially viable. For example, it may take time to reach a stage where the class can be certified as such by a court, and also there may be considerable investigation to be undertaken both as to the merits of the claim and in finding assets before it might be appropriate to launch action. All of that may need to be done without tipping off the defendant(s) and there may well be many competing representative claimants going through that exercise. Indeed, as a consequence, there may be an incentive for a representative claimant to bring a claim as early as possible, before sufficient investigation has taken place to freeze assets at the outset.

³ For example, in terms of time required by lawyers to investigate and explain courses of action to potential claimants (to “book build”) and to put in place and manage structures for the group. These may include systems for decisions and instructions through a committee of claimants and for communicating updates and advice to claimants, as well as dealing with issues of funding and insuring against potential adverse costs awards.

- 2.15. However, the problems with class actions should not deter the finding of some better mechanism to enable redress for these types of victim.
- 2.16. One possibility to consider to address, at least in part, these issues is whether a central body in each jurisdiction can be appointed to administer opt-out class actions in fraud cases. In particular, without prior approval of that central body, no representative claimant may have a class action certified. A potential representative claimant would have to approach the central body at the outset to obtain prior approval, and the central body could monitor progress by the representative claimant in order to ensure that sufficient steps were being taken with expedition, otherwise such approval would be revoked.
- 2.17. Indeed, the central body may well be one which could work in co-ordination with the criminal authorities, as the criminal authorities may well be able to take effective steps to restrain the proceeds of crime at an earlier stage than a class action can obtain any freezing order.
- 2.18. If there is to be class action redress for victims, then it will be important for certification as a class by a court in one jurisdiction to be easily recognised in other jurisdictions, so as to enable steps to be taken on behalf of the class quickly and cost-effectively in other jurisdictions so as to find and freeze assets.

(3) Funding issues

- 2.19. Funding issues may arise in the above two types of claims. Funding may not be available from the victim because of wrongdoer control, or because it is not commercially viable for a representative claimant or even a group of claimants to provide the necessary funding. There may be other cases where funding is required, e.g. where a victim has gone into bankruptcy or has otherwise been stripped by a fraud of assets from which to fund proceedings.
- 2.20. In such cases, funding might be available as a consequence of lawyers acting on a contingent basis and/or the provision of litigation funding. However, one difficulty is not knowing whether the trail of enforcement will lead to a jurisdiction where such forms of funding may be unlawful. That is prohibitive of efforts to effect a recovery.

2.21. If a model law for civil asset recovery is to be created, then it is suggested that it should make clear that contingent fees and third party funding are permitted.

3. DISCLOSURE OF ASSETS/INFORMATION

3.1. The two issues that we address in this section are:

3.1.1. Difficulties caused by unavailability, delay and/or cost of disclosure from third parties when looking to trace assets across multiple jurisdictions.

3.1.2. The problems caused by lack of information in many jurisdictions about ownership of corporate entities.

(1) Enforcement of disclosure orders

3.2. Asset recovery cases are often fast-paced in order to find and freeze the assets before they can be further dissipated. Delays in the process of obtaining disclosure from banks and other third parties holding information as to assets can therefore be severely detrimental to the asset recovery process. Similarly, if the defendant is notified of the steps being taken to locate assets, those steps may be rendered ineffective, as the defendant takes further steps to dissipate assets and to cover their tracks.

3.3. One possible solution is the introduction of uniform system of enforcement of disclosure orders made by the court dealing with the substantive proceedings (or by the court dealing with enforcement of any judgment). The aim would be to prevent the need to obtain a series of orders in multiple jurisdictions, each time having to instruct local lawyers and apply to the local court, with the result of increased cost and delay.

3.4. The process of enforcement should be summary, with limited grounds of challenge by the third party, perhaps based upon legal privilege, national security or other public interest. The third party should also be able to challenge the width of the disclosure if it is overly burdensome, even with the benefit of any security for its costs that the claimant has to provide.

3.5. It is important for the disclosure to be effective for the purposes of tracing assets that:

3.5.1. Disclosure not be resisted on grounds of banking secrecy.

3.5.2. Disclosure orders that are made *ex parte* by the primary court are enforced in the local court, and there is not some requirement that enforcement will only occur if there has been a hearing on notice to either the defendant or the third party.

3.5.3. If the primary court considered there should be “gagging” provisions to prevent disclosure by the third party that might tip-off the defendant, then the local court should similarly incorporate a gagging provision when it enforces the disclosure order.

(2) Publically sourced information

3.6. Another significant issue in the tracing of assets is the lack in many jurisdictions of publically available corporate information, in particular regarding shareholders and ultimate beneficial owners of companies. Whilst it is appreciated that there may be arguments in favour of privacy, it is submitted that these should be outweighed by having a sufficiently transparent system that avoids concealment of assets.

3.7. Changes to enable such information to be publically available may not be fully effective. In England, many companies fail to comply with requirements to disclose ultimate beneficial ownership, and those who are determined to conceal assets may use nominees or otherwise provide false or misleading information. However, such changes would at least be a step in the right direction. At the very least, it should enable a claimant to identify, name and serve appropriate defendants at different levels within a corporate chain of ownership of assets, even if those defendants turn out to be nominees. The practical benefits in this regard may be seen in the example provided in the next section.

4. FREEZING OF ASSETS

4.1. The three issues that we address in this section are:

4.1.1. The difficulties encountered where assets are held through complex structures, often involving nominees.

4.1.2. The need for better cross-border recognition of interim measures designed to freeze assets.

4.1.3. Issues arising from new forms of assets, in particular cryptocurrencies.

(1) Assets held through complex structures

4.2. Successful asset recovery will often involve freezing of assets at the appropriate time, sometimes simultaneously in multiple jurisdictions. The appropriate time is usually at the outset, once assets have been identified. Assets may be held through complex structures, perhaps involving layers of companies and it is important to freeze assets at the correct level(s) within the structure.

4.3. That question of freezing assets at the correct level(s) within the structure, can present particular problems. For example, a defendant may be the ultimate beneficial owner⁴ of real estate in England, where the legal title is held by a Cypriot company, the shares of which are owned by a BVI company, whose shares are in turn owned by individuals who are nominees of the defendant:

4.3.1. It may be that there is sufficient evidence that the defendant is the actual beneficial owner⁵ of the real estate and the Cypriot company is nothing more than a nominee, in which case enforcement of any judgment will in due course be directly against the defendant's beneficial interest in the real estate and it is that interest that has to be frozen. It does not in that scenario require shares in the Cypriot or BVI companies to be frozen because even if they are dissipated it does not matter who ultimately owns the Cypriot company if all it does is hold a bare title to the real estate⁶.

4.3.2. Or it may be that there is no such evidence, and ultimately enforcement will have to be against the defendant's beneficial interest in the shares of the BVI company. Enforcement will ultimately have to take place by moving down the chain of companies

⁴ This term is used to denote an individual who has an ultimate economic interest in the asset, rather than an individual who has a direct beneficial interest in the sense that the party with title to the asset holds it on trust for the individual.

⁵ I.e. the party with title to the asset holds it on trust for that individual.

⁶ In practice, it may be prudent to freeze the shares in case the court ultimately finds one of the companies to be the true beneficial owner of the real estate, or if those companies might own other unknown assets which might be the subject of enforcement in due course.

to take control of them and realise the real estate, the proceeds of which will then move back up the chain to be distributed to the claimant as creditor of the beneficial owner of shares in the company at the top of the chain. In that scenario, it may be important to freeze all levels so as to freeze the shares in the BVI company, shares in the Cypriot company and the real estate itself.

4.3.3. Or it may be that the defendant's direct beneficial interest is in shares in the middle of the chain, e.g. if the BVI company holds shares in the Cypriot company on trust for the defendant, in which case enforcement will ultimately be at the level of the beneficial interest in the shares of the Cypriot company and it may be important therefore to freeze shares in the Cypriot company as well as the real estate itself.

4.4. It will readily be appreciated from the above that there are complexities in how a claimant has to tackle freezing an asset that is held through a chain of corporate entities. This is made all the more difficult where there is no publically available information about shareholdings. For example, if the claimant can see that the real estate is held by a Cypriot company and can see that the shares in the Cypriot company are held by a BVI company but cannot see who the shareholders are of the BVI company, the claimant is not going to be able to know whether there are further companies sitting on top of the BVI companies and/or in whose names are the shares of the company sitting at the top of the chain, all of whom might need to be parties to any freezing and/or enforcement proceedings.

4.5. The entrenched concept of separate legal personality of a company, and the fact that a company may have creditors, means that a blunt instrument of ignoring the chain of companies and allowing enforcement direct against the underlying asset may not be appropriate. If in the above example, it were the case that enforcement has to be against the beneficial shareholding of the BVI company and that company has genuine third party creditors, then those creditors may have to be paid out of the proceeds of sale of the real estate.

4.6. In addition, there are a number of jurisdictions where use of nominee owners makes enforcement extremely difficult, if not impossible, because of a lack of recognition that there is a beneficial ownership of the asset against which to enforce. If there cannot be enforcement, then freezing the asset may be have no proper purpose.

4.7. Perhaps one option is to have a system in place that recognises the concept that assets may be beneficially owned or ultimately beneficially owned by a defendant and, on appropriate evidence, enables freezing (and ultimately enforcement) where the underlying asset is held against that asset direct. That would be subject to service, at the same time as the defendant is served, upon the title holder (and any other identifiable parties in the chain of ownership). The title holder and others in the chain of ownership would then be entitled to raise objection, to protect the interests of innocent shareholders and creditors. The consequence would be that any parties who claim to have an interest, but who might not be readily identifiable, would have to identify themselves.

(2) Cross-border recognition

4.8. Whilst there is some degree of recognition at international level, enabling interim relief granted in one jurisdiction to be recognised in another, often this first requires the interim relief granted by the primary court to have been served on the defendant and the defendant to have had the opportunity to challenge that interim relief. That can lead to delays in the freezing of assets, providing an opportunity for those assets to be dissipated.

4.9. It is submitted that recognition should take place at the *ex parte* stage, with the protection for the defendant (or relevant third party, e.g. if the interim relief is granted against a nominee of the defendant) being that if the interim relief granted by the primary court is subsequently set aside on an *inter partes* basis, the recognition in other jurisdictions would also fall away. There could be minimum safeguards in place for the recognition of interim orders, including the provision of security for damages that might be suffered by the defendant or third parties consequent on the freezing of assets, if recognition later falls away.

4.10. It is also submitted that such interim relief should include the recognition of interim receivers who have the powers to secure assets and to seek information about assets from third parties within the jurisdiction where recognition is taking place.

4.11. The other area where we consider there is scope for recognition is that of committal for contempt of court. Proceedings to commit someone to prison for contempt of court in not obeying a freezing order is an important means of ensuring compliance with such an order. However, we have not encountered any circumstances in which one jurisdiction will extradite a person to answer proceedings for civil contempt. If that were to change, it could

provide a very significant deterrent to fraudsters disobeying court orders, and thereby greatly facilitating the recovery process.

(3) Cryptocurrency

4.12. The increased use of cryptocurrencies raises a different issue when it comes to freezing and enforcement where stolen assets have been converted into a cryptocurrency and transferred to a third party. Can the claimant assert a proprietary claim and trace into the hands of the third party?

4.13. The English Court has been willing to entertain the granting of proprietary freezing orders in respect of cryptocurrency⁷, though this has not been the subject of full argument before the court.

4.14. In its Legal Statement on Cryptoassets and Smart Contracts, the UK Jurisdiction Taskforce expressed the view that cryptoassets are to be treated in principle as property as they have all the indicia of property. It is submitted that that is the correct conclusion as cryptocurrency is used as a currency and the contrary conclusion could lead to great injustice where such currency has been used to transfer the proceeds of crime.

4.15. Whether that conclusion will be followed ultimately by the English Courts following full argument, or in other jurisdictions, remains to be seen. Moreover, even if that is the position as a matter of English law, the question arises as to which law might be the applicable law in any claim, and whether under the applicable law cryptocurrency is considered property. A uniform approach across jurisdictions to treat cryptocurrency as property would be welcome when it comes to tracing and recovering assets to reduce uncertainty, complexity and the possibility that stolen assets might be successfully laundered.

5. ENFORCEABILITY OF JUDGMENTS

5.1. In this section, we discuss issues in relation to:

⁷ Vorotyntseva v Money-4 Limited [2018] EWHC 2596 (Ch) at [13]; and Robertson v Persons Unknown (unreported) 16 July 2019, which cited the Singapore case of B2C2 Ltd v Quoine Pte Ltd [2019] SGHC (I) 03 where it was held that a cryptocurrency could be property for the purposes of being held on trust.

5.1.1. Cross-border enforcement of judgments.

5.1.2. The impact of criminal restraint and confiscation proceedings.

(1) Enforcement of foreign judgments

5.2. Some of the issues around enforceability are covered in the section on freezing of assets, as the two largely go hand in hand: freezing assets only makes sense if those assets are ultimately amenable to enforcement.

5.3. The key issue again to be addressed in this section is the question of recognition across borders. There are some countries where there are systems of mutual recognition of judgments (e.g. within the EU, but not in relation to all civil judgments), but nothing on the scale of the New York Convention in respect of recognition of arbitration awards. It is difficult to see the justification for a private dispute resolution mechanism, which is not subject to the scrutiny of public hearings and a system of appeals, to lead to awards more readily enforceable than court judgments.

5.4. Thus, a claimant who has proved their case already in one jurisdiction may have to start over again (if within the relevant limitation period) to prove their case and enforce in another jurisdiction. This can lead to massive delay and costs, and risks real injustice if a limitation defence arises or if the delay enables assets to be dissipated.

5.5. It is suggested that a model law could incorporate a summary process of enforcement of foreign judgments for monetary sums and in relation to proprietary claims in respect of moveable property. Perhaps this would incorporate the common law requirements for enforcing foreign judgments that the judgment debtor was subject to the jurisdiction of the foreign court (whether by presence in the foreign jurisdiction at the time the foreign proceedings were commenced or by voluntary submission) and there is no policy reason not to enforce (e.g. fraud on the foreign court, breach of natural justice).

5.6. Further, in the same way that under the UNCITRAL Model Law on Cross-Border Insolvency there can be recognition of bankruptcy trustees and liquidators, it is submitted that an enforcement receiver appointed in the primary jurisdiction to collect in assets of the defendant for the purposes of satisfying the judgment should be recognised in other

jurisdictions and be given the powers in those other jurisdictions to obtain disclosure from third parties about assets and to collect in those assets.

(2) Impact of criminal restraint and confiscation

5.7. The area of criminal restraint and confiscation of the proceeds of crime, together with mutual legal assistance, is a substantial specialist topic area and we do not seek to address it in any detail in this paper. The use of parallel criminal proceedings to restrain assets can be an effective adjunct to a civil recovery process, and indeed may lead to recovery for victims through the making of a compensation order in favour of victims.

5.8. However, there it is not always the case that the victim will be able to obtain a compensation order, and there is the danger that assets which might otherwise be available for civil enforcement by the victim will instead be confiscated by the state.

5.9. It is submitted that in all jurisdictions, victims ought to have priority over the state when it comes to recovery from the proceeds of crime.

6. ACCOUNTABILITY OF THIRD PARTIES

6.1. In this section, we discuss the potential for accountability to victims by:

6.1.1. Banks who have through inadequate processes permitted the proceeds of fraud to be laundered.

6.1.2. Those who assist making defendants “judgment proof”.

(1) Banks

6.2. Whilst there has been increasing focus on banks complying with anti-money laundering regulations, there is a disparity (at least in some jurisdictions, such as England) between the regulatory requirements on banks and the civil liability that they may have to victims of fraud, where funds have been laundered through the banks.

- 6.3. The processes put in place by banks to prevent money laundering may entail the use of an automated system to generate alerts if there is unusual customer activity. For example, if an account has for a number of years only been used for low-value transactions but then suddenly receives large sums of money, that might generate an alert. Alerts are then reviewed by individuals employed or engaged by the bank to determine whether the issue giving rise to the alert should be escalated to someone more senior to consider and, if appropriate, make a suspicious activity report to the authorities. The reviewers might make enquiries of the customer, seeking an explanation for the unusual activity.
- 6.4. It is quite often the case that the proceeds of a fraud end up being laundered through banks without detection, despite the fact that the size of the receipts into the relevant account are unusual and payment instructions are given swiftly thereafter to transfer the monies to a foreign account.
- 6.5. At present, in England, where much of this activity takes place, the banks take the position that as a matter of English law:
- 6.5.1. They owe no duty of care to a customer so as to incur liability for negligence.
- 6.5.2. They are not acting dishonestly so as to incur liability for dishonest assistance.
- 6.5.3. They do not receive funds beneficially⁸ so as to incur liability for knowing receipt or unjust enrichment, and that mere negligence on the part of the bank would not be sufficient to satisfy the mental element of such a claim⁹.
- 6.6. It is however submitted that if the banks fail to detect money laundering, either by having inadequate automated systems to generate alerts or by having inadequate human review, leading to the bank complying with instructions by a fraudster to pay out monies belonging to the victim, then the victim ought to have a right of redress against the bank.

⁸ This is a controversial point under English law, and it is submitted that the proper answer is that the banks receive funds beneficially given that the bank will use customer deposits for its lending and other business.

⁹ The question of what in fact needs to be established in respect of the mental element is again unclear in English law. It is submitted that a failure to take the steps a reasonable banker would take in light of information it receives, ought to be sufficient to render the bank's conduct unconscionable so as to satisfy the mental element for receipt based claims.

6.7. Private enforcement by victims may have the added benefit of forcing higher standards of detection and prevention of money laundering in the banking system.

(2) Those who assist in making a person “judgment proof”

6.8. A whole industry of “asset protection” has been built up, which often involves setting up structures and moving assets in a way which is designed to harm the interests of an existing or prospective claimant. This conduct is designed to prevent the claimant obtaining the redress to which they would ultimately be lawfully entitled if the substantive claim is resolved in favour of that claimant.

6.9. We believe that this conduct should not be condoned and should instead lead to liability of those involved, and those persons should not be able to hide behind legal privilege or other secrecy laws to prevent victims obtaining redress.

6.10. Whilst there may be remedies that can be sought in respect of transactions to put assets beyond the reach of creditors, that entails being able to find the assets that have been transferred, and it may well be that they have ended up in a jurisdiction where there is no effective remedy.

6.11. Liability in respect of this conduct might be achieved by the introduction of specific provisions enabling redress against those assisting the evasion of liability through moving or transferring assets so as to make enforcement more difficult.

6.12. Such provisions should also enable disclosure to be sought against these third parties as to their conduct in advising on or otherwise assisting the transfer/movement of assets. Legal privilege/secrecy may be overridden if there is a sufficiently strong case of impropriety against such parties. There is a principled basis for that: in English law, there can be no privilege in iniquity, so if legal advice is sought for the purposes of carrying out an unlawful act, there may be no privilege (or confidentiality) in that advice.

7. CONCLUSION

7.1. Multi-jurisdictional asset recovery cases tend to be very complex, with significant obstacles, making the process of enforcement more risky, more costly and slower. The more obstacles

that can be removed or overcome, the better for victims and for society in general given the damage that is done by financial crime.

PCB Litigation LLP

2 December 2019