

Asset Recovery

Contributing editors

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2017

GETTING THE
DEAL THROUGH

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Asset Recovery 2017

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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

A corporate entity conducting an internal investigation should be aware of the following non-exhaustive list of relevant legislative provisions:

- the Police and Criminal Evidence Act 1984 (PACE), the Codes of Practice made pursuant to it, and in particular PACE Code of Practice C, which deals with the questioning of suspects and what documents or materials an accused is entitled to;
- the Computer Misuse Act 1990, which criminalises unauthorised access of a computer or computer network;
- the Data Protection Act 1998, which provides for criminal and civil sanctions for the misuse of personal data;
- the Regulation of Investigatory Powers Act 2000, which governs when private or state bodies may lawfully intercept communications and use other covert techniques;
- the Proceeds of Crime Act 2002, which, among other things outlines when a person in the regulated sector is required to disclose a suspicion or knowledge of money laundering; and
- the Employment Act 2002, which prescribes the circumstances in which an employee may be lawfully dismissed or disciplined.

If it is thought appropriate to enlist the services of a private investigator to obtain information about other parties or prospective parties, the investigator and those instructing must take heed at all times of the above legislation, and also the Bribery Act 2010 and common law offences such as misconduct in a public office. It is essential to ensure that an investigator is not engaging in corrupt or illicit practices, as those instructing that investigator may find themselves subject to an ensuing law enforcement investigation or equivalent. In July 2013, the Home Affairs Select Committee revealed that law firms and insurance companies were among a list of clients potentially connected to private investigators convicted of illegally obtaining information. In December 2014, the Home Office indicated that the government intended to introduce the statutory licensing of private investigation activities as soon as possible.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

A party to parallel criminal and civil proceedings may apply to stay concomitant civil proceedings on the ground that the continuation of the civil proceedings presents a real risk of serious prejudice in one or both sets of proceedings, which might lead to injustice (see *The Financial Services Authority v Anderson & Ors* [2010] EWHC 308 (Ch)). This is a high threshold, rarely demonstrated by the party applying for the stay. In addition, in *JSC BTA Bank v Mukhtar Ablyazov & Ors* [2016] EWHC 289 (Comm), a defendant who was subject to a worldwide freezing order and asset disclosure order was also facing criminal proceedings in Kazakhstan and elsewhere. He argued that he should not be compelled to give disclosure of documents, relying on privilege against

self-incrimination. It was recognised that there is no automatic right to privilege against self-incrimination in relation to overseas criminal proceedings, however, the court has discretion to uphold that privilege where there is a clear danger to the individual seeking to rely on it. The court dismissed the defendant's application and compelled disclosure on the basis that a 'confidentiality club', under which the claimant had given an undertaking that only its legal team would be able to look at the documents disclosed, had been established previously, negating the risk to the defendant.

3 Forum

In which court should proceedings be brought?

A claim for the recovery of assets greater than £100,000 should be brought in the High Court, where it may be allocated to the Commercial Court (a specialist court in the Queen's Bench Division) or the Chancery Division. Financial claims valued at more than £50 million which relate to sophisticated financial products including project finance, derivatives and hedge fund disputes, claims that require particular expertise in the financial markets, or raising issues of general importance to the financial markets will be managed in a specialist Financial List.

On 27 July 2016, Lord Justice Briggs published a report on the future of the civil courts structure. His recommendations include:

- the creation of an online court for money claims up to £25,000 (to begin with);
- an increase in the minimum claim value threshold for commencing claims in the High Court to £250,000; and
- the county court to become the default court for enforcement of all judgments and orders of the civil courts, with enforcement procedures to be unified and digitised.

4 Limitation

What are the time limits for starting civil court proceedings?

Time limits for starting civil court proceedings are, in general, provided by the Limitation Act 1980. With exceptions, claims must be issued within six years from the date at which the cause of action accrued. This is the case for claims in tort and breach of contract.

Equitable claims also have a six-year limitation period, with the exception of where a trustee who held a pre-existing fiduciary relationship with the claimant (eg, a lawyer or an accountant) is sued for fraud or fraudulent breach of trust, or to recover from the trustee trust property in the possession of the trustee. In such a case no limitation period is applicable.

Although the Limitation Act does not expressly deal with restitutionary actions, the courts have accepted them to be a species of 'quasi-contract', with a corresponding six-year limitation period.

In cases of fraud, any limitation period will not begin to run until after the claimant has discovered or could, with reasonable diligence, have discovered the fraud.

Claimants have four months within which to serve a claim form that has been issued within the applicable limitation period in the jurisdiction and six months if the claim is to be served outside the jurisdiction, although an extension of time may be sought from the court.

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

The time to assess whether the court has jurisdiction is at the time the claim form is issued (see *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1). The High Court has jurisdiction over any defendant who is domiciled in England and Wales and properly served with a claim form.

Where the defendant is not domiciled in England or Wales, whether the court will have jurisdiction will be governed by:

- the rules set down by Regulation 1215/2012 ('the Judgments Regulation') and the Brussels and Lugano Conventions (together the 'Jurisdiction Conventions');
- a binding jurisdiction agreement; or
- reference to existing common law principles (including that the defendant has submitted to the jurisdiction of the court).

The Jurisdiction Conventions collectively cover all EU states, Denmark, Iceland, Norway and Switzerland and establish a presumption that a defendant in a civil matter should be sued in the country in which he or she is domiciled. In the UK, sections 41(2) and 41A(2) of the Civil Jurisdiction and Judgments Act 1982 (CJJA) provide that an individual is domiciled in the UK if he or she is resident in the UK and the nature and circumstances of his or her residence indicate that he or she has a substantial connection with the UK. Pursuant to sections 41(6) and 41A(6) of the CJJA, an individual is presumed to be domiciled in the UK if he or she has been resident there for three months: see, for example, *Cherney v Deripaska* [2007] EWHC 965 (Comm).

A defendant may be sued in a state in which he or she is not domiciled if it is demonstrated that another jurisdiction would be more appropriate. For example, the presumption of domicile will be reversed in respect of a claim falling within the Judgments Regulation if the parties, regardless of domicile, had agreed that the courts of a specific member state was to have jurisdiction to settle any disputes arising in connection with a particular legal relationship. In such an example the agreed member state would have jurisdiction unless that agreement was null and void as to its substantive validity under the law of the member state.

In the event that the defendant wishes to dispute the court's jurisdiction, he or she must file an acknowledgment of service with the court and then, within the prescribed time, apply to the court for an order declaring that it has no jurisdiction or that it should not exercise any jurisdiction that it may have. A defendant will not be taken to have submitted to the jurisdiction simply by acknowledging service for the purposes of disputing jurisdiction or in the event that the purpose of his or her appearance before the court is to contest the validity of a freezing order entered against him or her.

Brexit Note: On 23 June 2016, the United Kingdom voted to leave the European Union. How this result will impact upon the continuing role of EU legislation in English law remains to be determined.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

Evidence is admitted primarily through documents and written statements from witnesses (which can include the parties themselves) supplemented by oral examination and cross-examination under oath. Evidence is admissible only where it is relevant to a fact in issue in the case.

Subject to certain blanket exemptions, the general principle is that where evidence is relevant to the matters in issue, it is admissible no matter how it was obtained (see *Helliwell v Piggott-Sims* [1980] FSR 356). Where evidence is tainted, either because it breaches a party's article 8 ECHR right to privacy, or because its acquisition entailed an unlawful act, the court must balance the competing needs of having all probative evidence before it, while preserving the opposing party's right to privacy and a fair trial.

The court is empowered by the Civil Procedure Rules (CPR) to exclude evidence that would otherwise be admissible.

If a defendant has been convicted of an offence in the criminal courts of the United Kingdom, that will be taken as proof, albeit

rebuttable, that the defendant engaged in the conduct which formed the basis of the charge: see Civil Evidence Act 1968, section 11.

7 Publicly available information

What sources of information about assets are publicly available?

Publicly available sources of information about assets include the following:

- The Land Registry: records freehold and leasehold interests in real property. The Register lists all those who hold a registerable interest in the relevant asset and the nature of their interest.
- The Driver and Vehicle Licensing Authority: holds details of the 'registered keeper' of licensed (taxed) vehicles in the UK.
- The Civil Aviation Authority maintains the UK Register of Civil Aircraft. Publicly accessible information includes the registered owner of the aircraft and details of the aircraft including year built.
- The Maritime and Coastguard Agency maintains the UK Ship Register.
- Companies House: maintains a register of the officers of limited companies and other comparable entities in the UK. Information held on the register includes filed accounts, mortgages and charges over the company's assets, and details of any insolvency proceedings. From June 2016, UK registered companies were also required to make available the details of their ultimate beneficial owner or owners.

The government has recently consulted on proposals to bring foreign companies that hold English or Welsh real estate, or that intend to bid for UK government contracts, under a similar beneficial ownership disclosure regime to that introduced in respect of domestic companies, which will apply to records kept at Companies House and the Land Registry.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Evidence from law enforcement agencies may be obtained for use in civil proceedings. A request (usually in writing) should be made to the relevant agency who will consider the request in line with written guidance and any statutory or other obligations. Material subject to public interest immunity may be redacted. The Crown Prosecution Service has published detailed guidance on its approach to requests for disclosure of materials in its possession to third parties.

Documents disclosed by the Serious Fraud Office (the SFO – the UK's primary prosecutor of serious fraud and corruption) during the course of an investigation (for example, to an individual who is interviewed as part of that investigation) may also be used in civil proceedings as disclosure by the SFO does not give rise to an implied undertaking not to use the documents for 'any other purpose': see *Standard Life Assurance Ltd and another v Topland Col Ltd and Others* [2010] EWHC 1781 (Ch).

Where the relevant agency will not voluntarily disclose the requested material, it may be sought by making an application to the High Court: see for example *Phillips v Newsgroup Newspapers Ltd and another* [2010] EWHC 2952 (Ch).

Individuals can also make a request for information to the relevant law enforcement agency pursuant to the Freedom of Information Act 2000, however, there are a number of exemptions available to such agencies enabling them to withhold information. In other circumstances an individual could make a Subject Access request pursuant to the Data Protection Act 1998 to a law enforcement agency in order to obtain information relating to themselves, although civil courts do not approve of this as a means of obtaining pre-action disclosure from a potential party to proceedings (see *Elliot v Lloyds TSB Bank PLC & Ors* [2012] EW Misc 7 (CC)).

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

Where a party has grounds to believe that a third party is in possession of information or documents that may be relevant to a potential claim, he or she may apply to the High Court for an order requiring the disclosure of that information:

- under CPR 31.17 by demonstrating that the documents sought are likely to support the applicant's case or adversely affect the case of one of the other parties to the proceedings. The applicant must also show that disclosure is necessary to dispose fairly of the claim or save costs;
- pursuant to the *Norwich Pharmacal* jurisdiction (after *Norwich Pharmacal Co v The Commissioners of Customs and Excise* [1974] AC 133). To obtain *Norwich Pharmacal* relief, the applicant must show that the respondent has become mixed up in the alleged wrongdoing to make him or her more than simply a mere witness, although it is not necessary to show that the applicant intends to bring legal proceedings in respect of the alleged wrong;
- by obtaining a *Bankers Trust* order (following *Bankers Trust v Shapira* [1980] 1 WLR 1274). Such an order requires a third party to disclose any information that might assist the claimant in pursuing a proprietary claim. Such orders are typically sought against parties who inadvertently become mixed up in laundering the proceeds of fraud, for example, a bank; and
- pursuant to section 7 of the Bankers' Books Evidence Act 1879 the court may make an order allowing a party to civil proceedings to inspect and take copies of any entries in a banker's book for the purposes of such proceedings.

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

The English jurisdiction offers the claimant a wide range of interim remedies. Such applications are usually made without any notice to the defendant and in such applications the applicant is subject to an onerous duty to make full and frank disclosure to the court of any matters that might influence its decision.

If there is an immediate risk that evidence is likely to disappear, a claimant may apply for a civil search order. This order requires a defendant to permit the claimant's lawyers, in the presence of an independent supervising solicitor, to enter premises occupied or controlled by the defendant in order to identify and preserve evidence relevant to the action. Where a claimant seeks to recover specific property from the defendant or the traceable proceeds of that property, the court, subject to certain requirements, can grant an order for the detention, custody or preservation of that property.

Should a claimant suspect that a defendant may dissipate assets in order to frustrate judgment, he or she may apply to the High Court, usually without notice, for a worldwide freezing order. The effect of such an order is to prevent the defendant from dealing with any of his or her assets above a certain monetary level, anywhere in the world. A freezing order can affect any asset which the defendant has the power, directly or indirectly, to dispose of or deal with as if it were his or her own, including assets not legally or beneficially owned by him or her, but under his or her control (see *JSC BTA Bank v Ablyazov* [2015] UKSC 64). It is binding on any third party who has notice of it.

A worldwide freezing order will usually include a disclosure order compelling the defendant to confirm, on affidavit, the nature and location of his or her assets, which may include a defendant's interest in a discretionary trust (see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139). Similarly, tracing orders may require the defendant to confirm his or her dealings with a specific asset or monies over which the claimant asserts a proprietary right. The claimant may also apply for an order that the defendant deliver up his or her passport to the court, to prevent him or her from fleeing the jurisdiction until he or she has complied with the disclosure provisions in the order. In rare cases the court may direct that a receiver take control of the defendant's assets and manage them pending the determination of any claim.

A freezing order can also be extended to parties against whom no cause of action actually lies. In *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231, it was held that the courts have jurisdiction (known as the *Chabra* jurisdiction) to grant freezing orders against not only parties to a cause of action, but also third parties who are not party to the claim, for example, if the third party holds or is exercising power over the assets of the defendant or judgment debtor or is a potential judgment debtor.

In *Holyoake v Candy* [2016] EWHC 970 the court ordered a novel 'notification injunction' which only required the defendant to give notice to the claimant before transferring a particular asset, but did not otherwise preclude him or her from doing so. In order to obtain a notification injunction, a claimant must satisfy the same basic test that is applied when seeking a freezing order, however, the claimant need demonstrate a lower degree of 'risk of dissipation' as the remedy is less intrusive.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Defendants are not required to acknowledge service or file a defence in civil proceedings (see *V plc v C* [2001] EWCA Civ 1509), however, judgment may be entered against them by default, or if a defendant fails to advance a positive case, the claimant may seek summary judgment against him or her. While the Civil Evidence Act 1968, section 14, provides that parties to civil proceedings enjoy the benefit of the privilege against self-incrimination, and may refuse to answer any question or produce any document where to do so would expose them to criminal liability, the privilege attaches only to situations where a party is compelled to answer questions or produce documents, for example, under disclosure, tracing or search orders (where failure to comply would be punishable by contempt). The privilege has been abrogated by statute where proceedings have been brought in relation to an offence under the Theft Act 1968 or the Fraud Act 2006, although any admission given by compulsion may not be used against the defendant in criminal proceedings. The court has discretion over whether to allow a defendant to claim the privilege against self-incrimination in relation to criminal proceedings brought against him or her in a jurisdiction other than England. Privilege against self-incrimination is no defence to civil proceedings.

Defendants may also be entitled to refuse to disclose documents or information on the basis of other forms of privilege.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

A litigant or third party who deliberately acts in breach of an order of the court may be in contempt. A contemnor may be fined, have his or her assets seized and even be committed to prison, as in *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm). Any contempt does not excuse the requirement to comply with the original order. Part 81 of the CPR details the procedure by which the failure to comply with a judgment, order or undertaking may be enforced by contempt proceedings: either via an order for committal (with a maximum sentence of two years' imprisonment and or an unlimited fine) or a writ of sequestration to seize property to satisfy the judgment or similar.

Deliberate failure to comply may also result in the opposing party applying to the court for a debarment order (as in *JSC BTA v Ablyazov* (No. 3) [2010] EWCA Civ 1141) preventing the respondent from pursuing or defending a claim, potentially in the form of a sanction attached to an unless order (court orders which specify that a party to the proceedings must do some act by a specified date).

CPR 81.4 has extra-territorial effect. A committal application was made in respect of a foreign company director and served on him outside the jurisdiction, when it was alleged that he was responsible for the contempt of a company that was subject to the jurisdiction of the English court (see *Dar Al Arkan Real Estate Development Co v Al-Refai* [2014] EWCA Civ 715).

The CPR provide the court with a range of sanctions to remedy procedural breaches, including making adverse costs awards against the defaulter or striking out that party's statement of case, leaving them unable to pursue or defend the claim.

Following the implementation of the Jackson Reforms in 2013, strict adherence to court orders, directions and rules has become a

priority in civil litigation; compliance is now enforced by the threat of severe sanctions against a defaulting party (see *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537).

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

The High Court has no power directly to compel a witness in a foreign jurisdiction to give evidence, but may instead request courts in that state assist pursuant to the following:

- Council Regulation (EC) 1206/2001 (the Taking of Evidence Regulation) (where the foreign court is within an EU member state);
- the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (where the foreign state is a signatory);
- the Evidence (Proceedings in Other Jurisdictions) Act 1975 (where the court is in one of the other jurisdictions within the United Kingdom);
- bilateral convention; and
- the High Court's (rarely used) inherent jurisdiction to issue a letter of request.

The foreign court which is subject to the request may then make the necessary arrangements for the evidence in question to be obtained, in accordance with its own rules of procedure (although Regulation 1206/2001 additionally allows for a court to hear evidence from a foreign witness in accordance with the law of the member state in which that court is situated, see *Laminco GLD NA v Ageas NV, formerly Fortis NV* [2012] EUECJ C-170/11).

In *Secretary of State for Health v Servier Laboratories Ltd* [2013] EWCA Civ 1234 it was held that interlocutory orders for the provision of information and disclosure against a company domiciled outside the jurisdiction were procedural in nature and therefore governed by the law of England and Wales. Consequently there was no requirement to seek the assistance of the foreign court. (See 'Brexit Note' in question 5.)

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

The Civil Jurisdiction and Judgments Act 1982, section 25, provides that the High Court may grant interim relief to litigants in existing or contemplated foreign proceedings where it is not 'inexpedient' to do so. The applicant must also demonstrate a substantial connection between England and Wales and the defendant, or his or her assets.

However, in some cases an application for *Norwich Pharmacal* relief may be possible against an international bank with a branch in London, the headquarters of which are in another country, and it is envisaged that the disclosure will come from that country (see *Credit Suisse Trust v Intesa San Paolo Spa and Banca Monte Dei Pasche Di Siena* [2014] EWHC 1447 (Ch)). Furthermore, just as an applicant can seek an order for committal against a defaulting respondent during the course of a domestic claim, this sanction may equally be imposed on a respondent to an order made pursuant to section 25 (see *Kagalovsky and another v Balmore Invest Ltd and others* [2013] EWHC 3876 (QB)).

The High Court has the power under Regulation 1206/2001 and the Evidence (Proceedings in other Jurisdictions) Act 1975 to order persons within its jurisdiction to provide evidence in aid of proceedings which have commenced or are in contemplation in a court in another jurisdiction. Furthermore, it will assist parties in enforcing judgments obtained in a foreign state, either by registering the judgment for enforcement pursuant to the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 or the CJA or by following the simplified procedure for enforcement of the judgment of a member state pursuant to the Judgments Regulation. Where the foregoing legislation does not apply, it may nevertheless be possible to enforce a foreign judgment pursuant to English common law rules under which fresh proceedings are commenced based upon the foreign judgment.

In addition, the English courts will enforce foreign arbitration decisions pursuant to the 1958 New York Convention and may grant

freezing relief in support of foreign arbitration or in aid of enforcement of a foreign arbitral award (see *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] EWHC 260 (Comm) and *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ1040). (See Brexit Note in question 5.)

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

Causes of action most common to civil asset recovery include actions in tort, equity and restitution although, depending on the circumstances, claimants may also be able to found a claim on breach of contract, fraudulent misrepresentation, breach of fiduciary duty or various statutory torts such as under the Insolvency Act 1986:

- In tort: deceit, conversion and conspiracy claims are often made.
- In equity: the beneficiary of a trust may sue a trustee in breach for the recovery of trust property. Such claims are capable of being proprietary in nature, meaning that the claimant will be able to rely on the more sophisticated rules of equitable tracing (for a recent discussion of which see *FHR European Ventures LLP and others v Mankarious and others* [2016] EWHC 359 (Ch)), which may include permitting backwards tracing (ie, following money that ostensibly left an account before the relevant monies were deposited) and tracing the value of an asset whose proceeds are paid into an overdrawn account if the claimant can establish coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction (see *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35 which is persuasive, but not binding decision of the Privy Council). Equity may also provide in personam redress against third parties who dishonestly participate in the breach or knowingly receive trust property.
- Where it can be shown that the defendant has been unjustly enriched at the claimant's expense, a restitutionary action for money had and received may be available.

In certain very limited circumstances, the court is prepared to pierce the corporate veil allowing a cause of action to be advanced against the controlling mind of a company involved in wrongdoing (see *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34). This principle applies when a person is subject to an existing liability which he or she evades, or whose enforcement he or she frustrates by interposing a company under his or her control.

16 Remedies

What remedies are available in a civil recovery action?

The remedies available to successful claimants will depend on the nature of the claim as pleaded. For the majority of in personam claims, damages will be the available remedy.

Claims brought against a trustee in breach, or a third party on account of their dishonest assistance or knowing receipt, may entitle a claimant to an account of profits.

Where the claim is proprietary in nature a claimant may be entitled to restitution as a remedy and the restoration of the stolen property rather than damages to compensate for its loss.

Claimants will be able to claim interest on the judgment sum and may also recover their legal costs.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

Claimants may obtain judgment in advance of a full trial by way of an application for default judgment or for summary judgment pursuant to Parts 12 and 24 of the CPR respectively.

Following the deemed date of service, a defendant has 14 days to acknowledge service of the claimant's claim form, and then a further 14 days to file a defence (provided the defendant is served within the jurisdiction and subject, in respect of the defence, to agreed extensions of time). If the defendant fails to do either within that time the claimant

may make an administrative application for judgment to be entered in default against the defendant.

The claimant may also apply for summary judgment where it can be shown that the defendant has no real chance of successfully defending the claim and that there is no other compelling reason why the matter should proceed to full trial.

Where the claim arises as a result of a debt, the bankruptcy and winding-up procedures laid down by the Insolvency Act 1986 can provide a means of (usually partial) recovery without the necessity of a full trial.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Where a claimant suspects that, following judgment, a defendant will attempt to dissipate his or her assets he or she may apply for relief including a worldwide freezing order, a disclosure order, an order permitting the cross-examination of the defendant on his or her assets, and a receivership order. Should he or she suspect that the defendant will flee the jurisdiction to frustrate judgment the judgment debtor may obtain a passport order or a writ restraining a person from leaving the UK, which provides a power of arrest.

19 Enforcement

What methods of enforcement are available?

A number of different enforcement mechanisms are available to judgment creditors. A selection of examples follows:

- A writ of control permits enforcement agents to attend the defendant's premises and seize goods to satisfy the judgment debt (see Part 3 and Schedule 12 of the Tribunals, Courts and Enforcement Act 2007).
- A charging order may be obtained against land or securities, leaving the claimant as a secured creditor (Charging Orders Act 1979, section 2). To realise the debt under a charging order, an order of sale must also be obtained (CPR 73.10C).
- If a third party holds money on the defendant's behalf, those funds can be directed to satisfy the judgment debt by way of a third-party debt order (see Part 72 CPR).
- The claimant may apply to wind up a company or make an individual bankrupt to effect a distribution of the judgment debtor's assets among creditors (see the Insolvency Act 1986).
- Where other enforcement methods have failed, the judgment creditor may apply for the appointment of a receiver by way of equitable execution, who may be appointed over the assets of the debtor including trust assets where the debtor has a legal right to call for the trust assets to be transferred to him or her to his or her order, or if he or she has de facto control of the trust assets in circumstances where no genuine discretion was exercised by the trustee over those assets (see *JSC VTB Bank v Skurikhin and others* [2015] EWHC 2131 (Comm)).
- Where the defendant has assets situated in another member state and the claim was uncontested, the judgment may be enforced by way of a European Enforcement Order (see Regulation 805/2004) or by applying to the member state concerned for a European Order for Payment (see Regulation 1896/2006). The UK is also signatory to a number of other bilateral enforcement conventions. If no legislative provisions exist, the ability to enforce a judgment depends on the law of the country concerned. (See Brexit Note in question 5.)

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) the following funding arrangements are available:

- Conditional funding agreements (CFAs): an agreement where fees become payable by the client (stated as a percentage of the overall fees that would have been charged by the lawyer had a CFA not been in place) in a defined set of circumstances (eg, if the client

is successful in his or her claim or in defending that claim, a 'success fee' will be payable by the client in addition to normal fees). For CFAs entered into after 1 April 2013 (save for limited exceptions), this success fee is no longer recoverable from the opponent, who therefore no longer has to be notified if a CFA has been entered into.

- Damage-based agreements (DBAs): the client may agree that their lawyer will receive a percentage share of the damages recovered from the opponent if the case is successful. However, if the case is unsuccessful, the Damages Based Agreement Regulations 2013 provide that the lawyer will receive no fees as 'hybrid' or discounted DBAs are not currently permitted. No notification requirement exists for DBAs.
- After-the-event (ATE) insurance: policies can cover the client's liability to cover their opponent's costs, but may also cover the client's own disbursements and, dependent on risk, the client's own legal costs. ATE premiums are no longer recoverable from the losing party (save for limited exceptions).
- Third-party funding: involves a commercial litigation funder with no connection to the proceedings who agrees to pay some or all of the costs of the case in return for a share of any monies recovered. There is no requirement to notify opponents of the existence of a third-party funding arrangement.

LASPO introduced new provisions at CPR 3.12-3.18 for costs management, applicable to all multi-track cases (although they do not apply automatically in certain cases or to proceedings that exceed £10 million in value). Each party must file and exchange costs budgets for litigation at an early stage. This allows the court to make a costs management order that will control the amount of costs which the party can recover if successful. From 1 October 2015, a Shorter Trials Pilot Scheme has been operated in the Chancery Division and Commercial Court. Cases in this scheme are exempt from the costs management regime unless the parties agree otherwise. Fraud and dishonesty cases are not eligible for this scheme however.

Cost capping orders have also been introduced which limit a party's recoverable costs in advance. Costs capping orders will only be granted where the risk of excessive costs being incurred cannot be controlled by costs management orders or detailed assessment.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

The Proceeds of Crime Act 2002 (POCA) provides three distinct interim measures for the restraint of assets suspected to be the proceeds of crime.

First, the Crown Court (the superior court of record for criminal matters in England and Wales) may make a restraint order under section 41 of POCA if it is shown that a criminal investigation or prosecution has been commenced but not concluded, and that there is reasonable cause to suspect that the alleged offender has benefited from his or her criminal conduct. There is no statutory requirement for the court to be satisfied that a suspect will dissipate his or her assets and so frustrate any later confiscation proceedings.

A restraint order has the effect of prohibiting the defendant from dealing in any way with the restrained assets unless agreed by the prosecutor or permitted by the court. The assets restrained can either be specified in the order, or include the whole of the defendant's property. To deliberately disobey the order is a contempt of court, punishable by a fine, imprisonment or both. The order is binding, not only on the defendant, but on any third party with notice of it.

The defendant subject to such an order may draw down a limited sum for living expenses, but may not withdraw restrained funds to pay for legal expenses connected either to the restraint proceedings themselves or the underlying criminal investigation or prosecution. It is worth noting that criminal restraint orders, like civil freezing orders, do not prevent a defendant from incurring new liabilities, for example, for legal fees. Incurring a liability is not the same as diminishing the value of any of the defendant's assets (*Revell-Read v Serious Fraud Office* [2013] EWHC 1483 (Admin)). However, the lawyer in that situation runs the risk that the client is never in a position to pay those fees.

Commonly, restraint orders that cover the whole of the defendant's property also include an asset disclosure clause. In such case, the defendant must also disclose to the court and the prosecutor dealing with the restraint proceedings all property, wherever situated, in which he or she has an interest. Attempting to put the assets out of the reach of the court to circumvent the restraint order may constitute an offence of perverting the course of justice (see *R v Kenny* [2013] EWCA Crim 1).

Second, prosecutorial agencies exercising the non-conviction based forfeiture provisions in Part 5 of POCA may apply to the High Court for a property freezing order, pending the determination of any Part 5 claim. The effect of the order is to freeze property where a good arguable case exists that that property represents the proceeds of crime.

Third, a police officer who discovers and seizes cash which he or she suspects may be the proceeds of or intended for use in crime may apply to the Magistrates' Court for it to be detained pending the outcome of his or her inquiries: section 294 POCA. This power exists regardless of whether there is any criminal investigation. Once seized and detained, an application can be made to the Magistrates' Court to forfeit that cash.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Where, following a complaint, there is evidence that a crime has been committed, the police are under a duty to investigate. Other investigative bodies are subject to similar obligations, subject to certain case acceptance criteria. Investigative agencies will consider whether, in the circumstances of the case, steps should be taken to prevent the dissipation of suspected proceeds of crime by a suspect, but not all investigations into acquisitive crimes necessarily lead to the freezing of assets.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

In the UK, the principal legislative instrument for confiscating the proceeds of crime is POCA. Part 2 of POCA contains provisions for recovering from convicted defendants the benefit they have obtained from their offence. The 'benefit' is the value of any property or pecuniary advantage obtained by the defendant as a result of or in connection with the criminal conduct. However, the concept of 'benefit' is a deliberately wide one which can, in certain circumstances, lead to the recovery of a greater amount than that represented by the offence for which they were convicted (see eg the 'criminal lifestyle' provisions outlined below). Corporate entities that commit criminal offences may be subject to confiscation proceedings in an identical manner to natural persons.

Property used in the commission of any offence (sometimes known as 'the instrumentalities of crime') may be forfeited by order of the Crown Court: see section 143, Powers of Criminal Courts (Sentencing) Act 2000. The Crown Court also enjoys specific powers in relation to drugs, firearms, things for producing counterfeit goods and other similar items, provided by separate statutes including the Firearms Act 1968, Misuse of Drugs Act 1971, etc.

24 Confiscation procedure

Describe how confiscation works in practice.

When making a confiscation order against a convicted defendant under POCA, the court is called upon to make two findings:

- the benefit that the defendant has derived from the criminal conduct; and
- the amount of the defendant's realisable assets available to satisfy a confiscation order (the 'available amount').

The court will then make a confiscation order in whichever of those two figures is the lower. The order will specify the time in which the defendant is to pay, and a term of imprisonment the defendant is to serve if he or she fails to comply.

Where the available amount is lower than the total benefit the defendant derived from the relevant offence, the difference will remain effectively as an outstanding debt to the state. The prosecutor may apply to reopen confiscation proceedings where at some later date the defendant can be shown to be in possession of assets which could be used to satisfy the outstanding benefit.

In *R v Waya* [2012] UKSC 51, the Supreme Court sought to address the true purpose of UK confiscation legislation and whether decisions of the lower courts had gone too far in breaching the principles laid down in article 1 of Protocol 1 of the ECHR relating to deprivation of possessions and the conditions and principles necessary to justifiably do so. The case concerned the purchase of a flat using a proportion of the defendant's legitimate funds and funds which derived from a mortgage lender that the defendant obtained by deception. In determining the criminal benefit to the defendant, the first instance court looked at the then market value of the house and deducted the proportion of legitimate resources used by the defendant to purchase the property. The Supreme Court formed a different view, and stated categorically that POCA bestowed a discretion on courts which allowed them to 'mould a confiscation order to fit the facts and the justice of each case' and that the act should be construed strictly in a manner which avoided violation of article 1 Protocol 1 of the ECHR. The court therefore decided that judges should take a proportionate and common-sense approach and assess the true benefit to the defendant, rather than executing punitive and often disproportionate confiscation orders way in excess of the actual benefit obtained. In 2015, section 6(5) of POCA was amended to place the Supreme Court's judgment in *Waya* on a statutory footing by incorporating a provision that the court must make a confiscation order only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.

In *R v Axworthy (Liam)* [2012] EWCA Crim 2889, the principles in *Waya* were applied and the Crown conceded that a confiscation order for £22,010, which represented the value of a Land Rover which the defendant fraudulently reported stolen and was the subject of an insurance claim, should be quashed. The fact that the vehicle had later been recovered near the defendant's flat in Ibiza meant that to make a confiscation order for the total value of the car would be disproportionate. Courts must now only grant confiscation orders which reflect the true financial benefit obtained by the offender.

When calculating benefit, no deduction is made for costs incurred in the perpetration of the fraud (see *R v Chahal* [2015] EWCA Crim 816).

Defendants who jointly obtain a benefit through criminal conduct are each separately liable for the whole amount of that benefit, and confiscation orders have to be made against each defendant for the whole amount. However, each order can only be enforced to the extent that the sum had not been recovered in satisfaction of another confiscation order made in respect of the same joint benefit – a payment by one defendant of an amount due under the confiscation order should go to reduce the amount payable by the others (see *R v Ahmad (Shakeel)* [2014] UKSC 36).

Benefit

To calculate the defendant's benefit from his or her criminal conduct, the court must first determine whether or not he or she has a 'criminal lifestyle', as defined by POCA, section 75. This means that he or she has:

- been convicted of one of a number of specified offences set out in Schedule 2 of POCA, including fraud, money laundering, bribery and drug trafficking;
- engaged in a course of criminal activity (ie, been convicted of a number of offences within a defined period); or
- committed an offence over a period of at least six months and the defendant has benefited from that conduct.

If it is determined that the defendant does have a 'criminal lifestyle', POCA requires the court to make certain assumptions in calculating his or her benefit. These are that all property transferred to him or her and all expenditure met by him or her in the six years preceding the date of conviction, as well as any property held by him or her after the date of conviction, represent the benefit he or she has obtained from his or her criminal conduct. These assumptions can be displaced if they can be shown to be wrong, or that, if made, a serious risk of injustice would result: section 10, POCA.

If the defendant does not have a 'criminal lifestyle', the court must decide whether he or she has benefited from his or her particular criminal conduct and, if he or she has benefited, calculate the benefit from that conduct: section 8, POCA.

Where the benefit from the defendant's conduct has been obtained by a limited company and the company is under the defendant's control, the court may be invited to 'pierce the corporate veil' and attribute some or all of that benefit directly to the defendant: see, for example, *R v Seager* [2009] EWCA Crim 1303.

Available amount

Section 9 POCA provides that the available amount is the total value of the defendant's 'free property', once any priority obligations have been satisfied. A priority obligation is either a fine or order following a previous conviction, or a preferred (ie, secured) debt as defined by section 386 of the Insolvency Act 1986. It is for the defendant to prove the available amount is less than the benefit figure. If no sensible explanation has been provided as to what happened to the proceeds of an offence, a judge is entitled to find hidden assets in the sum of the full benefit figure (see *R v Saben* [2013] EWCA Crim 575).

'Free property' is any property in which the defendant holds an interest. It extends to all real or personal property, wherever situated, including money, things in action and intangible property. It also includes the value of any 'tainted gifts'. Tainted gifts are transfers at undervalue made to third parties after the relevant offence was committed, or, where the defendant has a criminal lifestyle, within six years of the date the relevant offence was committed.

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

A raft of state agencies in the UK enjoy powers to pursue the proceeds of crime under the POCA. They include:

- the Serious Fraud Office;
- the Financial Conduct Authority;
- the Crown Prosecution Service (Proceeds of Crime Unit);
- HM Revenue & Customs; and
- the National Crime Agency.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

A confiscation order made under POCA is not made in rem against any specific property that derives directly from the defendant's criminal conduct. Rather, once the court has determined the extent of the benefit derived by the defendant from his or her criminal conduct, any property held by him or her may be confiscated up to the value of the benefit obtained (and this is the 'true benefit' obtained by the defendant rather than a more punitive approach formerly taken by the courts). This includes any asset acquired using the proceeds of the original offence (as well as any lawfully obtained property).

Section 80 of POCA provides that if the proceeds of crime are used to obtain an asset that subsequently increases in value, the increase in value also constitutes the defendant's benefit. If, for example, a defendant buys property for £200,000 using the proceeds of crime, and the value of the asset increases to £500,000, the defendant's benefit will be the full value of the asset, namely £500,000. If the defendant in fact mixed £100,000 of the proceeds of crime with £100,000 of legitimate funds, his or her benefit would be £250,000, 50 per cent of the value of the asset at the time the confiscation order was made. It is important to remember that if the defendant has a 'criminal lifestyle' as defined by section 75 and Schedule 2 of POCA, then all property held by him or her at the date of conviction will be assumed to be his or her benefit, unless he or she can show that the assumption is wrong or to apply it would result in a risk of serious injustice.

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

Property that has passed from the defendant to a third party may be included in the calculation of a confiscation order if determined to be a

'tainted gift', as defined by section 77 of POCA. The tainted gift provisions operate to catch property that the defendant has sought to put out of reach by placing the asset into the name of another third party. They provide that where a transaction is made in relation to an asset of the defendant, for which no or insufficient consideration is given, the value of that asset is to be included in the amount available to the defendant to satisfy any confiscation order. It does not matter about recoverability of the tainted gift by the defendant when calculating the amount of a confiscation order. Tainted gifts must be included in such an order to prevent the defendant from dissipating their assets by giving them away and claiming that these are unrecoverable (*R v Smith (Kim)* [2013] EWCA Crim 502).

Third parties who wish to challenge a finding that property held in their name is a 'tainted gift' have no locus to be heard in the Crown Court confiscation proceedings. If they wish to challenge the finding of a court as to an alleged tainted gift, this must be done at the enforcement stage: see, for example, *Backhouse v HM Revenue & Customs Prosecution Office* [2012] EWCA Civ 1000.

Section 10A POCA is applicable to third parties where there is no suggestion of a tainted gift. It states that where the court finds that there is property held by the defendant that is likely to be realised or otherwise used to satisfy a confiscation order and a third party holds or may hold an interest in the property, the court has the power to determine the extent of the defendant's interest in the property. In such a case the court must provide the third party with a reasonable opportunity to make representations to the court.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

The Crown Court may make an order for costs (ie, expenses incurred) against a defendant where it considers it just and convenient to do so: section 18, Prosecution of Offences Act 1985. This may include not only costs incurred in the proceedings themselves, but also those incurred during the investigative stage: see, in a different context, *Neville (Westminster City Council) v Gardner Merchant Ltd* [1983] 5 Cr App R (S) 349.

However, POCA provides that a confiscation order will have priority over any other financial order imposed by the court (save for a compensation order, although recent case law suggests that it is disproportionate to make an order for confiscation and compensation where the loss which is the subject of the compensation order is also defined as the criminal benefit: *R v Jawad* [2013] EWCA Crim 644): section 13 POCA. Costs will therefore only be recoverable if the defendant possesses sufficient assets to satisfy the whole of the benefit derived from his or her offence.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

In short, the UK criminal confiscation regime is a value-based system. A confiscation order made under POCA is not made in rem against any specific property that derives directly from the defendant's criminal conduct. Rather, the court first determines the benefit that the defendant has obtained from his or her offence, and then proceeds to identify any available property held that can be confiscated to satisfy the outstanding benefit figure.

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

POCA shifts the burden of proof onto the defendant in relation to two key matters. Where the defendant has a 'criminal lifestyle' as defined by section 75, he or she shoulders the burden of demonstrating that he or she has not benefited from his or her general criminal conduct. He or she must persuade the court, on the civil standard of proof, that the relevant assumption is either incorrect or that there would be a serious risk of injustice if it were to be applied.

The burden is also on the defendant to persuade the court that he or she does not have the available assets to satisfy the confiscation

order, as alleged. If the court is not so persuaded it must make a confiscation order for the full benefit with a sentence in default. In the case of ‘hidden assets’, where the court has been invited to find that the defendant enjoys the benefit of property that is not readily identifiable (usually cash, or assets held abroad), the defendant can find himself or herself in the invidious position of having to ‘prove a negative’. A defendant who does not provide evidence about the available amount, or no substantive explanation regarding potential hidden assets, will likely be the subject of a hidden assets order: *R v Dhall (Harpeet Singh)* [2013] EWCA Crim 892.

The question of proportionality of confiscation orders as a result of the principles laid down in *Waya* has also affected the concept of what is considered the correct ‘available amount’. A recent example of *R v Yew (Gabriel Kok)* [2013] EWCA Crim 809 allowed, on appeal, the reduction in the value of a confiscation order due to an over-inflated valuation of a property that did not take into account the defendant’s wife’s beneficial interest in the property. Clear evidence of the true available amount will therefore be required in all situations, otherwise the available amount will be reduced accordingly.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

POCA provides that a confiscation order will have priority over any other financial order imposed by the court, as well as debts owed by the defendant to any unsecured creditors. This will include any civil claimants who cannot establish a proprietary claim against the restrained assets: *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443.

There are several exceptions to this (see section 13 of POCA), including where a court is contemplating making an order to compensate any party who has suffered loss as a result of the defendant’s conduct pursuant to the Powers of Criminal Courts (Sentencing) Act 2000. In that case the compensation order has priority. If a defendant has the ability to pay both confiscation and compensations orders, the court can make an order for both sums to be paid separately, but see *R v Jawad* above.

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

Financial advantage or profit obtained by a defendant though the commission of criminal offences would constitute that defendant’s benefit for the purposes of POCA. In the corporate context, for example, profits flowing from contracts obtained through bribing or otherwise corrupting foreign officials have been made the subject of a confiscation order as in *R v Mabey & Johnson plc* [2009].

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

Part 5 of POCA provides for a system of non-conviction based forfeiture in the UK. Under Part 5 the High Court may make an order vesting property in the state where it is persuaded on the civil standard of proof that the relevant property is ‘recoverable’ (ie, that it represents the proceeds of crime). Although the respondents to Part 5 proceedings are the beneficial owners of the property in question, the proceedings are effectively in rem, with POCA establishing rules for tracing recoverable property akin (but not identical) to the equitable jurisdiction of the civil courts.

In the corporate context, settlements under Part 5 of POCA have been used by the SFO to confiscate and repatriate assets obtained by companies who have engaged in overseas corruption. An example is Oxford Publishing Limited, who in July 2012 agreed with the SFO to pay over £1.9 million under Part 5 after self-reporting corrupt sales practices in Tanzania and Kenya. However, the practice of addressing corporate criminality by the use of these powers has been the subject of judicial criticism. See for example the sentencing remarks of Lord Justice Thomas in *R v Innospec Ltd* (2010).

In addition to the Part 5 Civil Recovery Order, the Crime and Courts Act 2013 has introduced an additional tool for tackling financial crime without having to resort to a criminal prosecution: the Deferred Prosecution Agreement. Such agreements can be entered into between a corporate body and the prosecutor, where the former agrees to comply with certain financial penalties and requirements imposed by the agreement. Criminal proceedings are initiated but are suspended while the agreement is operative. If the corporate body complies with the requirements of the agreement, the prosecuting authority will not pursue the criminal proceedings, enabling the company to avoid prosecution.

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

Assets that have been restrained pending a criminal trial are usually managed through case-by-case negotiations and agreement between the prosecutor and the defendant’s legal representatives. Where agreement cannot be reached, either party may apply to the court to vary the order. All parties (including the court) are required to act in accordance with the ‘legislative steer’ contained in section 69 POCA; namely to preserve as much of the restrained property as possible in order to satisfy any later confiscation order.

In some cases the Crown Court may make an order appointing a management receiver over the defendant’s assets: section 48 POCA. Typical examples would include where the defendant is held on remand facing trial and has property which requires management which he or she is incapable of so doing, or where his or her assets included corporate entities (which would not be run efficiently where significant management decisions were often required to be approved by the prosecution). The management receiver is entitled to be remunerated for his or her services out of the assets in receivership, although where the restraint order has been discharged following acquittal it has been argued that those costs be met by the prosecution. Recent decision of the Supreme Court in *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26 held that requiring the assets of a group of companies to be used to pay the remuneration and expenses of a receiver appointed following the making of a restraint order under the Proceeds of Crime Act 2002 section 41 would breach the European Convention on Human Rights 1950 Protocol 1 article 1, in the circumstances where it had been held that the restraint and receivership orders should never have been made. In such cases the receiver is entitled to recover his or her remuneration and expenses from the Crown Prosecution Service, on whose request the work is undertaken.

35 Making requests for foreign legal assistance

Describe your jurisdiction’s legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

A restraint order made under POCA purports to freeze the assets of a defendant wherever situated. In practical terms, policing the restraint order may therefore require the assistance of the courts in another state. This may be sought by way of a mutual legal assistance (MLA) request made pursuant to either section 7 of the Crime (International Cooperation) Act 2003 or, more likely, section 74 of POCA (which makes specific provision for MLA requests in respect of restraint and confiscation matters).

Under section 74, the prosecutor may send a request for assistance to the Secretary of State for the Home Office for its onward transmission to the requested state. The UK government’s Mutual Assistance Guidelines set out the information that should be contained in the letter of request, including the defendant’s name, details of the relevant offence and particulars of the property in question (see 12th edition, available online).

Perry and Others v SOCA [2012] UKSC 35 threw doubt on the scope of Part 5 POCA and whether it allowed the UK courts to effect civil recovery orders in relation to property outside England and Wales or disclosure orders on individuals outside of the jurisdiction. However,

Update and trends

The effect of Brexit on civil asset recovery is a topic of much discussion and speculation (see Global overview). The general consensus suggests that the principles of comity and common sense should prevail as it is unlikely to be in the interests of the UK or the remaining member states to completely abandon the current framework of mutual recognition and enforcement of judgments, along with other European laws regarding forum and jurisdiction. How those laws will be maintained or transposed following Brexit remains unclear, but it is generally believed that whatever follows is unlikely to represent a substantial departure from the current order.

Focus on controlling costs in civil litigation also remains a hot topic. In January 2016, Lord Justice Jackson, responsible for introducing the new costs regime in April 2013, indicated that the fixed costs regime may be further extended to cover all claims up to a value of £250,000. He has also outlined plans for a new format for the bill of costs used in civil litigation, which would require solicitors to go into significant detail with the use of a range of 'J-Codes' breaking down the costs of a wide range of solicitors' tasks (which in itself is feared will be expensive to implement, be complex to work with and be too prescriptive). In addition, the Civil Justice Council has announced that it will consider whether qualified one-way costs shifting should be introduced, initially for private nuisance claims, and review whether before-the-event insurance may play a role in improving access to justice.

Litigators continue to seek robust and novel ways maximising benefits for their clients. Examples of this can be seen in cases such as *JSC*

Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139 in which the defendant was required to disclose his interest in a discretionary trust (the assets of which he could not be said to have a legal or beneficial right to, or exercise control over). In *Holyoake v Candy* [2016] EWHC 970 the court ordered a 'notification injunction', which required the defendant only to give notice to the claimant before it transferred a particular asset, but which also lowered the evidential threshold for 'risk of dissipation' to be met by the claimant.

In criminal litigation, alongside the first two Deferred Prosecution Agreements for failure to prevent bribery (section 7 of the Bribery Act 2010), discussed in the Global overview, the launch of a two-year pilot programme by the City of London Police aiming to increase and speed-up asset recovery in the UK may be symptomatic of a new focus within the UK criminal justice system on asset recovery rather than convictions for economic crime. The programme sees law enforcement (including the National Crime agency and the Metropolitan Police), law firms and asset recovery specialists working together in a public-private partnership. The private sector firms will attempt to identify, seize and recover criminal assets through civil recovery procedures, in parallel with any criminal investigations by the police. The pilot programme aims to test the belief that the lower standard of proof required for civil cases will make the process faster, giving criminals less time to move or dissipate the assets.

the Crime and Courts Act 2013 has expressly extended the power of the UK court to grant orders freezing property held outside the UK and imposing disclosure orders on individuals outside the UK where there is a 'connection' between the case and the UK.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the ERO) provides that the Crown Court may make a restraint order over the assets of a defendant against whom criminal proceedings are active in a foreign state. The ERO also makes provision for a mechanism for funds to be repatriated, if confiscation proceedings are determined against the defendant. Applications for restraint orders pursuant to the ERO are made by the SFO or other equivalent body, following receipt of a letter of request by the UK Home Office from the foreign investigative or prosecutorial body.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

The UK is a signatory to the following (non-exhaustive) list of conventions:

- United Nations Convention against Transnational Organized Crime 2000;
- United Nations Convention against Corruption 2003;
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- European Council Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990; and
- European Union Convention on Mutual Assistance in Criminal Matters between Member States of the European Union 2000.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Section 6 of the Prosecution of Offences Act 1986 preserves the right of any person to bring a private criminal prosecution, meaning, in theory, any legal person may bring confiscation proceedings following that prosecution.



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The number of private prosecutions brought by companies and high-net-worth individuals has grown exponentially over the past few years, possibly due to cuts in funding and the lack of resources experienced by law enforcement agencies and regulators over the same time period. Although there are some restrictions in bringing such a prosecution (eg, the private prosecution of some offences require the consent of the Director of Public Prosecutions or the Director of the SFO before being pursued), and the cost in doing so can be substantial, private prosecutions can result in a faster conclusion compared with civil proceedings and can have a significant deterrent effect.

In 2014, the largest private prosecution brought by an individual in the UK to date resulted in a sentence of eight years' imprisonment

imposed on Ketan Somaia for defrauding an investor, Mr Mirchandani, of US\$19.5 million. This followed his conviction at the Central Criminal Court by a jury on 13 June 2014 of nine counts of obtaining a money transfer by deception, contrary to section 15A of the Theft Act 1968. It is likely that cases such as this will increase in the UK following the Court of Appeal's judgment in *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52, which held that private prosecutors may pursue confiscation proceedings.

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