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Asset tracing and recovery in the Channel Islands

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It is always critical to ensure that there is value in pursuing or continuing to pursue proceedings. However, taking investigative and protective measures in offshore jurisdictions can be a minefield for those who are unfamiliar with the jurisdictions in question, in both the civil and criminal arenas.
Sometimes nothing more than a straight forward 'mirror order' is all that is required. In other cases, the onshore practitioner must deal with and understand, with the assistance of local counsel, a myriad of substantive, procedural and practical idiosyncrasies in order to obtain the most advantageous outcome for their client. This applies not only to the pure asset freezing and recovery process, but also to the methods of obtaining evidence offshore to support the substantive claim.
Although much of Guernsey and Jersey procedure will be familiar (in particular to practitioners in the UK whose experience predates the CPR), the legal framework in the Channel Islands does have a number of peculiarities worth noting.

Freezing and disclosure orders

Practitioners generally in the Channel Islands have significant experience in applying to the Royal Court for freezing orders (or 'Mareva injunctions', as they are still referred to here).
It is often the case that 'mirror orders' can be obtained in circumstances where there are no substantive local proceedings in the offing. These 'mirror orders' are ancillary to a principal freezing order obtained elsewhere and can often be obtained within days or even hours of local counsel being instructed, as much of the documentation and evidence relied upon in the principal proceedings can, in effect, be recycled.

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It must be noted also that Guernsey and Jersey are not members of the EU and therefore are not subject to the vast majority of EU directives and regulations (although some do apply). As such, if claimants are seeking to resort to any EU-based recognition procedures (for example, the EU Insolvency Regulation), advice should be obtained before proceeding in Guernsey and Jersey.

Further to this, the Bailiwicks' domestic law may look similar to the UK (and in fact is in many respects), but in some important respects it is fundamentally different. For example, there is no remedy of specific performance in Guernsey, and equity generally has a fairly tenuous place in Guernsey and Jersey law, although certain equitable principles and remedies might be 'imported' depending on a claimant's enforcement strategy.

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Another peculiarity to the Islands is that ‘Receivers’ are unknown to Guernsey and Jersey law (except in relation to protected cell companies), as is the concept of a ‘charge’. Property and security interests law in the Channel Islands is markedly different from the UK and claimants must carefully consider when first taking security how they might eventually enforce it.

Bearing the above points in mind it is of course of paramount importance that suitably locally-qualified professionals are involved from the outset in such matters.

How do the Channel Islands stand?

World markets continue to give cause for concern and there appears to be no immediate end to the uncertainty which presently pervades the marketplace. Four years ago the collapse of Lehman precipitated a collapse in world markets and now uncertainties about the Euro and a lack of faith in sovereign debt generally have cast a shadow over the tentative recovery of late.

It is often the case that fraudulent or negligent behaviour only reveals itself during such difficult times, when any irregularities in a company’s books or a person’s financial affairs are more likely to be exposed. As such, practitioners in the field tend to agree that Guernsey, Jersey and offshore financial centres worldwide are likely to see an even greater increase in demand for asset-tracing and recovery services in years to come.

Those claimants that seek such services in the Channel Islands should take comfort from the fact that Guernsey and Jersey boast the legal framework and the professional know-how to deal with such demand in what is an increasingly complex field of practice.

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Freezing orders can be granted on an ex parte application in circumstances where there is a "real risk of dissipation". In these circumstances cross-undertakings and orders for security for costs are standard. The usual American Cyanamid principles apply generally, as they do in the UK courts, and so if a plaintiff establishes a ‘good arguable case’, and if it is deemed that there is a "serious question to be tried", then the Court will give consideration to what is "just and convenient" between the parties.

With regard to disclosure orders there is no stand-alone procedure for pre-trial disclosure in either Guernsey or Jersey (other than in PI cases). However, ancillary disclosure orders are the norm in the context of civil proceedings involving freezing orders and, likewise, in the criminal field freezing orders are invariably coupled with a standard ‘policing’ order. As in the UK, Banker’s Trust, Norwich Pharmacal and Anton Pillar principles also apply, although the last of these (‘search orders’ in the UK) has not been used in the Channel Islands for some time.

Evidence gathering

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Guernsey and Jersey are well placed to provide evidence in support of foreign civil and criminal proceedings. Various methods are available, which depend on the nature and subject matter of the foreign proceedings.

In the civil arena, both Guernsey and Jersey are parties to the Hague Convention. This provides one ‘channel’ but it is not compulsory and it is possible to achieve the same result by way of either diplomatic procedure and/or by application to the Royal Court. Such an application in Guernsey is known as a ‘Commission Rogatoire’ and would generally be conducted by Counsel based in the requesting jurisdiction under the ‘guidance’ of a Guernsey Advocate. Importantly this route is available to jurisdictions which are not a party to the Hague Convention. Various other bi-lateral and multi-lateral treaties that assist in evidence gathering are available depending on the location and nature of the dispute. It should be noted that Guernsey’s lack of any tradition of pre-trial disclosure of documents limits the assistance that the Royal Court is likely to give in response to a request for assistance either under the Hague Convention or other treaty, or at common law. In Jersey, the Service of Process and Taking of Evidence (Jersey) Law 1960 applies and gives the court a very wide power to assist in a variety of ways, from obtaining witness and documentary evidence to inspecting and preserving property and obtaining medical evidence via examination.

In criminal matters, a range of provisions and procedures are available, depending on the circumstances. In cases of serious or complex fraud, these can be used to obtain information and documents from suspects and third parties in relation to fraud committed anywhere in the World. Foreign agents can be ‘deputised’ to conduct examinations on foreign soil for use in proceedings in the courts in Guernsey. Jersey has set its co-operation on a statutory footing, with the Criminal Justice (International Co-operation) (Jersey) Law 1991 adopting the letter of request procedure, both to obtain evidence in Jersey for use elsewhere and to obtain evidence overseas for proceedings here, in either case where there is reasonable suspicion of an offence having been committed. The Attorney General is the principal conduit.

Both islands also have "proceeds of crime" legislation and their accompanying rules and regulations can be used by the authorities in the islands to obtain orders for restraint, forfeiture and repatriation of funds and other property. The bar has been set very low in that the legislative framework simply requires that an investigation is on foot and that the suspect has profited before any action can be taken by the authorities.

In addition to the above investigatory tools the Channel Islands, which are both on the OECD white list of co-operative offshore jurisdictions and recognised internationally as being at the forefront of tackling white- collar crime, have also implemented a raft of other provisions which provide for more generalised assistance, forfeiture and restraint.

Other considerations

Banks and other financial institutions in the Channel Islands, which are experienced in dealing with foreign enforcement requests, will invariably ask to see a Guernsey or Jersey court order before they release any money or information. Foreign litigants must respect this and, subject to legal advice (where appropriate), should generally comply with the relevant procedures that such institutions have in place for dealing with such requests.

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