COLLAS CRILL

Unlocking the secrets of enforcement and asset recovery in the Cayman Islands

MAY 2024

There are likely to be very few claimants who would argue with the proposition that the real value in bringing proceedings is in the judgment obtained actually being satisfied. Delinquent, or worse - fraudulent - counterparties against whom a creditor has a judgment are rarely willing to disgorge ill-gotten gains or pay over damages duly payable as a result of their prior default or wrongful conduct.

Accordingly, a successful litigation strategy should encompass not only how to win before the tribunal, but the steps likely to be required to secure and recover assets once the claimant has a judgment in hand. A key driver of this strategy will be a consideration of the nature of assets which a judgment debtor has, and where those assets are located.

Enforcement or asset recovery?

The terms "enforcement" and "asset recovery" are often used in the same breath, but what do we actually mean by each of those terms? For the purpose of this article, we use the term "enforcement" to refer to process of a creditor taking civil action to collect the value of a judgment against the defendant. In contrast, an "asset-recovery" exercise may be employed in support of the enforcement of a judgment debt, but more broadly refers to the tracing and seizing of assets that have been misappropriated or dissipated.

There are a number of challenges to a successful asset-recovery exercise, including where the assets are located and how easily the legal system permits enforcement of judgments; whether assets have been transferred into the names of third parties; and the nature of the asset in question. In this article we take a look at the ways in which assets can be identified in the Cayman Islands, and what steps may be taken to protect and preserve such assets be they tangible or intangible.

Identifying assets for execution

In the Cayman Islands there are broadly three avenues by which a claimant looking to ascertain the existence of assets against which a judgment may be executed, namely:

- Ownership registers which may be searched irrespective of the status of any litigation against the defendant;
- Interim applications before the Grand Court seeking to freeze, preserve and take possession of assets of the defendant; and
- Powers exercisable by a liquidator (where the judgment debtor is a corporate entity)

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The use of liquidation as a means of seeking redress for an unsatisfied judgment, would normally be a means of last resort. Taking the steps of placing a corporate debtor into liquidation in order to obtain payment of an unsatisfied judgment changes from a private enforcement action to a collective-process outside the control and direction of the judgment creditor. Notwithstanding, there are circumstances in which appointing a liquidator with wide ranging powers to investigate the assets of the debtor and take action on the international stage is a proportionate step.

Public registries

Contrary to the perception that the Cayman Islands is a secretive jurisdiction, there are a number of registries which provide useful starting points when developing an enforcement strategy.

From these registries it is possible to identify if the defendant (or related parties who may be acting on the instructions of the defendant):

- is a current director of a company incorporated and registered in the Cayman Islands, whether that company is a domestic or exempted company.
- is a current shareholder of a domestic company.
- owns real estate in the Cayman Islands, whether that property is subject to a mortgage and the identity of the mortgagee.
- owns an aircraft registered with the Cayman Islands Civil Aviation Authority.

Data obtained from these registers may disclose real assets that can be executed against, or point to additional lines of enquiry by identifying third parties who may hold relevant information regarding the defendant's financial interests. Where the facts point to further steps being required in Cayman, the claimant will need to seek assistance from the Grand Court, as discussed below.

Most recently enforcement and recovery proceedings have required the consideration of how digital assets can be traced and executed against. The blockchain technology on which these assets are held and transferred makes digital assets more readily traceable than traditional assets. However, the users are identified only through their digital addresses which are long strings of letters and numbers. The task then becomes identifying the name behind the address. Through digital forensics and data analytics it is possible to unmask the parties to transactions on the blockchain, but doing so requires the right software and professional expertise.

Freezing and preserving assets in Cayman

A claimant who has been able to point to assets in the name of or held for the benefit of a defendant can seek to freeze all assets of the defendant. The purpose of a freezing order is to preserve the practical value of any judgment that has been or may be obtained. Freezing orders are frequently supported by disclosure orders which require the defendant to disclose the whereabouts of all assets in which they hold a legal or beneficial interest. This ancillary order supports the effectiveness of the freezing order and can be an invaluable tool in the enforcement and asset recovery strategy deployed by a claimant.

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Where the claimant seeking to recover assets held by or for the benefit of a defendant are has a legal of equitable claim to those assets a proprietary injunction may be obtained to stop those assets from being dissipated.

While there are subtle differences in the legal criteria which need to be met by an applicant, both forms of injunction can be obtained on a domestic or worldwide basis, and sought before or after judgment. The extent to which a freezing order stated to have worldwide application is effective depends on the jurisdictions in which the defendant is found to have assets that may be enforced against. Accordingly, a claimant looking to secure assets in various jurisdictions will also need to consider whether any / all of those jurisdictions would give effect to a worldwide freezing order.

A common feature of these injunctions, which cater to a number of circumstances, is that the relief is sought on an *ex parte* basis, such that the defendant may have little or no notice of the application until served with the resulting order.

In addition to injunctions against the defendant, where a claimant has been able to identify assets that are held by a third party who is not otherwise involved in the dispute, for the benefit of a defendant by a third party (e.g. note or share custodian), a third party of Chabra injunction may be applied for.

Receivers

A claimant may apply to the Grand Court for the appointment of a receiver to the assets of a defendant, or a prospective defendant. The appointment of a receiver is a flexible tool and may apply to the entirety of a company's assets, or be appointed for the purpose of realising and dealing with specific assets. Notably, the debt underpinning the receiver's appointment is not confined to domestic debts and a foreign creditor may seek the appointment of a receiver to enforce its debt.

While a receiver may be sought as a standalone application, it is often sought in addition to a freezing order to further ensure that the defendant is not able to dissipate its assets and thereby render the judgment in favour of the claimant valueless.

Debt enforcement proceedings

Injunctive relief and the appointment of a receiver are draconian measures that are costly both in respect of the professional fees required to prepared the application, and the need for the claimant to provide an undertaking in damages which may be called on to be fortified.

Where a claimant has a simple debt claim to be enforced, the Cayman legal regime offers a variety of effective debt recovery actions which are generally less costly than seeking injunctive relief, including:

- garnishee (third party debt) orders. It is an essential requirement that the debt be due and payable for a defined amount rather than subject to a calculation.
- appointment of a bailiff to seize and sell the debtor's assets to the value of the debt and costs of the proceedings and enforcement.
- charging orders and orders for sale, which applies to interests in land, securities, funds paid into Court and interests arising under trust.

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Whether a debt recovery action is viable will depend on the claimant first identifying a viable target asset. This requires both the application of legal principles, along with forensic asset recovery skills of suitably qualified professionals.

Gathering evidence

Given the status of the Cayman Islands as an international financial centre, the Grand Court regularly deals with cross-border enforcement actions and asset recovery actions where assets or funds have been misappropriated. Frequently, those assets may be transferred via or with the knowledge of a third party, who may by innocent of any wrongdoing and yet a valuable source of information in locating the whereabouts of assets of a defendant.

A Norwich pharmacal order may be sought against such third parties before or after the claimant has obtained judgment. This form of relief is intended to provide the claimant / judgement creditor with information held by a third party that can be used in proceedings against the defendant. The scope of information which can be ordered from a third party will be carefully scrutinised by the Court so as to prevent fishing expeditions, and the court will look to balance the competing interests of the claimant and the third party. However, these applications can fill in many evidential gaps which would otherwise prevent the claimant from taking proceedings against a wrongdoer.

If the claimant is seeking to trace or recover assets a banker trust order may be obtained. These orders may be granted against banks and other third party organisations, providing specific criteria are met. One of those criterion is that there is a real prospect that the information disclosed pursuant to the order will lead to the location of or preservation of assets.

Liquidation

Stepping outside the realm of private enforcement and asset recovery options, a claimant may seek the winding up of a company. The liquidation of a company may be sought on the basis that the company is insolvent, or for the reason that it is just and equitable that the company be wound up.

The basis invoked will be driven by the facts of the case, and the objectives of the petitioner, be it simple debt recovery (where the claimant has an unsatisfied and undisputed debt due under a judgment); or to remove the company’s management and conduct an investigation into the affairs and dealings of the company.

While the principal function of liquidators appointed by the Grand Court is to collect in the assets of the company, and distribute them to those entitled, it is well recognised that the necessary element of the liquidator's role is to investigate the affairs and dealings of the company. In support of that function the Companies Act (as revised) gives the liquidator wide ranging information gathering powers, including the power to compel relevant persons to attend for written or oral examination on matters under investigation; and the ability to compel any person holding property or documents of the company to deliver those up to the liquidator.

From the perspective of a claimant / judgment creditor, appointing a liquidator requires the claimant to give up taking unilateral action to obtain satisfaction of the outstanding debt from the company. Instead, the claimant will, subject to any security interest (including a charging order obtained prior to the liquidation) rank pai passu with the general creditors of the company. In each case it will be a cost/benefit analysis for a claimant as to whether it is preferable to continue to take

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independent enforcement steps in a bid to recover on a judgment for its own benefit, or to shift the cost and responsibility to the liquidation process which may yield a lower net return and potentially at a lower cost.

Conclusion

Evaluating the enforcement options and ability to execute against assets early on is likely to result in an efficient and effective litigation strategy. The Cayman Islands' legal system offers a range of measures by which a claimant may identify and preserve assets to be applied in satisfaction of judgment against a defendant, which have extra-territorial reach, subject to the question of recognition of those orders.

From a practical perspective, and with the exception of liquidation, the asset identification and asset preservation measurers that are available in the Cayman Islands can be used independently or in combination without one another. How these measures are deployed is best determined through coordinated efforts with advice from legal counsel in all relevant jurisdictions and experienced asset recovery professionals.

This article first appeared in issue 17 of of ThoughtLeaders4 FIRE magazine: FIRE International Vilamoura Edition: 2024

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