ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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Winning a favourable judgment or award is always a high for a litigation lawyer but, from the client’s perspective, a judgment by itself is just a piece of paper. The client’s objective is to receive money. For the client, it was never about the win, it was always about the money. Yet, collecting the money can be as hard-fought, as lengthy, and as costly a process as winning the award was in the first place.

This article addresses one of the specific tool-sets available to lawyers specialising in judgment enforcement – insolvency tools. It is important to note that the insolvency framework is a specialised tool: it is not a panacea, and so will not be suitable in every case. And, like any tool, it has greater utility in experienced hands than those of a novice. To understand how, when and where to deploy insolvency tools, it is important to take account of the alternative enforcement mechanisms, and to think about the need for recovery strategies generally.

No claimant should start litigation (or arbitration) assuming that the defendant, if defeated, will meekly pay up. Some – perhaps many – will do so. The defendant may be solvent and reputable, but even so the collection challenges might incentivise the defendant to hold out. Worse, there are some judgment debtors which are not reputable and which are of dubious solvency. For the disreputable judgment debtors, the judgment creditor’s collection challenges align
with the judgment debtor’s pre-disposition to hold out.

To make things more difficult for the claimant, the judgment enforcement landscape is becoming increasingly complex. Technological innovations such as electronic banking and faster payment schemes mean that assets can be acquired, transferred, and disposed of more easily than ever before. Consequently, judgment debtors are able to move their assets further afield, faster, with less effort and in ways that can be more difficult to track using conventional methods. With a click of a mouse, or even the tap of a smartphone screen, a delinquent judgment debtor can acquire a new shell company, convert their fiat currency to a readily transferable cryptocurrency, or empty multiple bank accounts in mere seconds. New bank accounts, perhaps in a jurisdiction with aggressive confidentiality laws and limited frameworks for judgment recognition, might be opened without ever requiring the judgment debtor to physically step foot in the territory.

These types of collection challenges can make the lawyers’ victory jig short-lived. Telling the clients that collection might take some time and will involve considerable further expense can quickly sour the client relationship. But the strain on the client relationship can be avoided by strategising about collection ahead of the judgment (speaking from experience, our firm sometimes finds itself called in to act as specialist co-counsel on enforcement more than a year before the judgment is delivered).

Of course, if a pre-judgment freezing order has already been granted by the court, the collection strategy has already been partly addressed – renew the freezing order so that it operates post-judgment, and close in on the assets identified and frozen. However, pre-judgment freezing orders are the exception rather than the rule. More often than not, the visible facts have not warranted the grant of a freezing order, yet the client nevertheless has a legitimate anxiety that the defendant will not pay without a further fight, or that, while the litigation was still pending, the defendant (now judgment debtor) will have taken steps to render itself more enforcement-proof.

A final and enforceable judgment will establish the defendant as a judgment debtor, and the claimant as an unsecured creditor. This principle underpins the use of the insolvency process as an asset recovery tool. An unpaid judgment debt forms the basis of a statutory demand; an unsatisfied statutory demand creates a presumption of insolvency which may then lead to a winding up or bankruptcy order.

**Weighing up the insolvency option**

When analysing the enforcement options, there are numerous issues to resolve in order to decide whether insolvency tools are the right fit. Only by working through these issues can a properly-informed decision about the suitability of insolvency be determined. Insolvency tools are powerful, but they can backfire badly if used incorrectly. In some cases, such strategies even if used properly may just be a bad fit. So, for example -

• Will there be competition for the debtor’s assets? A winding-up order may leave the client at the wrong end of a queue of secured and unsecured creditors, rendering the immediate victory pyrrhic. An existential threat to the defendant may increase its determination to fight to the bitter end. Playing the strongman sounds good, but if the strongman is Samson you just end up pulling the temple onto your client’s head.

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- On the other hand, if available assets are limited, are there competing judgment creditors further down the collection road than your client? If so, it may be that insolvency will help to cancel that disadvantage to the client.
- Are any of the jurisdictions enforcement-friendly (or, indeed, unfriendly)? Some civil jurisdictions provide for pre-recognition attachment, which can make any insolvency strategies unnecessary. Alternatively, recognition in some jurisdictions can be so slow or hostile that the assets identified as being located within such a jurisdiction may be beyond the reach of a judgment creditor: it may be that the foreign court would instead be more receptive to an office-holder, like a liquidator, seeking recognition of the insolvency process.
- Is the target debtor asset-rich or revenue-rich? If analysis shows that the target has strong regular revenue streams rather than piles of cash and property, insolvency would likely dam up those revenue streams. Maybe garnishment would collect the golden egg without killing the goose.
- To what will the debtor better respond? A consensual settlement of the outstanding judgment debt is always going to be quicker and cheaper for all parties concerned than an international war of attrition, but what will it take to get the debtor to want a consensual outcome? In some cases, commencing insolvency procedures may actually eliminate the option of driving the debtor to the settlement table. At the very least, insolvency brings into play an office holder less vulnerable to commercial pressure points felt by the debtor, and more focussed on the interests of creditors as a whole.

- Is the target based in only one jurisdiction or does it have assets, interests or affiliates in numerous jurisdictions? Although a multi-jurisdictional enforcement effort is naturally more complex, the international footprint of the debtor creates the opportunity to leverage differences in enforcement tools as between one jurisdiction and another. However, identifying the right lever requires not only experience and expertise in comparative law, but also a keen sense of timing and global control of the enforcement team. Timing is important because a step taken in one jurisdiction is likely to have knock-on effects elsewhere. Control is vital because a trigger-happy local co-counsel can disrupt the carefully developed global enforcement strategy.

Two points emerge from these typical issues. First, choosing to use insolvency tools should not be a reflex decision, but a sensible conclusion reached following a holistic analysis of the enforcement options. Second, accurate and comprehensive information about the target is vital — no informed decision can be made without information.

Leveraging cross-border discovery
Information is a vital commodity in the world of asset recovery. In any enforcement attempt, the judgment creditor must overcome an imbalance of knowledge: the judgment debtor will know where all of their assets are; the judgment creditor will not. Before the judgment creditor can enforce against an asset, they first need to know that it exists and, just as importantly, they must know where it resides. Information gathering therefore forms an important first step in any asset recovery campaign.

Some types of necessary information can be readily obtained through sources freely available to the public. Other information can be obtained through post-judgment discovery procedures.
To that end, a judgment creditor may apply for an order requiring the judgment debtor to attend court to provide information on oath about their means, or any other matter about which information is needed to enforce a judgment or order. If the order is granted, the judgment creditor can compel the judgment debtor to provide information about their assets worldwide.

In this context, once again there may be cross-border opportunities to leverage differences in discovery procedures. But there is the ever-present risk that using discovery procedures may simply tip-off the debtor, with the result that it re-doubles its efforts to render its assets enforcement-proof. Although claimants are sometimes motivated to seek disclosure of every document under the sun, this strategy is rarely sensible; rarer still is it accepted by the courts. And in some jurisdictions, third-party discovery may require the creditor to indemnify the third-party for the costs of the discovery exercise – this can be a high price unless the discovery request is accurately made and is aimed at obtaining a narrow class of highly useful documents. Discovery requests in this context should be used as a scalpel, and not a sledgehammer.

The position of a liquidator seeking information may be very different. As an office-holder, a liquidator can obtain access to the internal documents held by the company. The liquidator may be able to summon the directors to answer questions, and (subject always to jurisdictional differences) may be able to seek post-judgment discovery on a wider and less costly basis. Since a liquidator wields the right to access documentation, proportionality is less of a concern – although economic and strategic factors should nevertheless help shape and narrow what is sought.

If the client believes that the defendant has been re-organising its affairs during the pendency of the litigation so as to render itself more enforcement-proof, this may tip the balance in favour of deploying insolvency tools. The liquidator has visibility into the internal affairs of the target entity, and the capacity to interrogate the directors can uncover activities designed to thwart enforcement efforts. Moreover, the liquidator can hold the directors and recipients to account, where appropriate, can take recovery actions to restore to the company the assets which were placed elsewhere. Sometimes these powers are more valuable than the claimant’s capacity to challenge transactions as being fraudulent transfers, useful though that power can be.

Akin to, but different from, liquidation is receivership. This places in the cross-hairs a specific revenue-stream or asset. The receiver collects a specific asset and handles it in accordance with the distribution process sanction by the appointing court, leaving the debtor entity intact. Its availability varies from jurisdiction to jurisdiction. A court-appointed receiver is an office-holder and acts subject to the bespoke powers granted to him/her by the court. As with liquidation, an office-holder is accorded considerable respect by the courts. In the right case, receivership is the right insolvency tool.

**Show me the money**

But office-holders – whether liquidators or receivers – cost real money. The expense involved in deploying insolvency strategies demands an answer to the question – what are we going to do with all these powers? There is no useful purpose in triggering this strategy if the client’s objective – getting money in its hands – is not going to be achieved, or at least significantly advanced, by these means.

Client buy-in is essential, and many clients – financially depleted by the litigation which led to the judgment and generally war-weary – may reasonably disagree with the idea of insolvency strategies that promise yet more expense. But a fully worked-out insolvency strategy might appeal to the client if the expense is to be met by a third-party. The emergence of funders, willing in the right case to fund the cost of enforcement on a non-recourse basis in return for a share of the collections, can often render viable insolvency strategies which would be beyond the client’s appetite for further expense. From the funder’s perspective, the existence of a valid judgment or award removes several significant contingencies from its calculation of risk. From the client’s perspective (and especially that of the General Counsel), it takes the expense and risk off the balance sheet – collections can become all up-side once acceptable commercial terms have been struck.
In our experience, there is no hard or fast rule about when, how, and where, to deploy an insolvency strategy in aid of judgment enforcement. But it should not be used without prior careful consideration. Whether or not the tool is appropriate will be determined by the specific facts of the case at hand: the location, type, and extent of assets; the extent of available information about those assets; the conduct and sophistication of the defendant; the client’s litigation appetite; and wider commercial considerations are each factors that should be weighed before starting down the insolvency path. Nevertheless, when wielded properly, the insolvency framework can itself be an extremely valuable asset to the client.

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A highly regarded appellate advocate and trial lawyer, Andrew appears in the Supreme Court of the United Kingdom and acts in international arbitrations on a range of matters, including financial derivatives, insurance and international commercial fraud. He has been cited by industry publications as "a really good lateral thinker" and "a great tactician" with "fantastic courtroom demeanour".

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