

Asset Recovery in England & Wales and Worldwide

The issue of asset recovery has in the past several years become a very hot topic for in house lawyers working in banking and other credit organisations in Russia and CIS. Seemingly creditworthy borrowers can suddenly default and quickly turn into debtors. Outstanding sums, often considerable amounts, turn into seemingly unrecoverable bad debt. If the debtor has dissipated or concealed his assets, enforcement can sometimes seem impossible, even following a final judgment of the Russian court.

However, if overseas assets can be located, enforcement against those assets may prove a highly effective method of securing recovery from debtors. Identifying specialist lawyers at an early stage is crucial to such efforts, so that a tailored strategy can be designed depending upon the nature and location of the assets that potentially can be recovered. That strategy will often involve working closely with private investigators, lawyers in offshore jurisdictions, computer forensic experts, forensic accountants and other experts to build the factual and evidential matrix of each case.

Where a targeted international strategy is to be adopted, it can be particularly useful to have one law firm co-ordinating this approach, to ensure that all the teams work together, share the information obtained and that the steps taken in one jurisdiction do not hinder the potential steps that can be taken in another jurisdiction. It also permits clients to be advised upon the jurisdictions where recovery can be obtained more easily, and on the ones where there may be obstacles to recovery. This ultimately allows clients to minimise their costs. Further, it allows the process to be managed so that, for example, whilst doing everything possible in the hunt for assets, claimants are not viewed by the courts as impermissibly crossing the line into acting oppressively. This is a fine line to balance as clients understandably wish to push hard to identify, freeze and recover assets but it is important to know how far the Court will permit this to be done before it decides either to refuse to grant or limit the extent of the court orders being sought.

Frequently, cross-border strategies focus on ensuring that assets are not dissipated pending enforcement against them. Interim relief can be obtained in England and Wales as well as a number of other jurisdictions in support of and/or to enforce:

- A final enforceable judgment of the Russian or CIS court;
- An arbitration award granted in Russia or CIS or another jurisdiction; or
- Prospective court or arbitration proceedings in Russia or CIS or another jurisdiction; or
- A new claim against a debtor under English law provided the debtor is resident in England and Wales or there are other factors that would allow the English court to assume jurisdiction, or if the assets are located in this jurisdiction

Interim relief available includes not only freezing orders that prevent the debtor from dissipating the assets but also the following orders:

- Search orders that allow searches to be conducted at home or business addresses to retrieve information about the alleged wrongdoing and/or hidden assets;
- Imaging orders that are aimed at the retrieval of the electronic information stored on the debtor's devices, such as laptops or phones;
- Disclosure orders that require the debtor, within a short time period, to disclose information about his assets worldwide;
- Orders for examination that come into play if it becomes clear that the debtor failed to disclose information about his assets or provided limited disclosure that hinders enforcement;

- Orders for the surrender of passport(s) that are granted if the debtor is a flight risk, and there is evidence confirming that the debtor may escape a certain jurisdiction to avoid disclosure of his assets and/or enforcement against his assets;
- Orders for a declaration that the debtor is in contempt of court by breaching freezing/disclosure or other orders against him by, for example, dissipating assets that were identified in the freezing order or by refusing to provide any information about his assets. Such orders may ultimately result in the debtor being sentenced to imprisonment for contempt of court, and may lead to settlement.
- Orders for appointment of receivers over the debtor's assets, for example, over the companies he knows to make sure that the company's assets are not dissipated/transferred to third parties in breach of freezing orders.

Orders can also be obtained against third parties, for example, an order for disclosure of information under section 7 of the Bankers Books Evidence Act 1879 allows a party to legal proceedings to apply to inspect and take copies of any entries in a banker's book. Such an order may be granted on an ex-parte basis, and allow the claimant, for example, to trace monies transferred to the debtor's account.

Below are some recent case studies of PCB Litigation's experience on behalf of Claimants that illustrate the types of relief that can be obtained.

Case Study 1

We successfully acted for a major Russian mining company in a US\$500m claim based on deceit, breach of fiduciary duty and sham contracts. We obtained:

- Freezing orders in England, Jersey, Guernsey and BVI, each in the sum of US\$500m together with proprietary injunctions.
- Search Orders that were executed simultaneously at 3 different premises at the same time that the freezing orders were served recovering a wealth of electronic information (in excess of 80 computers, mobiles phones and electronic storage devices) that was used to enable assets to be identified that were held in complex structures with nominees, offshore companies and trusts.
- Third party disclosure orders against various banks, solicitors, ISPs and others.
- Orders for cross-examination of the Defendants.
- Orders for the medical examination of one of the Defendants who was outside the UK.
- Orders to debar the Defendants from defending.
- Undertakings to prevent allegations of witness intimidation.

In addition, we successfully resisted an application on the part of some of the Defendants for fortification of the cross-undertaking in damages in the sum of US\$100m.

As part of the successful strategy, a letter was written to a reputable third party of substance putting it on notice that the assets they held may be the subject of proprietary claims or the proceeds of crime, such that if they dealt with those assets, they may incur civil or criminal liability. Combined with the numerous orders set out above, it led to settlement.

Case Study 2

We obtained a US\$150m worldwide freezing order on behalf of a CIS Bank in respect of monies owed to it in England and the BVI by three BVI companies, which included an order that the three BVI companies disclose their assets. The failure of these companies to provide such asset disclosure enabled us to join their de facto director as a party and to bring committal proceedings against him. On the opening day of the trial of the committal proceedings, following the Defendant's failed application to adjourn the trial, the Defendant offered to submit to the English Court's jurisdiction in respect of a fraud claim (based on English law and the law of the CIS country) that is now ongoing against him.

The effect of obtaining the worldwide freezing order was sufficient to persuade both witnesses to co-operate and to obtain Court Orders in other overseas countries such that the client could take control of certain assets located there.

Case Study 3

We obtained a US\$40m freezing order in England in support of various Russian proceedings against a Russian businessman who guaranteed company loans, on the basis that he held the beneficial interest in two English Limited Liability Partnerships, the shares being held by offshore trusts in Liechtenstein and Nevis.

The Defendant denied that he had any interest in the trusts, which owned valuable property in Italy. We obtained orders:

- Obliging the trustees to disclose the trust documents which was sufficient to establish a case that the Defendant was their ultimate beneficial owner;
- Freezing the properties in Italy;
- Recognising the Russian judgment in England, which has enabled further orders to be obtained including an order that the Defendant be cross-examined on his assets; and
- Appointing Receivers in England to take control of a company before putting it into administration so as to be able to sell the properties in Italy.

The case is ongoing and further steps are being taken to enforce the judgments in England and elsewhere.

Case Study 4

The first Defendant was believed to be the owner of an aeroplane which was in the name of a Cypriot company with a nominee shareholder. We built the evidence from witnesses, public filings and other documents to demonstrate that the aeroplane was arguably beneficially owned by the first Defendant. The Court was persuaded that a freezing order should be granted and should specifically freeze the aeroplane. Following co-ordination with investigators to trace the aeroplane when it was next in England, the freezing order was served on the airport, which refused to allow the pilot clearance to take off. The aeroplane was effectively arrested so as to enable that asset to be available for execution.

The Defendant however continued to dispute his ownership of the plane as it was held in the name of a company. An order for disclosure obtained against the accountants of another company which

was believed to be owned by the Defendant revealed a family tree showing the Defendant at its top with numerous other companies beneath it, including the company which owned the plane.

Investigators subsequently identified very large commissions that the first Defendant was due to receive from brokering a multi-billion dollar deal in the Middle East. Rather than face the prospect of enforcement steps that we had threatened in respect of that prospective commission, the Defendant then settled our client's claims against him.

Case Study 5

The Claimant Bank made substantial loans to companies that were guaranteed by the controller of those companies. The loan and the guarantee were subject to Russian law and the jurisdiction of the Russian Court. The Claimant Bank obtained Russian judgments in the sum of the sterling equivalent of approximately £150 million against the guarantor.

Following the default on the loans and the failure of the guarantor's business in Russia, he moved to London. The English Court found that he had sufficient connection with the jurisdiction of the English Court to permit a grant of a Worldwide Freezing Order in support of the enforcement of the Russian judgments pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982, and the guarantor was subsequently served with the Freezing Order in London.

The case is ongoing and further steps are being taken to enforce the judgments in England and elsewhere, including by way of seeking the examination of the guarantor in relation to his assets.

Conclusion

As the case studies above demonstrate, enforcement of Russian judgments in England and Wales as well as worldwide can be very successful, and lead to either recovery or settlement. The key to this is an appropriate strategy, and the lawyers who know which relief can be obtained in each particular case and against each particular asset. Preliminary work, including the identification of assets prior to the start of the proceedings, is also crucial, and can be done with the help of private investigators and/or third party disclosure orders if appropriate. Ultimately, in enforcement, it is not the judgments but the recoveries obtained that make a difference to a Claimant Bank or other credit organisation.

In case of debts owed by individuals or companies to other individuals or companies, the same principles apply, and the same measures can be obtained, provided the relevant requirements are complied with. PCB Litigation will be happy to assist with any dispute or debt claim you may have.