

ROUNDTABLE

The International Who's Who of Asset Recovery Lawyers has brought together three of the leading practitioners in the world to discuss key issues facing lawyers today.



WILLIAM CHRISTOPHER
Pinsent Masons LLP
LONDON

Who's Who Legal: *What key trends have you noticed in asset recovery recently? Have you faced any major challenges in your practice?*

William Christopher: The key trends we have noticed are around the court's attitude to non-compliance with its orders. We have seen committal orders being made more frequently and with longer sentences. We have also seen the court being increasingly open to making innovative and creative orders.

For example, in the past 12 months we have seen, without notice, e-mail intercept orders and civil electronic tagging orders being made. Admittedly these were after a history of flouted orders and non-compliance, but there remains a trend towards the court showing its teeth in the face of non-compliance.

The major challenges we have are in relation to the obtaining of information in foreign jurisdictions, but here again the court has been willing to assist. We recently obtained an order circumventing the letters of request procedure, which can take 90 days in each jurisdiction, but relying on the principle of legal assistance. In effect the English judge required the assistance of UK court in a different jurisdiction to order the disclosure of information. The order was obtained in a matter of days.



CHRISTOPHER J REDMOND
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Christopher J Redmond: The courts in the United States have issued orders for a defendant or defendants to show cause why they should not be held in contempt for violating or failing to adhere to a prior order of the court. This occurs even in cases where the defendant pleads that it is impossible to adhere or comply with the court's order, such as when the defendant has transferred funds to an overseas jurisdiction and argues that the defendant no longer has control of either the funds transferred or access to any information in regard to the funds since a foreign trustee or protector now has sole exclusive control and dominion over the funds. Courts in such a situation after a full evidentiary hearing have determined the testimony of the defendant is not credible or believable. In a number of these instances the defendant has been sentenced to a term in jail for contempt – which has been upheld by the appellate courts – and in one instance keeping the defendant in custody for a period exceeding one year. In addition, courts are striking the defences of defendants who fail to produce requested documents or information as part of the discovery process and entering judgment once the defences are struck. This can take time as discovery requests must first be propounded; then, when not answered, motions to compel filed; and finally a motion to find the defendant in contempt for failing to respond to the discovery requests or the failure to produce the requested discovery. The major challenges are in obtaining discovery and related information in a legal and permissible manner while the defendants and their counsel often violate every rule in the book and then try to accuse you and your client of illegal or unconscionable conduct. Once the court understands the facts of the case, then it is enlightened as to who the real culprits are. The second major challenge is to learn how to coordinate the laws and procedures of a number of jurisdictions to effectuate a timely and effective result for your client.



SIEGBERT LAMPERT
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Siegbert Lampert: Due to the general economic downturn, one of the major challenges of international asset recovery involving multiple jurisdictions is to locate necessary funding to pay for the necessary investigative and legal work since individual victims of fraud often lack sufficient financial resources. Helpful in this respect is third-party litigation funding, which has become more readily available, especially in larger cases. Probably also due to economic reasons, it appears that banks and other third parties managing affected assets are more willing to challenge recovery proceedings in an effort to keep the impacted assets under their management.

Who's Who Legal: *With the global financial downturn resulting in parties going to greater lengths to preserve their assets and, conversely, trace what is owed to them, have you noticed an increase in any specific area of work? Are you expecting asset recovery work to remain steady?*

William Christopher: We are expecting the work we have to at least remain steady, and I think it will probably increase as the world economy begins to recover.

We have noticed an increase in the use of *Norwich Pharmacal* orders (for disclosure from third parties) and an increased knowledge about those types of orders. This we suspect is for a variety of reasons, not least because of the current issues around the use of investigators, including the Leveson Inquiry, and the court's attitude towards unlawfully obtained information.

We have seen a marked increase in our corporate clients being the victims of procurement frauds, and in corporate identity theft to commit frauds, especially to fraudulently divert funds for invoice payments.

We have also seen some rather unexpected consequences of the global financial downturn. We have ongoing matters for clients who happened to be sitting on large amounts of cash in accounts at banks which were looking very fragile in late 2008. Rather than leave it where it was at risk in those accounts they chose to make swift investments, some of which have transpired to be fraudulent schemes.

Christopher J Redmond: As technology advances, so do the sophistication of fraud schemes. While interest rates remain at an all-time low, a promise of a 6 per cent return on an investment is music to an investor's ears. The old adage remains accurate: if an investment sounds too good to be true then it is probably not a legitimate investment. Yet a number of individuals still get hooked on prime debenture schemes after 30 years of unsatisfactory experiences and notwithstanding the availability of sophisticated websites from the US Treasury detailing the scheme and advising investors to steer clear. As a result the work has stayed steady; pyramid Ponzi schemes, even after the *Stanford* and *Madoff* cases, are on the rise. As the economy improves then investors will feel more comfortable and want to recoup the losses or low returns experienced during the global financial crisis. Did we not take subprime loans, securitise them and have Wall Street package and sell various products to banks, investors and retirees – with the end result of those purchasers losing billions of dollars? While the internet has provided great access to all types of information, clients have still invested millions of dollars with individuals or companies without adequate due diligence, blinded by the promise of quick and extensive returns on their investment – only to be ultimately disappointed. We have been involved in more cases of affinity fraud by leaders of church and civic organisations using their respective positions to dupe and defraud innocent followers based on their misplaced trust. Unfortunately fraud is still pervasive and assistance to individuals and companies defrauded by slick “professionals” will continue and in all probability increase.

Siegbert Lampert: We expect fraud and asset recovery work to be steady or even increase, although the nature of the fraudulent activity may change. And the techniques are always evolving. Considering the enormous size and breadth of some financial frauds in recent years, such as *Madoff* and *Stanford*, it is no surprise that the frauds we see today are relatively smaller. These cases can be pursued if costs for this recovery work are affordable or financing may be obtained.

One area where we expect to see more activity in the future is cybercrime, IT and telecommunications fraud, and not just by local criminals but by large, well-financed and sophisticated organisations.

Who's Who Legal: *Have there been any changes to law or practice in this area over the past year? Are you*

expecting any groundbreaking cases that may have an effect on your work?

William Christopher: The important developments in the law relevant to my practice area have been, first, in relation to the current status of bribes and secret commissions since *Sinclair v Versailles* and the more recent case of *FHR European Ventures LLP v Mankarious* – in particular, whether the recipient holds such payments on trust for its principal. Not only is this the subject of lively judicial and academic disagreement, it is very likely that there are going to be more cases of this nature in the future, as our experience has been that corporates are uncovering evidence of corruption in their quest to comply with the Bribery Act.

Second, there is the case of *VTB v Nutritek*, which deals with the questions of jurisdictional challenges and forum shopping, which are almost inevitable in multi-jurisdiction fraud claims, and the question of when it is possible to pierce the corporate veil. This was developed in *Prest v Petrodel Resources Ltd*, with the Supreme Court – through the judgment of Lord Sumption – providing a detailed analysis of the law, and suggesting two principles that may assist, being the evasion and concealment principles, with only the evasion principle giving rise to grounds to pierce the corporate veil.

Christopher J Redmond: We have seen substantial changes in the development of laws and related case law in regard to international cross-border insolvency issues. The use of insolvency law in cross-border fraud cases has become more pronounced over the past several years. This is true, especially in fraud cases, where a large number of victims are involved without the ability to independently fund actions to effectuate a recovery of the defrauded assets. The United Nations Commission on International Trade Law (UNCITRAL) has completed its work on revisions to the Guide to Enactment, which provides background and explanation as to how the Model Law on Cross-Border Insolvency is applied. This work, as suggested by the United States Delegation to UNCITRAL, resulted in reduced factors in the determining the centre of main interest (COMI) of a debtor operating in multiple foreign jurisdictions. The case law from North America and the European Union was too widespread as a basis for a COMI decision of a debtor and often the result was unpredictable or not recognised or understood by the debtor's creditors. As a result, UNCITRAL limited the COMI determination to a two-part test where the registered office was not recognised as the debtors' COMI. The two-part test directs a court to determine first the location that is readily ascertainable by creditors of the debtor, and second the location at which the debtor conducts its operations. In addition, the timing of the determination of the COMI is the date of the opening of the original insolvency proceeding of the debtor, not the time of the filing of the application for recognition by the foreign representative. With the UNCITRAL revisions and commencement of the EU's work to revise and update its insolvency regulations, a party will have a greater predictability and transparency as to the determination of the COMI of the debtor. As part of this overall process liquidators and courts are communicating and cooperating with each other more closely, resulting in a collective proceeding that treats all assets and liabilities of the debtor in a coordinated manner so that all creditors and interested parties can participate. With the appointment of a trustee or liquidator, the fraudster can be removed

from effective control and the task of recovering the assets diverted can be effectuated. As a result, continued decisions will further impact the ability to utilise insolvency proceedings, especially in international cross-border cases, as an effective and efficient asset recovery vehicle.

Siegbert Lampert: Legislation on due diligence of financial intermediaries and anti-money laundering in general is permanently evolving, which supports our efforts in asset recovery cases. Documentation and paper trails are nowadays usually of a quality that allows us to trace almost any transaction. Other legal resources, such as bankruptcy and procedural laws, are also amended so that transparency of financial transactions is enhanced, which ultimately makes our work easier. We will see whether the actual discussions about abusive data collection of secret services and other governmental agencies will precipitate a step back in this regard in the future. The legislator will have to find some solution to balance the different interests.

Who's Who Legal: *Have you found the increased use of electronic resources in asset recovery, including e-discovery of extensive documents, to have had a significant impact on how cases and litigation are conducted?*

William Christopher: Yes, absolutely. In particular, the volume of electronic data that is now a feature of most litigation, and its impact on cost and time, means that it is crucial to become competent in planning and executing a review of large volumes of data. Due to the fact many users of e-mail do so very carelessly, there is a wealth of evidence to be gathered, provided you establish a way to search the data to ensure you do not miss helpful documents. The use of such review platforms is becoming all pervasive in our work, and we find ourselves advising in relation to these issues regularly and often.

The importance of a good review platform cannot be underestimated, and we have obtained fantastic evidence from using good platforms. I think it is also very important to keep an open mind about new developments, and new platforms, rather than slavishly using the one you have always used. We are also finding that the systems that are owned by providers, who can then provide a very bespoke system by coding to give exactly what you need in any particular investigation, are much more useful than the "off the shelf" systems.

It is worth looking at providers who are innovative in the way they price the e-disclosure service, as this can have a dramatic effect on the cost of this exercise.

Christopher J Redmond: E-discovery has had a dramatic effect on litigation in asset recovery cases. This is especially true where the cases are large and complex. While the information received is generally very beneficial to effectuate asset recovery, the cost to stay in the game can be expensive. I have one case in which I have had to spend over \$300,000 on e-discovery costs to date. Since the targets you are going after have substantial funds (diverted from victims of the fraud), one of the strategies by the fraudsters is to outspend you to try to make you give up the fight. It is critical to have a good understanding of the costs involved so that you can plan for that circumstance. Now for an appropriate and recognised cause of action you can obtain litigation funding, which – while expensive – can often mean the difference between a meaningful recovery for victims and the abandonment of the cause of action because of cost constraints. Often though, the information that you obtain from e-discovery will give you the basis to freeze the balance of the assets and make it more difficult for the fraudster to continue to wage a scorched earth defence. As with all litigation, a careful plan and budget are essential to a favourable and meaningful result. As always, finding the proper service provider is a key to maintaining cost control, quality and predictability throughout the process.

Siegbert Lampert: The increased use of electronic resources certainly has significantly impacted how cases are approached and how litigation is conducted. Documents are often the key to finding the money but you can be overwhelmed with documents. With the right resources, asset tracing may now be achieved more quickly and in a much more conclusive way. While document management can provide significant benefits and is an important tool, it is not enough. In today's world, it is critically important to have a reliable network of experienced asset recovery professionals to handle all aspects of a cross-border case and employ the necessary techniques in their respective jurisdictions. FraudNet, for example, the ICC's worldwide network of lawyers specialised in asset tracing and recovery, provides victims of fraud with the possibility of retaining the best asset recovery professionals in the targeted jurisdictions and access to a 24/7 international rapid deployment force to recover their stolen assets. Without this tool, even a large firm with multiple offices cannot hope to have the resources and localised experience needed to handle today's sophisticated and far-reaching frauds.

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Christopher Redmond is widely recognised for his involvement in international insolvency and international litigation matters, specifically concerning the pursuit of assets transferred to offshore jurisdictions. His asset tracking and recovery skills are sought worldwide by attorneys, individuals and foreign governments. Throughout the past 20 years, his experience includes the recovery of millions of dollars for creditors, trustees and receivers in the Isle of Man, the Channel Islands, Switzerland, Liechtenstein, England, Wales, Norway, France, Italy, the Netherlands, Cayman Islands, Nevis and South America.

His practice has been featured in articles detailing the recovery of assets that appeared in offshore accounts by the *ABA Journal*, *Business Week*, *Forbes*, the National Association of Bankruptcy Trustees and *The Wall Street Journal*.

In addition, Mr Redmond has been admitted as a member of the FraudNet section of the International Chamber of Commerce. He is a representative on behalf of the United States to the United Nations Commission on International Trade Law and was instrumental in assisting the development of the UNCITRAL Legislative Guide on Insolvency. In addition, Mr Redmond serves as a member of the expert group to UNCITRAL and has served as a UNCITRAL representative in coordination with The Hague Conference on insolvency matters, as well as a representative of the American Bar Association to UNCITRAL on insolvency matters. He also has served as a member of the United States delegation to the United Nations Office of Drugs and Crime.

Husch Blackwell LLP is a full-service litigation and business law firm with 600 attorneys in locations across the United States and London, serving clients with domestic and international operations.