Recovering misappropriated assets: The available routes

Carmel O'Reilly considers the various approaches to the recovery of ill-gotten gains

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> **WHEREVER THERE IS AN OPPORTUNITY TO MAKE MONEY, THERE WILL BE FRAUD**

Make a comment!

It will come as no shock to readers, particularly my fellow members of INSOL Europe's Anti-Fraud Forum, that we are all being defrauded.

As tax payers, citizens, employers and employees, we're all being shaken down, swindled, and cheated. Wherever there is an opportunity to make money, there will be fraud. The Association of Certified Fraud Examiners' 2012 Report to the Nations on Occupational Fraud & Abuse reported that 5% of the revenue of an average organisation is lost to fraud each year. Applied to the estimated Gross World Product for 2011, this amounts to a global fraud loss of US$3.5 trillion. In figures published in June 2013, the European Commission's Anti-Fraud Office (OLAF) reported fraudulent irregularities in 2011 EU budgetary expenditure of €295 million. Given its nature, figures cited for fraud are a best estimate. Most commentators acknowledge that such estimates are likely to be conservative.

A lot is being done to combat fraud, of course, and also to assist efforts to recover misappropriated assets, at national, European and international levels. This article considers the various approaches to the recovery of ill-gotten gains, whether through the use of civil or criminal legislation, and the relative merits and limitations they present. These routes are not all available to everyone; government agencies may have criminal and civil recovery powers which differ from those enjoyed by criminal legislation office holders, and again those available to civil legislation office holders. These routes will not be available in every case or under all circumstances. The purpose of criminal confiscation proceedings is to deprive criminals of their assets, subtly different from the focus on restitution to victims in insolvency proceedings. However, this is not to say that repayment of financial loss to victims in criminal proceedings cannot be a happy side effect. Civil and criminal routes to recovery are not mutually exclusive, although careful consideration must be given to the use of evidence obtained when mixing approaches. Although the focus of this article is predominantly on UK legislation, comparable legislation exists across Europe to enable a largely similar approach.

Asset recovery actions: what purpose?

A primary consideration in determining whether the criminal or civil method is more suitable is the purpose of the action. Where serious crimes have been committed or where a case is high-profile, the criminal approach is likely to be favoured. There may be a need for a prosecution and conviction in the public interest, followed by the recovery of assets through criminal legislation. In circumstances where it is not possible to pursue a criminal conviction and recovery action, an alternative approach might be considered.

The purpose of the proposed action may be to seek restitution for victims. Where criminal proceedings are underway, victims may apply for a compensation order, which entitles them to repayment of their financial loss, or a proportion thereof, out of the recoveries made against the convicted criminal. This is particularly appropriate where there is one victim or a limited number of victims, who can organise and coordinate such an application easily, for example insurance companies. Whilst the criminal route has the attraction that the tracing and recovery of assets is largely funded by the State, payment of a compensation order can take considerable time, as it usually follows the criminal prosecution, any appeals, confiscation proceedings and recovery activities. Where the victims can demonstrate that they are creditors of the offending party, a winding up or bankruptcy petition could be faster and more effective, although the civil recovery route may not be available if criminal proceedings have commenced. There are measures available in both the criminal and civil approach to mitigate the risk of dissipation of assets, and an *ex parte* (without notice) application will be appropriate in certain situations.

Other reasons for intervention can be to ensure the continuity of legitimate enterprises whilst recovering illegitimately misappropriated assets, or indeed to disrupt or intervene in unlawful activities. Both the civil and criminal routes can accommodate these purposes, for example a court appointed receiver, appointed over a group of companies to monitor trading, fact-find and asset trace whilst criminal proceedings are underway, or a liquidator appointed over a group of companies colluding in VAT fraud.

Civil vs criminal approaches: the salient considerations

Timing is all important when considering the relative merits of both the civil and criminal routes to the recovery of misappropriated assets. Criminal proceedings can be lengthy; the wrongdoer is entitled to a fair trial. It is not unusual for the criminal trial, appeals and confiscation proceedings to take many years, and it is often only at the end of these proceedings that the recovery process can commence. Although the wrongdoer's assets may be subject to restraint in that time, they could be losing value. Assets held out of jurisdiction are particularly at risk of dissipation, as the wrongdoer has ample time to put them beyond the reach of investigators. Civil applications for freezing orders, provisional liquidations, liquidations and trustees in bankruptcy can generally be brought before a Court in a reasonable timeframe and on an *ex parte* basis. However the applicant must ensure that he does his homework in advance, given the requirement for full disclosure and the fact that proceedings against the wrongdoer must have commenced, or be imminent, in this situation. Statutes of limitation will also have an impact on the options available.

The standard of evidence required must also be considered. My colleagues in the Anti-Fraud Forum will be all-too familiar with cases where little or no documentary information is provided by the wrongdoer, and limited documentation is available from third parties such as banks or public records. It may be unfeasible to attempt to prove a case beyond a reasonable doubt. The civil test is considerably lower, and lends itself more favourably to inferences derived from what is not delivered up, as well as what has been provided.

There are few fraud cases today which involve the recovery of misappropriated assets from within one's own jurisdiction alone; a wrongdoer will inevitably have invested in a property in Spain, hold bank accounts in Panama, shareholdings in a Zambian mining company or similar. The timing, cost and ability to gain international recognition to enable recovery differs from case to case and jurisdiction to jurisdiction, and there are benefits and drawbacks to both the civil and criminal route. Generally speaking, most jurisdictions have some form of insolvency legislation, which makes gaining recognition more straightforward for the office holder. This was highlighted in *BTA Bank v. Ablyazov*, where a Ukrainian court granted a request for recognition of an English freezing order, which had already been recognised in Austria, Latvia, Lithuania, Luxembourg, the Netherlands, Switzerland and the Grenadines. A receiver appointed under criminal legislation may have to contend with jurisdictions that have no frame of reference for his

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> THE RELATIVE BENEFITS OF BOTH CIVIL AND CRIMINAL APPROACHES IS SOMETHING THAT WILL NO DOUBT BE DEBATED BY MY ANTI-FRAUD FORUM COLLEAGUES AT THE 2013 PARIS CONGRESS BREAK-OUT SESSION

position, making an application for recognition time consuming and costly, with no guarantee of success. Mutual legal assistance does allow government-to-government assistance in obtaining evidence to assist in criminal proceedings through letters of request, as well as enforcing criminal confiscation orders, and is particularly effective where bilateral or multilateral treaties are in place between the countries involved. We have seen this put to good use in corruption cases, where substantial assets misappropriated by government leaders and others in power have been returned to victim countries.

The use of criminal or civil approaches can impact how much can be recovered for the benefit of the victims. This can vary greatly depending on the circumstances of a case; there are situations where criminal routes offer better prospects, and also situations where a civil approach is more likely to be beneficial. Criminal confiscation orders can be limited specifically to the assets identified as being the proceeds of that crime, although this is not always the case. Where misappropriated assets are recovered from another jurisdiction through a criminal route, the realisations may be subject to an asset sharing agreement with that jurisdiction. This agreement can vary greatly, from the entirety being withheld by that jurisdiction, usually where there are no identifiable victims and the focus is on depriving the wrongdoer of the benefits of his crime, to an equal split between jurisdictions, to the entirety being handed over. These agreements tend to be negotiated on a case-by-case basis if not already set out under a bilateral or multilateral treaty. A civil legislation office holder may not face this issue at all. I have previously successfully recovered a property in France, where an approach as receiver under criminal legislation would have resulted in a 50/50 split with the French authorities (although the cost was entirely our own!), whilst my approach using civil proceedings ensured full recovery of the proceeds to the UK.

The route to recovery taken can affect one's ability to be pragmatic, in terms of costs, litigation and settlements. With his remit to recompense creditors, the civil legislation office holder may have more freedom to agree settlements with wrongdoers in the interest of saving time and costs by foregoing lengthy litigation, thus securing the best result for creditors. The same approach can be problematic for criminal prosecutors; particularly where the offence in question is serious. Prosecutors must be seen to seek justice, and a conviction will be in the public interest. However, if managed with sensitivity and communicated to the public with care, settlements don't have to be divisive. This has been demonstrated by the Special Investigation and Prosecution Team in the Turks and Caicos Islands, who appear so far to have struck an impressive balance between negotiating settlements as a preferable result for the state and the public, and progressing criminal prosecution where appropriate.

Wrongdoers will often use third parties to assist in the laundering of funds, to act as a "front" for corporate vehicles, or as titleholders of assets beneficially owned by the wrongdoers. This often creates a difficulty for those seeking to recover misappropriated assets, particularly those in jurisdictions where there may be no legal concept of ownership in trust for another party. Criminal prosecutors may have insufficient evidence to tie the third party to the crimes of the wrongdoer, or may be unaware even of the existence of the assets at the early stages of prosecution or confiscation. It may be possible to tie the third parties into civil forfeiture proceedings: where there is no conviction, the proceeds of crime are delivered up through civil recovery proceedings; this has the benefit

of linking the offence to a specific asset, which may assist with gaining recognition out of jurisdiction. Civil legislation office holders face less of an uphill struggle, and it is not unusual for them to take action against third parties such as other companies and their directors, family members, and professional service providers, such as auditors, solicitors and banks.

Within jurisdiction, civil and criminal office holders and public prosecution bodies all enjoy strong powers to compel disclosure of information. I have mentioned mutual legal assistance, which can be used to request assistance in obtaining evidence from other jurisdictions, and is generally a time and cost-effective approach. Civil office holders have the ability to apply for disclosure orders, gagging orders and search orders. Whilst these are very useful tools, the application process can be time consuming and costly; these actions must be undertaken in the full knowledge that they are just a stepping stone in a larger asset recovery exercise.

Knowledge is the key

The relative benefits of both civil and criminal approaches is something that will no doubt be debated by my Anti-Fraud Forum colleagues at the 2013 Paris Congress break-out session. It is well-publicised that the losses through fraud can be far greater than recoveries made, however we are witnessing continuous improvements in legislation and political policy which assists in the tracing and repatriation of misappropriated assets. The EU has required all member states to set up or designate national asset recovery offices as national points of contact, to assist in the tracing and recovery of assets, and also to communicate best practices. As at March 2013, this platform has received generally positive feedback, and is considered to have enhanced EU-level cooperation and coordination in the battle against fraud. OLAF has recently reported the recovery of over €1.1billion of misappropriated EU money since 1999, €94.5million in 2012 alone. The UK's Serious and Organised Crime Agency has reported total assets denied to criminals of £482.6million in 2012/2013 through criminal and civil powers, the significant majority of which (£425.6million) has been denied by partners in the UK such as criminal legislation office holders, and partners overseas through mutual legal assistance and other methods. The real weapon in the battle against fraud is knowledge. We must be aware of the routes to recovery available to us, to determine the most appropriate course of action to deprive wrongdoers of their winnings, return losses to creditors, and perhaps help us all feel a little less ripped off, flimflammed and conned in our daily lives. ■

> **THE REAL WEAPON IN THE BATTLE AGAINST FRAUD IS KNOWLEDGE**

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