TEAM BUILDING AND COMMUNICATION
Getting the most out of investigators

A EUROPEAN PATCHWORK
Tracing assets across the EU

FIGHTING COUNTERFEIT GOODS
Using OSINT to fight the fakes

CDR Commercial Dispute Resolution

www.cdr-news.com

The world's leading dispute resolution source

April 2025

ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

Contributing Editor:
Keith Oliver
Peters & Peters Solicitors LLP

THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS

PETERS & PETERS

EXPERT ANALYSIS CHAPTERS

JURISDICTION CHAPTERS

Guernsey

David Jones
Carey Olsen

Simon Florance
Carey Olsen

John Greenfield
Carey Olsen

I Executive summary

As Guernsey developed into a thriving offshore financial centre from the 1980s, it has had to adapt to meet the challenges posed by the model and resourceful fraudster. Its laws and jurisprudence have evolved rapidly to ensure it does not provide a haven for such people and their ill-gotten assets.

The Bailiwick of Guernsey has one of the oldest constitutions, political systems and judicial systems in the world and, apart from certain events beyond its control between 1940 and 1945, it has enjoyed centuries of stability. Guernsey's close links judicially with senior (and indeed the most senior through the Privy Council) members of the United Kingdom Bar and judiciary means it has a system that is readily understood throughout the world.

This chapter deals with how those challenges have been met following the rapid popularity of Guernsey structures typically involving trusts, foundations and underlying companies. Guernsey courts have adopted international rules when required to make orders assisting proceedings in those jurisdictions, whether freezing assets, disclosing documents/information or straightforward asset tracing and recovery.

As will be seen later on, there are now many weapons in the armoury of those assisting the victim of fraud, when there is reason to believe that there exist in Guernsey either assets or information to which the victim is entitled.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

Over many centuries, the Bailiwick of Guernsey (the main Islands of which are Guernsey, Alderney and Sark) has developed a unique legal framework judicial system drawing on its routes and past connections with both England and France (part of the Duchy of Normandy at the time of the Battle of Hastings but now a Crown Dependency of the United Kingdom). These modern rules are passed by an elected government (the States of Guernsey) or more fundamental rules that also need to be approved by the King of England through his Privy Council.

The judicial process starts with the Royal Court of Guernsey (the Royal Court) constituted by local judges with right of appeal to a Court of Appeal, which is in Guernsey but is constituted by Senior King's Council

from the Bar in the United Kingdom. In certain cases, there is ultimate right of appeal to the Privy Council in London.

For the purposes of this chapter, developments of Guernsey's laws relating to fraud, asset tracing and recovery schemes have tended to follow those found in many developed legal jurisdictions and will have a familiar ring to them. In terms of its common law, decisions of the courts in England and Wales are persuasive but not binding unless based upon English legislation that states it to be binding on the Channel Islands – usually international laws such as immigration shipping and various international conventions.

Civil remedies and tools

As stated above, common law practitioners in the area of fraud and asset recovery will find Guernsey's overall law familiar, but there are some unique and useful differences. As far as civil fraud is concerned, the causes of action and remedies are for the most part drawn from modern legislation and jurisprudence.

In addition, given Guernsey's status as an offshore finance centre, its courts will often deal with claims brought for breach of trust/fiduciary duties and by insolvency practitioners (of both local and foreign companies).

So, what are the main weapons in the legal arsenal for tracing and recovering the proceeds of fraud? There is, of course, the remedy of damages; but as practitioners in the area will know, the proceeds of fraud will usually be moved quickly out of the hands of the actual fraudster, often through various financial institutions across a number of jurisdictions.

Guernsey courts have the well-recognised tools of asset tracing that originate from the English courts available to them, including:

- Disclosure orders under the principles set out by the House of Lords in *Norwich Pharmacal v Commissioners of Customs & Excise* [1974] UKHL 6, which requires a third party, even if innocent of any wrongdoing, to disclose information or documents to identify the wrongdoer (known as a *Norwich Pharmacal* order). The availability of a *Norwich Pharmacal* order is important in Guernsey, as there is no pre-action disclosure available under the procedural rules of the Guernsey courts, with the exception of personal injury/fatal accident cases.
- A variant of a *Norwich Pharmacal* order, which again requires a third party to disclose information and documents, is aimed at locating the victim's proprietary funds and protecting them from dissipation. This comes from the English High Court decision in *Bankers Trust Co. v Shapira* [1980] 1 WLR 1274.
- *Mareva*-type freezing orders to prevent a defendant dissipating assets before final judgment, the statutory power for which comes from section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. The Guernsey courts also have the power to grant ancillary disclosure orders as part of the injunction, particularly as to where funds have gone, so as to give the injunction "teeth".
- Albeit rare, the Guernsey courts have been known to grant *Anton Piller* orders; that is, permitting a party to search premises and seize evidence without prior notice, where there is a real possibility that the evidence in their possession will be destroyed.
- "Gagging orders", which often form part of the above orders.

In Guernsey, injunctions in asset recovery cases for fraud are generally against local banks. As regulated and respectable financial institutions, the banks should abide by the Guernsey courts' orders – this will ensure that any funds that are the subject of a freezing order are well and truly locked down.

Although it is a condition for a freezing order under the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 that the substantive proceedings are (or

will be) brought in Guernsey, the Guernsey courts do have the power to waive this requirement if substantive proceedings are taking place in a foreign jurisdiction. A common example of this is where the Guernsey courts are asked to grant a "mirror injunction" to give effect to a worldwide freezing order granted in another jurisdiction – that is, where the order extends to assets located outside of the jurisdiction where the original injunction was granted.

Prior to the modern-day *Mareva*-type injunctions, a Guernsey customary law procedure known as an *arrêt conservatoire* was traditionally used to seize property to prevent its dissipation. An *arrêt conservatoire* is available pre-action provided there is a Guernsey claim, and there is Guernsey property at risk of dissipation. The procedure is relatively straightforward with an *ex parte* application made to a judge in chambers, who then issues the *arrêt* which is executed by HM Sherriff (an officer of the court with equivalent powers of a United Kingdom bailiff).

Albeit rarely used nowadays, the *arrêt conservatoire* retains some practical usefulness in that, unlike a freezing injunction, it takes effect *in rem* rather than *in personam*. If a defendant does not comply with an injunction, then the sanction is a contempt of court – this will mean little if both the fraudster and his or her assets have long since left Guernsey. However, under an *arrêt conservatoire*, HM Sheriff can physically seize and lock down the property that is the subject of the fraud, in short order. This could be useful where the location of the property is known but the location and/or identity of the fraudster is not, or where, for example, the property is a luxury yacht (berthed in Guernsey) that could sail away at any time.

Another tool available to a claimant in Guernsey proceedings is the registration of an interlocutory act in those proceedings in the *Livre des Hypothèques*, with the leave of the Royal Court. This is a customary law procedure dating back to at least the 19th Century, the effect of which is to create a charge over the respondent's interest in any Guernsey realty/real estate, with priority over any subsequent charges.

However, there will be times when the trail of the fraudulent proceeds goes cold, and all the victim is left with is a judgment against a company or individual with no assets to their name. In that situation, the Guernsey courts have demonstrated a willingness to entertain a *Pauline* action.

The Royal Court acknowledged the availability of a *Pauline* action in *Flightlease Holdings (Guernsey) Ltd v International Lease Finance Corporation* (Guernsey Judgment 55/2005), which cited with approval the Royal Court of Jersey's decision in *In re Esteem Settlement* (2002) JLR 53. In essence, a *Pauline* action provides a remedy to a creditor to set aside an agreement between its debtor and a third-party recipient, which was made to defeat the interests of that debtor's creditors. It is a restitutionary remedy, and so does not result in the plaintiff being awarded damages.

Where a *Pauline* action can be very useful is where a debtor has deliberately transferred all of its assets, or at least enough to render the debtor insolvent, in a blatant attempt to defeat a creditor enforcing its judgment. Unlike many other restitutionary claims, a *Pauline* action does not require the creditor to have an equitable interest in the transferred assets.

The availability of the *Pauline* action in Guernsey is important for creditors as the Companies (Guernsey) Law, 2008 (the Companies Law), which contains the statutory provisions for insolvent companies, does not currently contain an equivalent to section 423 of the UK Insolvency Act, 1986 (that is, the statutory remedy for the court to set aside a transaction defrauding creditors).

However, the Companies Law does provide a statutory civil remedy where the business of the company was carried on with the intent to defraud its creditors. This remedy is available to a liquidator, creditor or member of the company against any person knowingly involved in the conduct – "person" is not limited to, but will invariably be, a director of the company. The limitation with this remedy is that the Royal Court can only order that the person contribute to the company's assets – if that person is a "man of straw", then the Royal Court's award will be pyrrhic.

It is also a useful tool where a debtor may have transferred assets into a trust at a time when he knew, or ought to have been aware, that he was unable to pay his debts. The Royal Court can make an order that will have the effect of setting aside the trust, leaving the funds available for enforcement against the settlors' debts.

Following judgment, a judgment creditor has three years to enforce a default judgment, or six years to enforce a judgment obtained after trial or by consent, with those periods being renewable for a further period on application to the Royal Court.

The principal enforcement procedure available to a judgment creditor is an *arrêt* execution. HM Sheriff seizes the judgment creditor's moveable property, which (if the judgment is not satisfied beforehand) is sold by court-ordered auction with the proceeds distributed amongst all creditors.

A judgment creditor may also commence *saisie* proceedings (another remedy derived from customary law) before the Royal Court for the vesting of the judgment debtor's land situate in Guernsey. *Saisie* is a procedure with a number of formal steps, and requires the marshalling of all the creditors to determine the priority of their claims.

The Royal Court also has the power to register foreign judgments under the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957. However, that law is limited as currently it applies only to the judgments of the superior courts of the United Kingdom and its Crown Dependencies, Israel, the Netherlands, the former Netherlands Antilles, Italy and Surinam. Registration requires an application to the Royal Court, and the grounds of opposition are very limited. If granted, the judgment may be enforced in the same way as a Guernsey judgment.

If a foreign judgment was obtained in a jurisdiction not covered by the above law, then the foreign judgment creditor must effectively sue on the debt by issuing fresh proceedings in Guernsey. Although, the grounds for defending such an action are again limited – the judgment creditor is not required to re-litigate the substantive claim. If successful, then the claimant will be awarded a Guernsey judgment.

Lastly, and although not strictly a debt collection regime, a creditor can apply to the Royal Court for the winding up of a debtor company. If the debtor is an insolvent individual, he or she can be declared *en désastre* by the Royal Court, with all creditors sharing in the proceeds of the sale of the available assets. *Désastre* is not the same as a bankruptcy order, and the debtor is not discharged from his or her liabilities – the creditors can continue to pursue the debtor if more assets become available in the future.

Anti-money laundering regime

On the criminal side, it will come as no surprise that fraud is a criminal offence in Guernsey, both under the customary law and the codified offences contained in the Fraud (Bailiwick of Guernsey) Law, 2009.

As a result, Guernsey's anti-money laundering regime is a key weapon in the fight against fraud (both locally and internationally). This is particularly so as the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the POCL), being Guernsey's principal anti-money laundering legislation, applies a dual criminality test in determining criminal conduct caught by that law. That is, an act done legally in a foreign jurisdiction will be deemed criminal conduct for the purposes of the POCL (and, importantly, the money laundering offence) if it would be illegal to do that act in Guernsey.

The POCL created three significant criminal offences, namely:

- concealing or transferring proceeds of crime from criminal conduct;
- assisting another person to retain the proceeds of criminal conduct; and
- acquisition, possession or use of proceeds for criminal conduct.

The proceeds of crime includes a broad catch-all definition of property, situated in or out of Guernsey, which arises "*directly or indirectly, in whole or in part*" from criminal conduct.

There is an exemption from criminal liability under the POCL offences if, before handling (or assisting in handling) criminal property, a person makes a disclosure of the relevant law enforcement agency, in the form of a suspicious activity report (SAR). In addition, there is a specific defence to the acquisition, possession, offence, where a person obtains criminal property for adequate consideration.

The POCL contains a wide range of investigatory and enforcement powers, which are available to Guernsey's prosecuting authorities. These include the

power to require the production of documents, and to seek from the Royal Court restraint orders over property, customer information orders and account monitoring orders.

Following the conviction of a person within the Bailiwick, the POCL gives the Royal Court wide powers to confiscate property (which was most likely secured pre-conviction by a restraint order) and to enforce that order. Further, the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Enforcement of Overseas Confiscation Orders Ordinance, 1999 provides the statutory framework for the enforcement of foreign confiscation orders by the Royal Court as if they were a domestic confiscation order.

However, in practice, where fraud is concerned, the authorities usually utilise the provisions of the Criminal Justice (Fraud Investigation) Bailiwick of Guernsey Law, 1991 (the Fraud Investigation Law), which provides them with considerably stronger investigative powers, in particular:

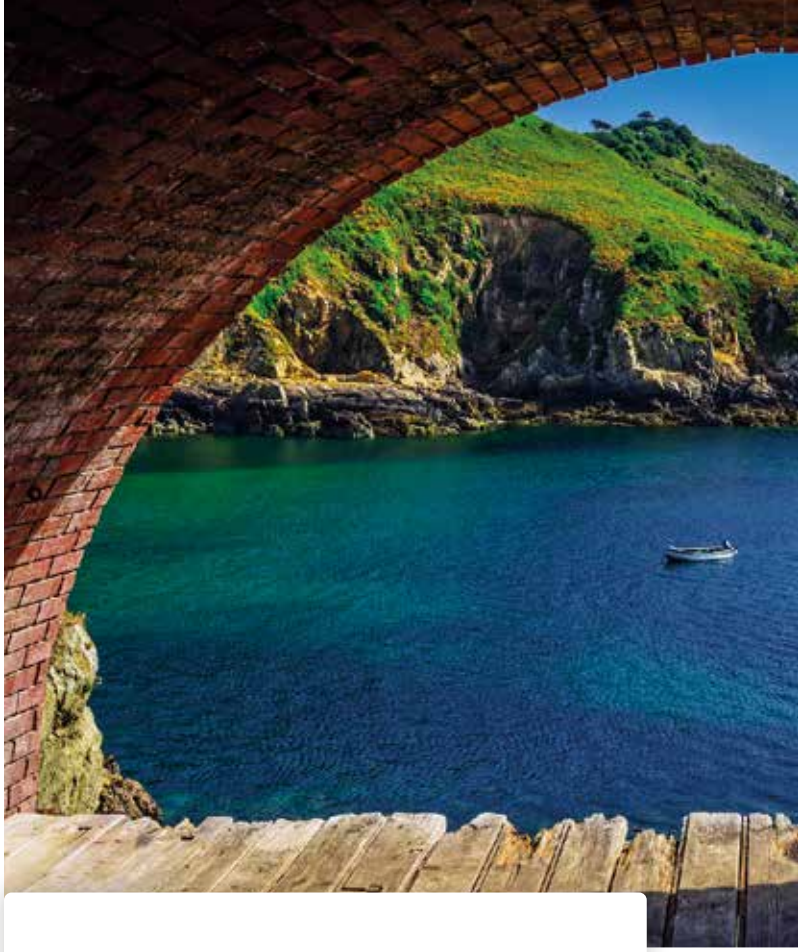
- the POCL deals with the proceeds of crime only whereas the Fraud Investigation Law is directed at the crime itself;
- under the Fraud Investigation Law, the person producing the disclosed documents may be compelled to explain them (or, if he cannot produce the documents, to state where they are), whereas under the POCL there is no power to compel explanation; and
- the Fraud Investigation Law empowers the authorities to issue a notice to attend, answer questions and provide information if there is reason to believe that the person has such knowledge or information. The POCL, however, requires an application to the Bailiff for an order to produce information or documentation only where there is an investigation into whether a person has benefitted from criminal conduct or to the extent or whereabouts of the proceeds of criminal conduct.

Finally, Guernsey's anti-money laundering arsenal is bolstered by its civil forfeiture regime. This provides Guernsey's authorities with non-conviction-based remedies to seize, detain, freeze, confiscate and have forfeited money that is the proceeds of, or is intended to be used in "*unlawful conduct*", coupled with investigatory powers similar to those under the POCL.

Guernsey's civil forfeiture regime is, as the name denotes, a civil procedure to which the lower standard of proof applies, being the balance of probabilities. As a result, the authorities are provided with a useful avenue to investigate and confiscate monies where they cannot prove an offence to the criminal standard of proof (that is, beyond reasonable doubt).

In addition, Guernsey's civil forfeiture regime can be beneficial to the victims of a fraud, as discussed later in this chapter.

Guernsey's civil forfeiture regime was revised and modernised last year, when the Forfeiture of Assets in



Civil Proceedings (Bailiwick of Guernsey) Law, 2023 came into force on 26 April 2024. This new legislation is discussed in the section on recent developments below.

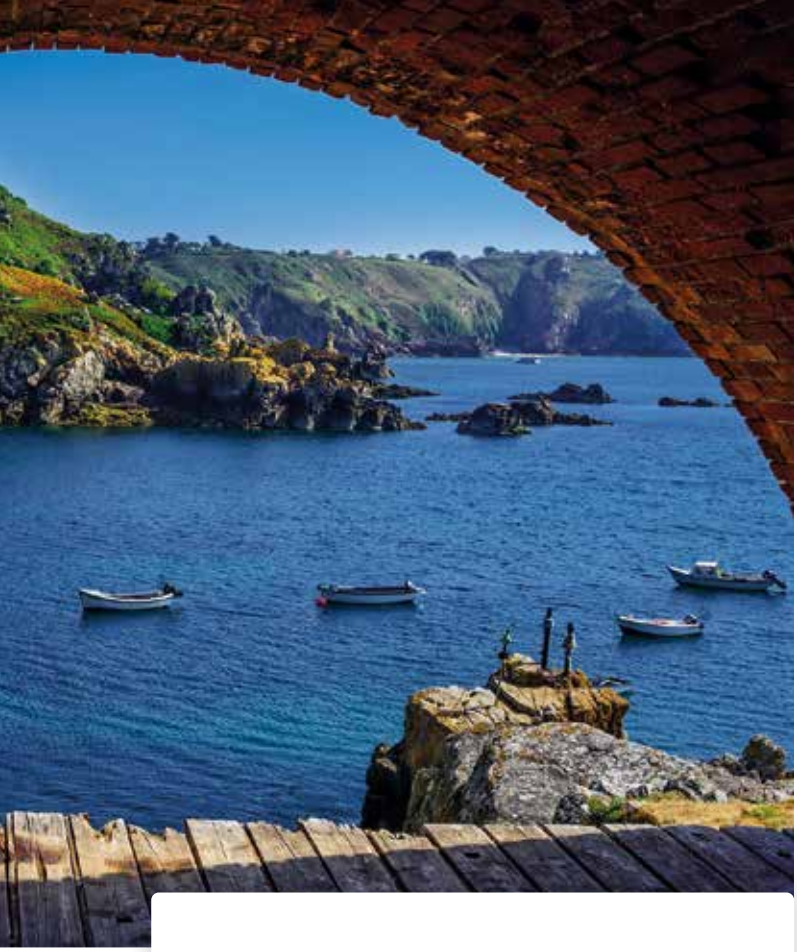
III Case triage: main stages of fraud, asset tracing and recovery cases

The main stages of civil fraud and asset recovery in Guernsey reflect those in most other jurisdictions that have an adversarial system of litigation.

Civil fraud and asset recovery proceedings can take a number of forms – from a substantive fraud action in the Guernsey courts, to applying for disclosure orders or a mirror injunction to assist foreign proceedings, or enforcing a foreign judgment/arbitral award against Guernsey assets. Each of those various actions will have their own procedure and considerations, and it is outside the scope of this text to deal with each scenario. Rather, the stages below relate to fraud proceedings commenced in the Guernsey courts, but many of those stages will also apply to the other possible forms of action.

The first stage is pre-action, which is largely evidence gathering from available resources – both the information and documents held by the claimant and any other publicly available resources. This is the collation of the necessary evidence required to either commence the substantive action or, at the very least, sufficient evidence in order to apply for pre-action disclosure orders.

Unlike some other jurisdictions, Guernsey does not have a codified pre-action protocol, and so a plaintiff



can commence proceedings without first sending a letter before action. However, in practice, such a letter will usually be sent, as there is an expectation by the Guernsey courts that it will be.

Of course, in fraud cases, a pre-action letter may not be sent for risk that it will "tip off" the defendant and assets dissipated, at least not until some form of injunction is in place. This brings us to the second stage of fraud cases in Guernsey, which are disclosure orders and injunctions.

As discussed in the previous section, claimants in Guernsey can avail themselves of *Norwich Pharmacal* and/or *Bankers Trust* orders to identify the correct defendant and where proprietary funds have gone. These orders are often brought as a precursor to an injunction, once the wrongdoer and the location of the funds are known.

At the time an injunction application is brought, substantive proceedings will have been brought or will be soon after. Proceedings are commenced in Guernsey by way of summons, which is served on resident defendants by HM Sergeant. Given the nature of Guernsey's business, the defendant is often domiciled in another jurisdiction, which includes the United Kingdom, requiring the Royal Court to first grant leave to serve a summons out of the jurisdiction.

In order to obtain leave to serve, a defendant must be out of the jurisdiction. This is a fertile area for satellite litigation, which can greatly delay the substantive action, as a determined and well-funded foreign defendant can seek to challenge jurisdiction.

Nevertheless, the Guernsey courts have often expressed the view that if a foreign defendant has decided in the past to avail himself of the advantage of using a Guernsey-based structure, he should not be allowed to wriggle out of being answerable to Guernsey courts.

As for criminal fraud proceedings, these are commenced by the Law Officers of the Crown (being Guernsey's prosecutorial authority) (the Law Officers) and follow the common criminal procedure of charge, plea, trial and sentence. Following conviction and upon sentencing, the Law Officers can apply for confiscation of the proceeds of the crime under the POCL, as discussed above.

The potential interplay between civil and criminal proceedings for fraud is considered in the next section.

IV Parallel proceedings: a combined civil and criminal approach

Unlike other jurisdictions such as England and Wales, it is generally accepted that there is no right to a private prosecution in Guernsey. All criminal prosecutions are conducted by the Law Officers.

As a result, the most a victim of fraud (or their advocate) can do is make representations to the Law Officers that the offender should be prosecuted criminally. The victim will have no control over the criminal prosecution, in particular the evidence that may be adduced. However, the question that arises is whether to bring civil proceedings simultaneously, or await the outcome of the criminal trial.

One important consideration for a victim is the impact that civil proceedings may have on a confiscation order under the POCL, made upon sentencing a convicted fraudster. If a victim has not commenced, and does not intend to commence civil proceedings, then the Royal Court has a duty to impose a confiscation order over the fraudster's property. That order will then be realised, with the proceeds going to Guernsey's general revenue and not the victim.

However, if a victim has brought or intends to bring a civil action, then the Royal Court only has power and not a duty to impose a confiscation order and, if it does, has a discretion to take into account a civil award. These provisions in the POCL are obviously designed to allow a victim a first bite of the offender's assets by way of compensation.

Therefore, a decision will need to be made on timing. If the claimant starts civil proceedings first and subsequently seeks to persuade the Law Officers to bring criminal proceedings, there may be a temptation for the Law Officers to await the outcome of the civil action. It may be prudent to persuade the Law Officers to commence criminal proceedings and, as soon as these are underway, commence a parallel civil

action. Also, it should be borne in mind that under Guernsey law and rules of evidence, a criminal conviction for fraud will be admissible in civil proceedings of the fact of that conviction.

Accordingly, a claimant may be well advised to have commenced civil proceedings to ensure that the Court takes them into account in deciding to impose a post-conviction confiscation order (and, if so, in what amount).

Further, if moneys have been seized and are to be forfeited under the Guernsey's civil forfeiture regime (see above), then a victim may apply to the Royal Court for those monies if they (or property representing those monies) belong to the victim. There is no guarantee that the Law Officers would pursue the civil forfeiture route but, if they did, then this avenue may be attractive (and arguably more cost effective) to a victim of fraud who is likely to have a proprietary interest in the monies seized. Although, please note the amendments to the Civil Forfeiture Law as discussed in the section on recent developments below.

V Key challenges

The extent of any challenges facing a victim of fraud will depend on how sophisticated the fraudster has been especially in covering his tracks. Generally, it follows that fraudsters using offshore structures will indeed be sophisticated and often have used many different jurisdictions – thus creating a structure of smoke and mirrors. Furthermore, the digital age has facilitated the ability of fraudsters to spread the schemes like a web across the globe.

This is further compounded by the use of cryptocurrencies, which are tougher to trace, together with darknet inscription technology, which utilises a number of intermediate servers to mask the user's real identity.

Despite all of these more recent challenges, the main difficulty for the victim usually continues to be having access to the funds, resources and stamina needed to pursue the claim. Inevitably, it is likely that the victim is already low on funds by reason of the loss arising from the fraud. The victim may be required to fund expensive professional advice and court proceedings over a number of years. Unfortunately, in Guernsey, lawyers remain prohibited from having a financial interest in the outcome of a case for their client so arrangements such as conditional fee agreements are not possible.

However, in recent times, litigation funding has found traction in Guernsey, which is discussed in the section on recent developments below.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

It is common when tackling modern fraud that the fraudsters' footprints can be found across multiple jurisdictions, requiring the engagement of different lawyers and courts and pursuing a joined-up strategy between all of those jurisdictions. Modern fraud is "a patron of many countries but a citizen of none".

For well over 30 years, the Guernsey judicial system has recognised the need for it to be fully up to date in the global processes for ensuring that Guernsey does not become a "black hole" into which fraudsters can hide away their proceeds. The Guernsey courts have been quick to adopt all the usual mechanisms to assist the *Mareva* injunctions, disclosure orders, *Norwich Pharmacal* orders, *Anton Piller* orders – all pre-action

and may include gagging orders if necessary. It is also commonplace for the Guernsey courts to grant, in effect, orders in aid of other jurisdictions, particularly upon receipt of letters of request from those jurisdictions.

Guernsey has also developed the principles arising from the common law concerning the characterisation of constructive trusts over assets that may be held in the possession of a relatively innocent third party, but that nevertheless, in law, belong to the victim.

So far as international conventions are concerned, and arising from Guernsey's position as a Crown Dependency, it looks to the United Kingdom to be responsible for its international relations. The result is that Guernsey rarely enters directly into international treaties or conventions, but has their effect extended to it by reason of the UK's participation. For example, the Hague Service Convention and the New York Arbitration Convention both extend to Guernsey.

On the criminal side, a number of international conventions have been extended to Guernsey, including the Council of Europe Convention on Mutual Legal Assistance in Criminal Matters, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, and the United Nations Convention against Corruption.

VII Technological advancements and their influence on fraud, asset tracing and recovery

Investigation and asset tracing for large-scale, multiple-jurisdiction fraud litigation is rarely undertaken without the use of increasingly sophisticated software. The lawyer advising the victim will have a whole new range of experts familiar with the investigations needed using modern technology.

In particular, the use of artificial intelligence has proved very effective, with specialist service providers offering to track down both the current whereabouts of the fraudster and the possible site of assets in financial institutions around the world. The larger accountancy firms offer a wide range of services in this field, and all of the "Big Four" accountancy firms (together with many others) have offices established in Guernsey.

VIII Highlighting the influence of digital currencies: is this a game changer?

Although cryptocurrency is by no means new, it has certainly seen a greater uptake over the years – particularly with the surge in value of certain currencies over the last couple of years. As with the increased popularity of any data-based product, particularly one such as cryptocurrency, which is largely unregulated, this has attracted the attention of cyber criminals. Cryptocurrency has long been viewed with scepticism and mistrust by regulators and law enforcement agencies in reputable jurisdictions, given its potential to be used for money laundering. The speed at which cryptocurrency can change hands in an unregulated environment has proved beneficial to fraudsters.

Nowadays, blockchain technology utilised by cryptocurrencies purports to create safeguards against fraud, due to its non-centralised nature. Transactions are checked and verified by an array of different computer systems that are not on the same network, which makes it very difficult for fraudsters to manipulate or falsify data. Also, blockchain technology provides a permanent record of transactions, making it easier to trace currency movements.

However, blockchain technology is not impenetrable to fraudsters, and one risk is what is known in the industry as a "51% attack". This occurs when a person or organisation gains control of more than 50% of a blockchain's "hashing power" (i.e., the combined computational power of the cryptocurrency network). The malicious attacker then has the ability to block the confirmation of new transactions or change the ordering of new ones – in other words, the attacker can rewrite sections of the blockchain and reverse their

own transactions so that the same cryptocurrency can be used twice or more (known as double-spending).

Cryptocurrencies are also used by fraudsters and scammers as bait, by creating sham currencies and propping the value by speculative investment. This attracts more investors and the price continues to increase, until it finally crashes – by which time the fraudster has cashed out and fled. The traditional tools of asset recovery have struggled to keep up with the fast-paced world of cryptocurrency, although there are indications that it is catching up.

In the decision of *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited* [2019], the English High Court was prepared to grant a worldwide freezing order against the unknown fraudsters who had stolen and dissipated cryptocurrencies through various exchanges, together with a disclosure order against the cryptocurrency exchanges to identify the fraudsters. This had been the first time an English court had ordered such disclosure from a cryptocurrency exchange located outside the UK. Although this has not yet been considered by the Guernsey courts, it is expected that the English decision would be persuasive.

Guernsey has yet to see any material cases arise from the fraudulent use/transfer of digital assets but the industry itself continues to develop with funds being established with digital asset bases. As the jurisprudence develops worldwide in terms of the ability to investigate, freeze and recover misappropriated assets, it is expected that the Royal Court will continue to adopt suitable persuasive case law from other common law jurisdictions to ensure victims are protected.

IX Recent developments and other impacting factors

Litigation funding

A most important development globally in recent years has concerned litigation funding. It is probably fair to say that it was rarely seen in Guernsey until recently, given concerns that it may breach the rules against champerty and maintenance, where a third party has a financial interest in the outcome of any judgment.

The Royal Court finally addressed this issue in a decision in 2017 in *Providence Investment Funds PCC Limited and Providence Investment Management International Limited*. The outcome of that case, which considered the use of a litigation funding agreement by joint administrators, was that litigation funding can be used providing the terms of the agreement did not give the funder "control" of the litigation. In *Providence*, the Court held that the agreement did not give the funder control even though it required the joint administrators to follow the legal advice of a funder's lawyers and, in addition, to consult with the funder.

The result is that litigation funders are now active in litigation conducted in Guernsey and victims are recommended to shop around for the best deals.

Insolvency

Other major developments have occurred in the area of insolvency. In January 2020, the States of Guernsey approved the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020. That ordinance was designed to further enhance Guernsey's reputation as a robust jurisdiction for restructuring and insolvency. The changes came into force on 1 January 2023 and include the introduction of new powers for liquidators, who will be able to compel the protection of documents from former directors and officers and to appoint an Inspector of the Court to examine them. The changes present a significant "beefing up" of the statutory investigatory powers available to insolvency office holders in Guernsey, which will be a vital tool in the investigation of wrongdoing and subsequent recovery action.

In addition, the ordinance introduces a formal statutory remedy by which office holders will now be able to pursue recovery of transactions at an undervalue and extortionate credit transactions. Another important change is the ability to wind up a non-Guernsey company. It was felt that this was necessary in the light of Guernsey's non-status of an international finance centre providing administration and asset management services to many foreign companies. This change brings Guernsey into line with other major jurisdictions

and will allow the Royal Court to apply the Guernsey regime to foreign companies where they have a sufficient connection.

Civil forfeiture regime

In April 2024, the Forfeiture of Assets in Civil Proceedings (Bailiwick of Guernsey) Law, 2023 (the Civil Forfeiture Law) came into force, repealing and replacing the previous 2007 legislation – which, itself, had been amended in 2023 to modernise Guernsey's civil forfeiture regime.

Prior to the (now repleaded) 2007 legislation in Guernsey, and unlike its English counterpart, there was no mechanism under the POCL whereby the authorities are deemed to consent to a transaction if they take no action within a certain period (as in England). The upshot was that there was the possibility that funds could be effectively "frozen" if a SAR was lodged and the authorities did not provide consent to the funds being accessed by their owners or a third party.

In stark contrast to the English regime where the responsibility of taking action (and quickly) falls squarely on the authorities' shoulders, the Guernsey authorities could simply refuse to provide their consent and then do nothing more. The customer (whose funds are the subject of the SAR) was then left with the choice of bringing a "private law action" against the financial institution holding the funds, which usually involved the customer having to prove that the funds were not the proceeds of crime.

The amendments to the civil forfeiture regime implemented in 2023 provided a mechanism for the authorities to apply to the court for a forfeiture order in respect of monies the subject of a SAR where certain requirements are met, in particular that a request for consent to deal with the monies has been refused by the authorities over 12 months ago. The customer then has opportunity to satisfy the court (on the balance of probabilities) that the monies are not (in whole or part) the proceeds of unlawful conduct.

The amendments were designed to make life easier for the authorities, who previously had to bear the onus of proof in civil forfeiture applications, and who often struggled in obtaining the evidence to provide that monies were the proceeds of unlawful conduct. The reverse burden of proof under the amendments puts the onus on the customer to demonstrate the source of their assets – given they are the ones with access to the information and documents to do so. Of course, this is provided that the customer appears at court to oppose the forfeiture application. If they do not, the amendments provide that the court shall make the forfeiture order.

The new Civil Forfeiture Law, which came into force in 2024, incorporated the 2023 amendments but also built on them. In particular, the new law expanded the types of unlawful conduct caught and the property which can be forfeited, and introduced a forfeiture procedure by way of notice (without the need for court involvement) where no objection is received. In addition, a request from another jurisdiction to enforce a foreign forfeiture order in Guernsey was previously restricted to a limited number of specified jurisdictions. Under the new Civil Forfeiture Law, any jurisdiction can now seek assistance to enforce such an order in Guernsey, subject to certain conditions.

Further, one feature of the 2023 amendments which were incorporated into the new Civil Forfeiture Law is a shift in the burden of proof. Prior to the 2023 amendments, the burden of proving that property was the proceeds of unlawful conduct rested on the shoulders of the Guernsey authorities seeking forfeiture from the Guernsey courts.

However, under the current legislation, the Guernsey court must make a forfeiture order unless the opposing party (usually the owner of the assets) satisfies the Guernsey court that the property is not recoverable. The parameters of that burden, and how it is dealt with practically in proceedings, was considered by the Royal Court of Guernsey in its decision in *His Majesty's Comptroller v Fidelity Management and Royal Bank of Canada (Channel Islands) Limited* [2025] GRC004. **CDR**

Carey Olsen has one of the largest dispute resolution and litigation teams in the offshore world. We represent clients across the full spectrum of contentious and semi-contentious work.

We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

From mediation to trial advocacy, we guide our clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts. We have also represented clients before the Privy Council. Many of our cases have established judicial precedents that are referred to in jurisdictions around the world.

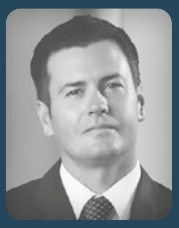
We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

www.careyolsen.com

CAREY OLSEN

David Jones is an advocate and head of the restructuring and insolvency team in Guernsey. He gives specialist advice in relation to complex restructurings and formal insolvencies in contentious, non-contentious and multi-jurisdictional matters. David has been involved in many of the largest insolvencies involving Guernsey entities, ranging from investment funds to global retailers. His practice extends to tracing and recovering assets on behalf of office holders and other stakeholders. David is a member of the Insolvency Lawyers' Association and R3 and sits on the Young Members Committee of INSOL International. He has also been appointed as a member of Guernsey's first-ever Insolvency Rules Committee. He is also a Channel Islands' Committee member for ThoughtLeaders4 FIRE Committee (Fraud, Insolvency, Restructuring and Enforcement).

david.jones@careyolsen.com



Simon Florance is counsel to the dispute resolution and litigation team specialising in commercial litigation and regulatory matters. Simon's experience and expertise encompass a wide range of areas including complex contractual disputes, shareholder and investor actions, cross-border litigation, fraud and asset tracing, freezing orders, contentious banking and finance issues, and property and construction disputes. Simon also advises on regulatory matters including anti-money laundering, data protection, directors' duties and renewable energy. Simon was admitted as a solicitor to the Supreme Court of New South Wales, Australia and to the High Court of Australia in 1994, and as a solicitor in England and Wales in 2017. Simon was admitted as an advocate of the Royal Court of Guernsey in 2019.

simon.florance@careyolsen.com

John Greenfield is a consultant for the dispute resolution and litigation group in Guernsey, where he was previously Managing Partner and head of Litigation. John undertakes the complete range of major litigation and advocacy work, including fraud and asset tracing, multi-jurisdictional disputes and commercial and trust litigation. He has been counsel in many of the major litigation cases before the Royal Court of Guernsey and the Guernsey Court of Appeal, and has appeared as counsel in the Privy Council. John was a member of the Committee that completely overhauled Guernsey's civil procedure in 2008 and is now part of the new review Committee in 2021. He is the Guernsey member of the UK Fraud Advisory Panel, a founder of ICC FraudNet and a Notary Public.

john.greenfield@careyolsen.com