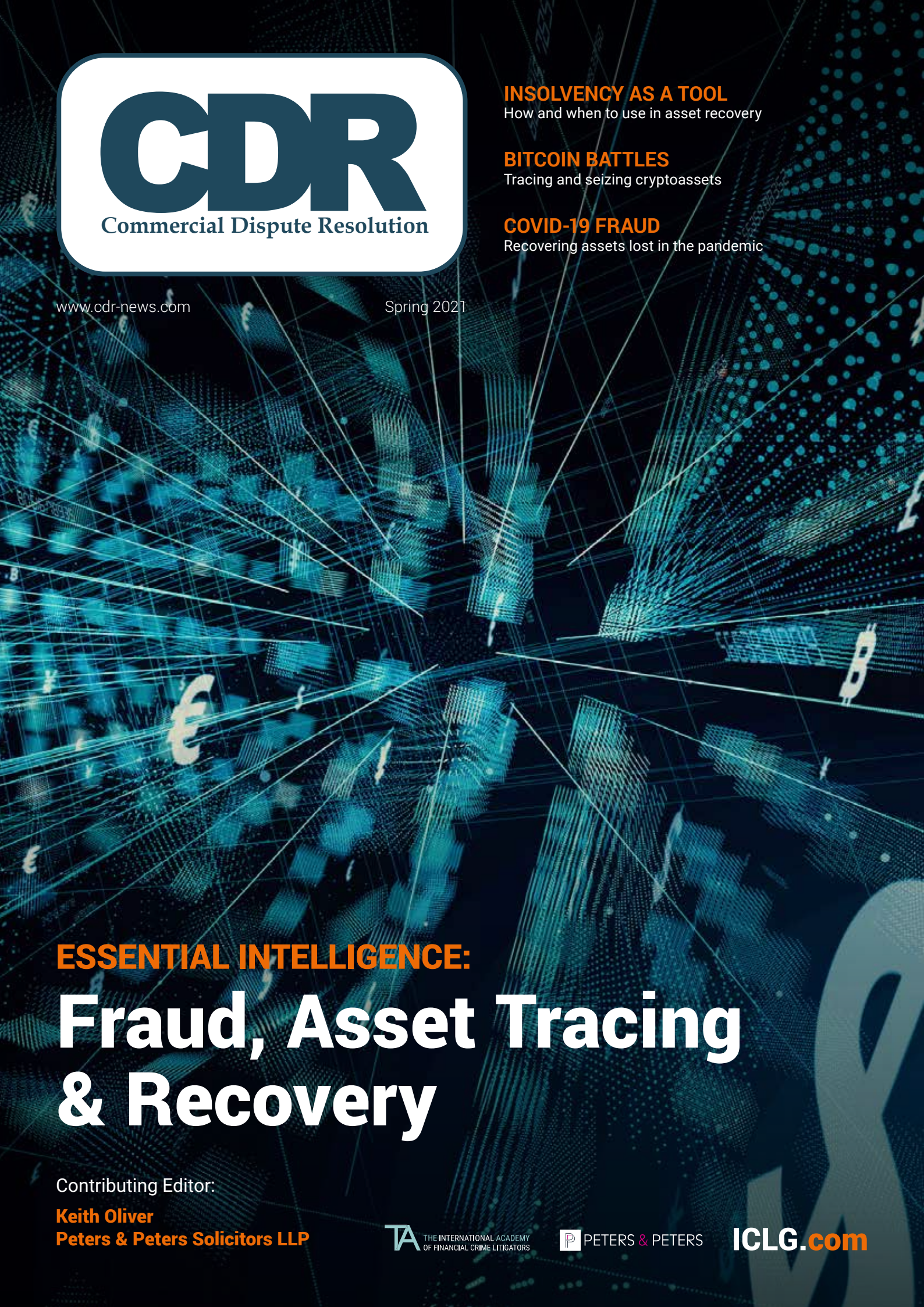

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Ireland has a sophisticated and respected courts system which is experienced in dealing with complex cross-border disputes. As a member state of the EU, Ireland benefits from the co-ordinated civil litigation procedures available under the Brussels I Recast Regulation (1215/2012) and other EU law regimes, and the large number of global companies locating their EU operations here often places Irish entities at the centre of global investigations. This is likely to increase in the wake of the UK's departure from the EU (Brexit).

The Commercial Division of the High Court has dealt with many cross-border claims and applications in aid of fraud litigation in other jurisdictions. This chapter provides an overview of the system, remedies available and the approach of the Irish courts to fraud and asset recovery litigation.

1 Legal Framework and Statutory Underpinnings

Ireland, as distinct from the separate legal jurisdiction of Northern Ireland, has a common law legal system with a written constitution and a Commercial Court experienced in dealing with complex litigation. Understanding the legal parameters for dealing with investigations into suspected fraudulent conduct is essential.

Criminal Justice (Corruption Offences) Act 2018

Ireland's anti-corruption laws were recently overhauled through the Criminal Justice (Corruption Offences) Act 2018. This legislation consolidated existing law and introduced a number of new criminal offences, closely informed by the UK's Bribery Act 2010, including active and passive corruption and corruption in relation to office, employment, position or business.

The Act also provides for a new corporate liability offence which allows a corporate body to be held liable for the corrupt actions of *inter alia* any of its directors, managers, secretary, employees, agents or subsidiaries, with the intention of obtaining or retaining business, or an advantage in the conduct of business, for the body corporate.

Some provisions have explicit extra-territorial effect, so that Irish persons, companies and other organisations registered in Ireland which commit acts outside Irish territory which would constitute an offence if committed within Irish territory may be prosecuted.

As a member of the EU, Ireland is subject to legislation on the internal market which often

carries with it additional extra-territorial considerations. The Criminal Justice (Theft and Fraud Offences) Amendment Bill 2020 is a recent example of such considerations. Transposing Directive (EU) 2017/1371, the Bill will establish a new offence of fraud affecting the financial interests of the EU, as well as bolstering corporate liability for offences committed by employees and personnel acting in the interests of a company. It is expected to be approved by the Irish legislature (Oireachtas) in early 2021.

Regard should also be had to false accounting (Section 10 of the Criminal Justice (Theft & Fraud Offences) Act 2001) and offences relating to the falsification of company books and documents under the Companies Act 2014, and to the low threshold for mandatory reporting of information relating to suspected offences under Section 19 of the Criminal Justice Act 2011, which includes a range of different financial and corruption offences.

Anti-money laundering

EU legislation has had a significant impact on the anti-money laundering and counter-terrorist financing framework in Ireland. Transposition of the Fifth Anti-Money Laundering Directive (MLD5) (EU) 2018/843 is progressing through the second stage of the legislative process as the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020. The Bill groups together individuals working in industries susceptible to money-laundering risk to create a new category of 'designated person'. Prior to establishing a business relationship with certain clients, designated persons will be required to adhere to strict Customer Due Diligence (CDD) measures, including establishing relevant beneficial ownership information. Additional CDD requirements will apply to high-risk third countries. The Bill further proposes a system of compulsory registration for virtual asset service providers governed by the Central Bank of Ireland, the country's first move to regulate non-fiat currencies. With moves by global companies such as Facebook towards setting up their own digital currencies, Ireland is at the centre of this new regulatory regime and is likely to be a forum for related disputes. Despite delays to the transposition of some provisions of MLD5, the resultant Bill is expected to be signed into law in 2021.

Hacking and cybercrime offences

Cybercrime is an increasing concern for businesses and the Criminal Justice (Offences Relating to Information Systems) Act 2017 was specifically targeted at hacking and cybercrime. The Act created new cybercrime offences and transposes the requirements of the EU Cybercrime Directive (Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems). It also addresses the cross-border impact of cybercrime by contributing to a harmonious approach to the issue across the EU.

Mutual legal assistance (MLA)

Applications for mutual legal assistance (MLA) are also commonly brought in Ireland again because of the large number of online/digital content providers domiciled here. The recent *Microsoft* litigation in the United States, which ultimately found that Microsoft's Irish entity was not required to produce information to US enforcement authorities other than through formal mutual assistance channels, leading to the CLOUD Act, is a case in point.

Criminal Assets Bureau (CAB)

Seizure of unexplained wealth has long been a focus of law enforcement in Ireland and the Criminal Assets Bureau (CAB) brings together law enforcement officers, tax and social welfare officials, as well as other specialist officers from different organisations. The CAB is an independent body corporate rather than part of the Irish police (*An Garda Síochána*) and has power to take all necessary actions in relation to seizing and securing assets derived from criminal activity. It is an investigating authority rather than a prosecutor (*Murphy v Flood* [1999] IEHC 9).

The CAB has many of the powers normally given to *An Garda Síochána*, including search warrants and orders to make material available to the CAB. In addition, the CAB enjoys extensive powers of seizure in respect of assets which are the proceeds of crime and can apply *ex parte* to the High Court for short-term 'interim' orders on the civil standard of proof prohibiting a person from dealing with a specific asset (Section 2 of the Proceeds of Crime Act 1996). Section 3 allows for the longer-term freezing of assets ('an interlocutory order'), for a minimum of seven years. At the expiry of seven years, the CAB can apply to transfer the asset in question to the Minister for Public Expenditure & Reform or other such persons as the court may determine.

Reporting obligations

Uncovering wrongdoing in the course of an internal investigation may give rise to a statutory reporting obligation. It is an offence under Section 19 of the Criminal Justice Act 2011 to fail, without reasonable excuse, to notify the appropriate authority where a 'designated person' has information which they know or believe to be of

material assistance in preventing the commission, or in securing the successful prosecution, of a relevant offence. 'Relevant offences' include: criminal damage; fraud; bribery; theft; company law violations; and offences relating to the investment of funds and other financial activities. The threshold is low and need not meet an evidential standard. Designated persons must be alert to this obligation as any failure to comply carries the risk of a substantial fine on conviction for individuals and entities, and/or a term of imprisonment of up to five years for relevant individuals.

A Section 19 report can be made orally but is best submitted in writing, a copy of which should be retained as a written record of the notification so that the extent/timing of the report is evident in the event of any subsequent attempt to prosecute the designated person.

Where money laundering is suspected, care must be taken to notify and to seek directions from the authorities as to the steps that the individual or entity must take in connection with the resulting criminal investigation. Tipping off in respect of money laundering is an offence.

Auditors also have strict reporting obligations under Section 59 of the Criminal Justice (Theft & Fraud Offences) Act 2001 if information of which the auditor may become aware in the course of an audit suggests that the audited entity may have committed offences of dishonesty.

The introduction of DAC6 (Directive (EU) 2018/822) in Ireland at the close of 2019 established a new category of reportable arrangement with mandatory reporting obligations for cross-border transactions which have the hallmarks of tax avoidance. The DAC6 reporting obligations operate to provide the authorities with prior warning of arrangements that may give rise to tax avoidance.

Whistleblowers

Whistleblowing reports often arise in Ireland in the context of investigations and litigation, where the conduct of specific individuals may be under scrutiny. The enhanced protection for whistleblowers under the Protected Disclosures Act 2014 aims to encourage disclosure of potential wrongdoing. The legislation gives no guidance as to how disclosures are to be investigated, but care should be taken to retain confidentiality and to avoid any steps which may be construed as penalisation of the discloser. It is essential that a defensible fact find takes place within the constitutional rubric applicable in Ireland. The potential exposure to damages for breaches of the Act is very significant.

Legal privilege

Irish law recognises legal professional privilege as a fundamental doctrine, grounded on the public policy that an individual or entity can consult lawyers and prepare for litigation in confidence. Three primary sub-classes of privilege protect communications: those evidencing legal advice (*legal advice* privilege); generated for the dominant purpose of existing or contemplated litigation or regulatory investigations (*litigation* privilege); or evidencing settlement negotiations (without prejudice privilege). A document may be either fully or partly privileged. Privilege confers an absolute immunity from production and inspection, but may be tested once asserted. A party making discovery must list on oath each individual document over which privilege is claimed.

Privilege may be waived voluntarily or if privileged documents are deployed in the course of proceedings and the benefit of privilege is generally lost once shared with a third party; although there is a mechanism for protection of privilege where privileged documents are shared confidentially for a defined purpose, on the express understanding that privilege is not waived. Reliance on certain privileged documents may result in broader waiver of privilege. Privilege may also be forfeited if it can be established that the author/creator of the documents did so for the purposes of engaging in a fraud or other illegal conduct.

Administration of justice in public

The Irish Constitution provides that justice shall be administered in public save in such special cases as may be prescribed by law (Article 34(1) of Bunreacht na hÉireann). This constitutional imperative of open justice means that hearings do not take place in chambers, and there is no precedent for the granting of gagging orders in the context of the making of orders for disclosure, for example. A recent decision of the Supreme Court may open up scope for the granting of such orders in an appropriate case. In *Sunday Newspapers Ltd. & Ors. v Gilchrist and Rogers* [2017] IESC 18, the Supreme Court considered whether a defamation action before a jury, involving highly sensitive evidence affecting a state witness protection programme, could be heard *in camera*. Finding it could on the facts, the Court said that any court must be resolutely sceptical of any claim to depart from the general principle of open justice, but where constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, then the minimum possible restrictions can be imposed to protect those interests. This decision has resulted in reporting restrictions being imposed in cases where such orders would not previously have been contemplated, including anonymisation of parties' identities in certain cases. The *Gilchrist* decision opens up the

possibility of obtaining reporting restrictions in the context of an application for disclosure by way of injunctive relief, where publicity may place the information at risk of destruction or assets at risk of dissipation.

Data protection

Data protection in Ireland is governed by the Data Protection Acts 1988 to 2018 and the GDPR, which impose a range of obligations on 'data controllers' and 'data processors' as regards how they manage the 'personal data' of EU 'data subjects'. The definition of personal data is much broader than that applicable in the US, for example, and care must be taken to ensure that international transfers of such personal data meet the requirements of the GDPR.

There is a preliminary obligation on all data controllers/processors to identify at least one of the prescribed 'legitimate grounds' permitting the lawful collection and processing of personal data. Personal data must always be relevant to the purpose for which it is collected/processed. It should also be retained only for as long as is necessary for the purpose(s) for which it was originally collected and always properly secured against unauthorised access.

Data protection should always be a central consideration, particularly where, for example, a company requires access to the personal data of clients, employees or other third-party stakeholders as part of an internal investigation/audit or an external request from a third party (e.g. a regulator/investigative body). In most cases, data controllers/processors are required to first obtain either the express or implied consent of data subjects before collecting/processing their personal data, especially sensitive personal data which in virtually all cases requires express consent. Where, for example, a company is investigating a suspected fraud, one of a number of exceptions may apply permitting the requisite processing for the purpose of obtaining legal advice in connection with anticipated legal proceedings, or for the purposes of preventing, detecting or investigating suspected offences. For non-sensitive personal data, processing is generally permitted to the extent that it is incidental to and necessary for the pursuit of a company's 'legitimate interests' (e.g. compliance with the terms of an employment contract or protection of its commercial/financial interests) provided that this is done fairly and proportionately. The key questions are likely to be whether the intrusion is proportionate to the need and to what extent the information needs to be disclosed to anyone other than the investigator.

The Irish Data Protection Commission (DPC) is considered the lead supervisory authority in the EU due to the number of digital content providers domiciled in Ireland. Any breaches are required to be notified within 72 hours (where feasible) and it may also be necessary to notify those data subjects affected. In December 2020, the DPC found against Twitter in the first data breach decision to be concluded via the GDPR dispute resolution procedure in Ireland.

Constitutional privacy rights also underpin data protection law in Ireland. Privacy is recognised as an unenumerated right protected under the Irish Constitution and the potential for breaches of constitutional rights should also be borne in mind when handling personal data, conducting investigations or engaging in measures such as surreptitious monitoring, filming, or other intrusive conduct as part of any investigation or in the course of proceedings.

Breach of confidence

Claims for breach of confidence tend to arise in commercial contexts stemming from the

commercial exploitation of confidential information whereby a company, for example, might sue in respect of confidentiality obligations owed to it by third parties (e.g. (former) employees, clients, or other stakeholders). Companies routinely rely on the law of confidence in connection with the removal or disclosure of commercially sensitive information by an employee. Breach of confidence has a broader remit than data protection law as it applies to all information whether or not it constitutes 'personal data'. The information must be confidential and the party possessing it must have shared it in circumstances which impute a duty of confidentiality.

A company may also be sued in respect of confidentiality obligations owed by it to third parties (e.g. (former) employees, clients, or other stakeholders). Compliance with data protection law is also likely to satisfy the company's obligations in respect of confidentiality. Where a company feels that it is necessary to disclose confidential information received from a third party to parties other than public law enforcement authorities, it should, where possible, seek the consent of the party from whom it received the information.

Seeking/compelling disclosure from third parties

Irish law provides a number of mechanisms for obtaining disclosure from third parties either in the context of existing proceedings, or in aid of foreign proceedings, or with a view to commencing proceedings.

The court will grant orders for production of documents by a non-party if satisfied that it likely holds the documents and that they are relevant and necessary and not otherwise obtainable by the applicant, subject to the applicant indemnifying the non-party in respect of the reasonable costs of making discovery. The court will generally not make such orders against entities or individuals outside the jurisdiction, although such orders may be made with the consent of the affected non-party (*Quinn & Ors. v Wallace & Ors.* [2012] IEHC 334).

A party can also apply for the disclosure of information (see Order 40 of the Rules of the Superior Court (RSC) for details of the procedural requirements relating to sworn affidavit evidence) by a non-party where such information is not reasonably available to the requesting party provided that the court is satisfied that this information would not have been otherwise obtainable. The court may, unless it is satisfied that it would not be in the interests of justice that the subject matter be disclosed, grant an order on notice to the non-party directing them to: (i) prepare/file a document documenting the information; and (ii) serve a copy of that document on the parties to the proceedings (Order 31, Rules of the Superior Courts (RSC) (as amended)).

Preservation of assets/documents

The courts will make orders for disclosure of documents as part of measures to restrain the dissipation of assets (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors.* [2013] IEHC 388; *Trafalgar Developments Ltd. & Ors. v Mazepin & Ors.* [2019] IEHC 7). Failure to comply with such orders constitutes a contempt of court, punishable by committal or attachment. The court will also take action to protect copyright by way of prior restraint in appropriate cases, for example (*EMI Records (Ireland) Ltd. v Eircom plc* [2009] IEHC 411).

Norwich Pharmacal orders

The courts will grant orders requiring the disclosure of information or documentation by a third party by way of *Norwich Pharmacal* relief in order to identify a wrongdoer (*Megaleasing UK Limited & Ors. v Barrett & Ors.* [1993] ILRM 497). In *easyJet plc v Model Communications Ltd* ([2011] (Unreported)), the easyJet board had been the subject of a viral social media campaign and sought *Norwich Pharmacal* relief against the Dublin-based PR company involved, which was ordered to produce its client's details and design materials, which confirmed that the originator of the campaign was a former shareholder of the company. Such orders are also frequently granted against internet service providers in respect of anonymous online content (see, for example, *McKeogh v John Doe 1 & Ors.* [2012] IEHC 95).

2 Case Triage: Main stages

When information about potential fraudulent activity emerges, careful consideration must be given to strategy and next steps. An internal investigation may lead to a disciplinary process, which may span different offices within an organisation and different jurisdictions, or give rise to mandatory reporting obligations. External investigations may result, with the organisation and its officers facing regulatory sanctions or criminal prosecution. Where this occurs, civil litigation is likely to arise or the organisation may need to pursue litigation to protect its own interests and that of any shareholders and to recover losses. Whether the situation is contained or becomes public, reporting obligations should inform the next steps.

The process of planning and managing an internal investigation requires careful handling. Contractual considerations are key and the organisation must operate within the law. Contracts with officers and employees, as well as an organisation's internal codes and procedures, may include terms concerning the use of material that is protected by data protection law or that falls under separate confidentiality or privacy obligations. Even where there is no statutory requirement to report matters to the authorities, a decision may be made to do so voluntarily for internal policy reasons.

Documents, particularly electronic documents, should be immediately preserved. Depending on the purpose of an internal investigation, it may be possible to rely on legal professional privilege in respect of the communications and outputs from the process. If litigation is anticipated, a legal hold should issue to ensure preservation of relevant material.

A broad range of remedies is available to an organisation in tracing and recovering misappropriated assets depending on the circumstances of each case. Proving criminal fraud can be difficult, and it may be strategically more sensible to pursue alternative approaches to asset recovery via civil litigation.

When suspected fraudulent activity comes to light, an organisation should take immediate steps to investigate. Having preserved all relevant information, it may also be necessary to interview relevant personnel and/or secretly to view material stored on a personal computer or device, or hard copy documents located in an employee's office. An organisation must always have regard to its obligations to its employees, its customers and other third-party stakeholders under data protection law and, separately, under confidentiality and privacy law. Many of these legal requirements may be satisfied by prior agreement between the organisation and the employee via a contract of employment, a separate non-disclosure agreement or relevant internal policy documentation. If searches are to be conducted against personal data, a legitimate interest assessment should be conducted under GDPR prior to conducting any searches.

A further complicating factor in respect of internal investigations is that a protected disclosure may be made, sometimes by the person or persons under investigation. Where that occurs, considerable care should be taken to ensure compliance with the requirements of the Protected Disclosures Act 2014.

Remedies

There are various remedies available to organisations in Ireland in tracing/recovering misappropriated assets. These include:

Injunctive relief

The Irish courts have broad jurisdiction to grant injunctive relief in appropriate cases where damages are not an adequate remedy and where the applicant satisfies the court that the relief sought is necessary. In urgent cases, the courts may grant temporary orders (i.e. interim relief) without notice to the other side, but the applicant must make full and frank disclosure of all relevant facts and circumstances, and any failure to do so may lead to the relief being set aside and potentially to liability for damages. The applicant for interlocutory injunctive relief must also give an undertaking as to damages and show, if challenged, that it has sufficient assets to meet the undertaking.

Proceedings in general in Ireland are in open

court and this should be borne in mind if seeking some of the remedies listed below given the risk of tipping off the other side.

Mareva injunctions

If the claimant is not claiming that it is entitled to some form of ownership of assets in the defendant's possession, but that it is unlikely to be able to recover funds from the defendant without a freezing order in respect of assets, then the freezing order sought is what is referred to as a *Mareva* injunction. A *Mareva* injunction can be a valuable pre-emptive remedy. It *"affects the assets of the party against whom it is granted, so as to prevent that party from placing such assets (save for assets in excess of any value threshold specified in the relevant order) beyond the reach of the court in the event of a successful action"* (*Dowley v O'Brien* [2009] IEHC 566 at 760 per Clarke J). Given their nature, *Mareva* injunctions are often granted *ex parte*.

Ancillary orders in support of Mareva injunctions

Mareva injunctions are often accompanied by ancillary orders to ensure their efficacy, including Asset Disclosure Orders (*Trafalgar Developments Ltd. v Mazepin & Ors.* [2019] IEHC 7), aimed at ensuring defendants fully and accurately disclose the true extent of their assets, wherever situate, and/or orders for the cross-examination of a deponent on disclosure. The High Court in *AIB plc v McQuaid* ([2018] IEHC 516) invoked its inherent jurisdiction to join non-parties to proceedings to enforce its own processes/orders. There was no requirement for any substantive cause of action to subsist against the non-parties.

Anton Piller orders

Where there is an urgent fear that the respondent may try to move assets or hide evidence of wrongdoing, the courts may also grant search orders permitting the applicant to enter premises to look for evidence of wrongdoing and to demand information from named people about the whereabouts of assets ("*Anton Piller* orders"). The jurisdiction is *"sparingly used"* (see Section 1, Legal framework and statutory underpinnings). The courts may, in conjunction with freezing orders, order a respondent to disclose the whereabouts of assets in the respondent's possession identified as being 'stolen' assets or traceable back to such assets, or of the extent and whereabouts of assets that may need to be frozen so there are funds available to meet the claim.

Norwich Pharmacal orders

See Section 1, Legal Framework and Statutory Underpinnings.

Bayer orders

In *"exceptional and compelling circumstances"* (*O'Neill v O'Keeffe* [2002] 2 IR 1), the court may restrain a respondent from leaving the jurisdiction for a limited time period and compel delivery of passports. Such orders are extremely rare and the court will qualify the restrictions as far as possible so as to balance the necessity for the proper administration of justice with the defendant's constitutional right to travel (*JN and C Ltd. v TK and JS trading as MI and LTB* [2002] IEHC 16).

Appointment of a receiver by the court

The aim of appointing a receiver before judgment is to preserve assets for the person who may ultimately be found to be entitled to those assets. The appointment of a receiver can be effective but is also an expensive and intrusive remedy. The appointment may occur in conjunction with other relief such as a *Mareva* injunction if there is, for example, a risk that a defendant may use a complicated structure to deal with their assets in breach of the injunction. This power is not limited to Irish-based assets. In the Quinn Family Litigation (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors.* [2012] IEHC 507), Ireland's specialised Commercial Court appointed a receiver over the personal assets of individual family members and later went so far as to appoint an Irish receiver over shares held by a UAE entity in an Indian company.

Where necessary, the court will appoint a receiver over future income receipts derived from a defined asset in post-judgment scenarios (*ACC Loan Management Ltd. v Rickard* [2017] IECA 245).

Orders for the detention, preservation and sale of property

In addition to the inherent jurisdiction of the court under Section 28(8) of the Supreme Court of Judicature Act (Ireland), 1877 to grant relief, Order 50 of the Rules of the Superior Courts (RSC) provides for the detention, interim custody, preservation, securing and sale of property. Some of its rules apply to property that is the subject matter of proceedings and some apply more broadly to also include property that may be the subject of evidence given in proceedings.

European Account Preservation Orders (EAPO)

The European Account Preservation Order (EAPO), applicable since January 2017, has been little used, probably because Ireland already has many procedural options available as outlined above. An EAPO is a bank account preservation order that exists alongside national preservation measures (Recital 6 of the EAPO Regulation 2014) and it prevents the transfer or withdrawal of funds up to the amount specified in the order which are held by a debtor or on their behalf in a bank account in a participating member state. It also enables the identification of relevant bank accounts by a simple online application procedure.

3 Parallel Proceedings: A combined civil and criminal approach

It is possible to pursue civil and criminal proceedings on a parallel basis in Ireland, as occurs in civil law jurisdictions, although criminal proceedings may significantly delay the ability to obtain civil remedies. Private prosecutions are not a feature of Irish asset recovery because the Director of Public Prosecutions (DPP) has the option as to whether to prosecute where a private prosecution has been commenced and effectively takes over the prosecution. In general, civil proceedings are speedier and more effective than the criminal route. Note that where criminal proceedings do arise in respect of factual matters also arising in related civil proceedings, the courts may place a stay on the civil claim until the criminal trial has concluded if there is potential for prejudice to the accused. If stolen assets are involved, it may be possible to involve the CAB.

Principal causes of action

Where a claimant has been the victim of a suspected fraud, careful consideration must be given to the nature of any proceedings that can or should be brought with a view to either recovering the assets or obtaining compensation commensurate with their value. Depending on the facts, it may be possible to show that more than one party conspired in furtherance of the fraud such as to form the basis for a conspiracy claim; there may have been a (fraudulent) misrepresentation; it may be possible to show wilful deceit or unlawful interference with the claimant's economic interests or property; or there may be grounds to seek to rescind a contract on grounds of illegality. Where it is not possible to prove fraud, there may still be the option of an action for money had and received, provided that the claimant can identify the funds and demonstrate ownership of them, or for a garnishee order, for example.

Standard of proof

The standard of proof is the civil standard, i.e. the balance of probabilities (*Banco Ambrosiano SPA & Ors. v Ansbacher & Co. Ltd. & Ors.* [1987] ILRM 669), but the gravity of an allegation and the consequences of finding that it has been established are matters to which the court must have regard in applying the civil standard (*Fyffes plc v DCC plc & Ors.* [2005] IEHC 477). Counsel should not plead fraud unless satisfied that there are cogent grounds on which to do so and it is not permissible to allege fraud in vague or general terms. There must be evidence of conscious and deliberate dishonesty, and the plaintiff must be able to show that it has suffered a loss as a result of the fraudulent conduct.

Conspiracy

As with an allegation of fraud or deceit, any conspiracy claim must be pleaded in detail, with particulars of the facts giving rise to the conspiracy to the extent that they are known. A claim of conspiracy will usually be combined with other causes of action where it can be shown that

more than one actor was involved in the events leading to the loss to the claimant. As with torts generally, the claimant must be able to demonstrate a causal nexus between the conspiracy and the loss or damage sustained. It is, of course, in the very nature of a conspiracy that facts are often concealed, so it can be challenging to meet this standard.

4 Key Challenges

Parallel civil-criminal proceedings

It is not possible to control whether criminal proceedings will impact on civil asset recovery proceedings and, as identified above, the party pursuing the claim may find that it is fixed with reporting obligations which will necessarily result in involvement by prosecuting authorities. In general, if a claim meets the Commercial Court criteria, it is possible to move civil proceedings with expedition and obtain effective remedies through seeking injunctive relief and appropriate orders. The more egregious the facts, the better from the perspective of obtaining the assistance of the courts.

Norwich Pharmacal relief – limitations

The rationale for granting a *Norwich Pharmacal* Order was discussed recently in *Parcel Connect Ltd & Ors v Twitter International Company* [2020] IEHC 279, in which Allen J opined, "even if the defendant is not legally responsible for the wrongdoing … it has nevertheless got so mixed up in the wrongdoing … as to have facilitated the wrongdoing that it has come under a duty to assist the plaintiff by disclosing the identity of the wrongdoer". In contrast to recent developments in the UK, Irish courts have shown no willingness to extend the jurisdiction, requiring clear proof of wrongdoing and strictly limiting the information gained from such an order to matters of identity, as shown in *Doyle v Garda Commissioner* [1997] IEHC 147. In *Muwema v Facebook Ireland Ltd* [2017] IEHC 69, the court refused to grant an order where the life of the implicated third party would be endangered. If foreign proceedings are already in being, the better route may be to seek disclosure orders from the Irish court in aid of those proceedings, provided that it is possible to identify data or documents that are relevant and necessary for that purpose and in the possession or power of an Irish person or entity.

Obtaining and accessing personal data

Compliance with the stringent requirements of the GDPR can be challenging in the context of an internal investigation where there are no legal proceedings in being and searches must be conducted against personal data. The better the organisation's general compliance with the GDPR, the easier it will be to move quickly in such circumstances.

Third-party litigation funding not permissible

As matters stand, it remains unlawful under Irish law for a third party to fund litigation, with the ancient rules of maintenance and champerty still effective under the Maintenance and Embracery Act 1634. The Supreme Court has recently addressed this twice (*SPV Osus Ltd. v HSBC Institutional Trust Services (Ireland) Limited & Ors.* [2018] IESC 44; see also *Persona Digital Telephony Ltd. & Anor v Minister for Public Enterprise & Ors.* [2017] IESC 27), stating clearly that such funding remains unlawful without legislation to rectify the situation. This can be a significant barrier to obtaining relief from the courts and it is hoped that the legislature will bring Ireland into line with other common law jurisdictions in this regard.

5 Cross-jurisdictional Mechanisms: Recent issues and solutions

Misappropriated assets are often hidden across national borders and require international cooperation in order to be traced properly. The Irish courts have proved to be pragmatic and responsive in the recognition of judgments and other steps which will assist the tracing of assets cross-jurisdictionally.

This pragmatism can be illustrated by reference to a bankruptcy case arising out of the financial crisis (*Re: Drumm (a Bankrupt): Dwyer, applicant* [2010] IEHC 546). The bankrupt was the former CEO of the now notorious Anglo Irish Bank Corporation. The bank sued him for repayment of substantial share loans extended to him as CEO and in respect of the alleged fraudulent transfer of a property into his wife's name. He filed for bankruptcy in Massachusetts just prior to the hearing of the Irish High Court proceedings. The Trustee in bankruptcy applied to the Irish Court for orders in aid of the US bankruptcy proceedings vesting the property in the Trustee, assisting in the realisation of any other assets and in the examination of the bankrupt in respect of all matters relating to his estate. Ms. Justice Dunne noted that there was a paucity of decisions on point. She concluded:

"We do live in a world of increasing world trade and globalisation... Whether one is talking of companies trading internationally or of individuals who have establishments in more than one jurisdiction, the fact of the matter is that businesses and individuals are infinitely more mobile than was

the case in 1770. I can see no reason of public policy for refusing to assist the trustee in bankruptcy in this case in the manner sought. On the contrary, it seems to me that it is to the benefit of the creditors of the bankrupt to facilitate the trustee in this case. One of the principal creditors of the bankrupt is Anglo Irish Bank Corporation Plc which is participating in the bankruptcy proceedings in the United States of America. There is no obvious disadvantage to the creditors in refusing to make an order in aid of the trustee in bankruptcy and on a practical basis, it would appear to be more appropriate to make such an order so that the property in this jurisdiction can be dealt with by the trustee in bankruptcy for the benefit of all of the creditors of the bankrupt."

Letters of Request

Letters of Request are a cross-jurisdictional mechanism whereby a court in, e.g., Ireland can request assistance from a court in another jurisdiction in obtaining documents and/or evidence, in support of proceedings.

Letters of Request have been used to great effect in the context of Irish conspiracy proceedings, in which neighbouring courts issued Letters of Request to the courts in Belize and the British Virgin Islands for assistance, resulting in the appointment of a receiver and the ultimate recovery of substantial assets (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors.* [2013] IEHC 388). The Evidence Regulation (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1)) applies in an EU context.

Enforcement of judgments

The Irish courts' attitude to the enforcement of foreign judgments is positive and facilitative. The enforcement of EU judgments is governed by the Brussels I Recast Regulation in respect of judgments or proceedings commenced after 10 January 2015; the Brussels I Regulation (44/2001) continues to apply to certain territories of Member States situate outside the EU. Ireland is also a party to the Lugano Convention 2007, relevant to certain EFTA Member States, and expects to be a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019, both by virtue of its EU membership.

In respect of third-country judgments, there are several multilateral treaties relevant to the recognition and enforcement of foreign judgments in Ireland. Only money judgments may be recognised and enforced at common law in Ireland and a party will generally apply for both recognition and execution if seeking the assistance of the Irish court. On the basis of respect and comity between international courts, provided the judgment is for a definite sum, is final and conclusive, and has been given by a court of competent jurisdiction, the court will generally recognise the judgment.

Grounds on which recognition and enforcement of such judgments may be refused include if Ireland is not considered to be the appropriate jurisdiction for recognition, if it is contrary to public policy, if the sums claimed have not been specifically determined, or if the court granting the judgment was not a court of competent jurisdiction (*Albaniabeg Ambient ShpK v Enel SpA* (2016) IEHC 139 and (2018) IECA 46; see also *Sporting Index Ltd. v O'Shea* (2015) IEHC 407).

Appointment of a receiver

The appointment of a receiver is also an effective cross-jurisdictional mechanism. (See also Section 2, Case triage: main stages, remedies.)

6 Technological Advancements and Their Influence

Technology is a key tool in asset recovery and machine learning systems are commonly now deployed in fraud and asset recovery litigation in Ireland both in terms of tracing assets and also managing the complex discovery exercises which tend to accompany such disputes. The Irish courts have been particularly progressive in this regard, and Ireland was the second jurisdiction globally after the US to approve the use of technology assisted review for making discovery (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors* [2013] IEHC 388). Ireland's Chief Justice is seeking to introduce technology more broadly in the courts system and it is common for documents to be presented electronically in complex litigation. The COVID-19 pandemic has certainly acted as a catalyst for the improved use of technology in the courts service, as discussed further below.

There is an emerging trend of international investigators seeking to promote intelligence software for asset recovery. As GDPR compliance is central to the effective deployment of such technology, data protection obligations must be the first port of call in assessing to what extent intelligence systems are likely to validly advance the asset recovery efforts without giving rise to data protection breaches, a consideration which comes into stark focus when dealing with cross-border asset recovery given the divergent data protection regimes in different jurisdictions and differing notions of data protection globally.

There is no doubt that the Irish courts view bitcoin and other virtual currencies as 'assets' and the Commercial Court has granted freezing orders in respect of cryptocurrency, including digital wallets: *Trafalgar Developments Ltd. & Ors. v Mazepin & Ors.* [2019] IEHC 7. The CAB has also been granted orders entitling it to seize bitcoin. We expect to see an increase in disputes involving virtual currencies as uptake increases in Ireland following the implementation of MLD5.

7 Recent Developments and Other Impacting Factors

Brexit

On 30 December 2020, the EU-UK Trade and Cooperation Agreement was signed, almost one year into the Transition Period following the UK's departure from the bloc. The move avoided a so-called 'hard' Brexit but left many uncertainties for the future of Ireland as the only EU country to share a land border with the UK. In leaving the EU, the UK effectively also left the Brussels I Recast Regulation and the Lugano Convention. Jurisdiction will now be decided by the Hague Choice of Court Convention 2005, which puts a heavy emphasis on exclusive jurisdiction clauses. The regime governing the enforcement of judgments issued prior to 1 January 2021 will still be enforceable in Ireland under the terms of the Brussels I Recast Directive. After this date, the position is less clear, but it is likely that the Hague Convention 2005 and the common law of both States will determine enforcement. All arrests made pursuant to a European Arrest Warrant prior to 31 December 2020 must still come before the UK extradition courts after which time the jurisdiction will lapse.

Ireland's common law legal system and adversarial court procedure make it a compelling jurisdiction for dispute resolution post-Brexit, given that the UK can no longer avail of the reciprocal arrangements for service, recognition and enforcement available under the EU Service Regulation and Brussels I Recast.

COVID-19

Legal systems across the world have struggled to keep up with the demands of the COVID-19 pandemic. A limited resultant benefit in Ireland has been the expedited passing of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, which allows for the electronic filing of court documents and gives every civil court the competence to sit remotely where the interests of justice allow. Business records are now admissible in court as evidence of the truth of the facts asserted, a significant exception to the hearsay rule. Statements of truth, akin to those available in the UK, may now be used in civil proceedings in place of sworn affidavits or statutory declarations to confirm a belief in the honesty of facts asserted. Statements of truth may be in electronic form, significantly modernising the current legal terrain. The courts have capitalised on these new powers with many remote and hybrid hearings already underway, such as IBRC (*In Special Liquidation) v Browne* [2021] IEHC 83.

Karyn Harty is an expert in asset recovery and fraud litigation. She has an in-depth knowledge of working with counsel in other jurisdictions, including civil law countries, as lead counsel, and securing orders and necessary sanctions in support of asset tracing including injunctions, the appointment of receivers and liquidators, findings of contempt of court, freezing orders and disclosure orders, including representing the plaintiffs in the leading cases *IBRC v Quinn & Ors* and *Trafalgar v Mazepin & Ors*.

Karyn is a member of the steering committee of the International Fraud Group and is also Co-Chair of the Forum on the International Enforcement of Judgments and Awards 2020/2021.

Karyn is well known as an e-discovery specialist and secured the first High Court approval for the use of Technology Assisted Review in inter party discovery.

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Audrey Byrne is an intelligent litigator and strategist who brings clear vision to the most complex of legal problems. Her practice focuses on complex commercial and taxation disputes and investigations, with a particular focus on international asset tracing, fraud and investigations. She frequently advises international clients (including foreign law firms) on cross-border issues and has a particular interest in white-collar crime compliance and contentious issues.

Audrey has unique experience in the Irish market of co-ordinating international litigation including fraud and asset tracing across multiple jurisdictions. Allied to this, she has extensive experience in dealing with regulatory bodies such as the Garda Bureau of Fraud Investigation and the Office of the Director of Corporate Enforcement.

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