



Recovering Your Money

A guide to civil recovery for fraud victims

Disclaimer

Dissemination of the contents of this Guide is encouraged. Please give full acknowledgement of the source when reproducing extracts in other published works.

Whilst every effort has been made in the construction of this Guide, compliance with it does not guarantee that you and/or your business will not be a victim of fraud or criminality aimed against you and/or your business.

The Fraud Advisory Panel and the contributors to this Guide accept no responsibility for any action taken by parties as a result of reading this Guide. Readers are strongly advised to seek and obtain the appropriate professional advice on the issues raised which affect them and/or their business.

Recovering Your Money

A guide to civil recovery for fraud victims

Acknowledgements

The Fraud Advisory Panel would like to thank Matthew Hall (Grant Thornton UK LLP), Paul Natali (Clifford Chance LLP) and Steven Philippsohn (PCB Litigation LLP), together with members of the Asset Recovery Working Group, for their assistance in the preparation of this publication.

Purpose of this guide

This Guide contains a summary of the options that may be available to you and/or your business as a victim of fraud when considering whether or not to seek to recover losses through civil recovery measures.

Professional legal advice should be sought to maximise the prospects of a successful recovery.

A glossary of terms used in this Guide is included in the final section.

What is civil recovery?

Civil recovery measures can be used by victims of fraud to recover their losses. The emphasis is on the victim obtaining compensation (a payment of money or transfer of assets) from the fraudster or someone else who participated in the fraud. The victim may be an individual, a business, or a Government agency.

Civil recovery is an alternative to criminal prosecution, where the matter is reported to the police, Serious Fraud Office or other Government body for investigation and possible prosecution. Compensation is sometimes also available through a successful criminal prosecution, in addition to other penalties (prison, fines and confiscation orders), but this is in the hands of the prosecution authorities and not the victim.

Why choose civil recovery?

The civil courts in many countries can grant orders to enable victims of fraud to recover their losses. These are often enforceable in other countries, enabling the victim to chase money and assets held by the fraudster in order that the victim may be compensated. In many countries it is easier to satisfy the civil burden of proof than the criminal burden of proof, thus making civil recovery desirable.

Criminal action cannot always be taken against a fraudster. This may be due to jurisdictional or resourcing issues, or because the prosecution authorities do not consider the criminal burden of proof to have been satisfied. The emphasis of criminal action is often on punishment of the fraudster and not compensation for the victim.

Developing an effective strategy to recover your losses

If you think you may be the victim of fraud, you should take legal advice before confronting the suspected fraudster. A solicitor specialising in civil recovery and fraud will be able to advise you on the risks and rewards of seeking to recover your losses – a cost/benefit analysis – and, in appropriate cases, will be able to help you develop an effective strategy to recover your losses and to put the strategy into effect. Working with a solicitor will also give you the protection of legal privilege: “confidentiality” in relation to the legal advice and strategy.

The key to successful civil recovery is to act quickly and adopt an appropriate strategy to:

- Investigate the fraud and obtain evidence;
- Freeze assets; and
- Obtain favourable recovery orders and the payment of compensation.

Investigating the fraud and obtaining evidence

It is important to quickly establish broadly what actually occurred. The full evidence may not be easily available, but often the better the quality of the evidence the more likely a successful civil recovery will be made. Evidence might be physical in nature (documents and electronic material) or witness testimony. The fraud should be investigated without notifying the fraudster. Particular issues will arise if the fraudster is an employee of your business.

Often, it will be ideal if a team of professionals with complementary skills investigates the fraud and assists you to seek a recovery order. An investigation and recovery team may comprise some or all of the following:

- An in-house team (for a business) (but if senior management failed in their duties to prevent the fraud, it may be appropriate to omit the senior management from the team)
- A solicitor
- A forensic accountant
- An insolvency practitioner
- An investigator
- A computer forensic specialist.

A key element of the investigation process will be to determine with your solicitors what legal claims are available to you and/or your business, and against whom and in which courts and countries these claims should be brought. Defendants might include the suspected fraudster and others who have assisted in the commission of the fraud. In general, it is only worthwhile pursuing defendants who you are confident have sufficient assets available against which you will be able to enforce a favourable recovery order obtained in due course.

You should secure evidence (physical and witness testimony) with the assistance of legal advice to ensure that it is admissible in any court proceedings. In particular, documents, images of computer drives, mobile phones, etc should be obtained on a forensically sound basis.

Disclosure orders may be obtained to require an organisation to release information relating to the fraud or the fraudster's financial affairs. They are a very effective and important method of investigating fraud. Many countries recognise the importance of third-party disclosure. Disclosure orders may be obtained against, for example:

- Internet service providers and telephone/courier companies, to discover the identity of a fraudster; and
- Banks, company formation agents or creditors of the suspected fraudster, to locate assets against which a subsequent recovery order can be enforced.

You should also consider taking steps to preserve remaining assets and to prevent further fraud. For businesses this may include consideration of the business's financial position and making notifications to third parties such as your insurers, regulators or the police. It may also be necessary for a business to establish that it remains solvent.

Freezing assets

Freezing orders can be obtained to prevent suspected fraudsters from accessing their assets. The assets should remain frozen until you have had the opportunity to obtain a favourable recovery order against the defendants and satisfied the recovery order by releasing those assets. Freezing orders are recognised and enforceable in many countries and generally contain prohibitions on the fraudster.

Other orders can also be obtained: e.g. search orders enable valuable evidence, such as images of computer drives, to be recovered; receiving orders appoint a receiver to investigate and manage the fraudster's assets. Some of these orders are onerous to defendants, and the victim will need to give a number of undertakings to the court and others who may be affected by such orders before they are granted.

Once a freezing order has been obtained, there are a number of steps you should take simultaneously to ensure that the order is as effective as possible. Ideally this should be done with the assistance of a solicitor and other members of the recovery team and may include:

- Quickly obtaining court orders in other countries to freeze assets identified overseas;
- Serving the freezing order on third parties (e.g. banks) to ensure that assets they control are frozen;
- Serving the freezing order on the fraudster as soon as practicable – the fraudster will normally be required to disclose details of his/her assets and can also be required to surrender his/her passport(s) if there is a risk that he/she will leave the country without complying with all obligations under the freezing order; and
- Serving any search orders, receiving orders and other orders obtained, as appropriate.

Obtaining favourable recovery orders and the payment of compensation

There are a number of steps you can take to obtain recovery orders and the payment of compensation, depending upon the evidence and the legal claims. This will require the assistance of a solicitor and other members of the recovery team. Steps may include:

- Ensuring the fraudster's compliance with any freezing order obtained;
- Making an application for a summary judgment (an abbreviated form of court proceedings) on the basis of the documents obtained (where appropriate);
- Taking the proceedings to a full civil trial (involving lawyers presenting the legal case and facts to the court, including the presence of witnesses and other evidence), where the victim's case will need to satisfy the civil burden of proof;
- Seeking to satisfy any recovery orders obtained from the fraudster's frozen assets – additionally, enforcement may take place against other assets located; and
- In some cases the fraudster may seek a negotiated settlement – this can be sought directly between the parties themselves or facilitated through an independent mediator.

The cost of civil recovery

Victims often pay the costs incurred in civil recovery proceedings on a privately funded basis. These may include legal and other professional fees and disbursements. Ultimately, however, these costs, or a proportion of them, may be recoverable from the fraudster.

There are a number of other options that may be available to you:

- You and/or your business may have **insurance**. Any coverage should be checked at the outset, ideally with the assistance of a solicitor. There are often strict time limits for notification of claims, imposed by the insurer, with which the insured must comply in order to be able to claim on the policy. The insurer may be able to insist on the choice of solicitors used to bring the claim.
- Increasingly, **third-party funders** will underwrite the costs on the basis that they are paid a percentage of the monies recovered. The percentage amount will depend upon a number of factors, including the size of the claim, the risks and the speed of recovery. The funders may be able to nominate the solicitors to act on behalf of the victim to bring the claim.
- Your **solicitor and/or other professionals** may be prepared to operate on a conditional fee basis, by which they are only paid fees (which are higher than basic fees) if there is a successful recovery. Alternatively, they may be prepared to operate on the basis that they charge a lower hourly rate which can be increased in the event of a successful recovery. However, this may not be available or appropriate in all cases (eg. for expert witnesses or forensic accountants).
- Legal costs can sometimes be shared through the pursuit of a class action in appropriate cases.

Further information

Association of Chartered Certified Accountants

www.acca.org.uk

Insolvency Practitioners Association

www.insolvency-practitioners.org.uk

Institute of Chartered Accountants in England and Wales

www.icaew.com

Institute of Chartered Accountants in Ireland

www.icae.ie

Institute of Chartered Accountants of Scotland

www.icas.org.uk

Law Society in England and Wales

www.lawsociety.org.uk

Law Society of Scotland

www.lawscot.org.uk

Law Society of Northern Ireland

www.lawsoc-ni.org

Glossary of terms

Understanding the justice system and the remedies available to you can be confusing. Some of the most common terms used are explained below.

- **Burden of proof:** The degree to which the Crown (see criminal litigation) or a claimant (see civil litigation) must establish their case before the court.
- **Civil burden of proof:** Civil litigation requires the claimant (see civil litigation) to prove his case “on the balance of probabilities”.
- **Civil litigation:** The process of one party (the “claimant”) bringing a court case (or action) against another party (the “defendant”) in a civil court, e.g. the High Court. Civil litigation requires the claimant to prove his case to satisfy the civil burden of proof.
- **Civil recovery:** The process by which a claimant (see civil litigation) may bring an action against a defendant to recover any losses the claimant may have suffered as result of the defendant’s fraud, breach of contract, negligence or other culpability.
- **Class action:** A class action is where a group of claimants (see civil litigation) who may individually have suffered small losses arising from an alleged culpable act, but who collectively have suffered a large loss, present their case as a single group of litigants. In presenting their case as a group of litigants this may facilitate a cost-effective solution in funding the litigation.
- **Confiscation:** An optional action brought by the Crown against a defendant in criminal litigation who has been found guilty of or pleaded guilty to a crime of an acquisitive nature. The Crown, in a criminal court, must prove “on the balance of probabilities” (see burden of proof) that the defendant has benefited from his crime and has assets available for confiscation. Confiscation is separate from any punitive fines the court may impose on a defendant as a criminal penalty.
- **Criminal burden of proof:** Criminal litigation usually requires the Crown to establish the burden of proof “beyond all reasonable doubt” (but see confiscation).

- **Criminal litigation:** The process by which the Crown – via a law enforcement authority – prosecutes a defendant for an offence contravening criminal law in a criminal court, e.g. a Crown Court. It is possible to bring a private prosecution against a defendant, but this is very rare. Criminal litigation usually requires the Crown to prove its case to satisfy the criminal burden of proof (but see confiscation).
- **Disclosure order:** A court order requiring the person or organisation to whom it is addressed to produce to the claimant the information and explanation specified in the order (see civil litigation). A variation on a disclosure order is a production order.
- **Freezing order:** A court order restraining a defendant from dissipating any assets which may or may not have been funded through the defendant’s culpable act. A freezing order allows time for the claimant (see civil litigation) to prepare his case against the defendant, during which time the claimant may investigate the full extent of the loss suffered and the extent of the defendant’s ability to pay any recovery order which may be granted. A “worldwide” freezing order may be recognised in other jurisdictions around the world, preventing a defendant from dealing with his assets wherever they may be.
- **Search order:** A court order requiring the person or organisation to whom it is addressed to permit the claimant’s (see civil litigation) representative to enter the person’s or organisation’s business and/or domestic premises to look for and preserve (and copy) relevant evidence and property.
- **Receiving order:** Where the defendant’s assets include businesses or complex investment structures, it may be necessary to have the court appoint a receiver to investigate the extent of the defendant’s assets. Receivers can perform this combined investigative and management role by effectively being granted control over the defendant’s assets. Should a recovery order be granted by the court, an enforcement receiver may be required to liquidate the defendant’s assets and satisfy the amount of the recovery order from the realised funds.
- **Recovery order:** A court order issued in favour of the claimant (see civil litigation) ordering the defendant to pay to the claimant an amount equal to the value of the claim (as confirmed by the court) or to transfer assets. The claimant will be responsible for seeking to enforce the recovery order against a defendant’s assets, including any assets subject to a freezing order.

For more information on the Fraud Advisory Panel please contact:

Fraud Advisory Panel

Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ

Tel: 020 7920 8721

Fax: 020 7920 8545

Email: info@fraudadvisorypanel.org

Or visit:

www.fraudadvisorypanel.org

Registered Charity No. 1108863

November 2008