

SIGNATURE

# Asset Tracing and Recovery in Gibraltar

**The Gibraltar Supreme Court provides a wide range of remedies for local and foreign claimants who are victims fraud. In general terms, the court will act to assist victims of fraud in the tracing and recovery of assets. Gibraltar has in place a range of legislative tools and resources to deal with fraud and asset recovery in the context of civil law.**

## Application of the CPR and remedies thereunder

The English Civil Procedure Rules apply to Gibraltar by virtue of the (Gibraltar) Supreme Court Act and the supporting Supreme Court Rules. The Supreme Court has equivalent jurisdiction to the High Court in England and Wales, allowing it in appropriate circumstances to make an order for a freezing injunction or alternatively, can also grant a proprietary injunction or appropriate injunctive relief ordering the detention, custody or preservation of any property or asset over which a claim is made. The court also has jurisdiction to grant orders against a third party or the perpetrator of a fraud ordering the provision of information or disclosure in relation to matters which are the subject of a claim.

Ordinarily, asset tracing claims will be brought in the context of a civil action commenced in Gibraltar or alternatively, in aid of substantive proceedings commenced in a foreign jurisdiction. The most common types of civil fraud claims are claims brought in the tort of deceit, fraudulent misrepresentation, claims either for breach of trust or breach of fiduciary duty, equitable proprietary claims or other restitutionary-type claims.

## Remedies available

The Gibraltar court has a wide discretion to grant both interim and final orders to assist in the tracing and preservation of assets as well as to assist and enable a victim of fraud to obtain information and help recover property that has been misappropriated, or simply to freeze and preserve assets in support of any such claim.

It is open to a party, in appropriate circumstances to make an application for an Interim Remedy pursuant to CPR Part 25. The types of interim remedies that can be ordered include the following:

a. an interim injunction;
b. an interim declaration;
c. an order for the detention, custody or preservation of relevant property or the inspection of relevant property;
d. a freezing injunction restraining the party from removing from the jurisdiction assets located in Gibraltar or elsewhere;
e. an order directing the party to provide information about the location of the relevant property or assets that are or may be the subject of an application for a freezing injunction;
f. a search order; and
g. an order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party's right to the fund in question.

CPR 25.1(1)(a) refers to the court's jurisdiction to make an order granting an applicant an interim injunction. The specific remedies set out in CPR 25 are not exhaustive and injunctive remedies can include:

a. injunctions to protect interests relating to real property;
b. anti-suit injunctions;
c. injunctions to protect confidentiality obligations;
d. proprietary injunctions.

An application must be made in accordance with CPR 23 and can be made before the commencement of a claim (but usually on the basis of an undertaking to issue a claim) or at any time after a claim has been issued (including after a judgment has been given). Injunctive relief can also be sought in aid of foreign proceedings.

The court has jurisdiction to grant an interim remedy irrespective of whether there has been a claim for a final remedy of that kind in the substantive claim. The burden is on the Applicant to make out



and satisfy the court that the interim remedy should be granted on an ex parte basis of putting the opposing party on notice of any such application would defeat the object of such applications and lead to the dissipation or hiding of assets or information.

An application for injunctive relief must be accompanied with a witness statement or affidavit setting out the basis for the application. The evidence normally explains and gives a chronology of events, the background to the dispute, and the reasons why the injunction is necessary. The applicant has a duty of full and frank disclosure and must give an undertaking as to damages.

The court will need to consider all the circumstances of the case in considering the exercise of its discretion. The applicable principles for the grant of an injunction are the American Cyanamid principles (*American Cyanamid Co (no1) v Ethicon Limited [1975] UKHL 1*), under which the court must consider whether there is a serious question to be tried and assess the balance of convenience. The test is considered in three stages:

a. are damages an adequate remedy for the applicant if they succeed at trial? If so, an injunction is unlikely to be granted.
b. if damages are not an adequate remedy for the claimant, will the cross-undertaking as to damages provide adequate protection for the respondent if the court determines in the defendant's favour at trial? If not, the injunction is also unlikely to be granted.
c. a more general assessment of the balance of convenience if there is doubt as to the adequacy of damages, with a view to applying and preserving the status quo.

Gibraltar's Civil Jurisdiction and Judgments Act 1993 makes specific provision for the power of the Supreme Court of Gibraltar to grant interim relief in support and in aid of foreign proceedings. The Gibraltar Court regularly hears application for "mirror freezing orders". The case of *Secilpar v S.L v Fiduciary Trust Limited and Fiduciary Management Limited* [2003-04 GLR 463] is authority for the granting of Norwich Pharamacal applications in this context.

## Freezing Injunctions

In order to obtain a freezing injunction, the Claimant must demonstrate the following:

a. that he or she has a cause of action or good arguable case;
b. that there is a serious risk that if the Defendant is not restrained by an injunction that the assets will be removed from the jurisdiction or otherwise dissipated or disposed of so as to frustrate any judgment which might be obtained later; and
c. that it is just and convenient for the court to make the order sought.

Most freezing injunction applications are made without notice to the respondent as giving notice would defeat the object of a freezing injunction and provide the respondent with the opportunity to dispose of their assets before the injunction is disposed.

When making a freezing injunction, the court will usually make an ancillary order requiring the Defendant to give disclosure or to provide information concerning his assets or to disclose information to assist in the tracing of assets alleged to have been misappropriated.

As part of any such application the Applicant will normally be required to provide a cross-undertaking as to damages. The Applicant should also be mindful of the onerous duty of full and frank disclosure required at the application stage and the effect that non-disclosure can have on the injunction ordered.

## Norwich Pharmacal relief

To the extent that the identity of the perpetrator of a fraud is unknown to the claimant it will be necessary for the victim to seek a non-party disclosure order (known as Norwich pharmacal relief) against an innocent party who has been mixed up in the fraud through no fault of their own but who may be able to provide information as to the identity of the perpetrator or alternatively, information to assist the victim in the tracing of assets.

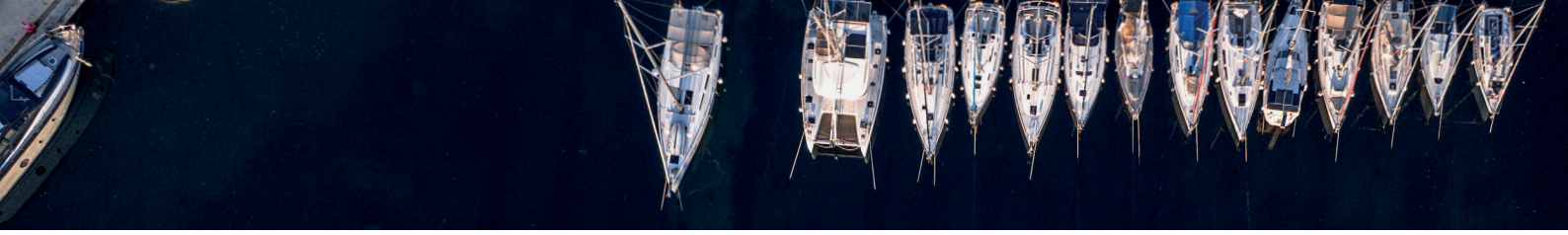
In the context of a pre-action disclosure order, the applicant will ordinarily be required to meet the costs of the disclosing party which are both incidental to the application as well as meeting the costs of the third party's compliance with any disclosure order which may be made.

In the event that a civil claim is issued against a fraudster the compensatory measures that may be sought by the victim are as follows,

a. damages;
b. an injunction;
c. an account or inquiry;
d. equitable compensation;
e. interim remedies

Gibraltar has by virtue of its application of the Civil Procedure Rules adopted the new gateway for the service of information orders against non-parties, making it possible to obtain permission to serve Norwich Pharmacal and Bankers Trust orders outside of the jurisdiction.

The new gateway at paragraph 3.1(25) of CPR PD 6B is widely drafted and covers claims or applications for disclosure to obtain information regarding "*(i) the true identity of a defendant or a potential defendant and/or (ii) what has become of the property of a claimant or applicant*" that is needed for proceedings brought in Gibraltar, or which are intended to be brought here using the information sought. The ability to serve these orders overseas will be of great assistance in fraud claims and asset tracing cases, where cross-border issues have become a standard feature and assets may have been moved through offshore exchanges and markets and been unwittingly assisted by international non-parties.



Applications for Norwich Pharmacal relief will usually be dealt with speedily by the Court and may, in some circumstances, be dealt with during the holiday period.

## Interim Remedies and Tracing in the context of Crypto disputes

Various applications for interim remedies have been brought by crypto fraud victims in the English courts in the past few years. Whilst Gibraltar case law in this area is still in its relative infancy, recent English judgments are likely to be highly persuasive going forward. These recent English judgments have held inter alia that:

a. Cryptocurrencies are property.
b. The location of the cryptoasset may be England if that is the country where the owners are domiciled or resident (this being the place where the cryptoasset is controlled, usually by knowledge of the private key).
c. Victims can obtain a worldwide freezing order (with ancillary information orders) and a proprietary injunction against persons associated with the victim's cryptocurrency or its traceable proceeds.

The frauds perpetrated in relation to cryptoassets are not new: they are old scams which have been adapted. Similarly, we have seen familiar claims, interim relief and remedies all being adapted to address the issues associated with an asset that only exists virtually and which can be traded around the world in seconds, ostensibly anonymously.

With the new gateway under CPR PD6B para 3.1(25), now both Norwich Pharmacal and Bankers Trust orders can be served outside the jurisdiction. Other typical gateways commonly used by victims are gateways:

a. 3 (a claim against an anchor defendant).
b. 4A (further claim out of the same or closely connected facts).
c. Gateway 9; A claim made in tort where (a) damage was sustained, or will be sustained within the jurisdiction, (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction, or (c) the claim is governed by the law of England and Wales.
d. Gateway 11: A claim about property within the jurisdiction.
e. Gateway 15: A claim made against the defendant as constructive trustee, where the claim (a) arises out of acts committed or events occurring within the jurisdiction, (b) relates to assets within the jurisdiction, or (c) is governed by the law of England and Wales.
f. Gateway 15A: A claim for unlawfully causing or assisting in a breach of constructive trust where the trustee's liability would fall within gateway 15.
g. Gateway 16: A claim for restitution where (a) the defendant's alleged liability arises out of acts committed within the jurisdiction, (b) the enrichment is obtained within the jurisdiction, or (c) the claim is governed by the law of England and Wales.
h. Gateway 21: A claim for breach of confidence or misuse of private information where (a) detriment was suffered, or will be suffered, within the jurisdiction, (b) detriment which has been, or will be, suffered results from an act committed, or likely to be committed, within the jurisdiction, (c) the obligation of confidence or right to privacy arose in the jurisdiction, or (d) the obligation of confidence or right of privacy is governed by the law of England and Wales.

In each case it will be essential to identify the location of the crypto asset in question, the location of the act said to have caused damage to the claimant, or the law governing the proposed cause of action. As to these:

a. Location of the asset. The courts have treated the location of a crypto asset as the place where the person or company who owns it is domiciled.
b. Location of the act causing damage. Where the asset is located in a particular jurisdiction, the court has held that the damage suffered as a result of a fraudulent scheme was suffered in that jurisdiction.
c. Governing law. The Rome II Regulation (regulation 864/2007) governs the law applicable to non-contractual obligations. In this English context, a finding that the asset is located in England has led to the court determining that English law governs for the purposes of the Rome II Regulation.

The courts will grant service out of the jurisdiction where the location of the defendants is unknown, and service can be by alternative means under CPR r 6.15.

Generally, the most useful remedy for victims of crypto fraud is to bring a proprietary claim against the fraudsters and, depending on the circumstances, against the exchange. As a proprietary claim rather than a personal claim, the victim benefits from familiar advantages including priority in insolvency, the ability to recover the property itself or an equitable lien for the amount the property was worth when it was taken (which may be beneficial in a volatile market) and recovery from subsequent transferees.

As against the fraudsters, there is a range of potentially relevant personal claims including misrepresentation, deceit, restitution for unjust enrichment, breach of confidence and conspiracy. If a Claimant can establish a breach of trust (such as arising from the above-mentioned constructive trust) or breach of fiduciary duty, then he or she may wish to claim against a third party for dishonest assistance or knowing/unconscionable receipt.

Once the victim's cryptoassets have been located and frozen and judgment obtained against the fraudsters, the Claimant will need to decide how best to enforce its judgment. Relevant factors include who holds the cryptoassets (or their traceable proceeds), whether the fraudsters are identified and within the jurisdiction (in which case conventional enforcement methods may suffice), whether the private key is obtainable such that the cryptoassets can be transferred and which defendant has the deepest pockets (including if any is insolvent).



A practical point to consider is the importance of acting quickly, since an asset can be dissipated at the click of a mouse. The sooner an expert is instructed, and the sooner any disclosure orders are sought, the better the chances that you will be able to locate the assets.

## Causes of action

To bring a civil claim in Gibraltar, the court must have jurisdiction and the burden is on the claimant to establish jurisdiction in the absence of a submission to jurisdiction by the opposing party.

As far as there are persons who may have assisted the perpetrator of the fraud it is open to the victim to consider issuing a claim against any such third party on the grounds of dishonest assistance or knowing receipt or alternatively, to commence restitutionary proceedings.

In a claim for breach of trust or breach of fiduciary duty, the claimant will need to establish the existence and nature of the duty concerned either in a trustee or fiduciary context and to prove the breach of such a duty by the trustee or the fiduciary.

Whilst the civil burden of proof applies (i.e. the balance of probabilities), the more serious the allegation the more cogent the evidence in support will need to be.

## Pleading fraud or dishonesty

Lawyers are under a duty to ensure that an allegations of fraud or dishonesty are properly particularised and supported by material that supports such a serious allegation. To make or persist in making such allegations without cogent material to support the allegations may, in some circumstances, amount to professional misconduct and can also result in a wasted costs order and/or disciplinary action.

## Limitation

Limitation is governed by the (Gibraltar) Limitation Act 1960. In non-fraud civil claims, the limitation period in respect of contractual claims is six years from the accrual of the cause of action and in tort claims is six years from the date the cause of action accrues. In cases of breach of trust, the period is six years after the breach.

In fraud claims these time limits may be extended in case of the fraud or concealment of the cause of action and time limits will start to run from the date when the cause of action could, with reasonable diligence, have been discovered.

## Defences

Defences to fraud claims will depend on the nature of the allegations made in the claim or in any prosecution brought and the type of claim or offence in respect of which the defendant is charged.

Some defences will focus on the allegations of fraud or dishonesty on the basis that the evidence is not sufficiently cogent to support any such claims or that the defendant state of mind was not dishonest. In certain circumstances it may be appropriate for a defendant to seek or to defend such claims on a summary basis if the evidence or pleaded case does not provide a sufficient basis to support the allegations which are made and therefore has no reasonable prospects of success.

## Jurisdiction

In matters related to tort or deceit, the courts of the state where the harmful event occurred or may occur will have jurisdiction. In relation to contractual claims, the courts of the state that is the place performance of the obligation in question will have jurisdiction. In fraud cases, the Gibraltar court will generally have jurisdiction if the fraud occurred in Gibraltar. Alternatively, the parties may have agreed a choice of law clause attributing jurisdiction to a particular state.

Should an opposing party seek to commence proceedings in another jurisdiction, then the court of that jurisdiction should proceed to stay any such claim pending the determination of the issue of jurisdiction by the courts of the State which the parties have agreed in the jurisdiction clause.

As far as the freezing or seizure of assets is concerned, in civil proceedings the appropriate course is to seek an appropriate interim remedy, usually an injunction in appropriate terms.

## Enforcement of foreign judgments in Gibraltar

A judgment or order of a foreign court has no direct operation in Gibraltar. Instead, it must be enforced by the Supreme Court of Gibraltar for it to take effect in the jurisdiction. The methods available to enforce foreign judgments in Gibraltar will depend on the location of the identity of the country where the judgment originates. In the majority of cases enforcement is by way of registration of the judgment.

CPR 74 provides the procedural mechanism for the enforcement and registration of judgments.

The judgments which are not enforceable in Gibraltar include:

a. Judgments relating to revenue and customs.
b. Administrative matters.
c. Arbitration proceedings.
d. Orders granting recognition to judgments of a non-member state.
e. Orders or injunctions granted without notice to the respondent where the respondent has not been served with the order.



The starting point is to consider which jurisdictional regime applies to the enforcement of the respective Court Order in Gibraltar. Gibraltar's sources of law in respect of the recognition and enforcement of foreign judgments are the following:

a. Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation");
b. Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels (Recast) Regulation");
c. Brussels Convention 1968 (the provisions of which continue to apply by way of the (English) Civil Jurisdiction and Judgments Act 1982);
d. The New Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007;
e. (Gibraltar) Judgments (Reciprocal Enforcement) Act 1935 (which applies to judgments from certain Commonwealth countries including Australia, India and Pakistan).
f. Administration of Justice Act 1920 which applies to Gibraltar by virtue of the English Law (Application) Act 1962 (and which also applies to various Commonwealth countries which include Australia, Isle of Man, Guernsey, Jersey, India and Pakistan);
g. By way of a common law action issued locally, effectively suing on the judgment debt awarded under the foreign judgment.

Following the Brexit transition period, Gibraltar continues to enforce judgments under the Recast Brussels Regulation and the Brussels Jurisdiction and New Lugano Conventions, given Gibraltar›s unilateral adoption of EU law as domestic law post Brexit.

By virtue of bilateral arrangements, the UK and Gibraltar are treated as separate Regulation states for the cross-border enforcement and registration of UK/Gibraltar judgments. Judgments of the English and Welsh High Court continue to be enforceable as of right in Gibraltar under Council Regulation (EU) No 1215/2012, which Gibraltar has retained post-Brexit.

## Brussels Recast Regulation

The main exceptions when a judgment will not be recognised under the Brussels Recast Regulation are when:

a. Recognition of the judgment would be contrary to public policy;
b. It was given in default of appearance and the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way to enable the defendant to arrange his defence;
c. The judgment is irreconcilable with another judgment between the same parties; or
d. The court that made the judgment lacked jurisdiction,

## The Common Law

Gibraltar applies the English common law by virtue of s.2(1) of the English Law (Application) Act 1962. Applicants can enforce foreign judgments in Gibraltar under the common law regime, if the EU regulations, conventions and statutory regimes do not apply. However, they will be required to institute new proceedings in Gibraltar on the basis of the foreign judgment and seek summary judgment on issues determined by the foreign court.

A party may seek to enforce a judgment for a fixed sum of money at common law. The Gibraltar Court will enforce a final and conclusive foreign judgment /order provided that it is not impeachable and that none of the exceptions set out in Rule 42 of Dicey, Morris and Collins on The Conflict of Laws, 15th Ed. (2015) and subsequent Rules apply. Judgments will not be recognised at common law if:

a. The proceedings were contrary to natural justice;
b. The judgment was obtained by fraud;
c. Recognition of the judgment would be contrary to public policy; or
d. The foreign court lacked jurisdiction.

The burden of proof is on the claimant in registration/enforcement proceedings to establish that (i) the judgment was final and conclusive on the merits of the action, and (ii) the foreign court had international jurisdiction over the defendant. The defendant bears the burden of establishing that a defence/s exists.

Together with the defences of fraud, breach of natural justice and public policy available under the common law, further defences to the enforcement of foreign judgments are found within section 21(1) of the (Gibraltar) Civil Jurisdiction and Judgments Act 1993, which provides that:

> *"Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in Gibraltar if:*
>
> *(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country;*
> *(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and*
> *(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court."*



LONDON



PARIS



GIBRALTAR

If an appeal is pending in the courts of the jurisdiction of origin, under the common law, the Gibraltar Court has the discretion to grant a stay pending resolution of the appeal. However, the fact that the judgment is subject to appeal in the foreign jurisdiction does not necessarily prevent its enforcement in Gibraltar.

In practice, the court is likely to stay the enforcement proceedings until the appeal has been heard however this cannot be taken as certain. By way of example, in *Banco Nacional v Empresa de Telecomunicaciones* [2007] EWHC 2322 (Comm), the Commercial Court permitted enforcement in England notwithstanding that there was an extant appeal against an Italian judgment.




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