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Access to Justice for the Victims of Global Economic Crime.¹

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1.0 The Global Fraud Phenomenon.

Economic crime is perceived by many to be a phenomenon that affects large corporations or involves drug barons and similar villains or indeed corrupt chief executives, such as Bernard Ebbers, of WorldCom, central to the biggest corporate fraud in U.S. history. Many see fraud as a crime that affects others. However, economic crime affects the world economy as a whole. It can involve embezzlement, cheque fraud and money laundering, and employee-perpetrated crimes including bribery, corruption and procurement fraud. Identity theft and credit card fraud are examples of fraud that are reportedly experienced by one in five U.S. citizens. The prevalence of fraud in our midst cannot be underestimated.

In the U.K. alone, economic crime cost U.K. businesses more than £40 billion in 2003 – the equivalent of £100 million a day – and the problem is getting worse, according to a report launched in October 2004 by business advisers and accountants, RSM Robson Rhodes LLP. In all, U.K. companies lost £32 billion in 2003 through acts such as fraud, embezzlement, corruption and money laundering, and spent a further £8 billion seeking to combat the problem. FTSE 100 companies alone lost an estimated £500 million and all listed companies lost £3 billion.

The average annual number of fraud headlines (in Reuters) relating to corporate fraud has nearly doubled over the past ten years. Contrary to misconception, fraud is never a victimless crime. It costs us dearly as tax payers, insurance policy holders and consumers, and it costs individuals and companies that fall victim millions every year.

Deceit is part of the human condition. Successful deceit, by its very nature, requires the ability to persuade or convince others that all is as it should be. Such powers of persuasion are not borne of an ability to act but a supreme sense of self belief and often of arrogance. The Serious Fraudster believes that he is entitled to what he takes and hides, believes he is entitled by virtue of the fact that he is who he is. Those from whom he steals are but ‘others.’ Those ‘others’ pay the bills and are viewed with contempt.

2.0 How Big is the Problem?

More than two-thirds of companies around the world report having been the victim of corporate crime, according to an international study of fraud by professional services firm Ernst & Young LLP.² In the vast majority of cases (85%), employees were the perpetrators of serious incidents of fraud. Of that group, over half (55%) of the fraudsters could be found among management.

Economic crime remains a significant threat to organisations worldwide. The Price Waterhouse 2003 Fraud Survey examines companies' perceptions of, incidences and responses to economic crime during the previous two years. Over one-third of respondents interviewed in the Western European survey said they had suffered from one or more incidents of fraud within the last two years (34%) – a 5% increase over the 2001 research. Incidents of economic crime were lower in Western Europe compared with other global regions such as Africa (51%), North America (41%) and Asia-Pacific (39%).

According to the Ernst & Young 2003 Survey, fraud was not concentrated in any one geographic region, industry or size of organization. Asset misappropriation was identified by 63% of respondents as the worst possible outcome of fraud, while 21% were most worried about financial-statement reporting fraud. More than half of fraud losses were relatively small in value (less than US\$100,000). However, 13% involved over US\$1 million – enough to seriously impact the profitability, or even survival, of an organization.

While companies are recovering greater portions of fraud losses (51% versus 29% in the 2000 survey), most of it is being recovered from insurers, banks and suppliers. In reality, recoveries from perpetrators remain low (about 20%).

It is interesting to note that many of these surveys show that organizations subjected to economic crime suffer damages other than financial loss. For example, 40% of Western European companies interviewed for the Price Waterhouse 2003 Fraud Survey reported that fraud had a detrimental

² Global Ernst & Young Study, 2003.

effect on staff morale and motivation – a concern also raised by companies in Africa (58%), Asia Pacific (57%), and South & Central America (49%). In addition, Western European companies reported that fraud had damaged their business relationships (23%) and their reputations (18%). Thus, fraud’s true cost extends beyond financial loss and includes reputation damage, management time loss, impact on morale and erosion of trust within teams.

3.0 Who Commits Fraud?

Not all fraudsters conform to a stereotype. However, many exhibit certain common characteristics, which undoubtedly serve them well in their quest. Not all of such actors manifest each of the following elements, but the identification of these characteristics is crucial in the study and understanding of the fraudster.

He evinces no intention to be bound by public or private obligations. Law, contract and obligation mean nothing. Ethics, morals, scruples or conscience are foreign words.

(a) He is often of casual or multiple residence.

(b)

He almost predictably will hide his wealth behind a labyrinth of secret offshore companies trusts, and other apparently legitimate devices and instruments. The liquid assets of his puppets are deposited with banks, whose client confidences are usually subject to the protection of criminal secrecy legislation. As Lord Cumming-Bruce of the English Court of Appeal said in *Re: A Company* [1985] BCLR 333:

“... he [hides] his wealth behind a ...web of puppet companies, with puppet directors dancing to his [the fraudsman’s] every tune.”

“...he [brings] ... into his service to further his unworthy ends ... puppet concerns of his own making ... puppet trusts in Liechtenstein ... a puppet finance company in the Bahamas ... [and] a puppet banking

company in the City of London . . .³ He uses a company as a ... device and a sham, a mask which he [holds] before his face in an attempt to avoid recognition by the eye of equity.”⁴

- (c) He manifests an element of arrogance.

The successful juxtaposition of appearance and reality confuses those who would revert to conventional, orthodox plans of discovery and recovery. The audacity of this fraudulent operator knows no bounds. He will come to banks, lawyers, accountants and other professionals, clothed with letters and trappings of legitimacy. Having perpetrated the fraud he requires the assistance of others, those who will aid him, whether unwittingly or not, in his dishonest design.

Key to the success of any plan seeking meaningful justice for the victims of fraud is for us to understand the fraudster himself, his characteristics, habits and *modus operandi*. The ability to step into the shoes of the sophisticated criminal, and to absorb the surrounding circumstances, proves an invaluable tool to the person who would seek to curtail his activities. Know the protagonist. Understand his traits, objectives and aims. Anticipate the means he uses to attain those ends and the media in which he operates.

4.0 How does he Operate?

The *modus operandi* of a fraudster varies according to where and from whom he learnt the trade and the opportunities that present themselves. There are however common trends and age-old methods that continue to be used, not least in part due to their reliability, but also because they mirror every day transactions and are thus relatively safe ways of taking value without suspicion at the early stages of a major fraud.

There are common techniques used to lift substantial value by deceit. Such methods of taking money include the following: —

³ Denning, MR, in the English Court of Appeal decision in *Wallersteiner v. Moir* [1974] All ER.

⁴ 217, 233.3 *Jones v. Lipman* [1962] WLR 832.

- ‘Bait and Switch;’
- Misappropriation and infidelity;
- Double Pledging of collateral;
- Linked transactions;
- Cheque kite;
- Securities fraud;
- False appraisals;
- Art & Antique dealing;
- Bleeding assets – the ‘vampire’ method;
- Prime bank notes;
- Up-front loan fees; and
- Internet Fraud.

In a world where boundaries diminish by the day, the opportunities to take or misappropriate wealth are endless and mutate from day to day. The Internet and the proliferation of services available for purchase online expand the facility of fraudsters to set up seemingly legitimate businesses, attract clients and their money and close before law enforcement officials have a chance to investigate complaints which often take months to filter through.

5.0 The First Steps to Recovery.

When one has been visited by fraud the first reaction is invariably one of shock, disbelief, “Why Me?” Many victims never move beyond this point, preferring or indeed being conditioned to accept fate and wallow in self-pity. Others experience a sense of anger, a desire for revenge is not an uncommon reaction. Where the fraud makes a sizeable financial impact the focus moves to recovery, what can we do? In small scale economic fraud the action taken rarely moves beyond the

reporting of the matter to the authorities concerned, this may or may not result in recovery. In larger scale frauds alternative action can and often must be taken, a successful fraud can bring even the mightiest of economic giants to their knees, we need only call to mind the Baring's scandal by way of illustration.

In considering what a victim of crime may do to address the effects of the fraud, it is vital that experienced assistance be engaged at the earliest possible stage. The formulation of any plan requires at first instance an answer to the question "what is to be achieved" and secondly a consideration of how that end might be achieved. This necessarily requires an evaluation of the considerations at play, whether they be environmental, political, economic or social in nature, or indeed a mixture of all four. In constructing a plan of asset recovery the questions are no different, and the considerations likewise. Embarking upon any plan of recovery will necessarily involve investigation, as key to the success of any plan, whether of recovery or not, is access to information, the right information.

The recovery of misappropriated assets (whatever form those assets may take), can range from a difficult to an exceedingly difficult exercise, if someone has taken the quantum leap from appropriation to misappropriation you can be sure that they have invested some time and effort in the process. The difficulties inherent in locating misappropriated assets are compounded by virtue of the fact that we live in an electronic age when funds can be moved around the world in a matter of seconds. The asset recovery process is rarely a straightforward or inexpensive one (locating \$100,000 can be just as costly as locating \$10 million). Although some cases are easily resolved, an international asset tracing and recovery assignment is among the most challenging for forensic accountants, investigators and litigators. In many such engagements, success requires the additional skills of specialized legal counsel.

Understandably, victims do not always choose to take action. Many feel that the odds are against a successful recovery. According to the 2003 PricewaterhouseCoopers Fraud Survey, of respondents in Western Europe who had attempted to reclaim misappropriated assets, only 13% had been able to recover more than 80% of their loss – although even this is higher than in some other regions. In

Central & Eastern Europe, for example, only 6% of crime victims recovered over 80% of their losses. The reasons vary as to why recoveries are so low. Companies are often wary to start the drawn-out recovery process, as success is not guaranteed. If assets have been moved from one country to another, the recovery process becomes complex.

There are many investigative options and legal remedies that can assist a victim of fraud or the victim of an absconding partner, the potential for recovery is directly proportional to the level of time and specialised skill employed in the effort. In essence, a successful recovery effort requires investigative, accounting and legal expertise as well as innovation, strategy and the ability to think outside the box.

Any asset recovery investigation in the 21st Century will almost invariably reach across borders as increased regulation and detection within the sphere of economic crime has forced the fraudster to diversify. As individual countries have moved to tackle the problem presented by fraud within the confines of their own boundaries, the experienced fraudster has recognised the need for expansion beyond these boundaries. This need for geographical expansion coupled with the innate adaptability of the experienced white collar criminal has resulted in the increased internationalisation of white collar crime. In order to be able to tackle this often formidable opponent, commitment of both financial and experienced human capital is essential.

To restate, in any asset recovery project the initial planning phase is the most critical. The first and most important consideration must be to prioritise your goals. Bearing in mind the fact that in any civil recovery effort, the predominant goal is the recovery of assets, a number of key questions must be considered: Do you have a strong case either for damages or against misappropriated assets? Which jurisdictions are involved and are they favourable to you? And, finally, where are the accessible assets and where are they located in relation to your legal action?

The process of firstly proving liability and secondly enforcing the obligation are two distinct and often equally difficult processes, the importance of solid ground work, reliable evidence and a proven legal foundation cannot be over emphasised.

6.0 Access to Justice – The Barriers.

The cost of orchestrating significant asset location and recovery exercises in cases that can require extensive investigative and legal work, is one of the main obstacles for even the most robust and well-capitalised victim. Other barriers faced when seeking recovery of assets include the multi-jurisdictional complex of facts and legal problems; bank and secrecy laws; and the use of other asset hiding techniques.

The potential financial burden of prosecuting an asset recovery exercise which may run for extended periods of time is possibly the primary consideration where the victim is either unable or unwilling to pay whatever it costs to get the show on the road. Time is a critical factor. In almost any investigation where assets have been moved, quick consideration must be given to recovery. The element of surprise and prompt action in asset recovery should not be underestimated. The plethora of asset protection mechanisms and the ease with which funds can be moved can frustrate even the most carefully planned recovery effort.

This ‘multi-jurisdictional’ factor can, and often does, make the task of the victim of economic crime much more difficult than it would otherwise be. Indeed, the addition of this factor to the mix can often dissuade such victims from seeking recovery, wary as they are of the increase in the likely cost of recovering money abroad.

Negotiating this particular aspect of the asset location maze requires a good knowledge of the customs and laws of offshore havens and an understanding of the bureaucracy which dogs these often small and somewhat provincial jurisdictions. The value of cultivating contacts in such places, both within the law enforcement and political spheres, cannot be underestimated. Knowledge of how these places operate and under whose or what influence is key. Knowing who to call and how to circumnavigate the yards of red-tape is half the battle; sometimes luck is the other half, where your fund’s fate lies in the hands of the offshore judiciary.

In addition to the simple logistical difficulty presented by the involvement of multiple jurisdictions in the mix, the victim of fraud will undoubtedly also encounter jurisdictions in which bank secrecy is prized and information on misappropriated assets is difficult to obtain.

Bank Secrecy Laws.

The cornerstone product offered by most offshore havens is a legal system that protects against unwanted and unauthorized disclosure of financial matters. Bank secrecy laws in many such jurisdictions prohibit the dissemination of information concerning a customer's account by bank employees. These prohibitions are generally buttressed by criminal sanctions including fines and imprisonment.

In such jurisdictions, the protection of the confidentiality of the customer's business matters from third party inquiries is of paramount importance. In general, foreign creditors, spouses, and litigants cannot legally obtain information concerning the existence or activity of any account. The attraction of such a system to those who have laundered the proceeds of crime through such accounts is self-evident. The difficulty it poses to the victim of crime and, to some extent, foreign government agencies, is likewise immediately apparent.

At first glance, many of these jurisdictions seem hostile to an attempt to obtain such information. However, recent developments have conspired to diminish or in some cases eliminate the protection afforded by bank secrecy legislation. In recent years, there has been a shift in the absolute secrecy policy in response to international pressures from the U.S. and other countries. Existing traditions of individual financial privacy in the Western democracies have yielded to the power of commercial interests, tax authorities, and litigants in a broad variety of civil matters. Offshore jurisdictions have been pressurised to follow suit.

While the laws invariably differ from jurisdiction to jurisdiction, it is probably safe to say that most bank secrecy laws now contain an exception to prohibitions on disclosure, namely that disclosure can be made where done so pursuant to judicial order. Obtaining such an Order, however, entails

the presentation of sufficient evidence to warrant the disclosure sought – evidence linking the account or account holder to a fraud and establishing the necessity for the disclosure in question. The attitude of the judiciary to such applications varies from judge to judge and from jurisdiction to jurisdiction. Thus, establishing a clear case for the application of the exception presents a challenge which merits careful consideration.

The Use or Abuse of the Corporate Form.

The separate identity offered by incorporation is a benefit exploited by the small and not so small economic criminal alike. Many jurisdictions continue to offer relatively regulation-free environments in which corporations, or at least special species thereof, can flourish without the need to provide details in relation to ownership, management or accounting. Offshore corporate vehicles can be used to further legitimate business but may also enable a perpetrator to cloak malfeasance behind the veil of separate legal identity. The difficulty in getting access to any meaningful information in relation to a corporation's dealings is further compounded by the slow pace at which enquiries are dealt with by the relevant authorities in offshore jurisdictions.

In the interim, the victim is left with no option but to pursue alternative methods of securing the relevant information, methods which themselves may cast a shadow on the information thus revealed. Almost every economic crime involves the misuse of corporate entities. Certain jurisdictions allow corporate vehicles established in their jurisdictions to use instruments that obscure beneficial ownership and control, such as bearer shares, nominee shareholders, nominee directors, "corporate" directors; without providing effective mechanisms that would enable authorities and victims of fraud to identify the true owners and controllers when queries as to such identities arise. Some of these jurisdictions further protect anonymity by enacting strict bank and corporate secrecy laws that prohibit company registrars, financial institutions, lawyers, accountants and others from disclosing any information regarding beneficial ownership and control to law enforcement authorities and others.

In any asset recovery exercise involving the use of corporate vehicles for an illicit purpose, the relevant enquiry will be who exercises effective control (rather than legal control) over the corporate vehicle. In many cases of the use of the corporate veil to conceal beneficial ownerships, the beneficial owner or settlor/founder controls the corporate vehicle despite outward appearances suggesting control by a third party.

The Use or Abuse of Trusts.

If assets are located in a trust vehicle the recovery exercise is made all the more difficult. In many jurisdictions there are no means of ascertaining (a) whether a particular person has an interest in a trust, and/or (b) what property is held in that trust. To begin with, there are a number of basic features of trusts which provide benefits to those who use or abuse them, while providing headaches to those who are tasked with ascertaining asset location and ownership. A trust separates legal ownership from beneficial ownership. It therefore provides opportunities to conceal the real entitlements lying behind the ownership of certain assets.

A trust enables anonymity to be preserved. There are very few arrangements in the world for the registration of trusts. A trust set up in an offshore jurisdiction will often contain assets of substantial value. Trusts of such value are increasingly subject to attack, not only by law enforcement agencies, but also from individuals who have a claim against assets held in trust. Such attacks are not welcome in the offshore trust world, and most of the offshore centres now have specific legislation which is intended to protect the trust fund against attack from other jurisdictions. Typically, such legislation will provide that if a trust is expressed to be subject to the laws of a certain jurisdiction (such as the Cayman Islands, for example) then only Cayman law can be applied to that trust and, in particular, to determine entitlement to the trust assets. Such legislation means that any individual or government agency attempting to receive assets held in, say, a Cayman trust will find that the existence of such legislation creates considerable difficulties.

Other Concealment Methods.

In addition to the possibilities for obfuscation presented by bank secrecy laws, corporations and trusts, there are a variety of means by which the proceeds of fraud may be obscured. Any professional on the trail of the ill-gotten gains should be familiar with techniques fraudsters use to conceal assets. Some of the more straightforward ones include:

- laundering money through local and international banks;
- transfers to corporations, family members or other individuals under their control or influence;
- transfers to discretionary trusts where the beneficiaries include the fraudster's children or other family members and the trustee is influenced by the fraudster;
- payments into insurance policies;
- mortgage paydowns on assets held by other family members;
- purchase of cashiers or travellers' cheques to redeposit in other locales; and
- safety deposit boxes.

Ultimately, a thorough understanding of international money transmission systems and asset protection schemes – together with an appreciation of the legal restrictions and aids available in the relevant jurisdiction – will improve the chances of success. A well-conceived plan, which aims to tie down the assets while obtaining a quick judgment, is the ideal basis for effective asset recovery.

7.0 Starting the Process – Model Building.

As will be apparent from the above, information is key in any asset recovery exercise. This will usually be garnered by means of an investigation varying in complexity depending upon the value of assets and the manner of holding involved. Any investigation should remain confidential as long as possible. Only those who need to know should be informed. If the target becomes aware an

investigation is being conducted, assets may be moved out of the jurisdiction to impede the victim's recovery efforts for months or years.

Initially, a key task is to profile the suspected fraudster. A significant amount of valuable information may be generated from the investigation of the fraud itself. Among the questions to consider are:

- Where is the fraudster likely to be?
- If missing, does the fraudster have personal or business connections in other domestic or foreign locations?
- How sophisticated is the fraudster?
- Is there evidence to suggest that the stolen funds are more likely to be overseas?
- Does the person's particular lifestyle (a gambling habit, for example) offer any clues as to where he or she might disperse or hide assets?
- Are there individuals who worked with/ know the fraudster who could provide information on a confidential basis?
- Are there any easy asset "hits" that can be recovered to fund a broader, more ambitious investigation?
- If assets are offshore and a judgment can be obtained in one jurisdiction, can it be enforced easily where the assets are located?
- How will a criminal proceeding influence the fraudster and the outcome?

In addition, it may be possible to build up a ‘laundering profile.’ For example, information as to how particular professionals employed by the fraudster generally counsel clients in terms of asset preservation can provide valuable leads to likely means of placement, layering and integration.⁵

While an investigation may be conducted on an unofficial basis, it will more often than not be necessary to avail of the assistance of a court in requiring the disclosure of information and indeed protecting the secrecy of the investigation. The traditional form of discovery relief in litigation is *inter partes*, or out in the open, so to speak. However, the circumstances in which relief is sought against a fraudster are generally such as to warrant *ex parte* or secret discovery designed to locate hidden wealth with a view to freezing same to frustrate any attempts to further hide it. Where available, any experienced professional will consider the use of what are termed ‘gagging orders’ to prevent early disclosure to the target. The advantage in sealing and gagging relief operates so as to preclude any disclosure of either the fact of the court ordered investigation, or the information being disclosed, to the party in respect of whom the information is relevant.

The chief extraordinary information gathering mechanisms available in the Anglo-Saxon (or Commonwealth) jurisdictions include *Anton Piller* orders, *Mini-Anton Piller* orders and *Norwich Pharmacal/Bankers Trust* orders “wrapped with a gag.”

⁵ *Placement* involves the channelling of ill-gotten funds into the legitimate commercial sphere of the world’s financial systems. This process may be represented by (a) the carefully planned making of deposits of funds with financial institutions, (b) the acquisition or disposition of assets (frequently at a cost well over or under prevailing market values), or (c) the purchase of spurious enterprises that can hide the truth behind a multitude of dummy transactions (such as the manufacturing of false invoices and receipts).

Layering involves the further obfuscation of the money’s history by employing a series of complex, second-level transactions. These transactions are designed to further separate proceeds from their illicit origins. Layering transactions may, and typically do, involve the use of trusts, shell corporations and a multiplicity of accounts in the names of multiple persons or shell companies.

Integration represents what is effectively the final stage of the money laundering process. It is the term used to describe the placement of funds in such a way as to make them available to the wrongdoer, free of suspicion. In this stage, funds originating from an underlying offence may be stored in pure financial investments, such as stocks and bonds, converted into real investments, such as properties, metals, precious stones, and art, or integrated into legitimate businesses.

An *Anton* or *Mini Anton* is useful only in circumstances where the victim is satisfied that the subject of the Order will not disclose the fact of the same to the fraudster. Thus, it may be used against lawyers, accountants and other service providers who may possess information relevant to the fraudster's assets and business. Because it is executed without notice it avoids the potential for concealment or destruction of records prior to the arrival of the victim's recovery team. In some situations, it will be necessary to have a plan in place to proceed immediately to secure assets located on foot of the order such as, for example, where it is feared that those assets may be moved once news of the execution of the order leaks out. Prompt access to a Judge should be arranged in the event that information as to the location of substantial wealth is uncovered. This can then be secured by way of a *Mareva* injunction.

A *Norwich Pharmacal/Bankers Trust* order may be sought against a bank where there are circumstances suggesting that money held on account in that particular bank belongs in equity to the plaintiff, and has been obtained inequitably. The plaintiff must, however, provide, *inter alia*, evidence of fraud sufficient to justify the order. The circumstances of each particular case will naturally dictate the requisite degree of fraud. In addition, the plaintiff may be required to give an undertaking in damages to the bank along with the universal undertaking that the documents disclosed will be used only for the purpose of tracing the funds in question. On the basis of the evidence supplied, the relevant court shall then consider whether the order so requested should be made and whether it can in fact make such an order having regard, *inter alia*, to whether there exists some statutory prohibition to the making of such an order.

Whatever mode of gathering information is used the paramount consideration must be the maintenance of secrecy unless the recovery team are poised to apply for injunctive relief. An injunction application will require well prepared and presented evidence. However, in practice it may not always be possible to have such an application ready to roll, particularly in the context of an ever evolving factual picture.

8.0 Management of the Process.

Locating the assets requires not only access to information on what jurisdictions are involved and what types of vehicle are being used to hold the wealth; it must necessarily entail a detailed analysis of all the parts of the puzzle, the fraudsters, his contacts, his history, his accomplices and, of course, the developed information on asset locations. The importance of the employment of a well thought out management structure cannot be overemphasised. In most asset recovery exercises, a number of professionals will be employed, all working within their own sphere, so to speak. However, if no one *modus operandi* has overall oversight of the operation there is a danger that significant details may fall through the cracks. This may be as simple as failing to check out a distant relative or an old business contact. Such details might appear irrelevant to a professional who is analysing the flow of funds through bank accounts, or checking corporate information, yet that detail might prove a vital link to the property that has not so far been connected to the fraudster.

While locating the assets is but a part of the asset recovery exercise, it is arguably the most important. However, the more assets that are located, the greater the possible scope of asset freezing relief and ultimately the greater the recovery. The benefits of solid groundwork at this stage of the process can be reaped at the latter stages of the process. This is the stage that requires significant expenditure of human and financial capital. It requires careful consideration of how the asset recovery team should be composed and who will drive the effort. It requires management, skill and experience. It also requires enthusiasm and the ability to adopt an innovative approach as circumstances dictate. A multi-disciplinary approach to the problem will provide the best chance to locate misappropriated assets.

By volume of dealing, the most ubiquitous career economic criminals are those who have demonstrated a facility for taking in excess of \$50 million *per* transaction. They are normally clothed with the trappings of legitimacy. It is this appearance that allows them to operate easily within the milieu of named financial institutions, affording them the opportunity to steal and hide significant tranches of wealth. They have mastered the art of transferring risk and exposure to the

victim of their dealings, through the use of a complex web of financial devices and legal instruments. An English court once observed that an economic criminal uses a company as a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.

Of a lesser size, in terms of magnitude of dealing, are the occasional economic criminals and *male fide* (bad faith) transactors. This group is marked by the taking of wealth at the rate of \$1 million to \$20 million *per* transaction. These recalcitrants borrow money legitimately, but when it comes time to repay, step over the line, and hide the money that they owe.

In most large-scale money laundering cases, the primary protagonist has (i) unlawfully obtained very substantial wealth, (ii) sought professional advice on how, when and where to hide that wealth, and (iii) taken steps to obscure the ownership of the wealth thus taken, most usually offshore. Such a person will wish to use the proceeds thus hidden at some time in the future and, importantly, represents a person who possesses all the normal human vulnerabilities. To continue to carry out unworthy ends, the violators of law who hold wealth illegally need to envelope themselves in (a) proper legal systems, (b) (purportedly) duly constituted juridical persons, and (c) gilt-edged financial institutions, in order that they might hold and enjoy the fruits of their conduct.

9.0 Funding Options.

The cost of large scale asset recovery litigation is a factor which often deters victims of economic crime from pursuing their rights through civil process, preferring instead to leave the task of bringing the wrongdoer to justice to the criminal legal system with its seemingly unlimited resources. There are a number of factors that cohere to make any asset recovery exercise time consuming and, by definition, expensive. These include the increasing cost of professional time, especially specialised professional time.

Also, in such litigation, misappropriated assets will usually have been transferred through several jurisdictions, many of them offshore financial centres, before arriving in their current physical

location. Locating the assets by necessity involves expenditure of the professional time of forensic accountants, investigators and lawyers in a number of jurisdictions. To add insult to injury the defendants use the misappropriated monies to hire experienced asset protection professionals or ‘counsellors’ to shield the victim’s money from detection and, where the devices employed are threatened, expensive legal teams to defend them.

The costs of mounting a legal action for the recovery of assets may be divided into legal costs, court fees and the costs of evidence gathering by forensic accountants and investigators. In smaller cases, lawyers may agree with their client not to be paid until the outcome of the case is known, but few firms of lawyers are likely to be able to take on larger cases, on a one-off basis, without being paid by their clients on an ongoing basis, given the investment of human and financial capital required in such cases.

In addition, the costs incurred in respect of forensic accountants and investigators are likely to be incurred predominantly at the beginning of any legal action, when the evidence is being sought. The front-loading of such costs is an additional factor to consider in assessing reasons why a funding mechanism should be put in place at the outset.

Access to Justice – Practice v. Theory.

It is recognised as a fundamental policy principle in the jurisdiction of England & Wales that an individual:⁶

*“...is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action, subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful, ...”*⁷

⁶ Who is not under a disability, a bankrupt or a vexatious litigant.

⁷ *Abraham v. Thomson* [1997] 4 All E.R. 362 at 372, per Potter L.J. referring to *Martell v. Consett Iron Co. Limited* [1955] 1 All E.R. 481 and *Groewood Holdings Plc. v. James Capel & Co. Limited* [1994] 4 All E.R. 417.

Apart from legal aid, which is available to a very small percentage of the population at large, there remain few methods by which a claimant can afford to meet the costs associated with any common or garden-variety litigation. Depending on jurisdiction, conditional⁸ or contingency⁹ fee agreements represent two of such methods; access to litigation costs insurance,¹⁰ another. However, in the United Kingdom, the introduction of conditional fee agreements (“CFAs”) has had no material impact on the economic problem posed by the right of access to justice – and the corresponding absence of the State as a source of funding the pursuit of private legal rights.¹¹ Most commercial litigation lawyers in England & Wales are unfamiliar with how CFAs operate, and how to manage the risks. Moreover, in jurisdictions where the loser pays the winner’s costs, an under-capitalized claimant cannot transfer his contingent adverse costs liability to his lawyer. Also, he is ordinarily unable to secure funding for the cost of employing expert witnesses – a cost that can run to well over £1 million in complex commercial matters.

It was once predicted that the provision of after-the-event (“ATE”) litigation costs insurance, with CFAs, would facilitate access to justice in instances where impecunious commercial claimants with

⁸ Section 58 of the U.K. Courts and Legal Services Act 1990 as amended by Section 27 of the Access to Justice Act 1999 provides that, “A conditional fee agreement is an agreement with the person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances.” The essential elements of such an agreement are that (a) no fee is payable to the lawyer if the case is lost and the fee if the client wins is an hourly rate enhanced by up to 100% as a success fee; (b) the client has to fund their own disbursements and in particular court fees and experts’ fees.

⁹ People often confuse conditional fees with contingency fees. In English Law, contingency fees are only available where a case is settled before Court proceedings are started. In the event that Court proceedings do become necessary then the contingency fee element of the Agreement comes to an end and some other form of case funding must then be agreed upon. In the U.S., however, contingency fees are not confined to non-contentious work. In a contingency fee agreement lawyers charge an agreed percentage of the compensation that the client recovers. This percentage will cover both fees and expenses. The advantage of contingency fee type arrangements is that the lawyer acquires an added incentive to succeed, and to increase that success.

¹⁰ After-the-event litigation costs insurance covers the insured claimant against contingent liability for own costs and disbursements and for the contingent risk of incurring liability for the costs and disbursements of the defendant

¹¹ The most recent survey carried out by the Law Society of England & Wales on the use of conditional fee agreements (“CFAs”), in 2003, showed less than 25% of firms using CFAs as a charging method, and only 16% of those (or 4% of those surveyed), using them for commercial litigation work.

meritorious claims were otherwise shut out of the system. However, according to the August 2005 Report & Recommendations of the Civil Justice Council of England & Wales styled 'Improved Access to Justice – Funding Options & Proportionate Costs':

*“...the essential ingredient of an ATE policy to support a CFA at an affordable premium is a limitation on putting an affordable funding package in place and in the absence of the lawyer paying the premium many people simply cannot afford this.”*¹²

The principal problem with ATE litigation costs insurance is that, to the knowledge of the writer, it is frequently not available in the market in instances where the risk of loss in the pursuit of a claim exceeds £500,000. Capacity and appetite in the current ATE insurance market is restricted and a number of insurers have withdrawn entirely from providing ATE cover to commercial claimants. Most insurers prefer to spread their risks thinly and play the actuarial position; thus, any policy in excess of £500,000 has to be specially underwritten. Furthermore, commercial claims present insurers with difficulties in, for example, defining what is meant by the likelihood of a “loss” or a “win” (e.g., how likely it is that a case with multiple issues and heads of claim will be “wholly unsuccessful”); how to predict how costs may be apportioned between the parties based on the number of discrete issues or steps in a case where a claimant may “win” some and “lose” some; and how the risk of loss of interim applications is to be dealt with. Predictability of a litigation budget – and therefore setting the appropriate level of insurance – is also an issue. Even assuming that these issues can be resolved under the classical actuarial model used by the insurance industry (– in contrast to an entrepreneurial approach); typical premiums of between 30% and 40% of the sum insured render policies out of reach when premiums have to be paid up-front by claimholders.

¹² Report and Recommendations of the Civil Justice Council of August 2005 at p. 31. The Report was prepared by Michael Napier CBE, Senior Costs Judge Peter Hurst, Robert Musgrove and Professor John Peysner (the “CJC Report”). The CJC was established in December 2001 to monitor the civil justice system of England & Wales following the introduction of Lord Woolf’s reforms through the 1998 Civil Procedure Rules (the “CPR”).

Third Party Finance of Claims.

The assignment of a partial interest in a claim to an owner of capital is a risk-sharing device, where part of the potential award from a lawsuit is exchanged for money or services. It is thus not dissimilar from a typical contingent fee type arrangement, whereby the fee is calculated by a professional service provider by way of a percentage of the economic benefits of the successful outcome of the case. The ability to assign all or part of the fruits of a cause of action provides an effective method of finance of litigation, assuming the availability of access to capital. For many victims of economic crime, access to venture capital represents the only viable method of financing multi-jurisdictional, complex and expensive litigation.

While conditional fee type arrangements theoretically provide a method of financing a portion of the litigation aspect of such an action, ‘extra-litigation’ costs are largely ignored. In large-scale fraud cases, the ‘extra-litigation’ aspect can be of greater fundamental importance (or more expensive) than the litigation element. There can be no meaningful recovery for victims if the necessary groundwork in terms of asset-location, forensic analysis and intelligence work is not carried out competently. Millions of pounds of security must be posted. The funding of these aspects of multi-jurisdictional proceedings does not come within the ambit of conditional fee arrangements with professionals, nor does it come within the ambit of the typical litigation costs insurance arrangement. This is where access to capital markets is of most crucial importance.

The current market for claims worldwide is at best disorganised. In many countries, outmoded laws derived from the doctrines of champerty and maintenance¹³ prohibit the free trade in claims either outright or make such trade subject to stringent conditions.

¹³ The law of champerty and maintenance is a vast study in its own right. I do not propose to include an in-depth discussion of same within the four corners of this paper. Halsbury’s *Laws of England*, 4th Edition, gives the following definitions of maintenance and champerty:

“Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognized by the law as justified his

In England, the torts of maintenance and champerty were abolished in the 1960s upon the recommendation of the Law Commission which concluded that an action for damages for maintenance and champerty no longer served any useful purpose. Maintenance and champerty were also abolished as criminal offences in England in the 1960s. However, the common law doctrine invalidating champertous contracts continues to exist.

A number of different approaches have developed in the United States to deal with maintenance and champerty. Some states such as Pennsylvania have maintained the common law prohibitions against champertous agreements, while the courts of other states like California have held that champertous agreements may be contrary to public policy. Yet other states such as New York have adopted statutes declaring champertous agreements void. Civil law jurisdictions including Puerto Rico and Louisiana have adopted an approach whereby if a plaintiff sells all or a portion of a lawsuit to a third party, the defendant may settle the litigation with the plaintiff by reimbursing the third party for the amount paid by him or her with interest and costs.

In general it may be said that there are three routes by which one person may seek to dispose of, and another person may seek to acquire, the prospect of benefiting from current or future litigation against a third party. The first is the transfer of property carrying with it the right to prosecute any cause of action closely related to that property, such as the assignment of a debt. Such a transfer and any action brought by the transferee to enforce that right are not champertous.¹⁴ The second is the assignment of a bare cause of action or bare right to litigate. Such assignments offend public policy.¹⁵ The third is the assignment of the damages or other monetary compensation that may be

interference. Champerty is a particular maintenance, namely maintenance of an action in consideration of the promise to give the maintainer a share in the proceeds of the subject matter of the action."

Maintenance can be described as a doctrine of public policy which is "directed against wanton officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse," per Fletcher Moulton L.J. in *British Cash and Parcel Conveyers Limited v. Lamson Store Service Company Limited*, [1908] 1 K.B. 1006 at page 1014.

¹⁴ See, for example, *Camdex International Ltd v. Bank of Zambia* [1996] 3 All E.R. 431.

awarded in an action in which judgment has not yet been given. Such an assignment, being an agreement to assign future property (damages, if and when awarded), operates in equity and, if supported by consideration, will be valid and no question of unlawful maintenance or champerty will arise, at any rate when the assignee has no right to influence the course of the proceedings.¹⁶

While the laws differ from jurisdiction to jurisdiction, some common or basic guidelines may be extracted from case law. In considering whether an arrangement is likely to offend notions of justice and/or is likely to stir up litigation unnecessarily, the case law suggests that courts will consider a number of factors, including the following:

- Merits of the plaintiff's lawsuit — the less meritorious the plaintiff's suit, the more likely the third party's financial assistance will be seen as intermeddling;
- Fairness and reasonableness of the arrangement as between the plaintiff and the third-party investor — if the parties can be viewed as relative equals with respect to their ability to bargain, there is a greater likelihood that a court will find the third party's assistance as proper. Additionally, the courts will examine the actual bargain struck to ensure that it is not unreasonable, and that it is reflective of equality of information and bargaining power between the parties;
- Whether the facts in the particular circumstances actually lead to the evils which the doctrines against champerty and maintenance are designed to avoid;
- Relative strength of the plaintiff and the defendant to the lawsuit — courts will consider the financial and other inequalities between the plaintiff and the defendant in favour of validating the arrangement between the plaintiff and the third party;

¹⁵ See, for example, *Trendtex Trading v. Credit Suisse* [1982] A.C. 679

¹⁶ See, *Glegg v. Bromley* [1912] 3 K.B. 474 per Gibson, L.J. in *Ward v. Aitken & Ors.*, [1996] EWCA Civ 689.

- Third party's ostensible motive in providing financial assistance — courts are more willing to uphold agreements where a third party claims a motive of providing assistance to help the disadvantaged, despite recognition by the courts that the third party's primary motive is to profit from the financing;
- Who brought the action to have the agreement declared champertous — if the litigant after succeeding wishes to have the court declare the agreement invalid, the fact that the litigant is not going to court with clean hands will have an impact upon the court's exercise of its equitable jurisdiction.

One of the recognised exceptions to the doctrines of maintenance and champerty is where the alleged champertor or maintainer has a legitimate commercial interest or a pre-existing interest in the subject matter of the litigation. In reality these are terms which courts can mould to suit the realities of the situation. A *bona fide* business arrangement will be upheld provided there are no other complicating factors present.

Although the remnants of champerty and maintenance still exist, more facts are required than merely the presence of professional funding in exchange for a share in the proceeds of litigation – for an English court to conclude that a funding agreement is incompatible with public policy and should be deemed unenforceable.¹⁷ In short, given the magnitude of costs involved in large-scale and complex commercial litigation, the limitations of CFAs and the lack of capacity in the ATE insurance market, an impecunious claimant's prospects for securing access to justice may well rest solely on the availability of substantial professional funding.

In this light, the so-called “professional funder” – earning a profit by sharing in the proceeds of a successful claim – is far less dubious than a wrong-doer benefiting from the claimant's inability to resource his claim. The existence of professional funders is crucial and in the public interest. This notion is finding wide acceptance. In their Report of August 2005, the CJC of England & Wales commented that, in part:

¹⁷ See, the section styled ‘Law of Litigation Finance’ set out in this Information Memorandum below.

“In the search for financial support to permit access to justice the use of funding by a third party is becoming more prevalent.

.../

*Recommendation 13: Building on the judgement of the Court of Appeal [of England & Wales] in “Arkin” [v. Borchard Lines Ltd. 2005 EWCA Civ. 655], further consideration should be given to the use of third party funding as a last resort means of providing access to justice.”*¹⁸

In February 2005, one commentator had this to say about recent developments:

*“Over the last three years, the courts in Australia, the United Kingdom, Canada and the United States have accelerated towards the abolition of the rules against maintenance and champerty. This has occurred primarily because of a heightened concern for access to justice, but also because of a recognition that the rules are no longer necessary (if they ever really were) to protect either the litigants or the court system.”*¹⁹

For purposes of the present discussion, it is important to have sight of the magnitude of cost involved in the funding of a large-scale fraud action. It is also necessary to bear in mind those who would be affected – the would-be claimant or victim. Depending upon who the perpetrator of the crime is, the victim can be all manner of person. Thus, the victim can be a sovereign state; the citizens of that state; the public at large; public-sector enterprises or entities; a private sector enterprise or a central bank. Theoretically, one of the benefits of third party funding is the absence of agenda in the enforcement context, apart, that is, from the monetary incentive. For example, in a case of large-scale government corruption, the recovery process will undoubtedly raise questions of significant public and political importance. Quite apart from financial considerations, political complications may act as a barrier or a disincentive to public law enforcement authorities embarking on a particular course of action, whereas a private law enforcement concern, focused

¹⁸ See, p.44, the CJC’s Report.

¹⁹ McLeron, H., *In Support of Professional Litigation Funding* (February 2005) (IMF (Australia) Ltd.).

upon victim recovery rather than punishment, may not be so constrained. The privatisation, so to speak, of victim recovery litigation represents a neutral and effective method of providing restitution to victims, with the added benefit of deterring the practises which caused the loss in the first place. Enabling access to capital markets in such a scenario effectively privatises law enforcement within the context of victim recovery, thereby providing access to justice for the victim, together with the social good achieved by compelling the perpetrator to account.

10.0 Conclusion.

As will be apparent from the above, for a variety of reasons, large scale asset recovery actions are fraught with difficulty and challenges, not least among them the cost involved. The somewhat insular and conservative attitude of the law or indeed the judiciary in many countries to providing support to foreign proceedings; and to recognising and enforcing foreign judgments; often adds to the complexity involved. Rather than seeking to diminish the inherent practical difficulties of litigating across borders, the law in relation to cross-border litigation often reinforces these difficulties, creating unnecessary and often prohibitive barriers for those victims of economic crime who seek justice.

Effective laws and mechanisms to enable such victims to seek and achieve redress are an integral component of a society that promotes equality and justice for all. The provision of meaningful and practical remedies for those visited by fraud, as well as other crimes, promotes a society where wrongs are punished and dissuaded, not only through the criminal justice system but also through the pursuit of wrongdoers by those immediately and directly affected. Crime affects society at large. As noted above, the cost of economic crime is one borne collectively by society. Thus, the greater the potential for recovery directly from the perpetrator of fraud, the lesser the burden borne by tax payers and insurance policy holders. The current global climate is such that jurisdictions that cloud their dealings in secrecy and provide protection to those who seek anonymity in relation to their financial dealings, can no longer expect tolerance. Increased transparency is now seen as a requirement; increased regulation of financial intermediaries has contributed greatly to the ability to access information which hitherto might have been unavailable. These are all factors which lessen

the management burden of an asset recovery exercise. However, the fight against global economic crime is one which involves battles fought on many fronts. As governments move to step up regulation, so too the economic criminals of this world devise new and increasingly complex ways to take and conceal wealth. The worth of careful research, investigation and analysis on a case by case basis cannot be over emphasised. Access to justice requires a degree of tenacity on the part of those who seek it. While theoretically available, it demands commitment and resolve in order to follow through and take it.