**IBA ASSET RECOVERY CONFERENCE**

**6-8 December 2023, Vienna, Austria**

**Keynote speech by the Right Hon Lord Briggs of Westbourne, 8 December 2023**

## Introduction

Thank you, Robert – and all – for the very warm welcome. May I start by saying what a privilege and a delight it is to be invited to attend the IBA's inaugural asset recovery conference, and to learn from leading minds in this field from multiple jurisdictions. The sense of collegiality, camaraderie and common purpose among delegates from such diverse backgrounds is truly impressive. This is an area where I used to be very active at the bar (up to 2006!) but it has not come my way on the bench as much as I would have wished, especially at the appellate level after 2013. That is probably true of all my Supreme Court colleagues, although some of us (alas not me) were very recently involved in the unending boundary war between asset recovery and arbitration in the *Mozambique* case.[1]

It is fantastic that the IBA now has an independent Asset Recovery Committee, particularly in circumstances where the ownership and transmission of assets has become increasingly complex and susceptible to unlawful cross-border activity. I wanted to share a few thoughts in this context under three headings: (i) the central role asset recovery plays in upholding the rule of law; (ii) the corresponding importance of developing asset recovery regimes from an international perspective; and (iii) the role the common law has played in developing new legal tools and modernising existing ones, the better to facilitate asset recovery.

## Asset recovery and the rule of law

Asset recovery's central role in maintaining the rule of law is threefold. First, it furthers the fundamental principle underlying the rule of law that (as the late, great, Lord Bingham put it) all persons and authorities within a state should be bound by and entitled to the benefit of the law.[2] Without the ability to find, freeze, follow, trace and recover assets as a means of securing

[1] *Republic of Mozambique (acting through its Attorney General) v Privinvest Shipbuilding SAL (Holding) and others* [2023] UKSC 32.

[2] Tom Bingham, *The Rule of Law* (Penguin 2010), p. 37.

proprietary remedies for unlawful conduct, claimants are unable to vindicate their legal rights and, conversely, wrongdoers are enabled to evade the full reach of the law. This is likely to generate disrespect for the law, by both victims and perpetrators, and the risk of resort to non-legal methods of recovery. Second, asset recovery facilitates the enforcement of judgments against defendants found responsible for fraudulent and corrupt behaviour. In that respect it can be an even more potent deterrent to fraud than criminal liability. It therefore strengthens a legal regime designed to prevent conduct that, in the words of the late Lord Templeman, "threatens the foundations of any civilised society".[3] Finally, effective asset recovery regimes need to uphold the rule of law on an international level, guarding against courts in different jurisdictions: (i) applying the law inconsistently, and therefore preventing unpredictability and ambiguity within international law; and (ii) taking an excessively parochial attitude to their jurisdiction. Treaties that provide for mutual assistance, for the disclosure and production of information, and then for the recognition and enforcement of foreign judgments are particularly valuable in ensuring cross-border harmonisation and precluding the need for parallel proceedings, thereby providing for clarity, efficiency and economy in the asset recovery process.

**Asset recovery from an international perspective**

The role asset recovery plays in upholding the rule of law, in the sense of ensuring that no person is beyond the reach of the law, is particularly significant in an internationalised world. As one former UK Supreme Court Justice (Lord Neuberger) presciently observed in 2011:

> *In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted.*[4]

In my view the internationalisation of fraudulent activity by the poachers has in recent years tended to outpace the cross-border response of the gamekeepers. This is true in so many areas. Internet shopping has made it easier for counterfeiters to evade trademark and other IP-based restrictions. The jurisdictional constraints of national courts can greatly inhibit cross-border asset recovery. For example, the English courts are slow to enforce

[3] *Attorney General for Hong Kong v Reid* [1994] 1 A.C. 324; [1993] 3 W.L.R. 1143, per Lord Templeman at 1146.
[4] *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWCA Civ 1042, per Lord Neuberger MR at [17].

*Norwich Pharmacal*[5] and *Bankers Trust*[6] duties on foreign banks and intermediaries, in seeking to assist in the identification of wrongdoers and the whereabouts of misapplied assets. A move towards internationalism in insolvency by the English courts has recently been greatly attenuated by a revived adherence to restrictive rules of private international law, save where statutory overrides apply. And what is true of the UK is I suspect a fortiori true of most other major jurisdictions, particularly those where the wrongdoers may be hiding themselves and the stolen assets.

It follows that asset recovery regimes must be reviewed and developed from an international perspective, as recognised by the International Bar Association and facilitated by conferences such as this one. Nothing else is going to work effectively. It is particularly encouraging that the IBA aims to create a model Asset Recovery Law in the near future and that the UN Commission on International Trade Law (UNCITRAL) is developing a draft text on civil asset tracing and recovery in insolvency proceedings. Such initiatives are essential to achieving predictability and practical effectiveness in the asset recovery sphere, but probably only in the long term. It may be doubted whether the concept of a world adhering to a common western democratic and rule of law based notion of society is currently on the advance. The challenge may therefore be daunting, but that is no reason not to struggle to achieve that objective. Every nation under heaven is going to have citizens who are defrauded en masse by crooks. There is no rational reason why combatting the bad guys should not be a shared political objective, worldwide.

## Asset recovery and the common law

Pending the further development of international law and cross-border mutual assistance regimes in this field, it is worth noting the leading role which the common law has played in devising effective asset recovery mechanisms, particularly through the development of equitable remedies. For example, in the seminal 1993 case of *Attorney General for Hong Kong v Reid*[7] the Judicial Committee of the Privy Council held that where a bribe is accepted by a fiduciary in breach of his duty, that fiduciary holds the bribe on trust for the person to whom the duty was owed. The injured person would therefore have a proprietary interest in the bribe and would be able to trace and follow it in equity. This decision conflicted with earlier English authority, particularly

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[5] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133; [1973] 3 W.L.R. 164.

[6] *Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274.

[7] [1994] 1 A.C. 324; [1993] 3 W.L.R. 1143.

*Lister & Co v Stubbs*,[8] but the conflict was eventually resolved in favour of the Privy Council's view in *FHR European Ventures LLP and others v Cedar Capital Partners LLC*,[9] to much rejoicing by many equity lawyers including myself.

The common law has been particularly effective in adapting remedies to contemporary challenges facing asset recovery, as demonstrated by the remarkable way in which the injunction has developed over the last half century. In English law, the freezing injunction was originally a remedy of limited scope, applying in domestic proceedings to restrain foreign defendants from moving assets out of the jurisdiction prior to an adverse judgment being rendered against them.[10] Yet the remedy has evolved over time to have much broader application.[11] In the recent case of *Convoy Collateral Ltd v Broad Idea*,[12] the Privy Council made clear that courts with equitable powers are able to modify existing practice where to do so accords with principle and is necessary to provide an effective remedy. The Board held that there was no reason in principle why freezing injunctions could not be granted in support of foreign proceedings, or against persons who are not themselves subject to any cause of action or substantive proceedings. On the contrary, to do so would be consistent with what the Board identified as the fundamental purpose of freezing injunctions: facilitating the enforcement of a future judgment or order to pay a sum of money. This was particularly the case in the light of significant developments in commercial and financial practices and the growth in the use of offshore companies.[13] The same rationale also applies in the crypto asset context, where international freezing injunctions have also been held to be applicable.[14]

*Norwich Pharmacal* orders and *Bankers Trust* orders are also relatively new but now familiar types of injunction: both operate on the basis that a person, however innocent, who has become mixed up in someone else's wrongdoing, comes under a duty to assist the victim with disclosure which may lead both to the identification of the wrongdoer and to the whereabouts of the misappropriated.

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[8] (1890) 45 Ch. D. 1.
[9] [2014] UKSC 45; [2015] A.C. 250.
[10] *Convoy Collateral Ltd v Broad Idea* [2021] UKPC 24; [2023] A.C. 389, per Lord Leggatt at [6].
[11] *Convoy Collateral Ltd v Broad Idea* [2021] UKPC 24; [2023] A.C. 389, per Lord Leggatt at [13]-[21].
[12] [2021] UKPC 24; [2023] A.C. 389 ("***Broad Idea***").
[13] Lord Leggatt in *Broad Idea* at [59]-[60], [82], [85] and [90].
[14] *CLM v CLN* [2022] SGHC 46; *AA v Persons Unknown* [2019] EWHC 3556 (Comm); [2020] 4 W.L.R. 35.

Equity's flexibility is also apparent from the development of internet blocking orders by the English courts. Basing themselves partly on EU jurisprudence, the English courts have developed this novel type of equitable relief as a formidable means of combatting the sale of counterfeit products. The IP owner gets a court order against all the main internet service providers requiring them to block the websites of named counterfeiters, despite the fact that the service providers are innocent of any wrong, and the IP owners have no cause of action against them: see *Cartier International AG v British Sky Broadcasting Ltd*.

The ability of the common law (or rather equity) to adapt and innovate where modern conditions so require has been confirmed by the UK Supreme Court's very recent decision in *Wolverhampton City Council and others v London Gypsies and Travellers and others*.[15] At issue in that case was whether courts had the power to grant injunctions against persons who, at the time of the order, are neither defendants nor identifiable, and who are described in the order only as "persons unknown". The case was brought after injunctions had been obtained by local authorities in the UK to prevent unauthorised encampments by Gypsies and Travellers. My colleagues and I found that the proposed injunction, which we referred to as a "newcomer injunction", was a wholly new type of injunction with no immediate ancestor of which it could be said to be a natural development. It was therefore necessary for the Court to go back to first equitable principles to determine whether a newcomer injunction could ever be a proper exercise of the court's statutory and equitable powers. Those principles include: (i) that where there is a right there should be an effective remedy; (ii) that equity looks to the substance rather than the form; (iii) that equity acts in an essentially flexible way, that will respond over time to changed circumstances and perceived new needs; and (iv) that, apart from justice and convenience, equity is not constrained by any limiting rule or principle which has become sacrosanct over time. We concluded, having regard to those principles, that newcomer injunctions may, subject to proper safeguards, be granted where there is shown to be a compelling need to do so, and no other remedy appears likely to be effective for the purpose of ensuring compliance with the law.[16]

The newcomer injunction may well have application beyond the unauthorised encampments context, particularly in circumstances where wrongdoers operating online are able to violate private or public rights behind a veil of

[15] [2023] UKSC 47 ("***Wolves v Gypsies***").
[16] Lord Reed, Lord Briggs and Lord Kitchen in *Wolves v Gypsies* at [238].

anonymity.[17] Indeed, the basic notion at the heart of *Wolves v Gypsies* – that injunctions can be granted against persons unknown – has recently been applied in the cryptocurrency context. In the 2022 case of *CLM v CLN*,[18] for example, the Singaporean High Court granted a worldwide freezing injunction against unidentified persons who had allegedly misappropriated cryptocurrency from the plaintiff. There are a number of English reported crypto cases (at first instance) where, at least at the outset, the unknown wrongdoers have been sued as persons unknown.[19]

It may be suggested that all this looks like judge-made law. But in reality it is you lawyers that do the blue sky thinking, and persuade judges to follow them.

The great thing about the common law in the context of an essentially international asset recovery battle is that it is itself a system of law which knows no national boundaries, even if its precise content may vary slightly from place to place. In the Judicial Committee of the Privy Council the judges of the UK Supreme Court continue to act as the final court of appeal for 26 small, mainly common law jurisdictions, some of which, like the Cayman Islands, Bermuda, the British Virgin Islands and the Channel Islands, are major financial centres in their own right. And the top courts of all the common law jurisdictions, including Australia, New Zealand, Canada, Singapore, Hong Kong and especially the UK pay the closest attention to developments of the common law around the world, looking not for slavish uniformity, but shared wisdom in the development of the common law to meet modern challenges. We even look at the essentially common law jurisprudence of the USA, and the (still unmerged) equity jurisdiction of Delaware, where most US companies are incorporated.

The common law has not been slow in recognising crypto assets as a form of property, although much has still probably to be done in developing proprietary claims and remedies, to make that basic recognition earn its keep.

**Conclusion**

The common law (and equity in particular) has therefore played a prominent role in developing asset recovery mechanisms to address changing social, commercial and technological conditions, but is of course limited in its international scope, mainly by jurisdictional constraints, and a desire to

[17] Lord Reed, Lord Briggs and Lord Kitchen in *Wolves v Gypsies* at [3].
[18] [2022] SGHC 46.
[19] See, for example, *AA v Persons Unknown* [2019] EWHC 3556 (Comm); [2020] 4 W.L.R. 35 and *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch).

continue to respect the jurisdictional and territorial integrity of other sovereign states. Increased cross-jurisdictional collaboration is urgently required to achieve an effective international asset recovery regime, especially given the increasing ease by which assets can be transferred and dissipated across borders. It is particularly welcome in these circumstances that the IBA Asset Recovery Committee is developing tools to facilitate asset restraint and recovery on an international level, supported by the work of other IBA committees with related expertise, and by UNCITRAL. This work is fundamental to maintaining the continued effectiveness of civil fraud litigation, and therefore the rule of law in a globalised world.