

# DISCUSSION

Who's Who Legal brings together two leading experts to discuss issues facing asset recovery lawyers and their clients in the industry today.



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## What trends are currently driving asset recovery work in your jurisdiction?

**Sandrine Giroud:** Switzerland is still one of the key jurisdictions for asset recovery, given its top ranking among the world wealth centres – though Swiss banking secrecy and the lack of discovery procedure remain the key challenges. The use of criminal proceedings as an alternative to discovery in order to gain access to banking or other information is becoming a regular tool in every Swiss asset recovery specialist's toolbox. International insolvency proceedings are also becoming more interesting asset recovery tools, given the upcoming changes in Swiss legislation that will facilitate the recognition of foreign insolvency proceedings in Switzerland. Another trend is the increasing focus on other trophy assets such as artworks, jewellery and gold, or new asset forms such as cryptocurrencies.

**Kate McMahon:** The first trend to mention is speed. Fraud is global, technologically sophisticated and fast. Even identification of a fraudster can be difficult; it's possible to disguise jurisdiction by re-routing phone numbers and websites, bank

accounts and by using different media. Counterfeiting is easy. Manipulation is easy. And people no longer have an expectation of "knowing" the people they do business with, nor necessarily meeting them. The diversity of investment schemes is also difficult; many of those my clients have invested into have had excellent press.

Second, networks. I think there is an ever-greater awareness of the importance of working closely with partners and authorities around the world to rapidly identify and locate evidence, and freeze assets before they are dissipated. Having trusted partners across jurisdictions (be they lawyers, investigators or law enforcement) in the formative stages of a case strategy has proved imperative. One of the things that makes tracking fraudsters so much fun is that often they're clever and inventive. It also means that there is not usually any time to waste when a fraud is discovered.

Third, transparency. A move towards transparency is also supporting the recovery of assets. For example, the new register of beneficial owners has been fully implemented across the UK. There are similar initiatives in play across the world. While this doesn't mean that

money and assets won't be hidden, it will make it harder and push fraudsters towards an ever-decreasing array of jurisdictions and lawyers can already see those changes taking place.

## As fraudulent schemes become ever-more sophisticated and complex, what do lawyers need to do to ensure they are delivering the best advice to clients?

**Sandrine Giroud:** Now more than ever, it is critical to consider a matter in its globality, with all the jurisdictions involved, to ensure that the best tools available in each jurisdiction can be used and, as the case may be, imported from other jurisdictions. One example is the use of English freezing orders and their recognition in Switzerland based on the Lugano Convention. It is also important to think out of the box and consider mixed strategies involving civil, criminal or insolvency means.

**Kate McMahon:** Understand the internet and technology! Whether it's an investment fraud, an advance fee scheme, an e-mail compromise or counterfeiting, most frauds now involve or use, in

one way or another, the internet and technology. It is important to understand how fraudsters have been able to adapt and deploy their charm, egocentricity and deception via technology to commit frauds with global reach.

Having the in-house capability to understand how technology can be used to intercept live criminal websites, and to triangulate data to identify wrongdoers and assets, is essential. It's important to also identify where the evidence is likely to be and what it looks like in the modern world.

### **What impact, if any, has the development of third-party litigation funding had on asset recovery cases?**

**Sandrine Giroud:** Third-party litigation funding remains a limited phenomenon in Switzerland in relation to purely litigation proceedings. This is due to the length of the proceedings, the lack of predictability of the outcome and court costs, and largely depends on the value in dispute. However, third-party funding is more regularly considered in relation to arbitration proceedings and related enforcement proceedings.

**Kate McMahon:** The significant cost of civil proceedings and asset recovery is likely to be a constant and perpetual hurdle for all litigants and the UK has a sophisticated funding market. In my experience, the recent developments that make third-party funding dynamic and fascinating is their readiness and recent enthusiasm to fund criminal investigations and private prosecutions for asset recovery. The draconian powers given to prosecutors under the Proceeds of Crime Act 2002, designed to deprive fraudsters of ill-gotten gains and luxury lifestyles, make third-party funding and private prosecutions a very interesting space to watch in the UK and – if successful – other jurisdictions.

### **Sources have pinpointed cryptocurrency-related fraud as a significant growth area for the coming years – what impact do you believe this will have on the practice of asset recovery?**

**Sandrine Giroud:** Cryptocurrencies are definitely an area to be watched. The Swiss government has issued guidelines that should help local initial coin offerings (ICO), with the hope of supporting the ICO market and boost blockchain technologies by clarifying when entrepreneurs have to apply anti-money laundering and securities laws. This has triggered a large interest from investors in cryptocurrencies. As always, great opportunities involve great risks, including risks of fraud. It is necessary to keep abreast of this development and with the technicalities of this new form of assets to include it in asset recovery strategies.

**Kate McMahon:** Ever since the creation of cryptocurrency and blockchain technology, it has been deployed for, among other things, money laundering, ransomware attacks and other criminal activities. While some cryptocurrency transactions are traceable, most are expressly designed using obfuscation techniques to avoid being traced, and thus allowing users to remain anonymous. While the European Union stands ready to regulate cryptocurrencies if risks from the sector are not tackled at the global level, the efficacy of any such regulation is doubtful. Recital 7 to the Directive proposed by the European Commission identifies that, despite regulation, users will be able to transact without exchange platforms or custodian wallet providers, and thereby remain anonymous. Thus, despite regulation, cryptocurrency-related fraud is likely to remain prolific. A number of cases are currently being litigated and shall be resolved in the next few years.

There are a number of options being discussed including banning certain

cryptocurrencies, in the same way as J P Morgan Chase has, but whether a cyber-libertarianism or cyber-paternalism model is implemented, I suspect radical changes will come along sooner rather than later, (including, perhaps, a digital ID before you even log on to the internet?).

### **Since you began your career, how have technological advances changed the way in which asset recovery is conducted?**

**Sandrine Giroud:** Technology is becoming an increasing support tool for data and document management, thus facilitating the investigations aspect of a file. However, the human factor remains crucial as it is critical to think across jurisdictions and sectors in order to determine strategy and identify the best experts to implement it.

**Kate McMahon:** Artificial intelligence and document review platforms have moved with alacrity. A prime example of the growing importance of AI in this sphere can be seen in the recent *SFO v Rolls Royce* case, where the SFO deployed a British artificial intelligence start-up and software – “robot” – to help expose large-scale bribery and corruption at Rolls-Royce; LPP documents were identified 2,000 times faster by “robot” than by humans, with 600,000 documents being reviewed per day. Since then, the SFO have announced plans to roll “robot” out across a much wider body of cases.

AI technology now undoubtedly assists those concerned in asset recovery to work smarter, quicker and more successfully to investigate economic crime and recover assets. It is so important to fighting economic crime, the courts in the UK are mandated to “[make] use of technology” in actively managing cases (CrimPR 3.2(2)(h)).