

# Maximising recovery

## SNAPSHOT:

- Despite the increasing prevalence of commercial fraud globally, commercial fraud in civil practice is still not widely recognised as a discrete practice area for legal practitioners in Australia. It should be.
- Commercial fraud litigation is difficult and complex but can produce very favourable outcomes.
- Bringing a civil claim is usually the fastest, most cost effective and efficient means of securing maximum recovery for victims of fraud.
- Such litigation often results in a negotiated settlement early in the proceedings, so the costs associated with a lengthy matter can be avoided.

## HOW TO SECURE THE MAXIMUM RECOVERY FOR VICTIMS OF FRAUD. BY ANDREW TRAGARDH

### Don't report the matter to police

Reporting a fraud to police is often done without a second thought. But in many cases, police action is unlikely to secure maximum recovery for victims of fraud.

This is what you should know:

- in Victoria (as in most states) there is no legal obligation to report fraud to police<sup>1</sup>
- the Victoria Police website states (relevantly): "Police only investigate criminal matters in order to charge offenders and place evidence before a court. Civil action is the most appropriate method of recovering money"<sup>2</sup>
- don't assume expert fraud investigators will assist you. The Victoria Police Fraud & Extortion Squad only investigates reported or targeted investigations assessed as highly complex, multi-agency or involving catastrophic victim impact – most fraud investigations are, therefore, conducted by police at local police stations. Fraud investigations typically require a thorough understanding of legal and financial affairs which are beyond the limited capabilities and resources of local police. This is not a criticism of police. It is just a fact.
- once a report is made to police, you and your client forfeit control of the matter
- significant delay is involved – once a complaint is made to police it typically takes years before an investigation is completed and the fraudster is interviewed and charged, let alone appears before a court
- while police may exercise substantial powers under the *Confiscation Act 1997* (Vic) to restrain or freeze assets of suspected offenders or others, such powers are not commonly exercised in fraud cases
- criminal cases are harder to prove than civil cases as they must be proved beyond reasonable doubt
- if a report is made to police, and then a decision is later made to commence civil proceedings in relation to the same subject matter, the fraudster may thwart such action by applying for a stay of the civil proceeding on the basis that to be compelled to defend the matter would require them to forego or waive their right to silence in relation to any subsequent criminal proceedings brought against them<sup>3</sup>
- bringing a civil claim is usually a fast, cost-effective and efficient means of securing recovery for victims of fraud. Just because a client may be a victim of fraud does not necessarily mean you must plead and prove fraud for your client to be adequately compensated. Sometimes recovery can come from a wider range of defendants than



could possibly be imagined in criminal proceedings. By establishing a proprietary interest in an asset and the deployment of tracing rules, proprietary claims can also be elevated above all others and survive the insolvency of the fraudster.

In most fraud cases the author strongly recommends seriously considering commencing a civil claim instead of reporting the matter to police. Once recovery is achieved via a civil claim, your client may then elect to report the matter to police without prejudicing their capacity to secure a recovery. Of course, there is no harm in victims and their legal advisers conferring with police before deciding whether to pursue a civil claim or make a report.

### Initial action

Every matter must be considered carefully and on its own merits. That said, some things should always be kept in mind.

- Early analysis of the evidence with a view to considering whether sufficient evidence exists to commence proceedings and to seek pre-emptive relief (discussed below) is the priority. Counsel ought to be briefed as early as possible to conduct this analysis and to provide advice.
- If further evidence is required, a covert investigation should be commenced immediately. Such investigation should not be conducted by the client or solicitors. Amateur sleuthing is an expensive and time-consuming mistake. The investigation should be conducted by a properly qualified professional investigator (preferably a certified fraud examiner or similarly qualified investigator)<sup>4</sup> who will bring all the necessary skills and experience to secure valuable evidence and “put all the pieces together”. The investigator should be engaged by you (the solicitor) to ensure their reports are protected by legal professional privilege. An affidavit by the investigator will support any application for a Freezing Order or Search Order.
- Do not confront the suspect. Ideally, the first time they know their fraud has been detected is when “out of the blue” they are served with a Writ and Freezing Order/ Search Order.
- Set up confidential lines of communication between your office and the client. Be careful not to alert the fraudster or others in the employ of the client who may be sympathetic or might innocently say something to give the game away.
- Check whether the client has a policy of insurance which may provide fraud cover. If so, it is likely the policy will require the insurer to be notified immediately.
- Always keep an open mind – there could be more than one fraudster. The fraud detected may be the tip of the iceberg. The conduct may have ceased or it may be continuing.

### Causes of action

Once the facts have been determined, applying the law is not straightforward. A diversity of overlapping claims may be available on the same facts. Knowledge of the law

of contract, tort, equity, trusts, insolvency, employment and corporations law is often necessary. The claimant may seek a personal remedy or a proprietary one. There may be claims against the individual fraudster such as deceit, unjust enrichment, conversion and most commonly, breach of fiduciary duty. There may also be claims against third parties such as money had and received, knowing or unconscionable receipt, or dishonest assistance. Potential defendants could include companies, partners or relatives of the fraudster. Common law tracing or tracing in equity may need to be considered. Careful analysis of the evidence and the law will be required to identify the correct defendants and formulate the appropriate claims and remedies. Counsel should, of course, be engaged at this critical time.

### Starting civil proceedings

Due to the urgency of the matter, there is usually insufficient time to draw a statement of claim. Instead, a writ with an endorsement of claim providing a statement sufficient to give with reasonable particularity notice of the nature of the claim and the cause thereof and of the relief or remedy sought in the proceeding will be satisfactory.<sup>5</sup> Unless otherwise ordered, a statement of claim must be served within 30 days after the filing of the defendant’s appearance.<sup>6</sup>

### Freezing orders

The most potent and commonly used tool at the disposal of the fraud litigator is the Freezing Order (previously known as a Mareva Order). It restrains the respondent/s to the order from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of those assets. The purpose of such an order is to prevent the respondent/s from subverting the judicial process by deliberately taking steps outside their usual activities to dissipate or transfer assets so they will not be available to meet any future judgment.

Application for a Freezing Order is typically done *ex parte* (in the absence of and without notice to the respondent/s). The preconditions to the grant of a Freezing Order are uncontroversial and clearly set out in the Rules, the Practice Note and the authorities.<sup>7</sup>

If a court is willing to make a Freezing Order, it usually sends such a clear message to the respondent/s about the strength of your client’s case that a favourable negotiated settlement may be achieved very quickly.

Ancillary orders may be made at the same time as a Freezing Order, including orders requiring the respondent/s to serve an affidavit disclosing full details of all their assets in Australia and worldwide, giving their value, location and details and the extent of their interest in the assets. Delivery of passports may also be ordered.

### Search orders

Commercial fraud cases are won on documentary evidence. As fraudsters have no qualms about destroying documents

or deleting computer files that may incriminate them, the Search Order (previously known as an *Anton Piller* order), is another necessary and vital tool in the armoury of the fraud litigator.

The purpose of a Search Order is to secure evidence relevant to an issue in a proceeding (or an anticipated proceeding). It requires the person/s on whom the order is served to permit certain defined persons (called a search party) to enter their premises for the purpose of securing evidence. Search Orders can include access to the fraudster's residence and vehicles, the fraudster's accountant's offices or storage facilities.

Once again, the application is usually done without notice to the respondent/s. The preconditions to the grant of a Search Order are also uncontroversial and clearly set out in the Rules, Practice Note and the authorities.<sup>8</sup> The search party must include an independent supervising solicitor, and will also usually include the plaintiff/applicant's solicitor, the client victim and an independent computer expert.

### What if the fraudster has gambled away all the stolen money?

Often, the author hears "there's no use bringing a civil claim as the fraudster has gambled it all away". The basis for such

assertion is usually a statement made by the fraudster. Why would you trust what they say? In the author's experience, what fraudsters fear the most is jail. It is not surprising, therefore, that once a civil claim is commenced the fraudster usually does everything in their power to make your client happy. Sometimes this involves paying the victim back even if it requires borrowing money or raising funds from family members. ■

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1. Mandatory reporting of suspected corruption in the public sector is a different matter, see s57, *Independent Broad-Based Anti-Corruption Act 2011* (Vic). So is concealing an offence, see s326 *Crimes Act 1958* (Vic).
2. Victoria Police website, [www.police.vic.gov.au](http://www.police.vic.gov.au), section "Reporting Fraud" (last updated 30 January 2015).
3. See, eg, *Re AWB Ltd (No.1)* (2008) 21 VR 252, *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237.
4. See Association of Certified Fraud Examiners, [www.acfe.com](http://www.acfe.com).
5. See *Supreme Court (General Civil Procedure) Rules 2015*, r5.04 (2)(b).
6. Note 5 above, r14.02.
7. Note 5 above, r37A; Supreme Court of Victoria Practice Note 5 of 2010; *Zhen v Mo* [2008] VSC 300 at [21]-[30].
8. Note 5 above, r37B; Supreme Court of Victoria Practice Note 6 of 2010; See also *Australia's Residential Builder Pty Ltd v Wiederstein* [2014] VSC 430.
9. [www.fraudbarrister.com.au](http://www.fraudbarrister.com.au).

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