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Cross-Border Strategies for Evidence Discovery in Common Law Countries in Civil Fraud Cases

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Fraud litigation covers a variety of disputes and forms, but there is some commonality in key areas. One, there is the importance of identifying and securing assets. Two, there is the issue of identifying the right perpetrators. Three, there is the gathering of evidence.

The following two discovery tactics available in jurisdictions such as Canada, Hong Kong, Singapore, the BVI, the Cayman Islands and the UK, can enable a litigant to better pursue a successful fraud recovery.

Norwich Pharmacal Order (NPO)—this is a legal remedy that enables an applicant to compel a third party to disclose information or documents about another party who is involved in wrongdoing, even if the third party is not directly involved. An NPO originates from the landmark case in English law, *Norwich Pharmacal Co. v. Customs and Excise Commissioners* (1974), 3 W.L.R. The information can be obtained from financial institutions, corporate service providers, trustees, and real estate professionals, among others. The application can be made pre-action, during a proceeding or after judgment. An application is usually coupled with a "seal and gag" order to prevent the respondent from alerting the wrongdoer that disclosure is being sought. That order also may require the applicant to give an undertaking to prevent abuse. To obtain an NPO, the applicant must demonstrate:

- The third party is involved or mixed up in the wrongdoing. The involvement can be direct or indirect but must be sufficient to justify court intervention.
- A genuine need to identify a wrongdoer, gather evidence for legal proceedings or prevent further harm or injustice.
- No adequate remedy is available.

Anton Pillar Order (APO)—this is similar to a civil search warrant. It is a legal mechanism to search and seize to prevent removal, concealment or dissipation of evidence. Originating from *Anton Pillar K.G. v. Manufacturing Processes*, (1976) 2 W.L.R. 162, the legal basis is a strong prima facie case against the defendant where damage, potential or actual, will be severe to the applicant. There must be clear evidence that the defendant possesses relevant documents or evidence and may destroy the materials if the defendant becomes aware of the proceedings. Since the APO is without notice, an undertaking will be required. In essence, to obtain an APO, the matter needs to be replete with bad dealing and dishonesty and strong evidence showing a real possibility that the defendant will destroy documents. Such seizure can be items that breached registered trademarks, a hard drive where massive amounts of confidential information was downloaded, or crytpo-assets held in a digital wallet.

Litigants should be aware of what discovery tactics are available to them when pursuing recovery of assets and claims that touch common law countries.

Related People



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