

NAVIGATING THE CIVIL FRAUD LANDSCAPE: STRATEGIES FOR ASSET TRACING & RECOVERY

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"This article discusses the legal framework for combating civil fraud and tracing assets for recovery through civil proceedings in Malaysia."

Recent high-profile cases in Malaysia have highlighted the importance of civil asset recovery as a powerful tool to tackle the rising tide of fraud and financial crime.

This article will provide an overview of civil fraud and asset recovery in Malaysia, focusing on identifying, tracing and seizing, which will ultimately lead to recovery of assets acquired through fraudulent means. By enhancing awareness and understanding of the legal framework in place, stakeholders can better navigate the complexities and work toward a more robust and effective recovery regime.

1. Legal Framework – Civil Fraud

Should you or your business become a victim of fraud, the primary legal consideration is identifying the specific nature of your claim and the responsible parties. An action premised on civil fraud enables a defrauded plaintiff to recover losses and damages caused by fraudulent behaviour.

"Civil fraud" does not constitute a legal action in itself; it is an umbrella term encompassing various heads of legal claims. The plaintiff bears

the burden of proving such claims on the balance of probabilities. This burden of proof is lower than the that required in criminal proceedings, which is beyond a reasonable doubt. Outlined below are the most common types of causes of actions for civil fraud claims and the available remedies.

Fraudulent Misrepresentation / Tort of Deceit

Fraudulent misrepresentation falls under the tort of deceit. To succeed in a claim for fraudulent misrepresentation, the plaintiff must establish¹:

- (a) The defendant made a false statement or representation.
- (b) The defendant knew the statement or representation was false or was reckless as to whether it was false;
- (c) The defendant intended for the plaintiff to rely on that statement;
- (d) The plaintiff relied on the false statement; and
- (e) The plaintiff suffered loss as a result.

[1] *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359, Court of Appeal (CA) at para [13]. As for the elements of the tort of deceit see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] SGCA 49, Court of Appeal of Singapore at paras [14] and [23]

Rescission is often the primary remedy pursued because fraudulent misrepresentation renders the contract voidable. The contract will be set aside, and the parties are put back in their original positions before the contract was made. However, the victim of fraud may elect to abandon their right to rescind and instead insist on the performance of the contract, placing them in the position they would have been in if the representations made were true².

The plaintiff is also entitled to claim tortious damages to compensate for the loss incurred. The objective of the law is to put the victim in the position they would have been in if the tort had not been committed. Hence, the rule as to the remoteness of damage contained in Section 74 of the Contracts Act 1950 does not apply³. The plaintiff can recover damages for all losses suffered directly due to their reliance on the false statement, even if the loss was not reasonably foreseeable. Of note, when the conduct of the wrongdoer discloses fraud, exemplary damages may be ordered⁴.

Unlawful Means Conspiracy

This is an economic tort. The plaintiff must establish⁵:

- (a) There was an agreement between two or more people to act together unlawfully, with the intention of causing harm to the plaintiff; and
- (b) The concerted action caused damage to the plaintiff.

The agreement to conspire does not necessarily refer to a written agreement or a formal arrangement⁶. The intention to cause damage need not be the predominant purpose; an intention to inflict harm suffices.

A company, as a separate legal entity, can conspire with its directors. The knowledge of the company may be imputed from the person who has management control (typically a director acting as its alter ego) for the transaction or act in question⁷. Conspirators who use unlawful

practices are liable for any damage that results from their unlawful concerted practices.

Dishonest Assistance

As a general rule, there must be a breach of trust or fiduciary duty by someone other than the defendant, and the defendant must have helped that person in the breach. It is the person assisting who must be shown to have had a dishonest state of mind⁸. Without a finding of dishonesty on the part of the person assisting, the finding of 'knowing assistance' is not sufficient⁹. In a breach of trust situation, subjective dishonesty is relevant¹⁰.

The elements that must be proved to establish dishonest assistance are¹¹:

- (a) There has been a disposal of assets in breach of trust or fiduciary duty;
- (b) The defendant has assisted or procured the breach;
- (c) The defendant acted dishonestly; and
- (d) There is resulting loss to the plaintiff.



[2] Contracts Act 1950, s 19(2)

[3] *Abdul Razak Bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and Another Appeal* [1999] 2 MLJ 500, CA at 508-509

[4] *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610, CA at para [144].

[5] *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, CA at p 406

[6] *Ibid*, p 406

[7] *Tekital Sdn Bhd v Sarina bt Kamaludin & Ors* [2012] 8 MLJ 734, at paras [93]-[96]

[8] *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 172, CA at para [55]-[56]

[9] *Ibid* para [65]. See also *Barnes v Addy* (1874) LR 9 Ch App 244

[10] *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169, Federal Court ("FC") at para [146]; citing *Twinsectra Ltd v Yardley* [2002] UKHL 12

[11] *Jaya Sudhir a/l Jayaram v Dato' Seri Timor Shah Rafiq & Ors and another case* [2020] 1 LNS 1975 at para [337], which cited *Caltong (Australia) Pty Ltd* (formerly known as *Tong Tien See Holding (Australia) Pty Ltd*) and another v *Tiong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 3 SLR 241 (SGCA) at para [33]. See also *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378; [1995] 3 All ER 97

An accessory is liable for the loss occasioned by their dishonest assistance to the same extent as the principal, but only with respect to the breach they knowingly assisted. For accessory liability, the accessory must know they are dealing with someone in a fiduciary relationship and owed a duty to act in good faith¹². The plaintiff may be awarded equitable compensation, a discretionary monetary remedy. Alternatively, the courts also have the discretion to order the defendant to account for any gain or profit obtained through dishonest assistance, irrespective of whether the wrongdoing caused any corresponding loss to the plaintiff.

Knowing Receipt

Central to the concept of knowing receipt is the proof of dishonesty on the part of the recipient¹³. The elements of knowing receipt are as follows¹⁴:

- (a) Disposal of assets in breach of fiduciary duty;
- (b) The beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and
- (c) Knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty.

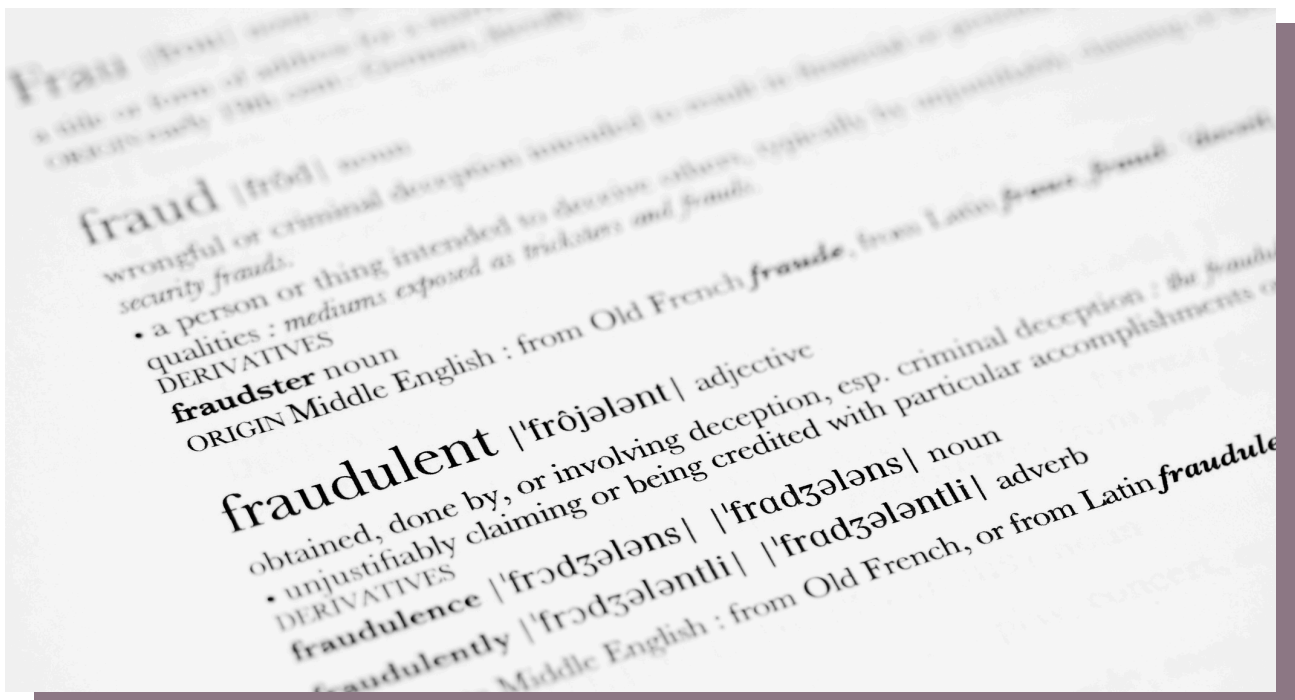
If a property is transferred in breach of trust to a third party who is not a bona fide purchaser for value without notice (i.e., an innocent party unaware of any existing claims to the property's title), the plaintiff will have a claim to that property¹⁵. The plaintiff may also pursue equitable compensation or an order for the account of profits as a remedy.

Unjust Enrichment

A cause of action in unjust enrichment can give rise to a right to restitution where it can be established that¹⁶:

- (a) The defendant has been enriched;
- (b) The enrichment was gained at the plaintiff's expense;
- (c) The defendant's retention of the benefit is unjust; and
- (d) There is no defence available to extinguish or reduce the defendant's liability to make restitution to the plaintiff.

The law of unjust enrichment can apply to the rights of parties to a contract that has been validly terminated. The usual remedy is that the plaintiff is entitled to restitution, whereby the defendant must pay the value of the enrichment.



[12] *Menno Leendert Vos v Global Fair Industrial Limited & ors* [2009] HKCU 1910
 [13] *Ooi Meng Khin v Amanah Scotts Properties (KL) Sdn Bhd* [2014] 6 MLJ 488, CA at para 34
 [14] *LNE Network Systems (Asia) Sdn Bhd v Loi Chew Ping & Ors* [2015] 3 CLJ 663, citing *El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685
 [15] *Ikumi Terada v Jemix Co. Ltd & Ors and other appeal* [2019] MLJU 561; applying *Foskett v McKeown* [2000] 3 All ER 97
 [16] *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, FC at paras [110], [117] and [118]

Tort of Conversion

This is the civil version of theft. Conversion occurs when someone without the right to deal with your property deprives you of its use and enjoyment.

A plaintiff must prove¹⁷:

- (a) The defendant's conduct was inconsistent with the rights of the owner;
- (b) The defendant's conduct was deliberate, not accidental; and
- (c) The defendant's conduct encroached on the rights of the owner, excluding the owner's use and possession of their personal property.

If it is demonstrated that the defendant intended to seize or interfere with the property, there is no need to prove that the defendant intended to commit a wrong. A claim for conversion can arise in various circumstances, but it often involves misappropriation, which frequently includes fraud.

Damages in conversion cases aim to compensate and restore the affected party to



their original position. The remedy includes the return of the goods or damages equivalent to the market value¹⁸ of the goods lost.

2. Immediate Actions: Securing Assets and Pursuing Recovery

To safeguard their position and enhance chances of recovery, victims of fraud and financial scams must act swiftly. The following immediate steps are vital:

(a) *Preventive measures to preserve assets and minimise further potential losses:*

- Preserve financial, IT, and communication data and records: Ensure all relevant data is securely stored, backed up, and readily accessible for review.
- Conduct internal investigations: Identify and pinpoint personnel involved in questionable transactions.
- Notify banks and financial institutions: Instruct them to freeze relevant accounts pending civil and/or criminal proceedings. Banks are required to promptly investigate notices of fraudulent transactions and take protective measures, even if it originates from parties with whom they have no direct relationship¹⁹.

(b) *Legal Action and Interim Reliefs*

- Develop a legal strategy for recovery.
- Determine the cause of action.
- Identify which party to sue.
- Assess the need for interim reliefs such as Norwich Pharmacal Orders, Anton Pillar Orders, and Mareva Injunctions.

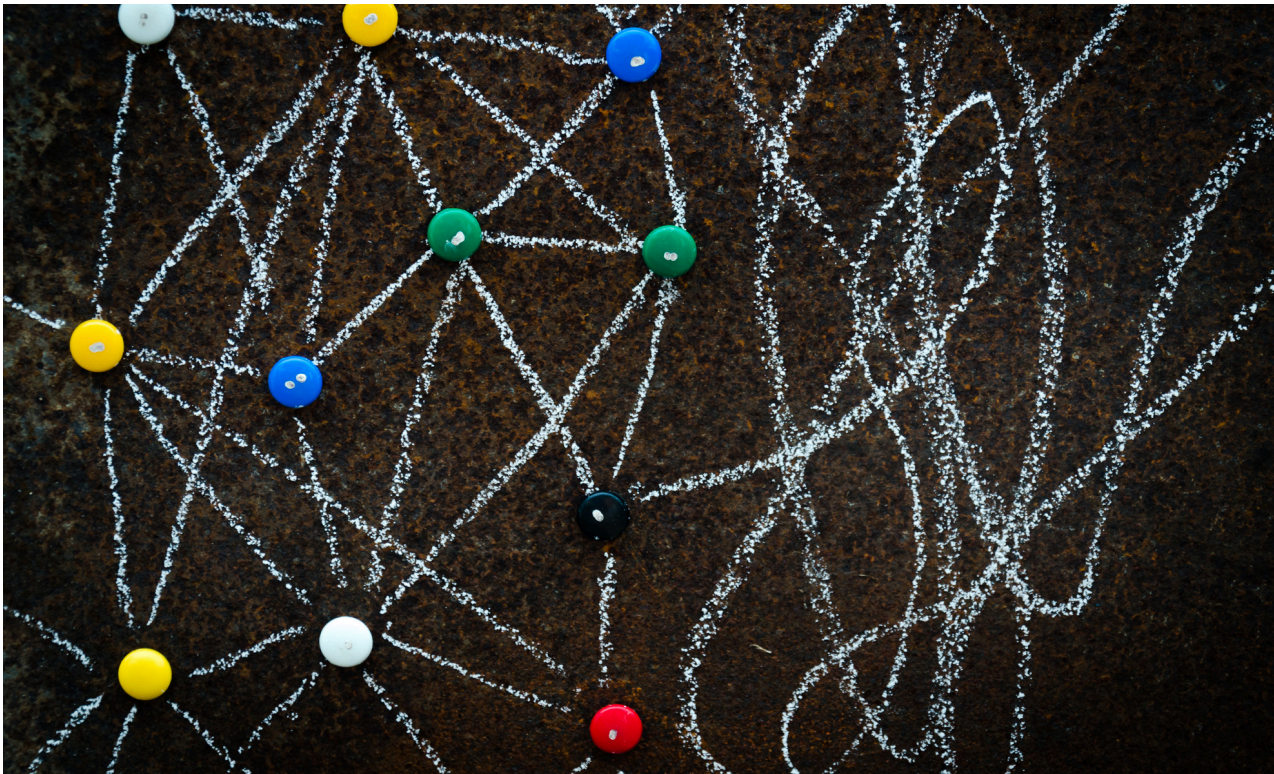
(c) *Obtain Evidence and Conduct Fact-Finding*

Consider the available evidence and whether it is sufficient. This may involve working with forensic IT experts, accountants, private investigators, and solicitors. It is advisable to involve solicitors at this fact-finding stage to ensure the findings are protected by privilege.

[17] *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 CLJ 445; see also *Tay Kian Hock v Kewangan Bersatu Bhd* [2002] 4 MLJ 411

[18] *KFH Siarah House (M) Sdn Bhd v Lembaga Kemajuan Wilayah Pulau Pinang* [2013] 3 MLJ 850

[19] *Nemonia Investments Ltd v AmBank Islamic Berhad & 3 Ors* [2023] 8 AMR 201



3. Asset Tracing & Recovery Strategies

Proactive and speedy measures such as collation of evidence, asset tracing, and securing freezing orders or injunctions are vital to preserve assets pending litigation. Criminal asset forfeiture hinges on a conviction. On the other hand, civil asset recovery proceedings target the property itself, not the individual. This means the standard of proof in civil asset recovery is lower; i.e., on a balance of probabilities rather than beyond a reasonable doubt.

The civil remedies under the Malaysian Court system provide various interim reliefs to ringfence assets pending disposal of the action and to obtain evidence in the event of suspected fraud.

A. Preservation of Assets²⁰

Mareva Injunction²¹

This is a court order freezing the defendant's assets up to a certain value, preventing the dissipation of assets within or outside the jurisdiction pending full and final disposal of the matter. The applicant may also seek the discovery of information or documents to support the Mareva Injunction and determine the location of assets.

To obtain a Mareva Injunction, the applicant must demonstrate:

- (a) A good arguable case against the defendant;
- (b) A real risk of the defendant dissipating assets; and
- (c) It is just and convenient to grant the injunction.

A risk of dissipation can be inferred if the defendant acted dishonestly in bad faith, maintains foreign accounts, and there is evidence of fund transfers to these accounts²².

Such an application can be made ex-parte but is valid for only 21 days from the date of the order. The plaintiff is required to make full and frank disclosure of all relevant facts, especially those unfavourable to their case. Failure to do so can result in the ex-parte order being set aside. Furthermore, the applicant must provide an undertaking to the court to compensate the defendant for any damages if it is later determined that the injunction was incorrectly granted. The applicant may also need to furnish security for this undertaking. An inter partes hearing will be fixed within 14 days of the ex-parte order being granted. Once served with the

[20] Injunctions are governed by Order 29 Rule 1 of the Rules of Court 2012.

[21] *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213

[22] *Securities Commission v Lee Kee Sien, Albert & Ors* [2009] 8 CLJ 70, HC. See also *Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd* [1999] 4 CLJ 430 at p 38 h-i where the Court held probity and conduct of the defendant is relevant to risk of dissipation of assets.



court order, third parties, including banks, are obliged to comply or they run the risk of being held in contempt of court²³.

The purpose of a Mareva Injunction is to prevent an abuse of the legal process, where a party facing judgment intentionally dissipates assets to avoid satisfying it. Therefore, the courts have recently held that factors such as where the balance of convenience lies, the adequacy of damages, and the potential irreparable harm caused by not granting the interlocutory injunction should not be considered in a Mareva application²⁴.

Proprietary Injunction

A proprietary injunction is a remedy that latches on to an asset over which the plaintiff asserts a proprietary interest. The asset sought to be preserved includes those that are monetary in nature²⁵. Unlike a Mareva Injunction, it does not require proof of the risk of dissipation²⁶. An applicant can pursue both a Mareva Injunction and a Proprietary Injunction concurrently.

The applicant must establish²⁷:

- (a) There is a bona fide serious question to be tried;²⁸
- (b) The balance of convenience lies in granting the injunction; and
- (c) Damages would not be an adequate remedy.

B. Obtaining Evidence

Pre-action Discovery under the Rules of Court 2012 (“RC 2012”)

Order 24 Rule 7A, RC 2012 permits pre-action discovery applications against potential wrongdoers or defendants. In pre-action discovery, the applicant seeks to determine whether they have a viable claim against the intended defendant

The applicant must demonstrate:

- (a) Pre-action discovery, and not discovery in the course of action or proceedings, is necessary;
- (b) The respondent to the application has in its possession, custody, or power the documents sought to be discovered;
- (c) The documents sought are relevant to an issue arising or likely to arise in the intended proceedings;
- (d) The documents sought are necessary to determine whether there is a viable cause of action for the plaintiff (which is the main question determining whether discovery will be granted); and

[23] *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 CLJ 40

[24] *All Kurma Sdn Bhd v Teoh Heng Tatt & Ors* [2023] 7 MLJ 303, at para [102]; citing *Lee Kai Wuen & Anor v Lee Yee Wuen* [2022] 1 LNS 1057, CA at paras [112]-[122]

[25] *Pacific Rainbow International Inc v Shenzhen Wolverine Tech Ltd and Others* [2017] HKCU 1076

[26] *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor* [2021] 7 MLJ 178

[27] *Keet Gerald Francix Noel John v Mohd Noor Bin Abdullah* [1995] 1 MLJ 195, p 206-207; adopting the test of *American Cyanamid v Ethicon Limited* [1975] AC 396

[28] This is typically achieved by demonstrating an arguable case in support of the applicant’s claim of a proprietary interest in the assets.

- (e) The discovery is necessary either for disposing fairly of the cause or matter or for saving costs.

When deciding whether to grant pre-action disclosure, the court must balance the competing interests of various parties, including third parties. Given the importance of personal and commercial confidentiality, safeguards and limited or redacted disclosures may be imposed. The application will be refused if the applicant already knows their cause of action and is not otherwise prevented from commencing proceedings against the intended defendant.

Norwich Pharmacal Order (“NPO”)²⁹

This common law pre-action discovery order is used to obtain information from a third party or non-party to reveal the identity of potential wrongdoers, before commencement of an action. The legal concept behind an NPO is that if an innocent person becomes unintentionally involved in the wrongful acts of others, they have a duty to assist the injured party by providing complete information and disclosing the identities of the wrongdoer.

An NPO is discretionary and not automatically granted. The order will only be issued if the applicant demonstrates that the interest of justice in allowing the discovery outweighs the public interest in maintaining confidentiality.

To succeed in such an application, the applicant must demonstrate:

- (a) The third party/non-party facilitated the wrongdoing, whether innocently or otherwise;
- (b) There is a good arguable case against the potential wrongdoer(s) whose identity is being sought; and
- (c) Disclosure is necessary to enable him to take action, or at least that it is just and convenient in the interest of justice to make the order sought.

An NPO may be accompanied by a gagging order to prevent alerting the wrongdoers or fraudsters about the ongoing investigation and tracing efforts.

Bankers Trust Order (“BTO”)³⁰

A BTO, a variation of an NPO, compels a third party or non-party to fully disclose information

to determine the whereabouts of the plaintiff’s assets, funds, or monies. Typically issued against a bank, a BTO serves as an exception to banking secrecy.

Similar to an NPO, the grant of a BTO is not as of right and is a matter of discretion. In addition to meeting all the criteria for a Norwich Pharmacal Order, the applicant must demonstrate a strong reason to believe that the bank holds property misappropriated by fraud or breach of trust, to which the applicant has a proprietary claim. It must also be demonstrated that the information will be used exclusively for tracing funds.

Anton Pillar Order³¹

An Anton Piller Order, often referred to as a civil search warrant, is generally granted ex-parte. It permits the applicant to enter and search the premises to enable an inspection, seizure, and removal of relevant documents and property. It is often used in conjunction with a Mareva Injunction in fraud or breach of trust cases, particularly where dishonest wrongdoers are likely to destroy evidence.



[29] *Norwich Pharmacal Co. & Others v Customs & Excise Commissioners* [1974] A.C 133

[30] *Bankers Trust Co v Shapira and Others* [1980] 1 WLR 1274 at p 1275; applied in *Tey Por Yee & Anor v Protasco Bhd & Ors* [2020] 5 CLJ 216 at p 251

[31] *Anton Piller KG v Manufacturing Processes Ltd and Others* [1976] 1 All ER



2001 (AMLATFPUAA 2001), is particularly instrumental in enforcing the recovery of stolen assets. This can be seen from the Malaysian Anti-Corruption Commission's (MACC) pledge to improve governance and institutionalise integrity to revive the country's economy through asset recovery operations. The synergy between regulatory authorities and private practitioners, coupled with a blend of parallel civil and criminal litigation, has proven to be a formidable approach in the ongoing battle against fraud and for the recovery of assets.

With a strong legal framework rooted in common law, Malaysia is well-equipped to tackle civil fraud by drawing upon English legal principles, equity doctrines, as well as precedents from other common law jurisdictions. This bolsters our position as a leading financial center and strengthens our capacity to protect financial integrity amidst global challenges.

The applicant must fulfil the following elements:

- (a) Demonstrate an exceptionally strong prima facie case;
- (b) Provide clear evidence that the defendant possesses incriminating materials at risk of being destroyed; and
- (c) Show that the damage to the applicant, potential or actual, is very significant without the order.

Given the draconian nature of this remedy, the applicant bears the burden of making full and frank disclosure. Failure to do so is likely to result in the setting aside of the ex-parte order and a claim for damages by the defendant.

4. Concluding Remarks

Malaysia is rapidly advancing as a financial hub. Recent legislative updates underscore its proactive stance in adapting to current financial demands, while the country benefits from various international investments.

On the regulatory front, bodies such as the Securities Commission Malaysia (SC), Bank Negara Malaysia (BNM), and the Malaysian Anti-Corruption Commission (MACC) play pivotal roles in detecting and prosecuting civil fraud. The MACC, empowered by the Anti-Money Laundering and Anti-Terrorism Financing Act

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