The Recovery Position in Litigation
By Daniel Hall August 15, 2017

Enforcement becomes necessary when defendants avoid judgments handed down in legitimate courts after being defeated in a trial—and for a variety of reasons, funded enforcement is becoming a global necessity.

Typically, in matters of funded enforcement, the central characters are wealthy, well-advised and recalcitrant debtors; those who choose to try and avoid paying their debts rather than those incapable of meeting their obligations. A commonly deployed strategy is to squirrel away wealth in complex offshore structures, moving various elements with underhand agility as a method to dodge justice.

Asset recovery in these scenarios is never a linear or process driven exercise; it requires expertise, investment and creative problem-solving.

Enforcement case studies are rare but instructive—especially given the growing demand for funded judgment enforcement. It is in that spirit that we expand on a concluded matter previously discussed in Burford Capital's 2016 Annual Report.

In 2010 Burford agreed to finance a piece of Florida litigation relating to a dispute between former partners of a Florida-registered oil trading business, International Oil Trading Company (IOTC), which provided fuel to the US military during the Iraq war.

The dispute arose when two of the three partners restructured the business, depriving plaintiff Mohammad Al-Saleh of his interest. The case went to trial and Al-Saleh won a jury verdict for $28.8m against IOTC and his former partners, Harry Sargeant III and Mustafa Abu-Naba'a. The defendants exhausted all avenues of appeal, but ultimately the Florida Supreme Court affirmed the verdict, along with approximately $10m in interest and costs, with interest accruing until paid. The defendants did not pay. Sargeant, a reported billionaire, continued to live in his multi-million-dollar home in Boca Raton (co-owned with his wife) and fly around the world in his private jet. Florida's debtor-friendly laws—for example, its homestead exemptions and what amounts to an asset protection structure called a Tenancy by the Entirety—rendered many such assets untouchable for enforcement purposes. Abu-Naba'a, a businessman based in the Dominican Republic, was similarly unfazed by the judgment against him. He continued to conduct lucrative asphalt trading operations in a jurisdiction where, practically speaking, Al-Saleh had no legal options.

Instead of paying the judgment debt, Sargeant and Abu-Naba'a ensured they were 'judgment proof' by making full use of different corporate veils in a multitude of onshore and offshore locations. In the real world, we know it is usually all one giant piggy bank; in the courtroom, proving that takes painstaking investigative, forensic and legal work—and that depends on what it is even possible to argue, country-by-country. As highlighted by the Panama Papers and similar leaks in recent years, there is a vast industry dedicated to protecting the assets of the rich and (in)famous. The justice system is slow and inefficient when dealing with multi-jurisdictional assets and financial activity, so it is entirely rational for recalcitrant debtors to adopt protective

measures. At best, they can avoid payment of a judgment debt altogether. At worst, they can secure a favorable settlement following a long war of attrition with the judgment creditor. And so Al-Saleh was left with a very expensive piece of legal paper against individuals who were more than able to pay him what they owed—but chose not to. This client driven need is why Burford invests in asset recovery. In this case, the enforcement work took several years and cost millions. But the efforts paid off: Al-Saleh settled for a substantial amount, and Burford more than doubled its money.But this business is not for the faint-hearted.

On Al-Saleh's behalf, there was a need to mount a multijurisdictional offensive against the judgment debtors' interests worldwide, combining unique investigative and legal methodologies that we have developed. Although it is difficult to pinpoint the straw that broke the camel's back, three actions brought particular pressure on the judgment debtors, and contributed directly to the favorable outcome. None of these would be considered 'traditional enforcement' of a judgment and were all stand-alone individual 'new' claims.

First, we were able to freeze $21.8m in Texas on the basis that BTB Refining LLC, a company registered in Texas which owned a refinery in Corpus Christi, was the recipient of some funds from the original IOTC fuel contracts and that BTB was itself an alter ego of Sargeant. The judge agreed that Al-Saleh's claim had a strong chance of succeeding on its merits, and issued a temporary injunction preventing Sargeant or BTB Refining from transferring funds out of the jurisdiction of the court.

Second, the strategy led to the appointment of an equitable receiver over a number of the duo's holding companies in the Bahamas. A Bahamian judge declared that the companies had breached a previously obtained Bahamian freezing order by causing funds to be distributed improperly amongst other companies in the debtors' Bahamian and US network. The appointment of a receiver had the effect of freezing assets down the chain of subsidiaries, as well as enabling a court appointed, independent third party to engage with current commercial counterparties of the debtors (never great for business).

Finally, Al-Saleh was able to tip IOTC USA into insolvent bankruptcy in Florida following testimony from Sargeant's de facto CFO in a separate action that the company had fewer than three outstanding creditors. If that is the case, under US bankruptcy law the presence of one creditor is sufficient to initiate such proceedings. This action had the dual effect of freezing subsidiary structures and assets (including a fuel tank complex in Aqaba, Jordan) and placing a US trustee in oversight of the company, including having the right to review all of the company's communications with its own lawyers.

In conjunction with other efforts, these actions brought sufficient pressure to bear that the defendants gave in. There was never the need go to full trial in Texas, the Bahamas or Florida on these new actions.While the saga underlines the sophisticated methods those with the means will go to in avoiding complying with judgments, it also shows that with innovation and adoption of a strong strategy, recovery is possible.