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ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

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INSOLVENCY: OBLIGATIONS AND LIABILITIES OF DIRECTORS—PART II

Nicole Ferreira-Aaron

In our last issue, we explored the duties and obligations owed by directors, and the higher standard of care to which directors might be held in the event of insolvency. This article examines some protective measures directors might consider in order to minimize their potential personal liability when a corporation is in the zone of insolvency.

Seek Counsel

Directors should seek external counsel from both financial and legal advisors who can assist directors and officers in making informed decisions. The advice sought and given should be properly recorded.

Watch Finances

Directors and officers need to devote more time and attention to the corporation's affairs and financial stability in the zone of insolvency than is required when the corporation is financially healthy.

If a director believes that there is no reasonable prospect of the corporation avoiding insolvency then they should immediately bring their opinion to the attention of the board as a matter of urgency. In these circumstances, the corporation should not incur new liabilities unless and until it has been appropriately advised otherwise.

Directors of listed public companies should be familiar with the additional specific duties and obligations derived from the listing rules relating to the market upon which their corporation is listed.

Be Aware of Fiduciary Duties

Directors should be fully aware of the fiduciary duties they owe to the corporation and its various stakeholders and ensure that the paper trail reflects acknowledgment of the expanded duties of the corporation and its directors.

Directors should be cautious of giving any form of personal guarantees or allowing the corporation to rely on personal guarantees without taking proper advice as to the implications.

Taking Action in Good Faith

Directors should choose courses of actions that best serve the entire corporation rather than a single group. Directors should always ensure, in a period of insolvency, that the decisions taken are motivated by good faith, sound business reasons and supported by financial and other data.

Directors should ensure that the assets of the corporation are not dissipated or exploited in a manner unfairly prejudicial to creditors.

Directors should understand and monitor the corporation's solvency to ensure that the corporation meets its financial obligations. If the corporation is encountering significant fluctuations in asset values, it is important to get a good fix on net worth based upon realistic market values, rather than inflated costs.

Mitigate Risks to Assets

Directors should carefully consider all major corporate decisions, particularly if those decisions involve a significant risk to the corporation's assets. It is always necessary to act under the business judgment rule, which requires good faith and informed, rational decision making. However, if corporate decisions pose a substantial risk to corporate assets, it might make sense to consult with or obtain the consent of major creditors before implementing such decisions.

Pay Taxes and Employee Benefits

Directors should ensure that the corporation has met and

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Insolvency: Obligations and Liabilities of Directors (cont'd)

continues to meet its ongoing obligation in respect of its remittances of taxes and ensure a reliable system is in place for the corporation to meet the statutory tax remittance obligations. If a director has become aware of a failure to deduct, withhold or remit tax amounts, they should act positively and make sure that all reasonable efforts are taken to remedy the problem.

Directors should ensure that the corporation has paid all amounts to employees for wages, salaries, commissions, vacation pay and other compensation owing for services rendered, ensure that there are systems in place to monitor payments owing under employment legislation and ensure that there are mechanisms for alerting directors to any failure of the corporation to maintain its ongoing obligations.

Directors should ensure that the corporation has met and continues to meet its ongoing obligations in respect of deductions and remittances under pension and employment insurance statutes and ensure that there are systems in place to monitor those payments.

Insurance

The personal liability of directors and officers at company law and in statutes are designed to create incentives for directors and officers to take steps to minimize their potential for personal liability. However, even if directors and officers have not been able to take all the steps required to eliminate their potential for personal liability, corporate law statutes allow corporations to purchase D&O Insurance for their directors and officers. These D&O Insurance Policies can help directors and officers to minimize their risk and exposure to personal liability when the policies provide appropriate coverage. Directors and officers should carefully review their policy when the corporation is in the zone of insolvency to ensure that it provides them with the appropriate coverage in their particular situation.

Nicole Ferreira-Aaron is the firm's Managing Partner, and she may be contacted at nicole@trinidadlaw.com

A CLIENT'S GUIDE TO CIVIL LITIGATION REVISITED PART II

Krystal Richardson



In our last Issue, we outlined the stages in the Litigation process, from initiation of a claim to the pronouncement of Judgment by the Court. While certainly litigation can end after the Court makes its order, in many cases, issues of enforcement may arise. In this article we will examine the options available to a party who has successfully obtained a judgment or order from the Court ("Judgment Creditor") when the unsuccessful party ("Judgment Debtor") is unwilling, unable, or otherwise fails, to comply with the order of the Court.

The civil litigation process at the High Court is governed by the Civil Proceedings Rules (CPR), and Part 46 of the CPR gives guidance as to how a Judgment Creditor should navigate circumstances surrounding the enforcement of a judgment against a Judgment Debtor's assets in Trinidad and Tobago.

Enforcing 'Money Judgments' or Judgments for a Quantified Sum

While several different types of Judgments and Orders can be handed down by the Court, money judgments or judgments for quantified or quantifiable sums are quite common in civil litigation. The CPR instructs that there are several methods by which a successful litigant could enforce a judgment for a quantified sum of money including:

1. The Writ of *fieri facias*
2. The Charging Order
3. The Garnishee Order
4. The Appointment of a Receiver
5. The Committal Order

• **Writ of *fieri facias* (*fi fa*)**

Generally speaking, a writ of *fi fa*, also called a "writ of possession" or "writ of delivery", enforces a money judgment by seizure and sale of the debtor's goods and chattels. This method of enforcement directs that the Marshal of the High Court levy upon or seize the Defendant's goods, with a view to applying the proceeds of sale to the satisfaction of the judgment sum. A judgment creditor, under this writ of *fi fa*, is entitled to recover the fees and costs of enforcement in addition to any other amount payable under the judgment - including interest. The general rule is that this writ of *fi fa* should not be issued without the permission of the Court.

• **Charging Order**

A charging order imposes a "charge" or hold on certain types of property for the purpose of enforcing a money judgment. In particular it allows the Judgment Creditor to obtain a charge on the Judgment Debtor's holding of stocks and/or shares of any public company. There is benefit of enforcement of a judgment using a charging order particularly in circumstances where it would be of little use if the Judgment Debtor has no, or no sufficient, moveable property to pay what is owed. If the defendant has an interest in stocks or shares, a court can order that they stand charged with the payment of the amount of the judgment. This enforcement method is commenced by application without notice which would be filed at the High Court.

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A Client's Guide to Civil Litigation Revisited (cont'd)

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- **Attachment of Debt / Garnishee Order**

Under this method the Court can direct that any debt owing to the Judgment Debtor from any third party be paid directly to the Judgment Creditor to satisfy the judgment. In other words, if someone owes money to the Judgment Debtor, on the basis of a Garnishee order that sum can be paid directly to the Judgment Creditor. The person owing the judgment money in this case is called the garnishee, and their goods are "garnished" under this type of order.

- **The Appointment of a Receiver**

A Receiver can be appointed by the Court to obtain payment of the judgment debt from the income or capital assets of the defendant. This method of enforcement is rarely utilised as most legal means of execution will produce a quicker realisation. It is, however, appropriate when a defendant is the recipient of income which cannot be garnished.

- **A Committal Order or Confiscation of Assets**

This method of enforcement gives the Court the power to commit a person to prison or to make an order confiscating assets for failure to comply with an order. It is arguably the most severe of the choices of enforcement.

Enforcement of other Types of Judgments

The above methods are available to a Judgment Creditor in an attempt to enforce money judgments. If the judgment is not for a quantified sum of money, can it still be enforced? The simple answer is yes. There are several other types of judgments that require enforcement and the CPR also provides guidance in these areas. While in many cases the methods are similar to the enforcement of 'money judgments', they are typically more specific in nature.

- **Enforcement of Judgments and Orders for Possession of Land**

A judgment or order for the possession of land may only be enforced by a writ of possession of land, a confiscation of assets order or an order for committal to prison. In addition, the order for the confiscation of assets or committal may only be made if the judgment or order requires possession of land to be given within a specified time or by a specified date.

- **Enforcement of Orders for Payment of Money into Court**

An order for the payment of money into court may be enforced by the appointment of a receiver under an order for confiscation of assets, or committal to prison. It is noteworthy that an order for confiscation of assets or committal order could only be made if the order

requires payment to be made within a specified time or by a specified date.

- **Enforcement of Judgments and Orders for Delivery of Goods**

The enforcement of an order for delivery of goods will depend on whether or not the judgment or order gives the judgment debtor the choice of paying the assessed value of the goods. If the choice is provided, the judgment could be enforced by a writ of delivery to recover the goods, a writ of specific delivery for the recovery of specified goods, or an order for confiscation of assets. If the judgment or order does not give the judgment debtor the choice of paying the assessed value of the goods, the judgment could be enforced by an order for the recovery of specified goods, an order for confiscation of assets, or an order for committal to prison.

- **Enforcement of Judgments and Orders requiring a person to do an act within a specified time or not to do an act**

The general rule is that a judgment or order which requires a person to do an act within a specified time or to abstain from doing an act, may be enforced by an order either for his committal to prison or for the confiscation of his assets.

- **Enforcement of Judgments and Orders Requiring a Body Corporate to do an act within a specified time or not to do an act**

In the case where a body corporate is required to do a specific act, the court may make an order for the committal to prison or for confiscation of assets against a director or other officer of the body corporate or for confiscation of assets of the body corporate.

In many cases, successfully completing the stages of litigation will not result in the immediate satisfaction of the Court's judgment or order. In such circumstances, the Judgment Creditor must enforce the judgment, and the method of enforcement will typically depend on the type of judgment or order granted by the Court.

*Krystal Richardson is an Associate in Hamel-Smith's Dispute & Risk Management Department, and she may be reached at:
krystal@trinidadlaw.com*

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Tel: 1(868) 821-5500 / Fax: 1(868) 821-5501

E-mail: mhs@trinidadlaw.com / Web: www.trinidadlaw.com
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