

Unexplained Wealth Orders - What Next?





Introduction

The English courts have handed down their first judgment concerning Unexplained Wealth Orders. As a result of the judgment the wife of a foreign ex-banker faces losing UK property worth millions of pounds unless she can explain the source of her wealth.

Set out below is an introduction to Unexplained Wealth Orders, how such orders can be resisted and the recent judgment handed down by the High Court. We also identify some key issues concerning Unexplained Wealth Orders which remain unresolved.

What is an Unexplained Wealth Order?

Unexplained Wealth Orders (**UWO**) were introduced by section 1 of the Criminal Finances Act 2017 and became available on 31 January 2018. UWOs are a mechanism designed to assist with the recovery of suspect assets by using civil, rather than criminal, powers.

A UWO is an order requiring the respondent to provide a statement:

- Setting out the nature and extent of the respondent's interest in the property in respect of which the order is made.
- Explaining how the respondent obtained the property.
- Where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order.
- Setting out such other information in connection with the property as may be so specified.

Respondents to a UWO can also be required to produce documents of a kind or described in the UWO.

Who can obtain a UWO?

UWOs can only be obtained by the following "enforcement authorities":

- National Crime Agency.
- Serious Fraud Office.
- Financial Conduct Authority.
- HM Revenue & Customs.
- Director of Public Prosecutions.

In order to obtain a UWO an enforcement authority must apply to the High Court and identify:

- the property in respect of which the order is sought;
- the person whom the enforcement authority thinks holds the property (the respondent).

The Court will issue a UWO if it is satisfied that each of the requirements for the making of the order is fulfilled (see below). Importantly, it does not matter whether the property was obtained by the respondent before or after the legislation permitting UWOs came into force, which means that the UWO regime applies retrospectively to property acquired before the Criminal Finances Act 2017 came into force.

Requirements for UWO

Before issuing a UWO the High Court must be satisfied that there is reasonable cause to believe that:

- The respondent holds the property.
- The value of the property is greater than £50,000.
- There are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.
- The respondent is either a politically exposed person (**PEP**) or there are reasonable grounds for suspecting that:
 - The respondent is, or has been, involved in serious crime (whether in a part of the UK or elsewhere); or
 - a person connected with the respondent is, or has been, so involved.

Importantly, there is a wide definition of a PEP. A PEP is a person who is-

- (a) an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State,
- (b) a family member of a person within paragraph (a),
- (c) known to be a close associate of a person within that paragraph, or
- (d) otherwise connected with a person within that paragraph

Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 also applies for the purposes of determining whether a person is a PEP. Article 3(9) of the 2015 Directive defines a PEP as including a natural person who is or has been entrusted with prominent public functions, including members of the administrative, management or supervisory bodies of "State-owned enterprises".

Defenses to UWOs

Respondents who receive a UWO may either comply with the requirements of the UWO, challenge the UWO by seeking to have it set aside or varied, or refuse to engage with the process.

If a respondent fails, without reasonable excuse,



to answer a UWO the target property is presumed to be “recoverable” for the purposes of Part 5 of the Proceeds of Crime Act 2002 (POCA). Part 5 of POCA enables an enforcement authority to recover, in civil proceedings before the High Court, property which is, or represents, property obtained through unlawful conduct.

If a respondent wishes to challenge a UWO there are a variety of types of arguments that can be made:

1. Arguments of principle can be advanced. For example, respondents may wish to argue that UWOs represent a disproportionate interference with their human rights (particularly the right to peaceful enjoyment of possessions set out in Article 1, Protocol 1 of the European Convention on human Rights).
2. Respondents may seek to have UWOs set aside on the basis that the criteria for obtaining the order have not been met. For example, depending on the facts of the case a respondent could argue that they do not hold the relevant property or they are not a PEP.
3. Finally, if the respondent to a UWO has a reasonable excuse for failing to comply with its terms they will be able to avoid the presumption that relevant property is recoverable. It is currently unclear what will constitute a “reasonable excuse”, but it could be possible to explain the inability to answer questions or produce documents by reference to matters such as ill health or the historic destruction of original documents.

National Crime Agency v A

On 3 October 2018 the High Court handed down its judgment in *National Crime Agency v A* ([2018] EWHC 2534). The judgment was the first to consider UWOs and brought into sharp focus many of the above issues. Although the identity of the respondent in the case was confidential at the time judgment was handed down, the relevant order for anonymity has now been lifted and Mrs A can now be revealed as Zamira Hajiyeva. Mrs Hajiyeva is the wife of Jahangir Hajiyev, the former chairman of the state-controlled International Bank of Azerbaijan (the **Bank**).

The facts of the case, in summary, are that from

March 2001 to March 2015 Mr Hajiyev was the chairman of the Bank. The Bank was the largest bank in Azerbaijan. The State had a controlling stake in the Bank. Mr Hajiyev’s net annual income from the Bank between 2001-2008 ranged from US\$29,062 to US\$70,648.70. On 22 December 2009 Vicksburg Global Inc (VG), a company incorporated in the British Virgin Islands (**BVI**), purchased a property in central London for £11.5 million (the **Property**). VG remained registered as the sole proprietor of the Property at all material times. On 3 June 2015 Mrs Hajiyeva informed the Home Office (as part of her application for indefinite leave to remain in the United Kingdom) that she was the beneficial owner of VG. In December 2015 Mr Hajiyev was arrested in Azerbaijan and subsequently charged with various offences including misappropriation, abuse of office, large-scale fraud and embezzlement in connection with the Bank. He was sentenced to 15 years’ imprisonment. In addition he was ordered to pay the Bank a sum of approximately \$39m. On or around 23 June 2016, Mrs Hajiyeva was arrested “in absentia” by the authorities for Azerbaijan and declared “wanted” in connection with avoiding the investigation into the Bank. On 31 January 2018 the BVI Financial Investigation Agency informed the National Crime Agency that the beneficial owner of VG was Mr Hajiyev. On 27 February 2018 a UWO was made against Mrs Hajiyeva on the basis that she was the wife of a PEP and there were reasonable grounds to suspect that she held the Property and her lawfully obtained income would have been insufficient to have allowed her to obtain the Property.

Mrs Hajiyeva challenged the UWO and sought to have it set aside on a number of grounds. The key points of challenge were as follows:

1. Mrs Hajiyeva alleged that her husband was not a PEP.
2. Mrs Hajiyeva alleged that the “income requirement” was not met.
3. The UWO infringed on her human right to the “peaceful enjoyment” of the Property.
4. The UWO offended the privilege against self-incrimination.

Politically Exposed Person

Mrs Hajiyeva argued that her husband was not a PEP because the Bank was not a State-owned

enterprise. However, the evidence in the case showed that 50.2% of the shares in the Bank were owned by the State. On that basis the Court concluded that the Bank was a State-owned enterprise and Mr Hajiyev was therefore a PEP because he was a member of the administrative, management or supervisory body of the Bank. This is a key decision by the Court because it means that PEPs will include not only non-EEA politicians but also key management of state-owned industries. There was some argument in the case on the question of whether an entity could be a State-owned enterprise if the State held only a minority stake, but it was not necessary to determine that issue and it has been left open for consideration.

Income Requirement

S.362B(3) POCA requires the court to be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purpose of enabling the respondent to obtain the property.

Mrs Hajiyeva argued that her husband had been involved in finance all his working life and, having been chairman of an international bank for 14 years, would have accumulated sufficient lawful income to purchase the Property. Mrs Hajiyeva also argued that her husband’s convictions should be ignored when assessing whether there was reasonable cause to suspect the source of his wealth. The Court rejected these arguments.

The court found that it was entitled to rely on Mr Hajiyev’s conviction when considering whether there was reasonable cause to suspect the lawfulness of his income. The court also found that (irrespective of Mr Hajiyev’s conviction) there was sufficient alternative evidence available to satisfy the “income requirement”. It appears that a key fact in the case was that Mr Hajiyev’s lawful annual income from the Bank was (at most) US\$70,648.70. That level of income provided reasonable grounds to suspect that Mr Hajiyev’s lawfully obtained income would have been insufficient to enable him to purchase the Property.

Human Rights

Mrs Hajiyeva argued that the UWO



disproportionately interfered with her right to “peaceful enjoyment” of the Property. The Court rejected that argument. First, the Court found that the UWO did not engage or interfere with the right to property because the UWO did not involve any confiscation or loss of value – the UWO merely required Mrs Hajiyeva to explain how she came to acquire the Property. Second, the Court found that any interference was proportionate and struck a “fair balance”. The Court found there were grounds to believe that the Property had been obtained by unlawful conduct and the UWO involved no more than a modest interference with the peaceful enjoyment of the Property.

Self-Incrimination

Mrs Hajiyeva contended that she should not have to answer the relevant queries because the UWO offended her privilege against self-incrimination and spousal privilege given that she is the subject of an ongoing criminal investigation in Azerbaijan and her husband is in custody in that country. In other words, she argued that answers given in response to the UWO might incriminate her or her husband in ongoing criminal proceedings in Azerbaijan. Mrs Hajiyeva also argued that, on the National Crime Agency’s case, both she and her husband could be said to be at risk of criminal prosecution in the United Kingdom.

The Court did not accept that the UWO offended the privilege against self-incrimination and spousal privilege. This was because, among other things, s.14(1) of the Civil Evidence Act 1968 (the 1968 Act), which sets out the privilege against self-incrimination, provides that it only applies “as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law”. Given the terms of the 1968 Act the Court found that Mr and Mrs Hajiyev had no right to invoke the privilege against self-incrimination with regards to the risk of prosecution for criminal offences outside the United Kingdom. The Court also found, as matter of fact, there was no “real and appreciable risk” that Mr and Mrs Hajiyev would be prosecuted for offences inside the United Kingdom. It appears from the reported judgment that Mrs Hajiyeva did not identify a real and appreciable risk of prosecution in the United Kingdom because she had failed to identify which answers to which questions might incriminate her - mere assertion that there was a risk of prosecution in the United

Kingdom was insufficient. Finally, the Court found that Parliament in creating the UWO procedure necessarily intended that the privilege against self-incrimination be abrogated – the powers contained in a UWO “would be rendered very largely nugatory if privilege applied”.

Unresolved Issues

Even after the recent case of *National Crime Agency v A*, there remain a number of controversies and unresolved issues in connection with UWOs:

- a) **Standard of proof.** Enforcement authorities are not required to prove that property or the owner of the property are tainted with illegality. There is no requirement to prove guilt beyond reasonable doubt or even on a balance of probabilities. The only requirement is that the enforcement authorities show reasonable cause to believe that the elements of the tests are met. That is a low threshold whose meaning is still unclear (when will there be “reasonable cause” to believe that the relevant threshold tests have been overcome?). These difficulties mean that UWOs can be obtained on potentially “thin” evidence.
- b) **Burden of proof.** Once the enforcement authorities prove their case on the (low) standard of proof, the burden shifts to the respondent to explain how they came to obtain the property. In other words, there is a reversal of the burden of proof and the “target” has to prove their innocence. If the target is unable to explain themselves satisfactorily there is a risk that property will be confiscated.
- c) **Freezing orders.** When a UWO is made the court may also grant an interim freezing order over the relevant property if it is considered necessary to preserve the property for later confiscation proceedings. The freezing order will prohibit the target to the UWO, and any other person with an interest in the property, from dealing with the property. Freezing orders are severe orders but the UWO regime allows for such orders to be granted without a case having been proven beyond a reasonable doubt or even on a balance of probabilities. A further

issue concerning freezing orders is that, although section 362R POCA provides for the relevant enforcement authority to pay compensation to the respondent if it later turns out that assets were improperly frozen, such compensation is only payable if there has been “serious default” by the enforcement authority and the UWO would not have been granted had the default not occurred. It therefore appears that if the enforcement authority simply “got it wrong”, or were merely negligent in seeking a freezing order, compensation will not be available to innocent respondents.

- d) **Frequency.** UWOs were introduced with a good deal of fanfare. In reality, however, they have rarely been used. Only two UWOs have been granted since January 2018. Although it remains to be seen whether the number of UWOs will increase rapidly, it does appear to be the intention of enforcement authorities to increase their use of UWOs in future. On 3 October 2018 the National Crime Agency issued a statement in which it was indicated that they would “seek to quickly move other [UWOs] to the High Court”.
- e) **Documents.** Although section 362F POCA makes it clear that statements made by a respondent to a UWO may not be used against that person in criminal proceedings, questions remain concerning how information and documents will be used once someone has explained the source of their wealth. For example, documents/explanations provided in response to a UWO could be used to prosecute third parties. Section 362F POCA also leaves open the possibility that documents (as opposed to statements) provided by the respondent might be used against them in criminal proceedings. There is also the possibility that third parties might try to obtain copies of documents from the relevant enforcement authority after they have been provided, whether by means of a Norwich Pharmacal application or otherwise. In summary, the provision of statements and documents in response to a UWO could open up the respondent or others to unexpected outcomes.



Conclusion

UWOs are a powerful new weapon in the armoury of enforcement agencies. Although such orders do not automatically lead to a loss of property, they have the potential to result in the confiscation of a number of high value properties in the United Kingdom.

The first judgment in this area suggests that that the courts will adopt a robust approach to those who seek to challenge a UWO. In particular, and unless there is a successful appeal, it appears from the case of *National Crime Agency v A* that challenges to UWOs based on human rights or the privilege against self-incrimination will be treated with caution.

Given the outcome in *National Crime Agency v A* it would be prudent for those at risk of receiving a UWO consider now how they would answer (or challenge) a UWO and whether they are able to produce the kind of evidence that would meet the requirements of an enforcement agency.

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