



- **UNEXPLAINED WEALTH ORDERS – THEIR POTENCY IN CIVIL OR CROSS-BORDER CASES**

- Jonathan Fisher QC

• Unexplained Wealth Orders

- Framework appears in new Part 8 sections 362A – 362H POCA (England & Wales) and sections 396A – 396U (Scotland).
- Under the new framework, a person will be required to explain how specific property has been acquired. In the absence of a satisfactory explanation, property will be subject to non-conviction based forfeiture under Part 5 POCA.
- Power to be exercised where there are “*reasonable grounds to suspect*” an inconsistency or disproportionality between a person’s legitimate income and the extent of their assets.
- The provisions practically compel an individual to respond.
- The effect of the order is to reverse the onus of proof.

• Definition

- A UWO is defined as an order requiring the respondent to provide a statement
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 - setting out the nature / extent of the respondent's interest in the property
 - explaining how the respondent obtained the property (including how any costs incurred in obtaining it were met)
 - where the property is held by the trustees of a settlement, the details of the settlement as specified
 - any other such information in connection with the property, as may be specified
- The UWO will specify the form and manner in which the statement is to be given, the person to whom it is to be given and the place at which it is to be given or, if it is to be given in writing, the address for sending.

• Implications

- A brand new coercive investigative tool which acts as a precursor to Part 5 proceedings.
- May be accompanied by an interim property freezing order.
- Can capture persons outside of the UK.
- Can capture property outside of the UK.
- Provision Secretary of State to request international enforcement assistance.
- The Home Office Impact Assessment report predicts there will be about 20 applications made each year.

• Conditions (s 362B /396B POCA)

1. The respondent is a Politically Exposed Person outside of the UK and European Economic Area; or there are reasonable grounds to suspect that he (wherever located) is involved in serious crime or a connected person is;
 2. The respondent's known income is insufficient to obtain the asset; and
 3. The value of the asset is greater than £50,000.
- Threshold was a late amendment – previously was £100,000.
 - Total value of assets. It does not matter whether others also hold the property or if obtained before provision commenced.
 - “*Serious crime*” refers to offences set out in Schedule 1 Serious Crime Act 2007 (including money laundering, tax evasion and bribery).
 - Relatively small threshold – pursuit of the low-lying fruit only?

• Reach

- The framework has broad extraterritorial reach.
- Neither the respondent nor his property needs to be situated in the UK.
- Definition of “property” in POCA already includes property situated anywhere in the world (section 414).
- Captures wide range of people, including associates and persons not linked to any particular suspicious activity.
- “Politically exposed person” refers to a person entrusted with a public function by an international organization or State, or who is a family member or close associate of such a person.
- “Connected” to a criminal suspect refers to a spouse, relative, relative of spouse and individuals acting together to exercise control of a company – section 1122 Corporation Tax Act 2010.
- If applicant is a foreign PEP, no need for any suspicion of criminality.

Who can apply for an order?

UWOs can be applied for by an enforcement authority on application to the High Court. S362A(7) provides that an “enforcement agency” is:

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

Where a law enforcement agency not listed here, such as the police, want to issue a UWO but cannot do so themselves, the Home Office has said that they can refer the matter to one of the above for consideration.

Application at request of a foreign authority?

- Only the five UK enforcement agencies can request a UWO application, not foreign authorities.
- Foreign assistance can be called upon in the UK – s362S POCA 2002 provides that in some circumstances the UK can request assistance from countries believed to house the property. This can be done to stop the person in question from dealing with it, and to preserve or maintain the property.
- A foreign authority can ask the NCA to obtain information in the UK where money laundering is suspected without invoking the international mutual legal assistance provisions, according to s339ZH(5), (6) CFA 2017.

• The application

- Application will be made to a High Court judge who must be satisfied of each condition on the balance of probabilities.
- The Act is silent on the type of evidence required to support the alleged disproportionality and, generally, the UWO application.
- Low threshold of “reasonable grounds to suspect” to be applied.
- Reasonable grounds to suspect involvement in criminal activity –
 - Australian experience of UWOs shows that where there is suspicion that the respondent is involved in serious criminal activity, there at least should be a statement from a law enforcement officer outlining the basis for the suspicion.
 - More recently, in *New South Wales Crime Commission v Arthur Calvert* [2017] NSWSC 13 the Court was satisfied that there are reasonable grounds to suspect criminal activity on the basis of a brief statement of the facts of an arrest from a police officer.

• The application (2)

- Reasonable grounds to suspect a disproportionality between known sources of lawful income and property that is held by the respondent
 - One of the easiest ways to do this will be by reference to individual tax returns and information held by HMRC.
 - Evidence based on use of social media as a dragnet for disparity between lawful income and assets?

• When is property “held”?

- Under section 362H / 396H (Scotland) a person (P) “holds” property where:
 - P has effective control over the property;
 - P is the trustee of a settlement in which the property is comprised;
 - P is a beneficiary (actual or potential) in relation to the settlement.
- Under section 362H: *“References to a person who holds or obtains property include any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom”*
- Effective control means exercises, able to exercise or entitled acquire direct or indirect control.
- Goes beyond legal interest.
- Low bar to be satisfied.
 - Income / property disparity and property over £50,000
 - No need to suspect illegality if person is a PEP or associated with PEP
 - Trustees could find themselves the subject of an order to provide detailed information about trusts

• The order

- Must specify
 - The respondent
 - The property in question
 - The form and manner in which the respondent is to provide the explanation relating to the property
- May specify if the respondent is to provide information or documents of a particular kind (ie. title documents, bank statements).
- Highlights broad investigative power of UWO regime.
- The UWO has effect in spite of any restriction of the disclosure of information “however imposed” (section 362G / 396G). i.e. Client confidentiality but note that legal privilege is preserved.

• Resisting the application

- Can expect limited opportunities to defend the application in the first instance since applications are likely to be made *ex parte*. See section 362I / 396I of POCA –

“An application for an unexplained wealth order may be made without notice.”

- Provisions require any interim freezing order must be made in the *same proceedings* as the UWO application. See section 362J(5) / 396J(5) of POCA:

“If an application for an unexplained wealth order in respect of any property is made without notice, an application for an interim freezing order must also be made without notice.”

• Interim Freezing Orders

- UWO and Interim Freezing Orders can be combined in the one order.
- Interim Freezing Orders
 - Made “in respect of the property” if necessary to do so for the purpose of avoiding risk of recovery order being frustrated.
 - Once made, enforcement authority can apply for a receiver to be appointed.

• Variation and discharge

- Framework does not contain express provisions relating to the review of a UWO.
- In the circumstances, can expect practical operation to be similar to that applying to Part II restraint orders, with the ability to seek variation or discharge following notification of *ex parte* order.
- Practically, challenge of a UWO is likely to be combined with an application to vary / discharge the interim freezing order.
- Express provisions enable the respondent to apply to vary or discharge the interim freezing order.

• Variation and discharge (2)

- The following could assist in challenging a UWO –
 - Statement of respondent and documents to demonstrate lawful income, gifts and earnings sufficient to afford the asset(s)
 - Evidence that someone else holds the interest in the asset
 - Valuation evidence showing that assets are worth less than £50,000
- Variation consideration - length of time to request, receive and assemble financial information in support of an explanation of an asset's legitimate provenance (ie. Subject Access Request timescales in UK (49 days) and abroad).
- Interim freezing order can be varied to exclude certain property.
- Exclusion must be limited to specific amount for “reasonable legal expenses”.
- Query whether this will dissipate the asset ahead of civil recovery – out of step with Part II restraint proceedings.

• **The explanation**

- Provided to the enforcement authority for consideration, not the court.
- Australian UWO cases highlight need for full description of interest in property including nature, name of the person / institution possessing title documents, date of acquisition, and source of funds (*New South Wales Crime Commission v Susan Nebme* [2016] NSWSC 1410).
- Australian experience shows that the legitimate provenance of an asset could be satisfied where respondent explains that it is linked to non-declarable gifts or gambling winnings.
- Unclear how far back to go in detailing funds source but presumably best explanations will be accompanied by documentation supporting legal income, earnings and, if possible, any gifts and winnings.
- Explanation and supporting documents cannot be used in criminal proceedings against the respondent but could be used in separate investigations / proceedings involving the respondent or other individuals or companies.
- Act contemplates material being used in other proceedings and copied.
- No provision as to how long the material may be retained.

NCA v A [2018] EWHC 2534 (Admin)

Zamira Hajiyeva

- On 3 October 2018, the UK High Court dismissed a challenge made by a woman known as "Mrs A" against an Unexplained Wealth Order ("UWO"). The National Crime Agency ("NCA") had issued a UWO against Mrs A on 28 February 2018 requiring her to explain how she afforded two British properties worth £22m
- The NCA suspect that Mrs A bought the properties, via a BVI company, using funds embezzled by her husband when he was employed at non-EEA bank.
- The NCA consider Mr A to be a PEP on the basis of the bank which employed him being a "state-owned enterprise".
- The NCA say that Mr A is currently in custody abroad having been convicted of fraud and embezzlement offences in relation to the bank.

Mrs A's challenge to the order

- Mrs A challenged the order on the basis that her husband was not a PEP working at a state owned bank and therefore the test to issue a UWO was not satisfied. Counsel for Mrs A also argued that Mr A was simply an international banker whose wealth had covered his wife's expenditure. However, the Court rejected the arguments that the defence put forward.
- Counsel for Mrs A advanced three separate arguments against the income requirement having been satisfied. Specifically, that Mr A's role was overstated, that Mr A's conviction in a non-EEA country should not have been relied upon, and that the NCA had not satisfactorily established that the income requirement had been met. The Court decided that these claims were unfounded.
- Mrs A also claimed that the UWO should be discarded because a penal notice had been attached to it. The Court rejected this argument, on the basis that the statute doesn't necessarily outlaw the imposition of a penal notice and that Parliament would have explicitly provided for this exclusion if it so intended.

Mrs A's challenge to the order (2)

- Mrs A claimed that the UWO was in contravention of the ECHR protection of enjoyment of rights (Article 1, Protocol 1). This argument was rejected by the Court, which found that the order struck a “fair balance”.
- It was also claimed that the order offends the privilege against self-incrimination and the spousal privilege. (This is based on the fact that Mrs A's husband is in custody and she is subject to ongoing criminal investigations both in a non-EEA country.) The court rejected this argument on several grounds, including that privilege doesn't apply to the risk of criminal prosecution in jurisdictions other than the UK and that either by the intention or implication of Parliament, privilege is abrogated here.
- Finally, counsel for Mrs A argued that in all the circumstances of the case and with the discretion of the Court, the order should be discharged. The Court dismissed this argument.
- Therefore, Mrs A's application to discharge the UWO was rejected on all 8 claims advanced.
- Mrs A has appealed this decision, but it is as yet unknown whether she has been granted permission by the Court of Appeal.

• The consequences

Non-compliance

- If without “reasonable excuse” - recoverability presumption and likely contempt of court proceedings.
- No statutory definition of “reasonable excuse” (consider from the perspective of a “prudent person” and whether non-compliance is due to unforeseeable or unusual event beyond respondent’s control (*Propaye v HMRC* (2011) UK FTT 136 TC 001010)).

Compliance

- If explanation is provided *and* interim freezing order is in force, enforcement authority has 60 days to decide whether to commence Part 5 proceedings (or other POCA proceedings) and notify the High Court.
- If no action is taken, the interim freezing order must be discharged.
- Nothing to prevent the enforcement authority from later changing its mind (ie. if new information arises).
- If the UWO is not accompanied by interim freezing order, no time limit applies.

• Final Thoughts

New criminal offence

- A person commits an offence if s/he knowingly or recklessly makes a false or misleading statement in regards to a material particular.
- Maximum 2 years' imprisonment.

Relatively easy to obtain

- If an enforcement authority can show that the figures on an individual's income tax statement appear disproportionate to his ownership of a particular asset, hard to see what more would be required.
- This of itself could give rise to reasonable suspicion of fraudulent tax evasion, one of the listed "serious crimes". No need for an in-depth criminal investigation to be on foot.

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