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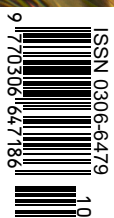
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Unexplained Wealth Orders. Explained

David Bloom considers UWOs—the newest enforcement measure introduced to tackle money laundering & economic crime



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IN BRIEF

- ▶ Unexplained Wealth Orders explained.
- ▶ Conditions for issuing an order.
- ▶ Consequences of non-compliance.

Since 31st January 2018, the enforcement authorities in England and Wales have been empowered with a new investigative tool to tackle money laundering and economic crime: Unexplained Wealth Orders (UWOs). These widely-trailed measures have been billed as having the potential to redefine the asset recovery regime. However, scrutiny of the statutory framework suggests limitations and challenges in practice indicative of more modest reforms.

Background

Introduced by the Criminal Finances Act 2017, which amended the Proceeds of Crime Act 2002 (POCA 2002), the aim behind UWOs was set out in the legislation's Explanatory Notes: to fill the lacuna in the POCA 2002 provisions that often meant enforcement authorities were unable to freeze or recover assets, even when they had reasonable grounds to suspect the identified assets represented the proceeds of crime, due to their inability to obtain evidence — often from overseas jurisdictions.

UWOs do not confer a new power to recover assets; they do compel an individual or company (the respondent) to provide information or documentation explaining the origins of assets that appear to be

disproportionate to the respondent's known income. Failure to provide a full response can give rise to a presumption that the property is recoverable in any subsequent civil recovery proceedings. A UWO creates a reverse burden on the respondent to prove the legitimacy of the income used to acquire the property and reduces the investigative burden on the enforcement agencies. As will be seen, the statutory provisions are wide in scope and the first a respondent may know of a UWO is being served with one.

The application

To prevent the property in question being dissipated, a UWO application may be made to a High Court judge in chambers without notice. The enforcement authorities permitted to make the application are the National Crime Agency, HMRC, the Financial Conduct Authority, the Director of the Serious Fraud Office and the Director of Public Prosecutions. Other agencies, private organisations or individuals can make a referral to one of the listed authorities.

The enforcement authority must specify or describe the property in respect of which the order is sought and the person whom it thinks holds the property. Though the statutory use of the word 'describe' suggests a degree of generality may be permitted, UWOs cannot be sought as a means of speculatively enquiring into a respondent's unidentified assets.

The court may issue a UWO if four conditions are met.

- ▶ **Condition 1** There is reasonable cause

to believe that the respondent holds the property.

- ▶ **Condition 2** There is reasonable cause to believe that the value of the property is greater than £50,000; it is the value of the property and not the respondent's interest which must exceed £50,000.
- ▶ **Condition 3** 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 obtaining the property; for these purposes, the court will consider any mortgage or other security that it is reasonable to assume was or may have been available and assume that the person obtained the property for market value.
- ▶ **Condition 4** The respondent is either:
 - ▶ A politically exposed person (PEP), ie entrusted with prominent functions by an internal organisation, a country other than the UK or another EEA state, or is a family member or close associate of such a person; or,
 - ▶ There are reasonable grounds for suspecting that the respondent has been involved in serious crime (which includes drugs and arms trafficking and money laundering) or a person connected with the respondent has been so involved.

The scope of UWOs is sufficiently wide to entitle the authorities to serve them in cases where property is registered in the name of an overseas company; where other persons (ie spouses) hold interests in the property and, significantly, UWOs have retrospective applicability and can be granted with respect to a property regardless of when it was purchased.

The court can, when issuing a UWO, make an interim freezing order (IFO) if it considers it necessary to avoid the risk of any recovery order that might subsequently be made being frustrated. The necessity of granting an IFO will need to be demonstrated to the court by the enforcement authority. The effect of an IFO is that the respondent (and any other person with an interest in the property) is prohibited from dealing with it.

There is enacted a high threshold to recover compensation in relation to IFOs: in addition to proving that loss was suffered, the applicant must demonstrate 'serious default' on the part of the relevant enforcement authority within three months of the discharge of the IFO.

The statement

If the court makes a UWO, the respondent is required to provide a statement in response:

- ▶ setting out the nature and extent of the respondent's interest in the property;
- ▶ explaining how they obtained the property;
- ▶ setting out details where the property is held by the trustees of a settlement; and
- ▶ setting out such other information in connection with the property as may be so specified.

The UWO may require the respondent to produce certain documents but must specify the form and manner in which the statement is to be given. The respondent must respond within the deadline specified by the court (the response period) and will be deemed to have failed to have complied unless each requirement is fulfilled.

Consequences of non-compliance

As mentioned, if the respondent fails to reply, without a reasonable excuse, the property will be subject to the presumption that it is recoverable property (ie the product of 'unlawful conduct') in any subsequent civil proceedings. In addition, a person commits a criminal offence if they recklessly or knowingly make a materially false or misleading statement in response to a UWO. This is punishable by a prison sentence of up to two years and/or a fine.

Consequences of compliance

If an IFO is in place, the enforcement authority must determine what enforcement or investigatory proceedings it considers ought to be taken within 60 days of compliance or purported compliance with the UWO. If no further proceedings are to be taken, the High Court must be notified within the 60-day timeframe. An initial decision not to pursue proceedings does not prevent proceedings being recommenced on any future date, even on the same information.

If no IFO is in place, the provisions are sweeping. On receipt of a respondent's compliance or purported compliance, the enforcement authority may, at any time, determine what, if any, further enforcement or investigatory proceedings it considers ought to be taken in relation to the property.

Challenges to UWOs

UWOs will, inevitably, be subject to a raft of individual challenges both procedurally and substantively. Most evidently any respondent will seek to satisfy the relevant enforcement authority and court that they have sufficient lawful assets to have enabled them to have obtained the

property in question. This will most likely be through the production of an audit trail of legitimate traceable income and tax filings.

The ownership and value of property will invariably be contested. The assumption that property is valued at more than £50,000 and was obtained for a price equivalent to its market value could result in surveyors providing independent evidence of lower valuations or the respondent providing evidence that the property was, in fact, legitimately obtained at a discounted rate.

The wide alternate limbs of the fourth condition will likely lead respondents to dispute the nexus with PEP or persons involved in serious criminality. The court will most likely vigorously scrutinize the asserted link to pre-empt obvious responses that challenge remote and tangential connections.

Any PEP may well seek to claim personal or functional immunity as a procedural bar to the bringing of UWO proceedings and claim that the property in question was obtained as part of an 'official act'. Whether there exists in practice the political appetite to dedicate enforcement resources to well-connected PEPs with deep pockets remains to be seen.

The statute does make provision for a respondent to have a 'reasonable excuse' for not complying with a UWO. This ubiquitous term is not defined and no examples are given in the Explanatory Notes but could fairly be supposed to include circumstances where specific requested documents have been destroyed or otherwise irretrievably lost.

The government has, to date, only produced guidance intended 'to raise awareness and a basic understanding of the provisions...not detailed guidance or interpretation of the power' (Home Office: 'Circular 003/2018: unexplained wealth orders', 01/02/2018). In the absence of detailed guidance, a recipient could reasonably claim not to know the level of detail required to produce a compliant response. The disclosure of too little information could lead to the consequences outlined above; too much information could offer the enforcement agencies inadvertent leads and cast suspicions on innocuous money flows, individuals and business structures. In addition, any information provided is not subject to a limitation period and may well be disseminated to other agencies and used for intelligence purposes.

Conclusions

The government has estimated that there would be 20 cases each year where the enforcement agencies would use UWOs,

after an initial year of no cases (Home Office: Criminal Finances Act—Unexplained Wealth Orders: Impact Assessment: IA No: HO0282, 20/06/2017). To put this into context, 5,839 confiscation orders were made between 2015 and 2016 (Public Accounts Committee: 'Confiscation orders: progress review'; Seventh Report of Session 2016–17, HC 124, 27/06/2016).

Confounding the government's expectations, on 28 February 2018, the NCA announced it had secured its first two UWOs to investigate assets totalling £22m believed to be ultimately owned by a PEP. These test cases relate to two properties, one in London and one in the South East of England, and are now subject to IFOs.

The POCA 2002 civil recovery provisions have undoubtedly been hitherto under-used: civil recovery orders resulted in the collection of £17.8 million between 2014 and 2015. During the same period confiscation orders generated £155m (National Audit Office: 'Confiscation orders: progress review', HC 886, 11/03/2016).

The confiscation process has been much maligned as costly and inefficient. The NAO estimates that the annual cost of administering the end-to-end confiscation order process is around £100 million. For the period 2015 to 2016, the amount confiscated was £175 million with £1.9 billion outstanding at the end of March 2016.

UWOs may make civil recovery appear more attractive to the enforcement agencies if lengthy and costly criminal investigations, trials and confiscation proceedings could be circumvented. The government's own polices though suggest they cannot. The joint guidance for prosecutors and investigators on their asset recovery powers issued in 2012 by the Home Secretary and Attorney General makes it clear the pre-eminence of criminal recovery in satisfying the public interest, and that criminal investigations and prosecutions are not to be avoided.

This hierarchy has unquestionably been the court's view: *Tomas LJ*, for instance, emphasised in *Innospec Ltd* that it would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil, as opposed to a criminal, sanction ([2010] Lloyd's Rep F C 462 (Crown Ct (Southwark))). The enforcement authorities must anticipate applications for UWOs receiving short shrift if the court suspects such expediency. This might, in time, represent a fifth (albeit unwritten) condition that further means the wide UWOs provisions are narrowly construed.

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