

Alert | White Collar Defense & Special Investigations



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Prove It or Lose It! – Part I: Unexplained Wealth Orders

Unexplained Wealth Orders (UWOs) have recently been in the news. They extend the powers available to UK law enforcement authorities under the Proceeds of Crime Act 2002 (POCA). A UWO enables investigators to ask people who are holding assets, which based on their legitimate income they would not be able to afford, to prove that such assets were obtained from legitimate sources. If the person can't prove the assets are from a legitimate source, then the authorities can take steps to recover those assets.

Introduced by the Criminal Finances Act 2017, UWOs became available to the UK's enforcement authorities on 31 January 2018, but it wasn't until July 2018 that their use was reported in the mainstream press. The press interest followed the unsuccessful appeal against a UWO obtained earlier this year by the National Crime Agency against Mrs. Zamira Hajiyeva, the wife of Jahangir Hajiyev, a former chairman of the International Bank of Azerbaijan who in 2016 was jailed 15 years for offences including abuse of office and large-scale fraud against the bank.

Amongst the resulting furore of reports discussing £11.5m properties, £20,000 necklaces and auction house raids, it is easy to forget the legal background of these measures. So, what are Unexplained Wealth Orders, and how do they work?

How Do UWOs Work?

Put simply, a UWO requires the responding party to explain what interest they have in whatever property is named in the order, how they obtained the property, and how it is held.

Applications for such orders can be made without notice to the High Court by enforcement authorities including the Serious Fraud Office, Her Majesty's Revenue and Customs, and the National Crime Agency. Applicants **must**:

1. Specify or describe the property in respect of which the order is sought; and
2. Specify the person who they believe holds the property.

If made, the UWO requires the respondent to provide a statement setting out the nature and extent of their interest in the property, an explanation of how they obtained the property, and any further information that may be demanded by the order.

Before deciding whether to issue a UWO, the court needs to be satisfied of the following:

1. That there is reasonable cause to believe the respondent holds the property;
2. That the value of the property is greater than £50,000;
3. That there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient to enable the respondent to obtain the property; and
4. That the respondent is:
 - a. a **Politically Exposed Person (PEP)**, which is defined in POCA as "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" and includes family members, known close associates or persons otherwise connected with such an individual; **OR**
 - b. there are reasonable grounds for suspecting that the respondent or a person connected with the respondent is or has been involved in serious crime (whether in the UK or elsewhere).

Any UWOs made will specify the form and manner of the statement to be given and may specify a time period for compliance.

Interim Freezing Orders

Enforcement authorities applying for UWOs can apply simultaneously for an interim freezing order to preserve the property that is the subject of the UWO where the court is satisfied there is a risk that any subsequent recovery order would be frustrated unless the property was preserved.

If an interim freezing order is granted by the court, the enforcement authority can also apply, in the same hearing or subsequently, for the appointment of an Interim Receiver, which can be a member of staff in the relevant enforcement authority, who then has the power to manage the property that is the subject of the proceedings. This can include selling items where their value may diminish, and managing (or appointing someone else to manage) any business that is itself the subject of the proceedings.

If an interim freezing order is granted, exclusions can be applied to allow for reasonable living expenses to be met, enable any persons affected by the interim freezing order to carry on their trade, business,

profession, or occupation, and to allow for reasonable legal expenses in respect of the UWO and interim freezing order.

Penalty for Non-Compliance

Failure (without reasonable excuse) to comply with a UWO results in a presumption that the property named in the order is “recoverable property.” This means that the law enforcement authority who applied for the order can commence civil recovery proceedings under Part 5 of POCA to recover the interest that the target of the UWO holds in that property, where the value of that interest is more than £50,000.

In addition to the likely commencement of civil recovery proceedings, and as confirmed by the court in Mrs. Hajiyeva’s case where a penal notice was attached to the UWO order, failure to comply with a UWO may result in the recipient being held in contempt of court, which can lead to imprisonment, a fine, or seizure of assets.

An Enforcement Weapon for the Real World?

The answer to this question is not yet clear.

So far, the UWO granted by the High Court against Mrs. Hajiyeva is the only public-domain use of these new powers, which due to human rights considerations in respect of privacy are not normally publicized beyond an anonymized press release that an agency has successfully obtained one (See GT Alert, [UK Court Rules a Suspect in a Criminal Investigation has Reasonable Expectation it will be Kept Private](#), July 2018).

The UWO was challenged by Mrs. Hajieva, but on 3 October 2018, the High Court **refused** her application to discharge the order. In doing so, the court dismissed a number of arguments, including: (1) that the order constituted a breach of Mrs. Hajiyeva’s rights under Article 1 of Protocol 1 of the ECHR (Protection of Property); and (2) that her husband (who was chairman at a bank whose shareholders included the Ministry of Finance of Azerbaijan, which held between 50.2 percent and 60.6 percent of shares at the relevant time) was not in fact a PEP.

Mrs. Hajiyeva also argued that complying with the order would violate her privilege against self-incrimination and spousal privilege because she is the subject of an ongoing criminal investigation in Azerbaijan. Further, she claimed that since her husband is currently in custody in Azerbaijan, compliance with the order would put him at risk for further charges. The court found that these privileges only apply to criminal offences in the UK and held, *inter alia*, that the evidence placed before it did not demonstrate a “real and appreciable risk that Mrs Hajiyeva and her husband would be prosecuted for offences in the UK” and that, in any event, the UWO proceedings were “proceedings relating to property” as defined in Section 13 of the Fraud Act 2006. Therefore, the privileges were not available.

What Next?

The story of the UWO is, like Mrs. Hajiyeva’s, to be continued. It remains to be seen how and to what extent these powers will be used by enforcement agencies, but authorities are encouraged by the High Court’s judgment in Mrs. Hajiyeva’s case. NCA Director for Economic Crime Donald Toon said, “I am very pleased that the court dismissed the respondent’s arguments today...[w]e are determined to use the powers available to us to their fullest extent where we have concerns that we cannot determine legitimate sources of wealth.”

The UK government's updated Serious and Organised Crime Strategy 2018 contains further indications that UWOs will be in regular use. This was confirmed by the NCA in its 31 October 2018 press release about the launch of the National Economic Crime Centre (NECC), which states that the NECC "will promote the use of new powers such as Unexplained Wealth Orders and Account Freezing Orders to tackle illicit finance."

UWOs will undoubtedly create significant discomfort for those on the radar of the NCA and other UK law enforcement agencies, and they may prove to be a valuable provision in the UK's fight against corruption, money laundering, and associated criminal activity.

For those who fail to comply with the requirements of a UWO, including Mrs. Hajiyeva, the next step would almost certainly be civil recovery of assets under Part 5 of POCA, which we look at in our next article Prove It or Lose It – Part II.

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