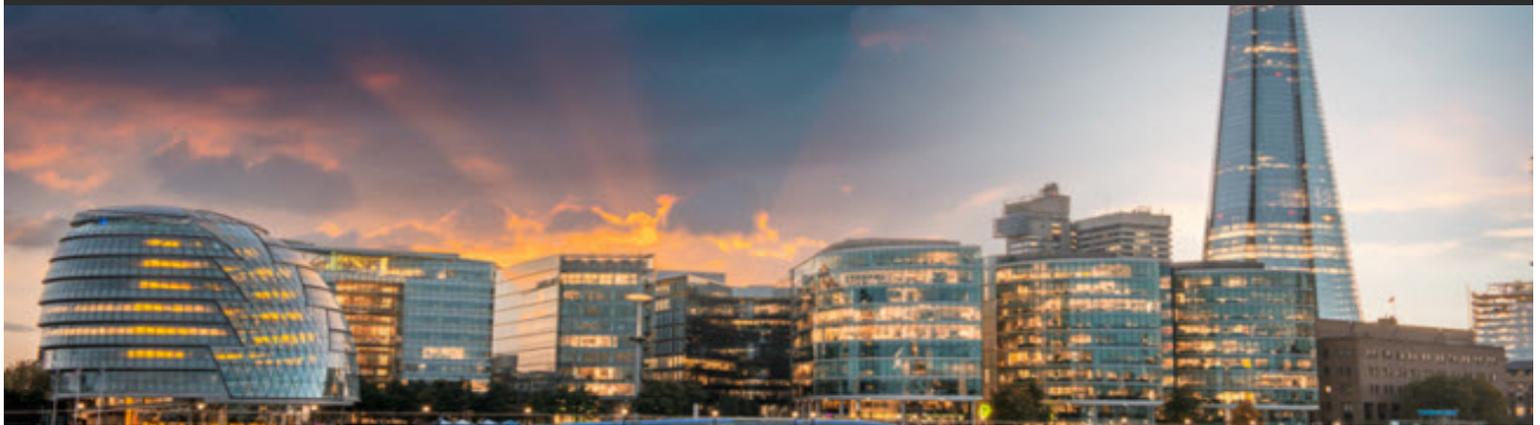


Alert | White Collar Defense & Special Investigations



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Prove It or Lose It! Part II: Civil Recovery Orders

In the first of our two-part series, we looked at **Unexplained Wealth Orders (UWOs)**. To summarize, UWOs require the recipient to explain how they obtained their wealth/assets, which authorities have reasonable grounds to suspect could not have been with the recipient's known sources of income. The UWO is the beginning of a journey that can result in assets being taken away from their owners by the state through commencement of civil legal proceedings under Part 5 of the Proceeds of Crime Act 2002 (POCA).

UK politicians and law enforcement agents have trumpeted these non-conviction-based asset-recovery powers for their ability to recover and rid the UK of laundered assets. However, many obstacles remain in pursuit of this goal. In this GT Alert, we review these civil-recovery powers under POCA against the backdrop of UWOs.

The Legal Framework

POCA Part 5 recovery powers have been available to enforcement authorities since 2003. To date, broadly speaking, the primary method used by criminal law enforcement to recover criminal property has been confiscation following criminal conviction; Part 5 recovery orders have been a relative criminal law enforcement backwater. However, with the introduction of UWOs and the UK's focus on cracking down on suspected money laundering, it is expected that this will change.

The distinction between confiscation and Part 5 recovery orders is important: Confiscation follows criminal conviction with the high legal threshold of beyond reasonable doubt. In contrast, a Part 5 recovery order is a civil law claim over property subject to the lower legal threshold of balance of probabilities. There is no requirement for a (and likely no) conviction to obtain a Part 5 recovery order.

The proceedings focus on the property; this means that even where a person is innocent of any wrongdoing, they can still be deprived of the property that they hold.

Timing

Subject to one caveat in the context of UWOs, enforcement authorities can apply through the civil courts for a Part 5 recovery order at any time. If an interim freezing order exists in respect of the property that is the subject of the UWO, then enforcement authorities must decide within 60 days from the date of compliance or purported compliance with the UWO what, if any, further investigation or enforcement action ought to be taken in respect of the property. If a person's explanation is considered insufficient by the relevant authority, then the authority may apply for an additional UWO, begin a civil recovery investigation, or apply for a recovery order.

Recoverable Property

The Part 5 recovery order regime revolves around the concept of recoverable property. [Section 304 of POCA](#) states that property "obtained through unlawful conduct is recoverable property."

Importantly, in the context of UWOs, if a person served with a UWO fails to comply with that order – in other words, does not provide an explanation for the source of their wealth – the property will be presumed to be "recoverable property." In that scenario, should the enforcement authority decide to initiate civil recovery proceedings, the onus would be on the individual to rebut that presumption, a difficult task.

Where there is no such presumption, the enforcement authority needs to prove that the property was obtained through unlawful conduct. Unlawful conduct is defined as conduct which takes place in the UK and constitutes a criminal offence in the UK; or which takes place abroad and constitutes a criminal offence in that country, and would also constitute a criminal offence if the conduct had occurred in the UK. This offence needs to be proven on balance of probabilities, and the property needs to be linked to that criminal activity. Even with a lower legal threshold of balance of probabilities, this proposition is not as simple as it sounds.

Proving unlawful conduct in connection with business deals outside the UK has a variety of challenges. UK authorities need to prove on balance of probabilities that those deals, which may have occurred far in the past, were unlawful. There is a 20-year statute of limitations for Part 5 recovery proceedings. In addition, proving that the property in question is the product of the unlawful conduct normally involves a tracing exercise, which is not easy.

There are exceptions and exemptions to what is defined as recoverable property as well as an available exception to the requirement that a court make an Part 5 recovery order.

A key exception applies if a person disposes of recoverable property and the person who obtains it on that disposal does so in good faith, for value and did so without notice that the property was recoverable. In those circumstances, the property ceases to be recoverable property.

Finally, the court may exercise its discretion not make a recovery order in respect of any recoverable property:

- if the respondent obtained the recoverable property in good faith;

- if he took steps after obtaining the property which he would not have taken if he had not obtained it, or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it (For example, incurring a significant financial liability such as a loan, in anticipation of obtaining the property which is used as collateral to secure the loan);
- if when he took the steps, he had no notice that the property was recoverable;
- if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him; and
- it would not be just and equitable to make an order.

Use of Civil Recovery Orders – Fight or Flight?

Speaking recently at the Cambridge International Symposium on Economic Crime 2018, the Serious Fraud Office's General Counsel outlined how civil recovery can supplement a criminal prosecution, even where that prosecution fails. This outline was provided in the context of not needing to limit yourself to a single theory of liability.

With the introduction of new enforcement measures and offences, courtesy of the Criminal Finances Act 2017, this message is a reminder to all UK enforcement authorities that civil recovery still has the potential to be a valuable enforcement tool.

Will this lead to a new wave of litigation? It seems probable. While superficially simple, obtaining civil recovery orders following a UWO is likely to be more complex than politicians and enforcement authorities might represent.

With valuable assets at stake, it is expected that attempts to recover property will be resisted, and the success of law enforcement agencies in this endeavor is far from certain.

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