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Unexplained wealth orders – the latest developments

Unexplained Wealth Orders (“**UWOs**”) were introduced in the United Kingdom on 31 January 2018. Since then, they have attracted significant attention.

The most famous UWO case to date involves Zamira Hajiyeva, the wife of an Azeri banker. The National Crime Agency (“**NCA**”) obtained a UWO against her in 2019. The UWO required her to explain how she purchased her luxury home in London.

Ms Hajiyeva tried to challenge this order and in a recent judgment, the Court of Appeal has rejected her appeal.

With this judgment now attracting more interest, this article answers questions that parties from other jurisdictions often ask about UWOs.

Q: What are UWOs, and who the power to obtain them?

A UWO is a form of disclosure order, which can be made against an individual who is either (a) a Politically Exposed Person (“**PEP**”) (from outside the European Economic Area) or (b) suspected of involvement in serious crime. These orders require the person to explain the source of the funds used to purchase specified “property”. “Property”, for the purposes of a UWO, means any kind of asset, including real estate, cash but also what are called “intangible” assets, for example debts.

In the UK, only an “Enforcement Authority” can apply for a UWO. Enforcement Authorities include: the NCA, Her Majesty’s Revenue and Customs, the Financial Conduct Authority, the Serious Fraud Office and the Director of Public Prosecutions.

Q: What happens after a UWO is served on an individual (the “Respondent”)?

The UWO will specify certain property (for example, in Ms Hajiyeva’s case, a house in London). It will require the Respondent to provide, within a specified period, information in the form of a statement. The statement must include the following information:

1. The nature / extent of the Respondent’s interest in the property; and
2. An explanation of how the Respondent obtained the property, and how they paid for it.

In addition, the UWO can specify additional specific information that is requested in relation to the property. The UWO will specify in what form the Respondent has to set out their answer.

If the Respondent does not comply with the requirements of an UWO, the property specified in the UWO is “presumed” to be “Recoverable Property” – meaning the proceeds of “Unlawful Conduct” – for the purposes of “Civil Recovery” proceedings. This means that the Court will find the property to be “Recoverable Property” unless the Respondent can provide evidence showing that it is not.

The effects of failure to comply with a UWO do not end there. UWO’s can include a ‘penal notice’. This means that if the Respondent disobeys the order, they can be fined or imprisoned.

Finally, if the respondent to a UWO knowingly or recklessly makes a statement that is materially false or misleading, they commit a separate a criminal offence, punishable by up to 2 years imprisonment.

Q: Can UWOs be served on companies, or only individuals?

A UWO can be served on an individual, company, trust or other legal entity.

The legislation is deliberately broadly drafted, so a vast number of “third parties”, may be subject to a UWO. For example, it is sufficiently broad to allow UWOs to be served on:

- Professional trustees and/or trust beneficiaries; and
- Anyone “connected to” a person suspected of involvement in serious crime. There is no time limit for the connection; it effectively means “is or has been” connected. Consequently, if someone is suspected of involvement of a serious crime, UWOs can be obtained against their current or former business partners, or even indirect, family members – for example, as distant as a husband’s sister’s husband.

Q: Can UWOs only be served on persons who are physically in the UK? And do they relate only to wealth in the UK?

UWOs are expressly capable of extra-territorial effect. A UWO can be served on a Respondent outside of the UK, and / or in relation to property located outside of the UK.

Q: Can UWOs be challenged, and if so how?

As the Hajiyeva case demonstrates, it is possible to challenge a UWO in the High Court. The most common grounds of challenge to an UWO will be:

1. That the Respondent is not a person upon whom a UWO can be served. This ground of challenge will involve the subject showing that s/he is not a PEP **or** that there are no “reasonable grounds for suspecting” that s/he is “involved in serious crime” or “connected to” such a person; and / or
2. That the subject can “explain” the provenance of the property in question. This will involve showing that the subject has (or had, at the time of purchase) sufficient income or wealth, of legitimate origin, to acquire the property which is the subject of the UWO.

Q: If a party is in the public eye, but has significant wealth, how can they prepare for the possibility for a UWO being served on them?

The best way to prepare to resist a UWO is to prepare credible, verifiable evidence that shows that the tests for the making of a UWO are not met. This should be in a format that would be intelligible to the English Courts.

For example, if an individual owns a substantial property in London, which was purchased from income derived from dividends, paid by a company in which that person has a large shareholding, they could prepare the evidence demonstrating (a) how they acquired those shares (and particularly the source of money was to pay for them), (b) how long they have owned the shares, and (c) evidence that the company paid dividends. In some cases, this evidence will be easier to prepare than in others. For example, it is relatively easy to show that a public listed company has paid dividends; it may be more difficult to show this in relation to a private company.

In the Hajiyeva case, Mrs Hajiyeva had difficulties providing evidence of her husband’s income and wealth, as he was in prison in Azerbaijan. Mrs Hajiyeva was herself wanted in Azerbaijan, and not able to return to gather evidence. The English Courts were not sympathetic to the difficulties Mrs Hajiyeva experienced in presenting her case as a result.

Q: Can a private litigant obtain a UWO?

No. Only the UK enforcement authorities can ask the Court for a UWO. However, a private individual or company can provide information to the authorities that may persuade them to make an application for a UWO. The authorities are not obliged to act upon such information; they do not even have an obligation to engage with the person who provides it. However, where there is a strong case for a UWO this is a route to consider.

Q: Are private litigants or victims of crime able to access the prosecutor's file to see the information filed by the prosecutor or the defendant?

Private individuals have no automatic rights to information from the authorities. However, there have been some cases in the UK to show that they may, in limited circumstances, be entitled to civil orders for disclosure (known as 'Norwich Pharmacal Orders') against some authorities.

While this has never been done before, it is possible that the following could happen to a Respondent: (a) they could be served with a UWO, and so have to disclose information about their assets to the English authorities and (b) a claimant could obtain disclosure of that information from the English authorities.

As this has never been done in the context of UWOs any Claimant trying to obtain disclosure like this would be testing new legal territory; it will be interesting to see if this is attempted.

Q: If private litigants cannot obtain UWOs, what other avenues are available in the UK to get information?

Civil litigation in cases of fraud and corruption is more powerful in England than in many jurisdictions. Even if a UWO is not available, Claimants can obtain very similar information through litigation. A Claimant can start civil proceedings before the English Court and obtain documents both from other parties to the proceedings as well as third parties.

The most obvious route to disclosure of assets is through a freezing order. Normally, where a Claimant obtains a freezing order, the Court will also make an order that the Defendant must disclose details of their assets. In some cases, that disclosure can be very broad: for example, a Defendant can, in some cases, be ordered to provide information about assets they used to own (but do not own anymore), including an explanation of what has happened to those assets.

Freezing orders can be obtained before proceedings are started (although normally the Claimant must then start the proceedings immediately after the order is served on the Defendant). Another type of order that can be obtained before proceedings are started is a 'Norwich Pharmacal' order. This is an order for disclosure of documents and/or information against a third party. These orders are usually

obtained where a Claimant needs more information before they can bring a claim; for example, they may know they are a victim of a conspiracy to defraud, but they may not know who all the co-conspirators are. In those cases, the court may, for example, make an order against a bank so the Claimant can find out who received monies that were fraudulently stolen from them through the conspiracy.

More widely, as part of normal litigation (even without a freezing order), there is usually very wide disclosure in England. All parties to English proceedings normally have to disclose documents they rely on, that help the other side's case, and/or which damage that party's own case. The disclosure obligations extend to documents that the parties control (not just documents that they 'own'), and 'control' is interpreted widely. It normally includes, for example, documents held by the parties' agents (for example, if a party is entitled contractually to force a trustee to provide them with documents, they are likely to have to disclose those in litigation if the documents are relevant).

The parties' disclosure obligations are treated very seriously by the English Court, which expects the parties to comply strictly with the rules.

Q: UWOs are famous for requiring an explanation of where wealth comes from. Why are Ms Hajiyeva's assets not being seized?

UWOs oblige a Respondent to provide information to the authorities. They are not an asset forfeiture tool in their own right.

The authorities can use information disclosed as a result of a UWO for any purpose (although it may not be admissible in criminal proceedings against the Respondent).

However, the main intention behind the UWO is to allow the authorities then to move on to seek asset forfeiture by means of "Civil Recovery" proceedings. If the Respondent to a UWO fails to comply with a UWO properly, the asset which is specified in the UWO is "presumed" to be "Recoverable Property". This means that the Court will presume it to be "Recoverable Property" unless the Respondent can provide evidence showing that it is not.

Civil Recovery has been available to the UK enforcement agencies since 2003 and allows them to seek forfeiture of property, which represents the proceeds of “unlawful conduct”, in civil proceedings.

Q: If assets are seized in Civil Recovery proceedings who gets the proceeds of those seizures – do they get passed to the victim(s)?

The default position in Civil Recovery proceedings is that the UK Home Office and the applicant agency (e.g. the NCA) each receive 50% of the sum recovered.

However, there is provision to enable victims to make an application to the Court, within the course of Civil Recovery proceedings, for a declaration that specified property belongs to them. In order to obtain such a declaration the victim must be able to show that they did not obtain the property through “unlawful conduct” themselves. As far as we are aware, these provisions have never been utilised or tested before the Courts.

Following pressure from non-governmental organisations, UK enforcement agencies are increasingly trying, wherever possible, to repatriate the proceeds of crime and corruption, where the victims are overseas governments. For example, in December 2019 following a settlement agreement with Pakistani property tycoon Malik Riaz Hussain forfeited assets (including a £50m mansion overlooking Hyde Park in London), the NCA returned these funds to the government of Pakistan.

Q: What other avenues are available for asset recovery in the UK for victims?

The other avenue for asset recovery in the UK is starting civil proceedings before the English Courts. English Courts are very familiar with cases where victims of fraud try to recover stolen assets through private claims and have developed an extensive arsenal of orders and remedies to assist victims of fraud.

One of the most powerful instruments available to victims of fraud, also known as the Court’s “nuclear weapon”, is a Freezing Order: it prohibits the Defendant from dealing with its assets and obliges the Defendant to disclose all of its assets, in any

jurisdiction, to the Claimant. It is important to understand that the Freezing Order is designed to prevent unlawful dealing with the Defendant’s assets but does not entitle the Claimant to a security over the assets.

Once the victim secures a judgment in its favour, it can enforce it against all known assets of the Defendant both in the UK and, once the judgment is recognised, abroad.

Separately, any person has a statutory right in the UK to seek to commence a private prosecution. Following conviction the criminal court can make various awards to a private prosecutor, including compensation (payable by the convicted Defendant) and as to costs.

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