

UNEXPLAINED WEALTH ORDERS

The ‘What, Where, When and How’ of the new Legislative Provisions

The case of Zamira Hajiyeva and the Unexplained Wealth Order “UWO” restrictions imposed upon her have brought to attention new legal restrictions that were passed by Parliament in 2017. This article looks at the introduction of UWO’s, what they are, and the tests for imposing them. **Yasin Patel and Amy Hazlewood** look at how the Courts have used their powers to impose them and the questions they have had to consider in doing so. We look at the case of Hajiyeva and the specific details of that case.

“UWO” - What is it and what is the law

A UWO is an investigation order issued by the High Court. The legal provisions of a UWO are contained in sections 1 to 6 of the Criminal Finances Act 2017. Under these provisions, a court may make a UWO to require an individual or organisation suspected of association with serious criminality to explain the origin of assets where they appear to be disproportionate to their known income. If that person does not respond or the explanation is not adequate, this may enable the property to be recovered under existing civil recovery powers.

The question must then be answered as to what is ‘serious criminality’ and how is that interpreted? The test for involvement with serious crime is by reference to Part 1 of the Serious Crime Act 2007. A UWO is not, by itself, a power to recover assets. It is an addition to a number of powers already available in the Proceeds of Crime Act (“POCA”) to investigate and recover the proceeds of crime and introduced new sections 362A – 362R and 396A – 396U of POCA.

Only agencies described as “enforcement authorities” in the Act may apply for a UWO. The enforcement authorities in England and Wales are the National Crime Agency, Her Majesty’s Revenue and Customs, the Financial Conduct Authority, the Serious Fraud Office and the Crown Prosecution Service. Crucially, it is only the “enforcement authorities” that may apply for a UWO. There is nothing here about victims or potential victims of crime using this power to safeguard losses they may have made or incurred and which may be dissipated in many ways, whether through various costs and services, including legal ones!

Why have they been introduced?

Despite all of the legislation that is available to the authorities, why was the 'UWO' required?

The purpose of introducing UWO's is threefold:

1. Deterrence

The UK has an increasing reputation for being a safe haven for funds obtained through illegal means. Via the new legislation, 'UWO's are supposed to signal to potential criminals that enforcement agencies have the power to act and will use this power against criminals who seek to use the UK as a safe haven for profits gained through crime.

2. Keeping up with criminals

Criminals are getting smarter at concealing their money by taking their money out of cash and putting it into a range of moveable valuables, such as fast cars, paintings, jewels, or even betting slips. The law needs to keep up the changing patterns used by criminals to conceal their money. UWO's provide a means for this.

3. Empowering law enforcement agencies

It is argued by the authorities that UWO's significantly enhance the capability of the UK law enforcement to tackle money laundering and to recover the proceeds of crime. It is estimated that the annual amount of money laundered globally amounts to \$1.6 trillion, while the National Crime Agency (NCA) assesses that many billions of pounds are laundered into or through the UK as a result of international corruption every year. The intention of the lawmakers is that UWO's will allow law enforcement agencies to act quickly and decisively against suspects before they have the opportunity to move assets.

The Test for a 'UWO'

The Procedure to obtain a UWO is simpler than one imagines. An application for a UWO by an enforcement authority must specify the property for which the order is sought, and the

person whom the authority thinks holds the property. This person becomes the Respondent in proceedings.

Once an order is made, the respondent is required to explain 4 things in relation to the property that is subject to the order:

- i) The nature and extent of their interest in the property.
- ii) How they obtained the property.
- iii) How any costs in obtaining it were met.
- iv) Any other information in connection with the property as may be specified in the order.

The fourth limb of this test gives incredibly wide powers to the enforcement authority. “*Any other information*” may include personal data that expands beyond the usual powers of investigating authorities.

In addition to these requirements, the order may also make a request for the respondent to produce documents that are specified or described in the order.

Before granting the order, the High Court must be satisfied that,

- i) firstly, the respondent holds the property and,
- ii) secondly, that the value of the property is greater than £50,000.

This monetary amount is an incredibly low threshold that will not be difficult for enforcement authorities to meet.

The High Court must also be satisfied that there are reasonable grounds for suspecting that the respondent, or a person connected with the respondent, is or has been involved in serious crime.

Given that the legislation is in its infancy, having only been enacted in 2017, the scope of “reasonable grounds” has not been sufficiently tested by the Courts.

This part of the Act also enables enforcement authorities to issue a UWO to secondary parties who do not or are not expected to become a party to the primary criminality that is suspected.

Furthermore, the Act does not define how a person becomes connected to the respondent. Likewise, it does not provide clear parameters for when a connection will be too remote for a UWO to be ordered.

The Hajiyeva Case

One case that has got a great deal of national and international publicity is that of Zamira Hajiyeva: she has been the target of the UK's first 'UWO's. Mrs Hajiyeva is the wife of Jahangir Hajiyeva, an Azerbaijani banker serving a 15-year prison sentence in Azerbaijan for fraud, misappropriation of state funds, and the embezzlement of billions from the Baku treasury. Jahangir Hajiyeva, the former chairman of the state-owned International Bank of Azerbaijan was sentenced to 15 years in jail for defrauding the bank of up to 5 billion manat (£2.2 billion). The National Crime Agency (NCA) claims Zamira Hajiyeva is wanted by the Azerbaijani authorities in connection with avoiding the investigation into fraud at her husband's former bank.

In early November 2018, Mrs Hajiyeva was arrested by the Metropolitan police at the request of the authorities in Azerbaijan, where she is wanted on two charges of embezzlement. An extradition request has been made by the Azerbaijani authorities and a hearing is expected later this year.

Under the 'UWO's, that Mrs Hajiyeva has had imposed upon her, the current items that have been seized include:

- A Cartier diamond to the value of £1,190,000 was seized.
- Two properties with a combined value in excess of £22 million.
- Further items of jewellery valued at more than £400,000 which were due to be auctioned at Christie's.

Before Mrs Justice Supperstone in a High Court Hearing, the Learned High Court Judge was told that Mrs Hajiyeva spent over £16 million on 3 Harrods customer loyalty cards over 10 years. Further, that she used 35 credit cards in Harrods that were issued by her husband's bank. Mrs Justice Supperstone ordered that Mrs Hajiyeva must comply with the UWO and explain how she amassed the money to fund the purchases.

Where the UWO has changed the goalposts are that although in Mrs. Hajiyeva's case it has been said that, '*The NCA's case is that the UWO is part of an investigative process. Not a criminal procedure, and it does not involve the finding of any criminal offence*'¹, that is rather hard for any person subject to a UWO to accept. Whereas POCA Proceedings require a person to account for their 'benefit figure' following a criminal conviction, here one is required to account for and prove the legitimacy of any monies and sources of funds without any criminal procedure or finding. If this case succeeds then it is possible that the NCA could launch up to 9 new UWO investigations.

Burden of Proof

As is highlighted above, perhaps the most controversial aspect of a UWO is the shift of the burden of proof. Previously the burden was on law enforcement agencies to investigate and subsequently prove that an asset was purchased with laundered funds. Under the Criminal Finances Act 2017, it is the respondent who is now required to explain how they obtained the property in question.

Legally, respondents to a UWO are innocent. However, by reversing the burden of proof UWO's imply guilt upon the respondent until they can prove that they are innocent. A consequence of this reversed burden is that those subject to a UWO face public vilification before charge, before arrest and before trial. Should the matter end up before a jury, their right to a fair trial may already be infringed.

Perhaps the biggest concern arising from the Act is whether too much power is given to the law enforcement agencies. The enforcement authorities have the power to decide whether the person is guilty of obtaining assets through proceeds of crime, and then asks the respondent to explain the origins of the said assets. This is the role of a trial by jury to decide: not the law enforcement agencies. Indeed, as a result of the shift in burden, the offices of the enforcement agencies become the Court room. The investigating officers of law enforcement agencies become the Judge and jurors, and the public form an opinion of innocence or guilt before the matter proceeds to trial. UWO's in turn leave respondents exposed by failing to protect

¹ The Guardian Newspaper – 10th October 2018

individuals from the arbitrary judgements of those with authority and power. Accordingly, the rights of the individual against the state perish.

Freezing Orders

After reversing the burden of proof, the Act then permits freezing orders to be applied for in tandem with a UWO. The Act seems to promote a practice whereby the enforcement authorities apply for a UWO, requiring the respondent to explain the origins of their assets, whilst simultaneously, prohibiting that person from dealing with the property in any way. All of this is permitted by the Act before a person is charged with any wrong doing.

Section 3 of the Act permits a UWO to be made against property that is in a country outside the United Kingdom. No parameters or limitations have been set with regards to countries where this power can be utilised. Questions can arise as to whether it is right for the British Government to bring about a UWO if a rouge state convicts someone.

Conclusion

In theory, the imposition of UWO's have shifted the ground for those with assets and money which it is alleged comes from criminality. The case of Hajiyeva highlights the power that the authorities now have. However, the question must be asked, how will the NCA act if a request is made by a nation who are an 'acquaintance' as opposed to a 'friend'?

The Criminal Finances Act may have introduced a piece of legislation that seems a big hurdle for all defence lawyers to overcome: however, where the imposition of a UWO requires the Court to be provided with evidence and information supplied from foreign states, it will be the challenge of those defending the interests of the 'innocent' to not only test and analyse the procedure but also investigate the sources and suppliers of the evidence itself. It is those that will look to go the 'extra mile' that stand the best chance of success in these cases.

26 January 2019

**Yasin Patel
Amy Hazlewood
Church Court Chambers**

