



Unexplained wealth orders explained

Ali Naseem Bajwa QC, Garden Court Chambers

Russell Fraser, Garden Court Chambers

Shahida Begum, Garden Court Chambers

14 March 2019



GARDEN COURT CHAMBERS



@GardenCtCrime

Welcome



GARDEN COURT CHAMBERS



@GardenCtCrime

A date for your diary..

The second in our series of fraud related seminars, **Thursday 23 May 2019.**

Confiscation

Led by Tom Wainwright

Tom brings his analytical and advocacy skills to bear on large-scale complex frauds. He is particularly well-known for his expertise in confiscation proceedings and has co-authored 'The Confiscation Manual' - a practical guide to the proceeds of crime.



Our fraud team

- Large, experienced and successful - consists of 7 QCs and 18 juniors
- Ranked as a leading set of chambers in the Legal 500 for fraud law, focused on winning with a demonstrable successful track record
- Members of the team have authored the highly regarded Confiscation Manual, the authoritative guide for lawyers on applications under the Proceeds of Crime Act 2002



Our fraud services

- Pre-charge advice - Bribery and Corruption
- International fraud - Money laundering
- Other large scale fraud, e.g. Boiler Room Fraud
- Land banking fraud - Unexplained Wealth Orders
- Confiscation - Restraint Orders
- Criminal anti-competitive cartels e.g. LIBOR Fixing



Notable cases

- LIBOR-fixing fraud
- Pakistani cricket spot-fixing corruption
- Operation Emerged – largest ever VAT ‘carousel’ fraud
- Operation Hornet – corruption and fraud at HBOS
- R v Karim – Bollywood international film fraud
- R v Van Badlo – large scale Ponzi fraud
- R v Childs – fraud against Libyan Investment Authority



Our new website

www.gardencourtchambers.co.uk



GARDEN COURT CHAMBERS

@GardenCtCrime

Unexplained wealth orders explained

Ali Naseem Bajwa QC, Garden Court Chambers

14 March 2019



GARDEN COURT CHAMBERS



@GardenCtCrime

Why?

“... hundreds of billions of dollars are laundered through UK banks and their subsidiaries each year” (National Crime Agency)

Because of political influence, corruption, a difficulty in gathering evidence from overseas, etc. it is “... very difficult, and sometimes impossible, to obtain enough evidence to undertake civil proceedings or convict an individual of a criminal offence” (Home Office)



What?

“A UWO is a civil power and an investigation tool. It requires the respondent to provide information on certain matters (their lawful ownership of a property, and the means by which it was obtained).” (Home Office)



How?

- Criminal Finances Act 2017 ('CFA') came into force on 31 January 2018
- CFA s. 1 amends Part 8 of the Proceeds of Crime Act 2002 ('POCA') by inserting sections 362A - 362H (England and Wales), 396A- 396U (Scotland)



Applications

A UWO can only be applied for by “an enforcement authority”, i.e. (i) NCA, (ii) HMRC, (iii) FCA, (iv) SFO, and (v) DPP

A UWO provides an enforcement authority with the ability “to require an individual or company to provide specific documents or information in order to establish whether the asset(s) in question have been legitimately obtained”



-
- Any application for a UWO must be made to the High Court.
 - With or without notice.
 - The application must specify or describe the property in respect of which the UWO is sought, and identify "the respondent", the person whom the enforcement authority believes holds the property.
 - An interim freezing order can be obtained at the same time as a UWO to prevent the relevant property being dealt with in any way.



Four Part Test

Section 362B POCA

1. There is reasonable cause to believe that R holds any property
2. That property is worth at least £50,000
3. R's known income is insufficient to have obtained the asset
4. R is either (i) a politically exposed person ('PEP'), family member or "close associate" or (ii) "involved in serious crime" or somebody connected with either type of person



First test: Reasonable cause to believe R holds property

R “holds” property when:

R has “effective control if he has direct or indirect control over the property, or is merely “able to exercise” or just “entitled to acquire” such control

R is a trustee of a settlement in which property “is comprised”

R is the beneficiary of such a settlement

R has “effective” control when “from all the circumstances, it is reasonable to conclude... [R does or could] exercise direct or indirect control over the property”



Second test: Reasonable cause to believe value is £50,000 or more

£50,000 threshold lowered (from £100,000) as a late amendment in the House of Lords

Resisted by some peers concerned that "quite legally unsophisticated individuals may be swept up in the new regime" Lord Hodgson of Astley Abbotts (Con), House of Lords Committee Stage, 28 March 2017

£50,000 is not a minimum value of each item of property - can be an aggregate of any amount of property



Third test: Known income insufficient

- “Reasonable suspicion” that sources of income
- “reasonably ascertainable” from “available information”
- at the time of making the application for the order
- “would have been insufficient” to enable R to obtain the property

A conviction based on a “flagrant breach of Article 6”, such as a confession obtained through torture cannot be relied on: *NCA v Hajiyeva* § 84



Fourth test (1): Satisfied Politically Exposed Person (PEP)

- A person entrusted with prominent public functions by an international organization or a state outside the UK/EEA; or
- A “family member” of such a person; or
- A “close associate” of such a person; or
- “Otherwise connected with” such a person

Article 3 of the 4th Anti-Money Laundering Directive (2015) applies for the purposes of determining whether the first three matters above are established



Fourth test (2)(i): Reasonable suspicion involved in serious crime

- As defined by Part 1 Serious Crime Act 2007
- Section 2(1): R has (i) committed, facilitated the commission or “conducted himself in a way that was likely to facilitate the commission by himself or another person” of “serious crime”.
- In the UK or equivalent offences elsewhere in the world
- “Serious crime”
 - Part 1 Schedule 1 – Includes: bribery, fraud, money laundering, computer misuse, tax offences, and others, OR
 - “in the particular circumstances of the case, the court considers to be sufficiently serious” that it is treated as such



Fourth test (2)(ii): Reasonable suspicion “connected” with those “involved in serious crime”

“Connected with” defined by section 1122 Corporation Tax Act 2010:

- “A company is connected with another company if..”
- “A company is connected with another person (“A”) if..”
- “An individual (“A”) is connected with another individual (“B”) if..”
- “A person, in the capacity as trustee of a settlement, is connected with...”

No time limit on the face of the statute on “connected with”



Effect

- A UWO requires that R disclose (a) the nature and extent of their interest in the valuable property and (b) explain how any costs incurred in obtaining the property were met.
- The UWO sets out the form and manner the statement should be given, who it should be given to and where it is to be given or sent.
- By reversing the burden of proof and requiring an individual or company to explain the origin of assets that appear to be disproportionate to income, the aim of the UWO is to “establish whether the individual in question has legitimately obtained the asset or not”.



Sanctions

- Part 5 of POCA deals with the civil recovery of property
- If R fails without reasonable excuse to comply with a UWO within the time frame set by the court, the property is presumed to be recoverable for the purposes of Part 5 POCA proceedings, unless the contrary is shown (s. 362C)
- Reckless or knowing false statements in UWO proceedings: maximum 2-year prison sentence
- If R complies or purports to comply with a UWO, the enforcement authority will determine whether to take further enforcement or regulatory proceedings (s. 362D)



Information provided

- Statements made in UWO proceedings may not be used in criminal proceedings, unless –
 - In confiscation proceedings
 - Prosecuted for making a false statement in UWO proceedings
 - Prosecuted for perjury in relation to any proceedings
 - Inconsistent with evidence in prosecution for another offence

Documents obtained under a UWO may be retained for s. 341 POCA investigations (s. 362G) and if reasonable grounds to believe documents “may need” to be produced in “any legal proceedings” and in order to prevent them becoming unavailable (s. 362G(5))



Investigative value

- Information gathered in course of UWO proceedings can be used to inform applications for search warrants/production orders
- Enables authorities to draft specific, targeted applications – more likely to succeed
- UWOs create a bridge from suspicion to evidence



Thank you

020 7993 7600

info@gclaw.co.uk

@gardencourtlaw





Who are the targets of unexplained wealth orders?

Russell Fraser, Garden Court Chambers

14 March 2019



GARDEN COURT CHAMBERS



@GardenCtCrime

“Successive Governments have come to realise that London is treated as a safe haven for corrupt money from overseas. We now need to prevent laundered money and crisis capital from distorting London’s property market. The determined use of Unexplained Wealth Orders, a new investigatory power for UK law enforcement in the Criminal Finances Bill, would show the Government is taking this issue seriously. Our research has identified at least 140 London properties, with a value of £4.2 billion, which should be assessed as the prime targets for these new powers.”

Duncan Hames, Transparency International, March 2017



What is a PEP (Politically Exposed Person)?



'McMafia'law?



Politically Exposed Person

Section 362B

(7) In subsection (4)(a), “politically exposed person” means a person who is—

- (a) 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,
- (b) a family member of a person within paragraph (a),
- (c) known to be a close associate of a person within that paragraph, or
- (d) otherwise connected with a person within that paragraph.



Politically Exposed Person

Section 362B

(8) Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 applies for the purposes of determining—

- (a) whether a person has been entrusted with prominent public functions (see point (9) of that Article),
- (b) whether a person is a family member (see point (10) of that Article), and
- (c) whether a person is known to be a close associate of another (see point (11) of that Article).



How long does it take to spend £16 million in Harrods?



National Crime Agency v Hajiyeva [2018] EWHC 2534

Hajiyeva applied to discharge order on grounds, inter alia:

- Mr Hajiyeva was not a PEP because the bank was not a SOE;
- The income requirement was not met;
- The UWO should be discharged owing to the penal wording attached to it;
- The UWO offended principle against self-incrimination and spousal privilege.



National Crime Agency v Hajiyeva [2018] EWHC 2534

The High Court held:

Mr Hajiyeva was a PEP and the bank was a SOE;

The NCA and the Court could have regard to the conviction when considering the income requirement;

The UWO did not need to be discharge because of the penal notice;

The UWO did not offend privilege against self-incrimination or of spousal privilege.



National Crime Agency v Hajiyeva [2018] EWHC 2534

Some thoughts:

- Court held because Government had majority shareholding in the bank it had ultimate control of the bank and so not necessary to decide the position if the Government only had minority shareholding;
- “By an international organisation or by a State other than the UK or another EEA state” means PEP must be entrusted with public functions and entrusted by IO or non EEA state;
- Did Parliament intend to abrogate privileges?



Thank you

020 7993 7600

| info@gclaw.co.uk

| [@gardencourtlaw](https://www.instagram.com/gardencourtlaw)



GARDEN COURT CHAMBERS

Unexplained wealth orders explained

Shahida Begum, Garden Court Chambers

14 March 2019



GARDEN COURT CHAMBERS



@GardenCtCrime

Predictions

The Home Office stated, 'Consultation with Practitioners has Indicated the Use of UWOs in 20 Cases Per Year', Criminal Finances Bill-Unexplained Wealth Orders Impact Assessment (10 January 2017).

In relation to Serious Crime Prevention Orders in 2007 the government estimated 'there might be some 30 or so serious crime prevention orders a year'. Less than a decade later, 338 Serious Crime Prevention Orders were obtained by police forces in England and Wales in a single year.



Brexit

- Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (Draft), Part 20 Proceeds of Crime:

(8) In section 362B 7 (requirements for making of unexplained wealth order), in subsection (7)(a), for "the United Kingdom or another EEA State," substitute—

(i) the United Kingdom, or

(ii) an EEA state,".

- Same change to 396B Scotland provisions.



Brexit

EXPLANATORY MEMORANDUM TO THE LAW ENFORCEMENT AND SECURITY (AMENDMENT)

(EU EXIT) REGULATIONS 2019. Changes to:

- Part 12 - Exchange of Information and Intelligence between Law Enforcement Authorities and Disclosure in Foreign Proceedings
- Part 17 – Joint Investigation Teams
- Part 18 – Mutual Legal Assistance in Criminal Matters
- Part 20 – Proceeds of crime
- Part 23 - Serious Crime and Fraud



Organised crime

Unexplained wealth orders: an explanation, assessment and set of predictions, J. Crim. L. 2018, 82(3), 232-244, Peter Sproat:

'..in this regard, it is worth noting other authors have suggested the opportunities for the use of UWOs will be widespread. Philips, for example, highlighted the possibility of a "sizeable amount" of UWOs being granted. He went on to note that in theory, there is "nothing to prevent" the authorities from going after the property of the family members of someone suspected of being involved in a serious crime in the UK or abroad. Indeed, he worried the authorities may begin to "rely heavily" on UWOs, seeking to deploy them for an array of unproven criminal activity against suspected criminals, their families, friends and business colleagues. Similarly, Clifford posited the UWOs would "substantially assist" the UK in investigating the illicit wealth of persons overseas. She went on to suggest the: "low monetary threshold of £50,000 suggests that UWOs have the potential to be used widely against both persons in the UK and abroad as well as the ultra-rich kleptocrats who were originally billed as targets'.

'...Indeed, one wonders whether grand corruption was ever the real target of UWOs...the initial minimum threshold for the use of UWOs was set at £100,000, yet this figure constitutes only one fifteen of the value of average price of property (£1.5 million) under investigation by the Metropolitan Police's Proceeds of Crime Unit...

As the Criminal Finances Bill went through Parliament, this initial de minimis threshold was reduced to £50,000 following suggestions from MPs who live in areas where property prices are much lower than those in London. Such a reduction in the minimum threshold should be no surprise to those familiar with the history the POCA. Among other things, the POCA enabled the authorities to seize cash and use civil courts to enable the forfeiture of these assets. At first, the cash that could be seized had to be in bundles of *J. Crim. L. 243 £5,000 or more--presumably, because the law was aimed at organised crime. Later this threshold was reduced to £1,000 as the process became "mainstreamed".



How to respond/legal issues

Section 362B POCA – Four stage test:

1. There is reasonable cause to believe that R holds any property
2. That property is worth at least £50,000
3. Reasonable grounds for suspecting R's known income is insufficient to have obtained the asset
4. R is either (i) a politically exposed person ('PEP') [immunities], family member or "close associate" or (ii) reasonable grounds for suspecting "involved in serious crime" or somebody connected [nexus] with either type of person



How to respond/legal issues

Section 362C POCA

- (1) This section applies in a case where the respondent fails, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period.
- (5) For the purposes of subsection (1)—
 - (1) (a) a respondent who purports to comply with the requirements imposed by an unexplained wealth order is not to be taken to have failed to comply with the order (see instead section 362D);
 - (2) (b) where an unexplained wealth order imposes more than one requirement on the respondent, the respondent is to be taken to have failed to comply with the requirements imposed by the order unless each of the requirements is complied with or is purported to be complied with.



How to respond/legal issues

Requirements of 326A:

- (3) An unexplained wealth order is an order requiring the respondent to provide a statement—
- (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,
 - (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
 - (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
 - (d) setting out such other information in connection with the property as may be so specified.
- (4) The order must specify—
- (a) the form and manner in which the statement is to be given,
 - (b) the person to whom it is to be given, and
 - (c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.
- (5) The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order.
- (6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).



How to respond/legal issues

Evidence

i) Open source material, Hajiyeva para. 37

ii) Experts

Independence Hajiyeva para. 40

Other jurisdictions 362B(c) income is “lawfully obtained” if it is obtained lawfully under the laws of the country from where the income arises;

iii) Company/financial records – could it lead to further proceedings



Human rights

Transparency International:

What about the human rights implications?

Transparency International operates in over a hundred countries, and in many of those the human rights of anti-corruption activists, and ordinary people, are routinely trampled on by corrupt governments and police forces. We take human rights extremely seriously. We have carefully weighed the human rights implications of UWOs. Our assessment is that sufficient safeguards are in place in the legislation to ensure that the measure is not abused:

- The UWO is a civil – not criminal – measure and is laid against the asset, not the individual. Civil actions against property are an altogether different proposition to deprivation of liberty and actions taken against individuals.
- The measure has a specific remit and its use is limited to illicit assets owned by foreign government officials or those who have links to serious crime.
- A reasonable level of evidence is required before applying to the High Court for a UWO, and the approval of a High Court Judge is required before a UWO can be served. This element of the process provides an opportunity to rebut the measure if there are concerns.
- TI has been reassured by our legal advice that use of UWOs is compatible with the UK's international obligations on safeguarding human rights.



Human rights

Transparency International continued:

- It is important to note that UWOs do not target an individual's liberty; they target assets from countries that have been plundered by grand corruption, and assets should be rapidly unfrozen if the required proof of income is produced. The UWO tool is designed to enable the returning of wealth to citizens that have suffered for decades from corruption, so that elements key to public wellbeing, such as health and education initiatives, are properly resourced.

'Criminal Finances Bill, European Convention on Human Rights, Memorandum by the Home Office and HM Revenue and Customs' assesses the impact of of Article 6, 8 and Article 1 of the First Protocol



Human rights

Article 6:

- Foreign conviction of Mr Hajiyeva relied upon para. 64 – para. 88. There would need to have been a 'flagrant denial of Mr Hajiyeva's rights under article 6 of the Convention so as to require the NCA, and this court, to ignore his conviction at this investigative stage.'
- 'There is no exclusionary rule that prevents a court from relying on the fact of a conviction even if obtained flagrantly unfairly. The exclusionary rule that exists at common law is very narrowly confined. There is a general rule that evidence obtained by torture is inadmissible in judicial proceedings: *A v Secretary of the Home Department (No 2)* [2006] 2 AC 221, para 97, per Lord Hoffmann.'



Human rights

Article 1 of Protocol 1 to the Convention:

ARTICLE 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties



Human rights

Article 1 of Protocol 1 to the Convention:

-Mrs Hajiyeva beneficiary of discretionary trust, para. 98.

-Modest interference with the peaceful enjoyment of property, para. 103.

Civil recovery stage



Garden Court Chambers – how we can help

- Multi-disciplinary chambers, covering criminal and civil law with 26 expert QCs and 183 leading barristers
- Our multi-disciplinary expertise has proved vital for clients where cases bridge a number of areas
- Top ranked in Chambers and Partners and Legal 500 with many top ranked individuals
- Impressive track record of success and proud to be ... 'Fearless in the pursuit of justice'
- At the centre of a whole range of landmark cases across the entire legal spectrum



Thank you

020 7993 7600

info@gclaw.co.uk

@gardencourtlaw

