

Unexplained Wealth Orders: Are Russians in the UK at risk of investigation?

10 APRIL 2018

CATEGORY:
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The new “Unexplained Wealth Order” regime came into force on 31 January 2018, and on 1 February 2018, the government published Circular 003/2018 to raise awareness and a basic understanding of the provisions of the “UWO” and “interim freezing order”.

Newspapers in Russia and in CIS countries are reporting that the UWOs may target rich Russians on the back of Ben Wallace's comments on the BBC drama McMafia as being “very close to the truth”. Many of the Russian newspapers are omitting the point that UWO's focus and aim will be a civil recovery of the proceeds of serious crimes or illicit wealth rather than fishing for information from all foreign owners of assets.

Some are also worried after the publication of an article in Transparency International UK: “ [Unexplained wealth orders in use: here's at least 5 cases the police should consider today!](#)” They mention 'suspected property' in London owned by the Russian First Deputy Prime Minister, Igor Shuvalov, with an estimated value of £11.4million and also an £18million mansion belonging to the 'first family in Azerbaijan'.

It is important to highlight, that in order to obtain UWO the relevant authorities must make an application to the High Court. It is quite problematic to foresee at this early stage what challenges can be made against a UWO. However if a UWO is applied for without notice to the respondent, this means the responsibility is on the applicant authority to make full and frank disclosure to the court – not doing so will create grounds for a challenge to the UWO by the respondent. It will also be up to the relevant authorities (and the High Court) to ensure that they do not violate an individual's rights to privacy (under Article 8 ECHR) and a fair trial (under Article 6 ECHR).

What is an Unexplained Wealth Order?

A UWO is an investigation order issued by the High Court on satisfaction of a number of tests. This legislation will apply to the assets obtained prior to the date of legislation coming into force.

A UWO is a civil power and an investigation tool and it is not by itself a power to recover assets as is mentioned in the government Circular. It may be coupled with an interim freezing order preventing a respondent from dealing with the property in question if the High Court finds that there is a risk that any later civil recovery order might be frustrated through dissipation of the property under consideration.

Who can apply for UWO?

A 'relevant enforcement authority' including:

- the National Crime Agency,
- Her Majesty's Revenue and Customs,
- the Financial Conduct Authority,
- the Serious Fraud Office, or
- the Crown Prosecution Service.

Against:

- any non-EU Politically Exposed Person (“PEP”) including any person “connected” with such a PEP; or
- any person, where there are “reasonable grounds” to believe that they are involved in or connected to a person involved in a “Serious Crime”;

The UWO may be issued against the persons who meet the criteria set out above if the High Court is satisfied that:

- there is a reasonable cause to believe that they hold a property (whether in the UK or elsewhere) with the value that is greater than £50,000; and
- where the High Court is satisfied that the “known sources of lawfully obtained income” of the person would have been insufficient to obtain that property.

The focus of the UWO is on individuals rather than companies but the Act does not preclude the issuing of a UWO against a corporate respondent

Consequences of being served with a UWO:

A respondent will be required to explain the source of the wealth, namely:

- the nature and extent of their interest in particular property; and
- how the property was obtained, where there are reasonable grounds to suspect that the respondent’s known lawfully obtained income would be insufficient to allow the respondent to obtain the property.

There is no time limit for response prescribed by the legislation, the High Court has a discretion to impose whatever time limits it deems necessary.

Failure to respond 'without reasonable excuse' will result in the property being presumed to be recoverable property under PoCA 2002. This means that the asset can be recovered through the civil regime under PoCA which does not require a conviction and carries a lower standard of proof. If an individual makes a statement that is known to be false or misleading in a material way, or if they recklessly make a statement that is false or misleading in a material way, they commit an offence. An individual guilty of this offence could be imprisoned for up to two years.

Admissibility of material obtained pursuant to a UWO:

The respondent’s statement produced by way of explanation of his/her wealth will not usually be admissible in criminal proceedings. It will however be admissible in:

- criminal confiscation proceedings;
- a prosecution for making a false statement. It is an offence under which is punishable by a maximum of two years imprisonment to knowingly or recklessly make a statement that is misleading to the court in response to an UWOPCA 2002, s 362E;
- a prosecution for some other (criminal) offence where, in giving evidence, the person makes a statement (in evidence in chief or in re-examination) inconsistent with the statement made to the High Court.

Extra-territorial effect of UWOs

UWOs have an international reach: a respondent does not need to be a UK resident, and property can be located outside the UK.

UK enforcement authorities may seek assistance from the foreign government of the country where the asset is based to enforce a UWO (and obtain an interim freezing order). However, it is highly unlikely that UK enforcement authorities will expend resources seeking UWOs where a UK nexus is lacking. Another consideration is the willingness of foreign authorities to assist in enforcing UWOs.

Concerns regarding UWOs

1. The reversed onus of proof undermines the presumption of innocence: the introduction of UWOs places the onus and burden of proof on the respondent requiring him/her to explain the lawful source of the specified asset. This can infringe human rights relating to privacy, property and fair trial and there is a risk that it could lead to confiscation of a property of innocent people. Provisions also infringe on the right to silence.

2. Conviction is not required: the Order and potential subsequent confiscation does not require to show any evidence related to any offence – it is not based on any criminal conviction. But if the respondent does not comply with an UWO without reasonable excuse the property potentially can be seized or subject to recovery proceedings.

3. Standard of proof – what are reasonable grounds? The standard of proof to obtain an UWO ('reasonable grounds to believe') is lower than the standard required in a criminal trial ('beyond reasonable doubt'). Currently there is no adequate guidance on what must be established to show reasonable grounds.

4. Interim Freezing Orders in support of UWOs. It is very likely that each time when the relevant authority applies for a UWO, they would try to obtain an Interim Freezing Orders, meaning that the assets subject to the Order cannot be transferred or dissipated. While it is a measure that is

frequently used in civil litigation, it usually requires a high standard of proof and full and frank disclosure from the applicant. There is a concern that the standard might be lower for the applying relevant authorities.

5. Potential basis to challenge an application: in civil proceedings when applications are made without notice to the respondent, court decisions may be subject to challenge on the grounds of material non-disclosure. This is because 'full and frank disclosure' is required for making an order in High Court on ex-parte basis.

6. Risk of widening the civil law in a view of lack of investigative resources: The Proceeds of Crime Act 2002 already provided for civil confiscation and forfeiture. This was anticipated to be a solution to tackle organized crime. So far this tool was used quite sporadically. Introduction of UWOs pursues the same ambition. The concern is that the prosecution is not required to first prove a criminal charge. In addition, it is not required to first prove that the property at issue is a proceed of crime. An allegedly criminal or corrupt conduct will be dealt with by a civil recovery order instead of criminal investigation.

7. Impact on financial institutions: they can be placed into difficult situation with regards to disclosing confidential client information or banking secrecy. A UWO can also raise a regulatory reporting obligation.

Short summary of the development of the legislation creating UWOs.

It may seem so, but putting in place UWO legislation is not a reaction to the US publishing a list of 'Oligarchs in the Russian Federation' (specifically stated as the non-sanction list, but nevertheless this has caused headaches for Russian's who are far removed from that list); and it is completely unrelated to the fictitious McMafia series following comments made by the UK Security Minister Mr. Ben Wallace on 3 February (rather short-sighted, in my view).

1. Discussions began in 2015, in a short debate in the House of Lords on corruption and in particular the use of corrupt capital to buy property in the UK. Lord Rooker cited a report from the Charity Transparency International called 'Corruption on your doorstep' and asked that the Government explore the feasibility of using them.

2. in April 2016 the Government published its 'Action Plan for anti-money laundering and counter-terrorist finance' together with a consultation, seeking the views of business law enforcement, professional services firms and NGOs about the reform of the suspicious activity reports (SARs) regime, specifically, the creation of new powers requiring those suspected of money laundering to declare their wealth and the provision of a linked forfeiture power for use where the answers provided are unsatisfactory, or where the subject fails to respond.

3. in May 2016, The Queen's Speech proposed the Criminal Finances Bill, the stated aim of which was to allow the Government to recoup more criminal assets by reforming the law on proceeds of crime, including provisions to strengthen enforcement powers and protect the public and to make it easier to seize illicit funds.

4. the Bill was introduced in October 2016. It received Royal Assent on 27 April 2017. CFA 2017, s. 1 makes provision for UWOs in the High Court by amendments introducing the power into POCA 2002.

5. the UWO regime is available from 31 January 2018.

The overseas experience: Australia and Ireland.

Australia and Ireland quite some time ago introduced and implemented unexplained wealth orders. The core of the UWO provisions in both countries is the reversal of burden of proof to the respondent to justify that his/her wealth was acquired by lawful means and is not the proceeds of any illegal activity. No conviction is required for potential asset confiscation proceedings. The burden of proof for prosecution is lower, because it must show only that a person has a lifestyle beyond his/her means.

Ireland was one of the first states in Europe that adopted civil forfeiture laws that reverse the burden of proof onto the respondent in 1996. This regime was broadly upheld by the courts as a necessary response to the serious threat that organized crime posed to society. Key elements of Irish regime are as follows: it is applied to any property that constitute proceeds of crime, however there is no need to show a nexus between an offence and the property; hearsay evidence is admissible at court and the burden of proof shifts to the respondent.

While the UWO regime has operated in Australia for some time, as at December 2016 this regime had seen only 28 applications for unexplained wealth declarations since 1 January 2001, 24 of which were finalized. Out of those that were finalized, 22 were settled. High settlement rate might have been influenced by unsympathetic courts. High Court of Australia and other Western Australia courts have not looked favorably on the civil forfeiture regimes because they consider them too radical and too infringing on fundamental civil rights. Statistic shows that predominantly the UWOs in Australia were used against suspected drug dealers and in cases they were used only a relatively small amount was recovered in Western Australia within 10 years – about USD 6 million.

The Irish regime was much more successful – there are reports pointing out a very high (up to 100%) success rate in civil confiscation proceedings. It is believed that those proceedings played a vital role in dismantling criminal activities and attacking proceeds of crime in Ireland.

The main reason for the success of UWOs in Ireland was the creation of a highly effective multi-agency task force – the Criminal Assets Bureau ("CAB"). The strategy of the CAB was to target well-known criminals and the principals of criminal organizations who had been on the radar screen of law enforcement for a long time and who had accumulated large amounts of property with no apparent sources of income. For completeness, it should be noted that some evidence suggests that in fact criminals have moved their operations to neighbouring countries (e.g. Holland and Spain).

The reversal of the burden of proof onto the respondent is highly controversial and challenged around the world. The powers vested in the relevant authorities are far reaching and may create a gross imbalance between the respondent and the state. In Australia UWOs were strongly resisted as a disproportionate measure that breaches fundamental human rights, such as the presumption of innocence and the right not to self-incriminate. This was one of the causes of their very moderate effectiveness there. . .

It is important to note that none of the Australian or Irish regimes applies to foreign PEPs and their connected persons. They both concerned with a serious crime suspects. There are researches that show that UWO's practical application has proven complex, time and resource consuming and highly controversial. Irish experience shown that UWOs are effective in cases where progress against crime cannot be made through the normal course of a criminal law, but they should be applied as a last resort.

What next?

Legal advice should be sought immediately if you have been served with an order of the High Court about the source of wealth in relation to a property.

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