

# Whose cash is it anyway?

After a fêted introduction, UWOs have had a stop-start beginning. But are things about to change? **Simon Davenport QC & Helen Pugh** assess the evidence

## IN BRIEF

▶ There are various grounds of challenge to UWOs including disputing the ownership, value, income and PEP requirements and disputing non-compliance.

▶ A trap for the unsuspecting lies in the wide use to which UWO information and documents can be put.

In the last couple of weeks unexplained wealth orders (UWOs) have once again been making a splash in the news. The few details released by the National Crime Agency (NCA) about the latest UWOs are sufficiently headline grabbing: 'a politically exposed person believed to be involved in serious crime'; 'three residential properties in prime locations'; and 'bought for more than £80m and held by offshore properties'. The current anonymity of the subject of the UWOs—and their nationality—merely adds to the interest.

Russia and CIS states, and their citizens resident in London, have been a particular target of recent political and media attention on corruption (and other matters). Yet it is perhaps a misconception that individual Russians' wealth is reflective of Russia as an economic superpower. In fact Russia's GDP in 2018 was \$1,630bn compared to the UK's GDP of £2,830bn, Germany's GDP of \$4,000bn and the USA's GDP of \$20,490bn. The political and media attention can partly be explained because much of the country's wealth is concentrated in the hands of the few. Yet the focus on Russia and CIS states masks a global problem.

The UK's National Economic Crime Centre, a multi-agency centre, estimates

that the scale of money laundering in the UK exceeds £100bn annually. In its 'National Strategic Assessment of Serious and Organised Crime 2018', the NCA lists Russia but also China, Hong Kong, Pakistan and the UAE as overseas jurisdictions which impact on money laundering.

The UK authorities have a number of tools to combat this threat. In particular, in England and Wales the Proceeds of Crime Act 2002 (POCA 2002) provides various mechanisms for asset recovery including:

- ▶ confiscation orders which apply to persons who have benefited from a criminal lifestyle and have been convicted or sentenced by or committed to the Crown Court (Pt 2);
- ▶ restraint orders applicable to persons where there is reasonable cause to believe they have benefited from criminal conduct and where they are the subject of an ongoing criminal investigation or proceedings (also in Pt 2);
- ▶ civil recovery orders over property which is, or represents, property obtained through unlawful conduct, defined as conduct which is unlawful under the criminal law applicable in the relevant locality or which could be a gross human rights abuse or violation

and would be a criminal offence if it occurred in a part of the UK (Pt 5).

The introduction of UWOs into Chapter 2 of Pt 8 of POCA 2002 from 31 January 2018 was seen as a way of answering the charge that the UK's pre-existing asset recovery tools were limited by the effect of a legal or de facto requirement of proof of a crime, often in a foreign jurisdiction. Similar UWO systems were already in existence in Ireland, Australia, and Colombia, but those regimes had considerable variations and there was high symbolic and perhaps practical significance of the UK adopting UWOs, as a global financial centre and hotspot for money laundering.

## The basics

By way of brief summary, s 362A(3) of POCA 2002 provides that an UWO 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.

To obtain an UWO the relevant authority must satisfy the High Court that:

- ▶ there is reasonable cause to believe that the respondent holds the property; *and*
- ▶ there is reasonable cause to believe that the value of the property (not just the respondent's interest) is greater than £50,000; *and*
- ▶ there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property; *and*
- ▶ the respondent is a politically exposed person (PEP) *or* there are reasonable grounds for suspecting that the respondent or a person connected with the respondent is or has been involved in serious crime in the UK or elsewhere.

An application for an UWO may be made without notice (s 362I) and at the same time as an interim freezing order (s 362J).

The legislation provides for different consequences in the event of non-compliance, purported compliance and

compliance.

Non-compliance occurs if a respondent fails, without reasonable excuse, to comply with the UWO in time. Non-compliance is measured according to the recipient's response to each requirement imposed by the UWO. If the UWO imposes more than one requirement on the respondent, then the recipient has to comply or 'purport to comply' with *each* requirement to escape a finding of non-compliance (s 362C(5)(b)).

In the event of non-compliance (most obviously where there is no answer provided to one or more requirements of the UWO), then the target property is presumed to be recoverable property under Pt 5 of POCA 2002 unless the contrary is shown. Thus the authorities still have to make an application under Pt 5 for a civil recovery order but will be at a considerable advantage in doing so.

Purported compliance and compliance are subject to the same procedure which differs from that applying to cases of non-compliance. In such cases the authorities have a discretion whether to take enforcement or investigatory proceedings in relation to the property. This determination has to be taken within 60 days of the compliance or purported compliance if there is an interim freezing order against the property, but otherwise may be taken at any time.

The key difference between purported compliance and compliance lies in the creation of an imprisonable offence in cases of purported compliance where a respondent has made a statement known to be false or misleading in a material particular or recklessly makes such a statement (s 362E).

### Grounds for challenge

The recipient (R) of an UWO has a number of potential avenues of challenge which we set out below.

#### 1. Full & frank disclosure

The initial application by the relevant authority will almost always be without notice. They will therefore owe a duty to the court to provide full and frank disclosure of material matters. As with any without notice order, this can be discharged if that duty is not complied with. Examples of non-disclosure would include where the relevant authority has not drawn the Court's attention to possible income streams or to competing ownership claims to the property.

#### 2. Disputing that R holds the property

There will most obviously be scope for challenge on this ground if it is alleged that R holds the property indirectly, perhaps

through a trust or corporate structure (although this latter will now be subject to greater scrutiny with the introduction since 2016 of the People with Significant Control registration requirements for UK companies), or if R in turn alleges that the property is held for another who is neither a PEP nor a connected person.

#### 3. Disputing the value of property

In theory this ground would be a relatively straightforward challenge to mount. In practice we expect that disputes about value will be relatively infrequent due to the low £50,000 threshold and the expectation that the authorities will be targeting those involved in high level corruption.

#### 4. Disputing the income requirement

This is likely to prove fertile ground for challenges. The relevant authority may have limited visibility on income streams in overseas jurisdictions or there may be legitimate reasons why the respondent has not made public all its income streams. Evidence relevant to disputing the income requirement is met include:

- ▶ current salary and bonuses;
- ▶ assets such as property or investments or trust interests;
- ▶ gifts and the source of any such gifts;
- ▶ inheritances;
- ▶ historical sources of income or asset sales; and
- ▶ accounts and tax filings.

Additionally, it may be that the country in which the income originated does not have the type of records or accuracy of records which the English court would be accustomed to in domestic cases. In such cases expert evidence of the type of records or paperwork which could or could not be expected to be generated in the country of origin may be useful.

#### 5. Disputing the PEP requirement

A PEP is defined in section 362B(7) as 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.'

One can see from this definition both that it is wide insofar as it covers anyone 'connected with' a PEP but also offers ample scope for challenge. The most obvious challenge will be to the question of whether



an individual is a PEP, and in particular whether they carry out public functions which are prominent and which are entrusted by an international organisation or non EEA state. The challenges will often take the form of legal argument, but there will be scope for adducing evidence to show on whose behalf the alleged PEP was acting, and whether a respondent is a close associate or otherwise connected with a PEP.

#### 6. Disputing the serious crime link

In cases where an individual is not a PEP, an UWO can be obtained where there are reasonable grounds for suspecting that the respondent or a person connected with the respondent is or has been involved in serious crime in the UK or elsewhere. The phrase 'serious crime' is defined by reference to Pt 1 of the Serious Crime Act 2007. The likely grounds for challenge where an UWO is based on this criterion are:

- ▶ that there are insufficient grounds for suspicion;
- ▶ that the alleged crime does not fulfil the criterion of 'serious crime';
- ▶ that the respondent is not connected with the person who is or has been involved in serious crime.

A respondent would do well to adduce any evidence to explain any suspicious circumstances and to negate or minimise any alleged connection with the person alleged to be or to have been involved in serious crime.

#### 7. Disputing a failure to comply without lawful excuse

The initial judgement call on whether compliance is classified as non-compliance, purported compliance or compliance, and whether any non-compliance is with or



without reasonable excuse, is made by the relevant authority rather than being referred back to the court which issued the UWO. If the relevant authority determines that there has been non-compliance without reasonable excuse and brings Pt 5 proceedings, the court in those Pt 5 proceedings then has an opportunity to determine that issue itself.

However, to deter the authority from bringing the Pt 5 proceedings at all, a respondent would be well-advised to address this issue when served with an UWO. Evidence to point to purported compliance and/or lawful excuse may include:

- ▶ evidence of absence from the country or lack of notice of the UWO;
- ▶ evidence of searches carried out and inquiries made in an attempt to answer the UWO;
- ▶ evidence of historical loss or damage of documents;
- ▶ evidence of the death, incapacity or other non-availability of crucial witnesses e.g. those who may hold relevant documents or could provide corroborating evidence.

Otherwise there will be an opportunity for the respondent to dispute the application of the presumption of seizure in the Pt 5 proceedings on the grounds that it did not fail to comply with the UWO or did so but with lawful excuse.

#### Caveat: use of evidence

Recipients of UWOs will face considerable pressure to comply, not least because non-compliance without lawful excuse will give rise to the presumption in favour of civil recovery and the provision of misleading or false information constitutes a criminal offence. Yet recipients will also need to be advised upon the potential pitfalls of

providing certain information.

Chief among these pitfalls is that any privilege against incrimination of self or spouse or civil partner only applies as regards criminal offences under the law of any part of the UK. Hence in *NCA v Mrs A* [2018] EWHC 2534 (Admin) (under appeal) Supperstone J rejected the argument that the privilege applied to Mrs A who alleged she was at risk of prosecution in Azerbaijan (among other reasons).

However, Supperstone J's judgment goes much further than this. The High Court judge held that even as regards criminal offences in the UK, the privilege had been abrogated and did not apply.

Even if Supperstone J's ruling on privilege is overturned on appeal, respondents are still at risk of 'line of enquiry' investigations triggered by something said or disclosed in response to an UWO, even if that actual statement or disclosed document cannot be relied upon.

In addition, under Pt 8 of POCA 2002 the authorities have the power to retain documents provided in response to an UWO for certain investigations or if there are reasonable grounds to believe that documents may need to be produced in any legal proceedings and retention is required to prevent the documents from becoming unavailable.

#### The success of UWOs to date

In February 2018 the NCA obtained UWOs (value c£22m) against Zamira Hajiyava, the wife of an Azeri banker who had been convicted and imprisoned in his home jurisdiction for money offences. While that investigation continues, new UWO activity was distinctly absent until recently. On 29 May 2019 the NCA announced that it had succeeded in securing a second round of UWOs (value c£80m), this time against a currently anonymous PEP 'believed to be involved in serious crime'.

In its March 2016 report entitled 'Empowering the UK to Recover Corrupt Assets', Transparency International UK concluded that the UK's asset recovery regime was 'not fit for purpose' in part due to an overreliance on a conviction in the origin country and it recommended UWOs as a way of circumventing this requirement.

In its 2018 report the NCA pointed out that the effect that UWOs will have on the UK being viewed as a safe place to launder illicit funds is likely to depend on the amount of assets successfully recovered as a result of UWOs. Judged by these measures, the impact of UWOs to date has probably been minimal.

#### The future

In April 2018 it was reported that the

NCA Director, Donald Toon, had stated that there were hundreds of UWOs under consideration yet a year on these have yet to materialise. In an interview with *The Evening Standard* published on 26 April 2019, Ms Osofky of the Serious Fraud Office praised UWOs as a 'very good tool' but commented that the SFO had tried but failed to identify possible targets so far.

In these times of austerity, limited resources will undoubtedly be having an adverse impact upon the authorities' ability to investigate and bring UWOs. Expanding and publicising a system of whistleblowing or 'tip-offs' from members of the public may be a practical and relatively inexpensive way for the authorities to widen the net. While HMRC do have a fund to use for payments to whistle-blowers, the scheme is poorly publicised and payments thought to be modest (totalling £605,000 in 2015 and down to £343,000 in 2016 according to law firm RPC). This contrasts with schemes such as that operated by the Inland Revenue Service in the US which has the power to award whistle-blowers of tax evasion up to 30% of the additional tax, penalty and other amounts it collects.

Similarly, there are currently a restricted number of bodies authorised to seek an UWO. Extending the categories of people with standing to include any interested party, eg a state from whom the wealth is suspected to have been stripped, may increase the number of UWOs sought.

Introducing the Australian system whereby the court, rather than the relevant authority, determines whether the UWO has been complied with or not may also embolden authorities to apply for more UWOs. They could do so in the knowledge that there would be a quick and impartial determination of whether the presumption will apply without the need for the authority to commence expensive Pt 5 proceedings.

The absence of any sizeable body of caselaw on UWOs will no doubt be regretted by anti-corruption campaigners, but it is also a matter for regret by future recipients of UWOs. In the absence of legislative or caselaw guidance, such recipients are at greater risk of accidental non-compliance with UWOs or conversely of disclosing information which puts them or others at risk of facing other legal proceedings. It is therefore hoped that after a slow start, the UWO regime starts to get a workout.

NLJ

**Simon Davenport QC**, 3 Hare Court, practises in Russian and CIS commercial and commercial fraud cases. **Helen Pugh**, 3 Hare Court, practises in commercial and civil fraud with a strong international element ([www.3harecourt.com](http://www.3harecourt.com)).