

Will Unexplained Wealth Orders limit the influx of Russian money to the UK?

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Following the alleged poisoning of the former Russian spy, Sergei Skripal and his daughter earlier in the year, there has been much coverage in the press about the UK turning a blind eye to "dirty Russian money". Indeed, the Commons Foreign Affairs Committee has recently said that London was being used to hide the "corrupt assets" of the Russian President and his allies and that its lethargic response is being taken as proof that "we do not dare stop them".

Subsequently, the Security and Economic Crime Minister is reported to have said that the UK is "determined to drive dirty money and the money launderers out" and that it will use all the powers it has in the Criminal Finance Act 2017 ("the Act") to "clamp down on those that threaten our security."

Now that the first Unexplained Wealth Orders ("UWOs") have been obtained earlier in the year, we examine their purpose and effect.

What are UWOs and where do they come from?

The Act has amended section 362 of the Proceeds of Crime Act 2002 in order to create new and far reaching investigative powers for the UK authorities including the National Crime Agency, the Serious Fraud Office, HM Revenue and Customs and the Financial Conduct Authority. These powers are known as UWOs.

UWOs were introduced on 31 January 2018 and are a civil power and an investigation tool. They enable UK authorities to apply to the court to obtain an explanation how an individual or corporate entity obtained an interest in a property anywhere in the world with a value in excess of £50,000. A UWO can be served on persons outside the UK but must be served in accordance with the provisions of the English Civil Procedure Rules.

Four conditions need to be satisfied to obtain a UWO:

- There are reasonable grounds to believe that the individual or entity holds asset[s];
- There are reasonable grounds to believe that the asset has a value in excess of £50,000;
- There are reasonable grounds to believe that the source of the individual's lawfully obtained income would be insufficient for the purposes of obtaining the property; and
- The individual falls into one of the following categories:
 - The individual is a politically exposed person ("PEP");
 - The individual is a close associate, family member or a connected person of a PEP;
 - There are reasonable grounds for suspecting that the person is or has been involved in serious crime (either in the UK or elsewhere); or
 - The individual is connected with a suspected criminal.

An applicant for an UWO need only demonstrate to the court that there are "reasonable grounds for suspecting" the subject has insufficient lawful income and that his/her assets are disproportionate with that income or has a connection to serious crime. The evidential burden on the enforcement authorities is therefore significantly less than the tests applied in a criminal or civil court.

A UWO requires an individual against whom it is made to provide detailed information, within a stipulated period of time, about their finances, including their interest in the property, how it was obtained, where it is held and "such other information in connection with the property as may be so specified". A UWO may apply to jointly held property and it does not matter if the property in question was obtained before or after the Act came into force. The disclosure that may be required from an individual to comply with the UWO is potentially very broad and may include an explanation of the way in which the individual holds assets more generally.

A failure by the individual to provide an explanation gives rise to a rebuttable presumption that the property was obtained from the proceeds of crime. An enforcement authority may use this presumption as a basis on which to apply to recover assets through civil recovery powers without the necessity to provide any further proof of criminality. An individual commits an offence under the Act if he makes a statement which is known to be false or misleading in a material matter or is made recklessly.

In addition to the introduction of a UWO, a new interim freezing order ("IFO") has been introduced. This provides for the High Court to grant an IFO prohibiting a respondent to a UWO (and any other person with an interest in the property) from

dealing with the property. Following the granting of an IFO, the UK authority must decide whether or not to commence proceedings within 60 days of the date of compliance with the UWO. Absent an IFO, the UK authority may decide when or if it will issue proceedings in the future.

One potential issue with a UWO which is obtained against a property in another jurisdiction is that any order must be registered and/or recognised in the relevant jurisdiction where the property is situated. This may add an additional complication to the process as the effectiveness of the order may depend on the ability of that jurisdiction to assist particularly if there is any immunity from prosecution for foreign officials.

The first UWO

The first UWOs and IFOs were obtained on 28 February 2018 by the National Crime Agency against a politician from Central Asia with a multimillion pound property portfolio. The orders related to two properties, one in London and one in South East England.

Donald Toon, Director of Economic Crime at the NCA, when announcing this order had been obtained, stressed the reliance which had been placed on this investigation tool by stating "Unexplained Wealth Orders have the potential to significantly reduce the appeal of the UK as a destination for illicit income. They enable the UK to more effectively target the problem of money laundering through prime real estate in London and elsewhere. We are determined to use all of the powers available to us to combat the flow of illicit monies into, or through, the UK". Last year, Mr Toon was reported as saying that the London property market has been skewed by the influx of laundered money. Prices are artificially driven up by overseas criminals who want to sequester their assets here in the UK. Reports in the press suggest that some £180m of UK property has been the subject of criminal investigation as suspected proceeds of corruption.

Who may be affected by a UWO

The Act provides that a person, for the purpose of holding the property subject to a UWO, can include a trustee of a settlement in which the property is comprised or even a beneficiary of a settlement. A trustee may therefore become subject to a UWO and be required to provide information both about the property itself and any settlement. In addition, trustees are likely to experience contact with UWOs and IFOs in the event that a beneficiary is served with a UWO or it is necessary for them to provide information on distributions to beneficiaries. Trustees may therefore be faced with difficult decisions of balancing their duties of confidentiality to the beneficiaries against the need to respond to a UWO.

In addition to trustees receiving a UWO, it seems likely that trustees and financial institutions who are service providers may need to deal with any requests for information which will assist an individual in preparing a response to a UWO. In this regard, the organisation will need to consider their obligations to their client under the laws of the relevant jurisdiction.

Financial institutions may also be affected by an IFO which will most likely limit the extent to which their customers served with a UWO may deal with particular property and which will require consideration of whether the existence of such an order engages other AML obligations.

And finally...

Financial institutions and trustees should be aware that the making of a UWO is just the beginning of a process which is intended to provide the authorities with information to enable them to decide whether and how to investigate the individual further. This is the first step in what is likely to be used as part of a wider evidence gathering process.

Only time will tell how UWOs will be deployed, but in the meantime, financial institutions and trustees should be alive to this investigation strategy and the potential risks which may ensue.

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