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Explaining the Unexplained Wealth Order and civil asset recovery



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A new weapon in the war on dirty money has attracted much press attention and legal commentary recently – the Unexplained Wealth Order. Ian Gatt QC and Pia Mithani consider the new Unexplained Wealth Order under the Criminal Finances Act 2017, its scope and practical operation, and what impact it might have in the world of civil asset recovery.

Minister of State for Security Ben Wallace has welcomed the Unexplained Wealth Order as a key weapon in the war on fraudsters and corrupt politicians with the promise that these individuals will now face the full force of the law. However, the response from law enforcement agencies is more muted. David Green QC, Director of the Serious Fraud Office (SFO) accepts their uses but believes we are not about to experience a sudden onslaught of forced asset disclosure. Unused by the SFO to date, he says the SFO is waiting for “the right case”.

What is an Unexplained Wealth Order?

The Unexplained Wealth Order (“UWO”) is a civil investigatory tool requiring a

Politically Exposed Person (“PEP”) and a person suspected of involvement in financial crime (or association with it), to disclose assets that appear disproportionate to their known income.

A UWO is only available to identified enforcement authorities, namely:

- the National Crime Agency
- Her Majesty’s Revenue and Customs
- the Financial Conduct Authority
- the Director of the Serious Fraud Office
- the Crown Prosecution Service

An application is made to the High Court if an enforcement authority has reasonable cause to believe that a person holds unexplained property in excess of £50,000 and they are either:

- a PEP outside the UK or a person closely associated or connected with a PEP (including family); or
- that there are reasonable grounds for suspecting that person is or has been involved in serious crime (in the UK or elsewhere) or is connected with such a person.

UWOs are available regardless of when the property was acquired; they can bite on assets acquired before the legislation came into force. The enforcement agency simply needs to persuade the court that there are reasonable grounds for suspecting that the known sources of the individual’s lawfully obtained income would have been insufficient for the purposes of enabling them to obtain the property in question.

A UWO requires the respondent to provide a statement setting out:

- the nature and extent of the respondent’s interest in the property;
- how the respondent obtained the property;
- if the property is held in trust, details of the settlement; and

- any other requested information.

If a respondent fails to comply with a UWO, there will be a rebuttable presumption that the property is recoverable for the purposes of civil recovery action under the Proceeds of Crime Act 2002.

False or misleading disclosure in response to a UWO constitutes a criminal offence, the maximum penalty for which is imprisonment for a term not exceeding two years, or a fine, or both.

Scope and practical operation

UWOs are for civil recovery only. The material received pursuant to a UWO cannot be used in criminal proceedings against the respondent (except in certain limited circumstances including prosecution for perjury, or on a prosecution for another offence where the respondent has provided inconsistent evidence).

This is an important limitation that may affect the level of enthusiasm of authorities to incur the time and expense of applying to court for these types of orders. For example, the SFO has not obtained any civil recovery orders since 2015. Despite this, the scope to obtain and then share information with other authorities means that they may still be a potentially useful tool in uncovering 'dirty' money.

In principle, obtaining asset information via a UWO may appear simpler than disclosure through criminal investigatory powers. First, the enforcement authority does not need to prove to the criminal standard that a crime has been committed. Second, provided reasonable suspicion of crime can be demonstrated or that a UWO is sought against a PEP, the burden of proof reverses such that the respondent is required to open their books and disclose the requested information. However, privilege against self-incrimination and human rights defences may cause applications for these types of orders to become mired in legal argument. Further, whilst proof of a crime may not be necessary, the relevant authority will, of course, have to adduce some supportive evidence to justify the order.

Where applications are made without notice, there is scope for a respondent to seek to overturn the order by challenging or criticising the evidence supplied ex parte by the law enforcement agency, giving authorities a potential costs risk,

especially in borderline cases.

The concept of property in an asset and what we mean by the term “asset” is becoming more and more opaque in a world where fraudsters are becoming increasingly sophisticated in using complex structures to hold assets across multiple jurisdictions (especially those with strict banking secrecy rules). The commercial court freezing injunction has evolved to deal with these developments, not least in the recent *Pugachev* litigation concerning the disclosure of interests in discretionary trusts. Whether law enforcement is going to be sufficiently nimble to deal with these difficult areas in asset investigation remains to be seen.

Further, in an age where we are seeing an exponential rise in the digital transfer of assets via blockchain technology, anonymity being a cornerstone of that mechanism, these types of orders may only become meaningful when authorities conduct sophisticated prior investigation work to ensure the correct targets are approached.

To assist with some of these challenges, the legislation envisages cooperation with overseas territories in order to enforce UWOs. How this will work in practice remains unclear, especially in the context of state-funded law enforcement where resources to chase down dirty assets are not limitless.

Impact on civil asset recovery

A victim of fraud usually has three available options to recover assets:

1. rely on a criminal process;
2. commence independent civil recovery action; or
3. run parallel civil and criminal proceedings. In large-scale fraud and corruption, option three is often imposed on a victim, especially where a victim seeks to enforce their rights in circumstances where criminal investigations have already started.

UWOs are not intended for use in criminal proceedings. They are a state civil recovery tool. If enforcement authorities start to crack down on fraud through the use of civil recovery, will we see tension with parallel private civil recovery work conducted by victims?

In principle, the English courts do not object to parallel criminal and civil proceedings, but how will they react to this type of parallel process?

This question is likely to arise when we start to see UWOs being used by law enforcement. The explanatory notes to the legislation state that the measures are intended to “improve co-operation between public and private sectors” but that note lacks any real clarity.

In principle, however, it does perhaps hint at the need for coordination where parallel investigations and asset recovery work is conducted by the state and the victim, so that the defendant does not benefit from any procedural hurdles.

Evidence gathering in large-scale fraud and corruption cases can be a large and costly challenge for victims, especially when the hunt for the most valuable assets extends right around the globe. The UWO may be helpful to victims as an additional source of intelligence, especially where extraterritorial assistance is provided for, and may operate as a tool by which to judge the consistency of asset disclosure given by a respondent to a commercial freezing injunction.

Of course, restrictions on the sharing of information between parallel processes remain a difficult question beyond the scope of this article: see, for example, the issues that arose in *Standard Life v Topland* [2011] 1 WLR 2162 (Warren J). However, the ability for law enforcement to retain documents provided in response to a UWO for the purposes of “any legal proceedings” may provide scope for this.

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Media contact: [Lydia Buckingham](#), Senior Marketing Executive, +44 (0) 20 7822 8134, lbuckingham@stewartslaw.com

KEY CONTACTS



Pia Mithani

Senior Associate,
Commercial Litigation,
Financial Crime,
Fraud and International
Arbitration

+44 (0)20 7822 8039

pmithani@stewartslaw.com



Ian Gatt QC

Partner, Commercial
Litigation, Fraud,
Competition Litigation,
International Arbitration
and Employment

+44 (0)20 7822 8147

igatt@stewartslaw.com

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