

October 11, 2018

UK Court dismisses first challenge to new AML powers

The UK National Crime Agency (NCA) has successfully defended the first challenge to its new power to require individuals to explain how they have acquired assets which it suspects may represent the proceeds of crime.

The NCA acquired the right to apply for and obtain unexplained wealth orders (UWOs) under sections of the Criminal Finances Act 2017 (the Act), which came into force at the end of January 2018. It used its new powers almost immediately, obtaining two UWOs on February 28. These orders required the individual concerned to explain the origins of funds used to purchase real estate assets totaling approximately £22 million. Anonymity orders previously preventing her from being named have now been lifted and it has been confirmed that she is Mrs Zamira Hajiyeva, the wife of the former chairman of a bank in Azerbaijan. She maintains her innocence, and it is important to note that the NCA has not publicly made any allegations against her or her husband.

On October 3, the English High Court dismissed her challenge to the order. Relatively little is known about the basis of the challenge (or whether the decision to dismiss it will be further appealed), but it is unsurprising that the court has taken a stringent approach. In cases predating the introduction of UWOs, where those suspected of money laundering have challenged restrictions on their ability to deal with property during investigations, the courts have declined to offer any relief and have shown themselves to be reluctant to circumscribe the investigative powers of the National Crime Agency and other agencies. See, for example, *National Crime Agency v N* [2017] EWCA Civ 253.

UWOs are one of a suite of measures introduced under the Act aimed at bolstering the investigative powers of the NCA and other agencies responsible for investigating economic crime. The threshold for the making of UWOs is low. A court may make one if it is satisfied, on a balance of probabilities (i.e., that it is more likely than not), that the value of the property is greater than £50,000, 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 the individual to obtain the property; that the individual(s) concerned is/are politically exposed persons (or, as in this case, their family members or known close associates) in countries outside the EEA or that there are "reasonable grounds to suspect" that they have been "involved in serious crime". The individual(s) concerned are then required to explain, before the end of the response period, the nature and extent of their interest in the property, how they obtained the property, where the property is held in trust, the details of the settlement and any other such information as may be specified in the order.

Although they are an investigative rather than a punitive measure, UWOs are deliberately draconian. They impose significant obligations on individuals at a much earlier stage of investigations than was previously the case. As in this case, they may be accompanied by interim freezing orders to preserve the property in question whilst investigators consider whether to accept explanations provided as to the provenance of property, or alternatively whether to take further steps to restrain or seize assets. If no explanation is given before the end of the response period, the property is presumed to be recoverable.

In its public statements, the NCA has robustly defended its right to use UWOs. It and other agencies including the SFO have indicated that they will do so again wherever they cannot identify legitimate sources of wealth. Although they were already an important part of the UK government's anti-money laundering strategy, the escalation of tensions between Russia and the UK, in particular shortly after their introduction, has further elevated their importance. The NCA and other UK agencies will regard the High Court's decision as an endorsement of their concerted efforts to crack down on money laundering, and it seems likely that they will become an increasingly popular investigatory tool and an increasingly familiar feature of the investigations landscape.

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