

Unexplained Wealth Orders

22 March 2018

Since 31 January 2018, the UK courts have had the power to make Unexplained Wealth Orders (“UWOs”), which require the respondent to explain how he paid for his assets.

An UWO can be made at the application of various UK law enforcement authorities against a non-EEA politically exposed person (“PEP”), or a person the court reasonably believes to be involved in, or connected to a person involved in, serious crime.

An UWO requires the respondent to set out the nature and extent of his interest in a particular asset, and explain how he obtained and paid for it. It can be accompanied by a freezing order in respect of the asset in question, if that is necessary to avoid the risk that any further enforcement action is frustrated by a disposal of the asset.

These new powers have been the subject of considerable media discussion, particularly concerning the possibility of their use against prominent foreign citizens.

In this memo, we discuss the requirements for the court to make an UWO, what effect one would have, and consider who may be targeted.

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What is the background to UWOs?

In 2016, the UK government noted that there were gaps in law enforcement agencies' abilities to investigate the proceeds of international corruption. In particular, in seeking information, agencies would often have to rely on the cooperation of countries which lack "*the will, the capability or the human rights record which would allow cooperation to take place*".¹

It is anticipated that UWOs will be used, in particular, to establish a link between non-EEA PEPs with modest official incomes who are suspected of corruption, and premium properties in the UK owned by them through opaque jurisdictions, such as the BVI or Cayman Islands.²

This is reflected in the only precedent so far. The first two UWOs were obtained on 28 February 2018, reportedly against a central Asian politician, in respect of two properties in the UK worth £22m, which were believed to be owned by him.³

Who can make an UWO?

Only a court can make an UWO, and only certain UK law enforcement agencies (and not, for example, police forces) can apply to the court. These include the National Crime Agency, the FCA, the Serious Fraud Office, and HMRC.

What are the requirements for making an UWO?

To make an UWO, a court must be satisfied that each of the following statements apply.⁴

1. There is reasonable cause to believe that the respondent holds assets worth more than £50,000.
2. There are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient to enable him to obtain the assets.
3. Either:
 - (a) the respondent is a non-EEA PEP; *or*
 - (b) there are reasonable grounds for suspecting that he has been involved in serious crime

(in the UK or elsewhere) or a person connected to him has been.

What is lawfully obtained income?

Income is lawfully obtained if it was lawful in the country in which it was obtained. For example, even though "*facilitation payments*" are criminal under the UK's Bribery Act 2010, this would be lawfully obtained income if such payments are legal in the country in question.

"*Known sources*" of income includes income from "*employment, assets, or otherwise*" which is "*reasonably ascertainable*" from information available to the enforcement authority.

Enforcement efforts in Australia, where UWOs were introduced from 2000 onwards, have reportedly been hampered by respondents stating that they have made money from gambling (which is not reportable to the tax authorities), and thereby effectively reversing the burden of proof.⁵ It remains to be seen if the approach in the UK will be more robust.

Who may be targeted?

The court can make an UWO against a PEP from outside the EEA, or someone connected to serious crime.

A PEP is an individual who is, or has been, entrusted with prominent public functions, his family members, close associates, and those otherwise connected with him. The definition includes government ministers, members of parliament or of the governing bodies of political parties, managers of state-owned enterprises, and directors of international organizations, but excludes "*middle-ranking or more junior officials*".⁶

Some aspects of the definition of a PEP are relatively black and white, such as whether someone is a government minister. But others are more open to argument, such as whether a person is the "*manager*" of a state-owned enterprise, or is "*connected with*" a PEP. While to date, the primary consequence of PEP classification has been in financial institutions

¹ [Action Plan for anti-money laundering and counter-terrorist finance](#), Home Office and HM Treasury, April 2016

² [Unexplained Wealth Orders in Use](#), Transparency International UK, 31 January 2018

³ [Asian politician targeted in UK dirty money clampdown](#), Financial Times, 28 February 2018

⁴ Proceeds of Crime Act 2002 s.262B

⁵ [Comparative Evaluation of Unexplained Wealth Orders](#), Booz Allen Hamilton, January 2012

⁶ Fourth Anti-Money Laundering Directive (Directive 2015/849/EU), Article 3(9)

conducting enhanced due diligence, and potentially denying access to their services, with the introduction of UWOs comes an increase in the risk of being known as a PEP. Given that risk, individuals may need to exercise more care as to their profiles and any public information regarding their associations and contacts than they may in the past have been accustomed to.

The “*serious crime*” category is also widely defined. “*Serious crime*” includes various violent crimes, as well as money laundering, fraud, bribery, blackmail, and the participation in organized criminality. A person may be “*involved*”, not just if he has committed a serious crime, but also if he has, among other things, “*conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence [...] (whether or not such an offence was committed)*”.⁷

How is an UWO obtained?

An application for an UWO may be made without notice, meaning that the court will hear the application without the respondent being informed (though in this case the authority applying will be under a duty of full and frank disclosure to the court). Once issued, the UWO is served on the respondent, and sets out how it should be responded to, and to whom the response should be given. The respondent may at this point apply to the court to set aside the UWO.

What will the respondent have to show?

An UWO requires the respondent to set out (a) the nature and extent of his interest in the asset, (b) explain how he obtained it (and, in particular, how the costs were met), (c) whether it is held through a trust, and (d) any other information related to the asset, as required in the UWO.

Can an UWO require discovery?

As well as setting out the information above, the respondent may also be required to provide documents “*in connection with*” the statement described above. The authority may take copies of those documents, and can also retain originals “*as long as is necessary*” for a subsequent investigation under the Proceeds of Crime Act.

What are the other effects?

The authority applying for an UWO may apply at the same time for a freezing order over the relevant asset, if the court considers it necessary to avoid the risk of the respondent disposing of the asset while it is subject to the UWO.

The court must discharge the freezing order within a defined period from the response to the UWO, unless the authority takes further action.

The legislation sets some limits on the scope of any freezing order, including the possibility of exclusions being made for living, business, or legal expenses. The respondent also has a statutory right of compensation (albeit a narrow one) if he can show loss, and that there was a “*serious default*” on the part of the authority that applied for the order.

What are the consequences of failing to comply with an UWO?

If the UWO is not complied with without reasonable excuse, the asset will be presumed to have been obtained through unlawful conduct. The authority then has the power to apply to court to seize it using the civil recovery powers provided by Part 5 of the Proceeds of Crime Act 2002. If proceedings are commenced, the respondent can provide evidence to rebut the presumption that the asset is recoverable.

If a person knowingly or recklessly makes a false statement, he is liable on conviction for a fine and imprisonment of up to 2 years.

Are well-known businessmen likely to be targeted?

UWOs are likely to be relatively difficult to make against businessmen with well-known and significant sources of legitimate income (assuming they are PEPs).

As explained above, the court would have to be convinced that the lawful income of the respondent is *insufficient* to buy the relevant asset. It therefore seems more likely that UWOs will be used to target politicians or suspected criminals with substantial assets but modest legitimate incomes, rather than PEPs with large incomes from legitimate business interests. This is particularly so where the respondent has very public business interests (such a stake in a

⁷ Serious Crime Act 2007 s.2(1)

public company), where at least some of his income should be “*reasonably ascertainable*” to the authorities.

For example, Transparency International, an NGO which encouraged the introduction of UWOs, gave the example of a non-EEA government minister known only to be paid only a modest civil servant’s salary, but who buys a house in London for several million pounds.

The current political climate has increased interest in the broader use of UWOs as a political tool. However, the legal requirements for making an order are such that UWOs are more likely to be made against politicians or state officials with unexplained wealth and opaque business interests, rather than substantial businesspeople who are also PEPs.

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