

Insights

UNEXPLAINED WEALTH ORDERS – HOW THE NATIONAL CRIME AGENCY GOT IT WRONG

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SUMMARY

On 8 April 2020, the High Court discharged three Unexplained Wealth Orders (“**UWOs**”) relating to multi-million pound London homes allegedly purchased with the proceeds of crime. In its judgment, the High Court criticised the National Crime Agency (“**NCA**”) for its inadequate and unfair conduct of the case. Here we examine the NCA’s approach, and the lessons that can be learnt when considering future UWOs.

What are UWOs?

UWOs are an invasive and hugely powerful investigatory tool available to the NCA. To date UWO’s have not been used extensively, but they can be deployed in order to elicit information in connection to property which the NCA has reasonable cause to suspect may result from the proceeds of criminal conduct.

In order to obtain a UWO, the applicant must satisfy the court of the following requirements:

1. “Holding” and “value” requirements – that the respondent holds the property and the value of the property is greater than £50,000;
2. “Income” requirement – that the known sources of funds would have been insufficient to enable the respondent to obtain such property; and
3. “PEP/serious crime requirement” – the respondent is a politically exposed person or there are reasonable grounds to suspect that the respondent, or a person connected with them, has been involved in serious crime.

Even in the event that all of the above criteria is met, the court still maintains discretion as to whether to grant the UWO.

Background – NCA v Baker [2020]

In May 2019, the NCA applied for UWOs in relation to five homes located in affluent areas of London, worth in excess of £80million (the “**Properties**”). The NCA argued during an *ex parte* hearing that the Properties were purchased as a means of laundering the proceeds of unlawful conduct of the late Mr Rakhat Aliyev (“**RA**”), a former senior official in the government of Kazakhstan. Based on the limited evidence before the judge, the UWOs were granted without notice to the Respondents.

In each case, the UWO named the Foundations which held the Properties as the Respondents. In August 2019, the Respondents voluntarily disclosed the Ultimate Beneficial Owners (“**UBOs**”) of the Properties to the NCA (the ex-wife and son of RA - Dariga Nazarbayeva (“**DN**”) and Nurali Aliyez (“**NA**”)) and provided them with what the court later referred to as “extensive information” regarding the purchase of the Properties. However, the NCA refused to withdraw the UWOs.

The Respondents duly appealed the UWOs on the grounds that the NCA made errors in law and approach in its applications, including material non-disclosures during the *ex parte* hearing, and that the information now available demonstrated that the UWOs were sought and made on a flawed basis.

The [judgment](#) was handed down on 8 April, 2020.

The NCA’s arguments

The central premise of the NCA’s arguments relating to all three UWOs was that RA was the founder of the three Respondent Foundations, that he had provided the Respondents with funds which were used to purchase the Properties and that such funds derived from his previous criminal conduct.

The NCA further argued that the Properties were “handled in the same way”, which they said showed a financial link between the Respondent Foundations and RA.

The NCA also placed significant weight on the complex and secretive manner in which the Properties were obtained and subsequently “handled”.

How did the NCA get it wrong?

Although the High Court was not persuaded by the argument that the NCA made material non-disclosures during the *ex parte* hearing, it found that the case which the NCA presented was “*flawed by inadequate investigations into obvious lines of enquiry*”. In particular:

- The investigations into RA in Kazakhstan confiscated RA's assets, but not those of DN. On the contrary, the investigation found that RA did not transfer illegally acquired funds or assets to DN and that DN did not hold any illegally acquired funds or assets.
- DN and RA were estranged following their divorce in 2007, and NA also had no further contact with his father. Mrs Justice Lang was critical of the NCA for not considering a breakdown in marriage when assessing the likelihood of an ex-spouse laundering suspected proceeds of criminal conduct.
- Both DN and NA had legitimate and publicly-known business interests which would have been sufficient to acquire the assets concerned and can be considered wealthy in their own right. The respondents had provided sufficient evidence of this to the NCA, of which they failed to carry out a "fair minded evaluation" despite the absence of any link between RA and the Foundations.

This case has also highlighted a number of points which may be relevant to wider application for cases concerning UWOs.

- Notably, the High Court cautioned against over-reliance on the use of complex corporate and offshore structures of property holding as itself being grounds for suspicion of money laundering. It was acknowledged that there are a multitude of lawful reasons for such structures, including privacy, security and tax mitigation.
- In addition, the judge stressed that similarities in the "handling of" the Properties were not necessarily evidence of a financial link with RA and that they are unsurprising, given that the Properties have the same, or related, UBOs.

Lessons for the future

This decision highlights that going forward there will be an expectation on the NCA to ensure that it carries out adequate investigations prior to making an application for a UWO, so that they are only utilised where it is proportionate to do so and can be justified based on the facts available.

It also underscores that suspicions of illegal conduct can be settled by the production of adequate explanations and evidence and, on this basis, the High Court may be required to discharge the UWOs. This will no doubt be a welcome thought for those faced with responding to UWOs. The respondents in this case were able to produce evidence that their own lawful income was sufficient to have obtained the properties. In this scenario, the "unexplained" wealth effectively becomes "explained".

Property lawyers handling high value property transactions are very familiar with seemingly complex structures being employed by purchasers for all sorts of legitimate reasons. That fact

appears to have escaped the investigations of the NCA. It may be that this case will provide them with the basis for ensuring that the rationale for such structures are properly evaluated rather than simply being characterised as suspicious or with criminal intent behind them.

This is the first successful appeal against a UWO since their inception, so it will be interesting to see whether there is a lasting impact for future cases. The High Court was extremely critical of the NCA with regard to almost every argument they pursued; it found the NCA's suspicions and assumptions to be unreliable and rebutted by cogent evidence provided by the Respondents.

The NCA have already issued a press release which makes clear their intention to appeal this decision. The basis of such an appeal is currently unclear.

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