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Have Unexplained Wealth Orders hit the rocks?

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The recent case of NCA v Baker is the first negative result for the authorities in the still-nascent regime of Unexplained Wealth Orders. ***John Binns*** *&* ***Michael Drury*** *of BCL Solicitors consider the implications for future cases and draw lessons for the reporting sector.*

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Setback

The UK's National Crime Agency (NCA) has suffered a serious defeat in its use of Unexplained Wealth Orders (UWOs), in the case of NCA v Baker, in which it was recently refused permission to appeal, and reportedly suffered a very painful heavy costs award against it, given that these are civil proceedings, in which 'costs follow the event'. The case illustrates the complex issues involved in working with the Proceeds of Crime Act 2002 (POCA) and may prove a decisive moment in the NCA's strategy to pursue assets it regards as 'suspicious'.

UWOs' role and context

By way of background, a UWO is not an end in itself. Its purpose is to support a scheme of civil recovery under POCA, by which assets can be frozen and forfeited if the High Court finds, on the balance of probabilities, that they represent the proceeds of 'unlawful conduct'. The authorities bringing the case need not specify the precise conduct involved, although they do need to specify the type of conduct, and where it occurred overseas, prove both that it breached the laws of that jurisdiction and that it would also breach the laws of the UK, if it occurred here.

This contrasts with the principal money laundering provisions of POCA, by which a person can be tried and convicted if a jury is satisfied, beyond reasonable doubt, that they have dealt with the proceeds of 'criminal conduct' applying, this time, only UK laws, where they know or suspect that this is so. One way of proving that such conduct occurred is to invite an 'irresistible inference' from the way the property, said to represent its proceeds, was handled.

'Reasonable grounds for suspecting'

In the context of the reporting obligations of the regulated sector under POCA, this idea of drawing inferences from the way property is handled – for instance, in the use of complex offshore structures, which may be used to disguise its criminal origin – has some resonance, in the test of 'reasonable grounds for suspecting' that a person is money laundering.

In the context of investigative powers under POCA, including UWOs, that same test of 'reasonable grounds for suspecting' is applied, for instance where the High Court considers the sufficiency of a respondent's 'lawfully obtained income' (applying the laws of the jurisdiction where it was obtained) to have obtained a property under UK investigation, and his involvement in or connection with 'serious crime' (applying, broadly speaking, UK laws).

The NCA's prior successes

The NCA's first, successful, UWO case (though even now an appeal to the Supreme Court is possible) was against Zamira Hajiyeva, whose status as a Politically Exposed Person (PEP) made it formally unnecessary to consider her connection with 'serious crime'. Instead the courts focused on whether the NCA had reasonable grounds for suspecting that her husband's income was not lawfully obtained, and (so far) concluded that it did. Its second case was against Mansoor Hussain, said to be a prolific enabler of organised crime and launderer of its proceeds, in which there was ample evidence to meet the thresholds of suspicion with relative ease.

The use of UWOs against trustees

How, then, did the NCA come to overreach itself in its third case? Part of the answer is in the nature of the respondents it chose to target. Mr Baker himself was the president of a Panamanian foundation, equivalent to a UK trust, that owned one of the three properties the NCA had in its sights. The other respondents were that and another foundation, and two other companies, which were the registered owners of the three properties.

The idea was clearly that Mr Baker and the other respondents had information that might assist the NCA to investigate the properties, which it suspected were vehicles acquired by relatives of a deceased Kazakh official, Rakhat Aliyev, to launder the proceeds of corruption offences. But the targeting of Mr Baker himself gave the NCA the additional hurdle of showing that he was a 'holder' of the property, which it was unable to do, and though the NCA sought to argue that some of the respondents (by virtue of their connection to Aliyev) were PEPs, it did not succeed.

On top of that, the provisions of POCA on 'lawfully obtained income' are unhelpfully drafted from the applicants' point of view where the respondent is not a beneficial owner. Where the issue is the source of wealth in the trust, it clearly does not make sense to investigate the income of a trustee, although that is what the terms of POCA seem to require.

Offshore structures and 'irresistible inferences'

The other, and perhaps, principal, reason for its failure lay simply in the quality of the evidence available to the NCA, and especially of its analysis of that evidence and the seemingly unsupportable inferences it sought to draw from it. Disingenuously perhaps, the NCA borrowed, from the context of proving principal money laundering offences, the concept of an 'irresistible inference' from the way that property is handled and suggested that the use of complex offshore structures gave rise to such an inference in this case. The High Court was strongly critical of this approach.

Importantly, in advance of the hearing the respondents provided the NCA with various material that they said was relevant to the questions about the sufficiency of 'lawfully obtained income', and about the reasonableness of inferring that the properties represented the proceeds of unlawful conduct. The NCA was dismissive of that material, and the High Court held that it had failed to analyse it properly.

Translating both points from this case to the general scheme of POCA, it seems that at this stage of an investigation, and even applying the admittedly low standard of proof of 'reasonable grounds for suspecting', it will be important for the authorities to show the court that any inferences they invite are both strong and fair, and that proper account has been taken of material that either supports a suspicion or detracts from it.

Lessons for the reporting sector

These points should also provide some food for thought for the diligent reporter in the regulated sector, who may be used to applying the test of 'reasonable grounds for suspecting' in a different way. Would such a reporter be able to point to this judgment if asked to explain a failure to report, and say that based on the material available to him, there was no 'irresistible inference'? Arguably, if such an inference is based on no more than the use of offshore structures, it is hard to see why not.

Conversely, what of the reporter who has a set of materials available to him that do give rise to 'reasonable grounds', but then receives more materials that may serve to undermine those grounds and change his view? Is she obliged, as the NCA was in this case, to peruse and analyse the material properly before deciding whether a report is warranted? Perhaps not, but again, it is hard to see how she could properly be criticised for not reporting until that job was done.

What next for the NCA?

The scale of the NCA's defeat in this case will surely have caught it on the back foot. Not only were the UWOs discharged at first instance, but leave to appeal was summarily refused, on the basis that it had no real chance of success. The costs, both on its own side and of that of the victorious respondents, are said to be very substantial indeed.

So, will the NCA be more cautious about applying for UWOs in future? Certainly, its comments to the authors of the recent Parliamentary 'Russia Report', which among other things discussed UWOs in the context of the NCA's fight against 'dirty' money, suggest that the sparing use of them so far has in part been due to the costs and risks involved, in a context where the respondents will often have the resources to fight any case brought, supported by strong legal teams.

A more nuanced conclusion on the NCA's future direction of travel might be that it will be more cautious about which cases it brings, and on what grounds. Where potential respondents do not clearly fit the statutory criteria, or where they provide material that tends to undermine the reasonableness of any inferences or suspicions that might otherwise be drawn, perhaps it will in future take a less stubborn, more pragmatic approach. Certainly, that is the message the NCA has now been given by the courts.

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