

The discharge of unexplained wealth orders! (National Crime Agency v Baker)

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Corporate Crime analysis: Despite their reputation as the principal weapon in the UK's fight against international money laundering, unexplained wealth orders (UWOs) are actually an investigative tool. A UWO requires a respondent to provide an enforcement authority with a statement setting out their interest in a particular property and explain how they have acquired it. It seeks information about the complex financial structures which are used to hold expensive property in the UK. UWOs are usually obtained ex-parte and without notice. A respondent can challenge a UWO by applying to discharge it. In this case the respondents were successful in their application to discharge three UWOs. This case exposes the potential limitations of UWOs and warns against overreliance on the use of complex offshore arrangements as evidence of unlawful conduct. It may prove to be the first step towards an adjustment in expectations about what UWOs can achieve. Gary Pons, a barrister at 5 St Andrew Hill examines the case in more detail and assesses the future implications of the judgment.

National Crime Agency v Baker and others [\[2020\] EWHC 822 \(Admin\)](#)

What are the practical implications of this case?

There are two important points to bear in mind when looking at the practical implications of this case. Firstly, the National Crime Agency (NCA) have publicly stated that they intend to appeal this judgment. Secondly, this is a decision which was largely made on the facts, in simple terms there was insufficient evidence to support the NCA's case.

The points that can be made from the judgment are:

- the basis for the order must be properly supported by the facts. This can be extremely difficult when the factual background takes place in a foreign jurisdiction. The drawing of inferences and the nuance from the evidence can be particularly problematic without first-hand knowledge of how institutions operate in these countries
- the court's decided that holding property in a complex and opaque manner does not, in and of itself, give rise to suspicion that the underlying funds are the proceeds of crime. Additional focus on the details of the alleged unlawful conduct will be required
- the requirement that the NCA shows that a respondent's known lawful income is insufficient to have obtained the property means the evidence must reflect the actual interest the respondent has in the property. This has the potential to limit the effectiveness of UWOs against trustees, who will rarely have an interest of any real value in the property

The judgment gives practical guidance to respondents on how to challenge the factual basis upon which a UWO was made.

What was the background in this case?

Three UWOs were obtained by the NCA ex-parte and without notice, in respect of three properties in London, worth over £80m. In each case the registered owner was either a Panamanian or a Curaçaoan Private Interest Foundation, all of which received the properties from British Virgin Islands companies in March 2013. The UWOs were obtained on the basis that the properties were acquired through laundering the proceeds of the unlawful conduct of Rakhat Aliyev (RA), a Kazakhstani national, who had died whilst imprisoned in Austria on 24 February 2015. RA had held a number of prominent roles within Kazakhstan politics. The NCA's case was that RA had decided that these properties would be held in a complex and private offshore arrangement in order to conceal the unlawful funds used to purchase the properties.

The UWOs were replied to by the respondents on a voluntary basis, despite the fact that they contended that the properties were all unconnected to RA. They set out that the ultimate beneficial owners of the properties were Mrs Dariga Nazarbayeva (DN) the ex-wife of RA, in respect of two of

the properties, and Nurali Aliyev, the son of RA and DN, in respect of the remaining property. DN is the daughter of the former President of Kazakhstan, Nursultan Nazarbayev. The respondents explained the source of the funds used to purchase the respective properties and challenged the factual basis of the NCA's case on the basis that DN and Nurali Aliyev had access to their own legitimate funds.

What did the court decide?

The NCA's argument that the properties were obtained through laundering the proceeds of the unlawful conduct of RA was not supported by the facts. In light of the extensive information provided by the respondents, it was DN and NA who were the founders of the respective Foundations and the source of the money used to purchase the properties.

Offshore Private Interest Foundations are vehicles for wealth management. In this case the properties had been transferred from the BVI companies to the Foundations to limit exposure to a new residential property tax. The court decided that the use of private and complex offshore corporate structures does not in and of itself provide a basis for believing that they are being used for money laundering.

The structure of Panamanian Foundation was such that the effective control over it and its assets is vested in the founder and the Foundation Council, not the President. This meant that, in selecting Mr Baker, the President of the Panamanian Foundation and solicitor of 35 years standing, as the respondent, the NCA were wrong in law.

Although the court decided that Mr Baker did not hold two of the properties, it observed that, where property is held by a trustee, the requirement that the NCA must show that a respondent's known lawful income was insufficient to obtain the properties must reflect the actual extent of his interest in the property. This is likely to cause problems in the future because of the difficulty in valuing a trustee's interest in the property.

Case details

- Court: High Court of Justice, QBD
- Judge: Mrs Justice Lang DBE
- Date of judgment: 8 April 2020

Gary Pons appears for both prosecution and defence in criminal cases. His practise has developed over the years and now includes areas such as asset forfeiture, civil recovery and extradition.

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