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Proving the Dough: *National Crime Agency v Baker & Ors*

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This note examines the High Court's recent decision in *National Crime Agency* v *Baker* to discharge three unexplained wealth orders (UWOs) relating to properties in London. The UWOs were originally granted on the basis that the properties were suspected of constituting 'recoverable property' for the purposes of the Proceeds of Crime Act 2002. The decision is the first to overturn an UWO. Given the few UWO applications to date, it is an important contribution to the available jurisprudence on the mechanism. This comment examines the presiding judge's statements on the evidential thresholds to be met in raising a presumption that property constitutes the proceeds of crime and looks at the decision's emphasis on enforcement authorities' obligations to meet proportionality requirements. It reviews the Court's discussion of complex property ownership structures. It concludes that the judgment raises issues which enforcement authorities may find challenging in seeking to use UWOs in future investigations.

INTRODUCTION

Where individuals suspected of involvement in serious crime or politically exposed persons (PEPs) hold assets which appear disproportionate to their known legitimate income, a relevant enforcement authority (namely: the National Crime Agency (NCA), HMRC, the Financial Conduct Authority, the DPP, or the Director of the Serious Fraud Office[1]) may apply to the High Court for Unexplained Wealth Orders (UWOs) requiring those individuals to explain how they obtained those assets.[2] In practical terms, UWOs impose a burden on respondents where there is an apparent disconnect between their lifestyles and their sources of wealth to establish that their assets were licitly acquired, often in circumstances where the relevant information may be only within the asset-holder's knowledge.[3] The order is used as a tool to assist in gathering evidence as part of, or to assist in determining whether to initiate, civil recovery

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1 Proceeds of Crime Act 2002 (POCA), s 362A(7).
2 Provided for pursuant to POCA, ss 362A-362T, as introduced pursuant to amendments made by the Criminal Finances Act 2017.
3 Home Office, 'Code of Practice issued under Section 377 of the Proceeds of Crime Act 2002 – Investigations' (January 2018) (Code of Practice) at [170]: UWOs provide an alternative means of 'obtaining information and allowing for the consideration of action against persons and their property about whom little information is available'.

investigations.[4] To the extent that a satisfactory response to an order is not forthcoming from a respondent within a defined response period, a presumption will arise that the assets the subject of an order are 'recoverable property' for the purposes of the Proceeds of Crime Act 2002 (POCA), thereby facilitating the making of a civil recovery order.[5]

UWOs were made available to enforcement authorities from 31 January 2018,[6] but as of July 2020, they had been deployed in only four investigations. Only three of those matters yielded written judgments, and so the law is relatively untested.[7] Two of those cases involved PEPs, the first involving an application for orders in respect of a property in Knightsbridge and a Berkshire golf course – properties owned by the wife of an Azeri state-owned bank's jailed former chairman. The respondent in that case, Zamira Hajiyeva, infamously spent £16m at Harrods in London, despite having no obvious sources of income.[8] The UWOs granted in the second of these cases, *National Crime Agency* v *Baker & Ors*[9] (*Baker*), were subsequently discharged by the High Court on the basis that the original applications submitted by the NCA were made on a flawed basis. In discharging the orders, Mrs Justice Lang, who presided over the discharge application hearing, held that the NCA had failed to consider obvious lines of enquiry which would have shown that the properties the subject of the orders were legitimately acquired. She went on to castigate the NCA for neglecting to carry out a 'fair-minded evaluation' of information proffered by the properties' ultimate beneficial owners (UBOs). The decision is notable not only because of the judge's unvarnished criticism of the NCA in its approach to its investigation, but also because in her analysis of the evidence submitted by the NCA, Lang J seems to suggest that more stringent requirements may need to be met by enforcement authorities applying for UWOs than is evident from the applicable legislation.

This case commentary considers three aspects of Lang J's decision. It first examines how the decision may create some confusion over the evidential threshold to be met by applicant enforcement authorities. It then looks at the Court's conclusions on the use of complex corporate ownership structures in establishing whether or not transactions are inherently suspicious. Finally, it discusses the decision's emphasis on proportionality in awarding UWOs. Drawing on

4 *ibid* at [169]. Provided there is a legal basis for using such information, the Code of Practice advises that UWOs can also be used for other reasons, both criminal and civil. An UWO will require a respondent, *inter alia*, to provide a statement explaining the nature of the respondent's interest in the property and how the property was obtained, and may require production of documents of a kind specified or more generally described in the order (POCA, ss 362A(3) and (5) respectively).

5 POCA, s 362C(2).

6 The Criminal Finances Act 2017 (Commencement No 4) Regulations 2018, regulation 3.

7 S. O'Neill, '£1.5m Legal Bill Forces Rethink over McMafia Wealth Orders' 13 July 2020 *The Times* 16.

8 At first instance: *National Crime Agency* v *A* [2018] EWHC 2534 (Admin); [2018] 1 WLR 5887. On appeal: *Hajiyeva* v *National Crime Agency* [2020] EWCA Civ 108 (*Hajiyeva*). At the time of writing (August 2020), Mrs Hajiyeva's lawyers are awaiting a response from the Supreme Court on her application for leave to appeal the Court of Appeal's unanimous decision to uphold the UWOs granted against her properties.

9 [2020] EWHC 822 (Admin).

the case law on UWOs to date and *Baker* in particular, this note concludes that notwithstanding the laudable aims sought in introducing the orders, *Baker* may dampen enforcement authorities' appetite for future applications and casts doubt on the longer-term feasibility of UWOs in the UK.

THE CASE

Prior to his death in prison in Austria in 2015, Rakhat Aliyev (RA) held a number of high-level public positions in Kazakhstan, including that of Deputy Foreign Affairs Minister. *Baker* concerned an investigation into the legitimacy of the wealth used to acquire three substantial London properties. In making its application for UWOs in respect of the properties, the NCA adduced evidence to the effect that the assets were acquired as a means of laundering the proceeds of crimes committed by RA during and after his time in office. The NCA successfully applied *ex parte* to the High Court in May 2019 for UWOs requiring the respondents to provide information in relation to the properties on the basis that the respondents were connected to individuals reasonably suspected to be involved in serious crime, or alternatively, because the respondents were PEPs. Each property was initially purchased by a company registered in the British Virgin Islands (BVI) and was subsequently transferred to four of the five respondents: an Anguilla-registered company, two Panama-registered foundations and a Curacao-registered foundation. The fifth respondent, Andrew Baker, was the president of the Panamanian foundations.

The UWOs required the respondents to provide details on the properties' funding and handling, and to confirm the properties' UBOs. The respondents replied to the order confirming the identities of the beneficial owners and requested that the NCA withdraw the UWOs on the basis that the properties were unconnected to RA and his activities. According to the respondents, the properties' UBOs were RA's former wife who he had divorced before any of the properties were purchased, and RA's son, from whom he had been estranged since the time of the divorce. The NCA refused the request, maintaining its position that the properties were the product of RA's criminality.

The respondents applied to the High Court to withdraw the UWOs, submitting extensive evidence to demonstrate how the UBOs came to acquire the properties and evidencing how each UBO held wealth independently of RA at the time the properties were purchased by the BVI companies. Documents including bank loan confirmations, share registers, and share and cash transfer records were furnished setting out how the property acquisition funds were raised.

Lang J granted the application to discharge the orders on the basis that the NCA's reasoning in seeking the UWOs was 'artificial and flawed' because it had sought them on the erroneous assumption that RA had beneficially owned the properties.[10] By a written order from Carr LJ dated 17 June 2020, the Court of Appeal refused the NCA leave to appeal the High Court's decision, noting:

10 *Baker ibid* at [130].

'Although this is a relatively new jurisdiction which may at the appropriate time benefit from further judicial interpretation, such matters are better addressed in an appeal with a real prospect of success'.[11]

EVIDENCE NECESSARY TO RAISE AN 'IRRESISTIBLE INFERENCE'?

Lang J referred throughout her decision to the 'irresistible inference' principle espoused by the Court of Appeal in *R* v *Anwoir*[12] (*Anwoir*): 'where the Crown seeks to prove that property derives from crime by evidence of the circumstances in which the property is handled, it must be "such as to give rise to the *irresistible inference* that it can only be derived from crime"'.[13]

She did not expressly conclude that circumstantial evidence sufficient to raise an 'irresistible inference' as to the provenance of the properties is necessary to sustain an UWO. However, she cited the standard a number of times including immediately before confirming the discharge of each order in turn. This is confusing because *Anwoir* involved a criminal prosecution for money laundering offences, not a civil recovery proceeding: the proceedings are not analogous and it is difficult to see the relevance of an 'irresistible inference' requirement in the context of an application for a measure designed to facilitate civil recovery investigations.

In pursuing the proceeds of crime, enforcement authorities broadly have two main options. Where an individual has been convicted of crimes, enforcement authorities can apply for a confiscation order for the suspected proceeds of those crimes or the trappings of the individual's 'criminal lifestyle' pursuant to Part 2 of the POCA. *Anwoir* established that in prosecuting money-laundering offences,[14] the burden of proving 'criminal property' can be satisfied *inter alia* by presenting circumstantial evidence showing that property is handled in such a way that the only logical conclusion – or 'irresistible inference' – that can be drawn is that the property constitutes the product of crime.[15] Such property is liable to criminal confiscation.

Alternatively, if an individual is suspected of holding the proceeds of crime but a prosecution is not pursued (for example because there is insufficient evidence to make a criminal conviction feasible), the authorities can institute civil proceedings seeking a civil recovery order pursuant to Part 5 of the POCA on the basis that property is 'recoverable property'. To obtain an UWO, an enforcement authority must establish to the High Court's satisfaction (i) that there is reasonable cause to believe that an eligible respondent (ii) holds an interest in a property; (iii) that the interest is worth at least £50,000; and (iv) that there are reasonable grounds for suspecting that the respondent's known sources of lawful income would have been insufficient to enable the respondent to acquire

11 Written order of the Court of Appeal, 17 June 2020, Ref C1/2020/0723.
12 [2008] EWCA Crim 1354; [2009] 1 WLR 980.
13 *Baker* n 9 above at [98] quoting Latham LJ in *Anwoir ibid*, 987 (emphasis added).
14 POCA, s 327, 328 and 329.
15 *Anwoir* n 12 above.

the property (the Statutory Tests).[16] Once these Statutory Tests are met and the High Court is satisfied that the making of an order is necessary and proportionate, it will issue an UWO. Property the subject of an order is (rebuttably) presumed to be recoverable property for civil recovery purposes.[17]

Is it the case that by making reference to 'irresistible inference', Lang J is endorsing this evidential standard for UWO applications? This is one possible interpretation. If the references throughout *Baker* to the NCA's failure to adduce evidence sufficient to raise an 'irresistible inference' are intended to extend the requirements to be met by authorities seeking an UWO beyond merely satisfying the Statutory Tests, this is confusing in a civil recovery context. The mindset of the property holder, the applicable standard of proof, and the relevant types of evidence necessary to obtain a civil recovery order all differ significantly to those required for establishing that property is 'criminal property' in a criminal prosecution for money laundering.

In a money-laundering setting, property is criminal property if:

(a) It constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) The alleged offender knows or suspects that it constitutes or represents such a benefit.[18]

In other words, an alleged offender's state of mind is an essential factor in establishing their culpability and may be inferred through the evidence presented. If the accumulated evidence allows a jury to draw an 'irresistible inference' that a defendant's assets could only have been acquired through criminality, and that the defendant must have either known or suspected that fact, then the defendant will be found guilty and the property will be deemed 'criminal property'. By contrast, in civil recovery proceedings, no adjudication is made on the guilt of the respondent. As civil recovery operates *in rem*, it looks to whether the *property* is likely to constitute the proceeds of crime. The identity of a respondent can be largely incidental. Determining the state of mind of the respondent at the time the property was acquired and/or throughout the time the property is held is not germane for civil recovery purposes.

In a money laundering prosecution, it is necessary for prosecutors to adduce evidence (including circumstantial evidence) sufficient to prove to a criminal standard the guilt of the defendant. Such evidence might include, *inter alia*, complex audit trails, the unlikelihood of the assets being of legitimate origin, and the defendant's association with known criminals.[19] Less exactingly, in civil recovery proceedings, enforcement authorities must establish on the balance of probabilities that property represents the product of unlawful conduct. For UWOs, if each Statutory Test is satisfied, that likelihood is presumptively affirmed unless proven otherwise. In *Baker*, the NCA relied on, *inter alia*, RA's memoir, a

16 POCA, s 362B.
17 n 3 above at [169].
18 POCA, s 340(3).
19 Crown Prosecution Service, *Legal Guidance, Proceeds of crime: Proceeds of Crime Act 2002 Part 7 - Money Laundering Offences*, version updated 1 March 2018.

report published on RA's wealth by the NGO Global Witness, and – in an echo of *Hajiyeva* case – information gleaned from customer accounts at Harrods. The NCA included details of one of the UBOs' LinkedIn profiles in the 'full and frank disclosure' part of its submissions. The respondents relied on, *inter alia*, a Kazakhstani prosecutor's account of an investigation into RA, a witness statement from the respondents' own solicitor, a 2013 article from Forbes Kazakhstan, and a Panamanian lawyer's legal advice which was considered on a *de bene esse* basis. As should be clear, the standards of admissible evidence typical of criminal proceedings do not apply to UWO proceedings.

The references in *Baker* to the 'irresistible inference' criterion used in money laundering prosecutions were therefore not directly relevant to the UWO proceedings, and the reasons for which it was cited are not readily apparent. It seems inconsistent with the operation of the UWO as a civil recovery tool that enforcement authorities will need to present enough circumstantial evidence to allow the High Court draw an irresistible inference that a property the subject of an application could only have been derived from crime. UWOs are intended to assist authorities by compelling the disclosure of information which *may* establish to a civil standard that property is derived from unlawful conduct. If it is necessary to adduce enough evidence to allow an irresistible inference to be drawn *in addition to* the satisfaction of each Statutory Test in order to obtain an UWO, then it is not clear why UWOs were introduced at all. If enforcement authorities have access to that quality of evidence, then it is likely that they have sufficient evidence to support not only a civil recovery proceeding, but also a money-laundering conviction for acquisition, possession or use of laundered assets,[20] and for a consequent criminal confiscation of those assets. This would render the need for UWOs redundant. No decision from the other two reported cases to date dealing with UWOs alluded to an 'irresistible inference' test.[21] No reference was made to such a test in the parliamentary debates considering the introduction of UWOs. An additional, unspecified requirement of circumstantial evidence sufficient to raise an 'irresistible inference' could not have been the legislative intention.

Whilst the decision in *Baker* does not discuss the point in much depth, it might be interpreted as implicitly endorsing the contrary view. The issue does not directly impact upon the outcome in *Baker*: in light of the evidence presented by the respondents showing the true ownership of the properties, Lang J was not convinced that the NCA had satisfied all of the Statutory Tests, and so the UWOs would have had to be discharged in any event. However, pending future judicial consideration of UWOs, it is unclear whether Lang J's discussion operates to increase the legal burden on applicants beyond mere satisfaction of the Statutory Tests.

Notwithstanding the foregoing, it may well be that Lang J's intention in referring to the 'irrestistible inference' standard, rather than to expand the criteria to be satisfied in seeking UWOs, was simply to emphasise to enforcement authorities the need to present a compelling evidential basis in making applications

20 POCA, s 329.

21 The other two cases are *Hajiyeva* n 8 above; and *National Crime Agency* v *Hussain & Ors* [2020] EWHC 432 (Admin); [2020] 1 WLR 2145.

for orders capable of impacting upon individuals' rights. This is consistent with the Code of Practice for enforcement authorities, which notes that although it is not expressly provided for in the legislation setting out the Statutory Tests, it is 'reasonable to expect the court to assess the full financial circumstances' of a respondent when assessing whether there are 'reasonable grounds' for suspecting that the respondent's known legitimate income was insufficient to acquire the relevant property.[22]

Alternatively or additionally, cognisant of the publicity surrounding the case and appreciating that the public at large might not be sensitive to the distinction between criminal confiscation and civil recovery, Lang J may, by referring to the NCA's failure to meet an 'irresistible inference' threshold of evidence, have wished to telegraph that no suggestion was being made that the respondents had committed any crime, nor was sufficient evidence adduced to substantiate any such suggestion.[23]

In the Court of Appeal's written refusal to the NCA's appeal application, it agreed with the High Court's finding that the facts did not give rise to the irresistible inference that the property could only have been derived from crime.[24] Respectfully to both Courts, references to the 'irresistible inference' standard in the context of a civil proceeding dealing with an investigative tool may create confusion as to the applicable law. Some clarification in a future decision on its use could be helpful.

COMPLEX STRUCTURES

Lang J sought to emphasise as 'an important point of principle' that viewing the use of complicated offshore corporate ownership structures as a grounds of suspicion should be treated with caution.[25] The properties the subject of *Baker* were each initially acquired by companies registered in the BVI and then subsequently transferred to foundations organised under the laws of other so-called 'secrecy jurisdictions.' She pointed to legitimate 'privacy, security, [and] tax mitigation' reasons for using those structures.[26] In *Baker*, the properties were transferred out of the BVI companies in 2013 in anticipation of a new tax in the UK which raised a tax liability for property owned through offshore companies.[27]

22 See n 3 above at [174].

23 Commentators have noted the stigma for respondents inherent in civil recovery proceedings, notwithstanding the proceedings' 'civil' character. See, for example: L. Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 MLR 681, 701; P. Alldridge, 'Civil Recovery in England and Wales: An Appraisal' in C. King, C. Walker and J. Gurulé (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Cham: Palgrave Macmillan, 2018) 515, 524.

24 See n 11 above.

25 *Baker* n 9 above at [96].

26 *ibid* at [97].

27 The Annual Tax on Enveloped Dwellings was introduced with effect from 1 April 2013 by the Finance Act 2013.

Curiously, in her discussion, the judge relied on the decisions in *Candy* v *Holyoake*[28] and *Mobil Cerro Negro Ltd* v *Petroleos de Venezuela*.[29] Each of those cases involved applications for property freezing injunctions. The statements made by the judges in each of those decisions addressed complex offshore corporate structures in the context of the parties' concerns around risks that assets held by the structures might be used to rapidly and invisibly dissipate assets. In each of those cases, it was concluded that the use of such ownership vehicles did not by itself establish a risk of dissipation. It is not entirely clear how a confirmation that use of offshore structures does not *per se* evidence risk of swift dissipation is directly relevant to circumstances where, as was the concern in *Baker*, offshore structures in secrecy jurisdictions were allegedly used to conceal assets or to disguise the true identities of the assets' owners – a separate issue. A primary function of UWOs, which are purely investigation tools, is to allow an enforcement authority access to information not otherwise available to it to determine whether a suspicion that a property is 'recoverable property' is well-founded. Lang J acknowledged that 'Of course, such structures may also be used to disguise money laundering, but there must be some additional evidential basis for such a belief, going beyond the complex structures used'.[30] Her apparent reluctance to entertain the idea that holding property via complex offshore structures may be viewed as inherently suspicious in a civil recovery investigation context is open to question when considered in light of the CPS's guidance to prosecutors on admissible circumstantial evidence in *criminal* cases, where it recommends adducing 'evidence of complex audit trails, from which an accountant may be able to conclude that the complexity of the transactions indicate that the property was the proceeds of crime'.[31] Moreover, the NCA was not relying *solely* on the use of complex offshore structures as a means of establishing the illegitimacy of the assets: it was but one factor which it sought to have taken into account in claiming that the ownership of the properties raised suspicion of unlawfulness. It is not therefore clear why the Court in *Baker* felt that the principle needed to be established for UWOs. Some further judicial clarification on the matter would be helpful.

A PROPORTIONALITY-BASED LIMITATION ON UWOS

Leaving aside the Court's approach to other matters, the *Baker* decision serves as an important reminder for enforcement authorities on the exigencies of proportionality and necessity considerations in applying for UWOs. Lang J stated that an UWO can be potentially intrusive 'as it requires the respondent to make a statement, answer questions and disclose confidential records in respect of sensitive personal financial matters.'[32] The statement signposts that a key concern for the Courts in considering UWOs applications is the need to balance a

28 [2018] Ch 297.
29 [2008] 2 All ER (Comm) 1034.
30 *Baker* n 9 above at [97].
31 n 19 above.
32 *Baker* n 9 above at [63].

potential infringement of a respondent's individual rights against the importance to society of pursuing criminal proceeds. In *Baker*, the judge noted that UWOs engage Article 8 rights to respect for private and family life and the protection of property under the European Convention on Human Rights (ECHR), citing Lord Sumption's dictum from *Bank Mellat* v *HM Treasury (No 2)*,[33] the principles of which are echoed in the Code of Practice. The latter provides that as such orders are potentially intrusive:

> The powers therefore need to be fully and clearly justified before they are used. The use of the powers which impact upon individuals' rights should be proportionate to the outcome being sought. In particular, those exercising the powers should consider at every stage whether the necessary objectives can be achieved by less intrusive means.[34]

This excerpt was quoted in *Baker* and the point was discussed in *National Crime Agency* v *Hussain & Ors*[35] (*Hussain*), the only decision published to date dealing with UWOs other than the *Baker* and *Hajiyeva* judgments. From the passage quoted above and Lord Sumption's requirements, if enforcement authorities can establish that the use of an UWO (i) is clearly justified; (ii) is not unduly onerous; and (iii) will elicit information that cannot be obtained less intrusively, then an order will be deemed necessary and proportionate. Examples of each have been considered in the case law.

Clear justification

The NCA's failure to establish a clear justification for sustaining the orders in light of the information presented by the respondents was central to the decision to discharge the UWOs in *Baker*. In her decision, Lang J unreservedly criticised the NCA's initial application as 'flawed by inadequate investigation into some obvious lines of enquiry' and charged the NCA with a failure 'to carry out a fair-minded evaluation of the new information provided by the UBOs and Respondents' in seeking to maintain the UWOs.[36] The NCA's claims that the orders were justified were undermined by the facts that it had failed, in Lang J's judgment, to (i) distinguish between RA and other members of his (estranged) family;[37] (ii) appreciate that the UBOs were each successful businesspeople in their own right who held wealth independently of RA; and (iii) accept (or at least, properly consider) the evidence submitted to it by the respondents to the effect that there was nothing linking RA with the property ownership vehicles at any time.[38]

Interestingly, Lang J highlighted the fact that there was information freely available in the public domain on the UBOs' wealth, noting that RA's former

33 [2013] UKSC 38 at [20], [2014] AC 700, 771.
34 n 3 above at [18].
35 n 21 above.
36 *Baker* n 9 above at [217].
37 *ibid* at [162].
38 *ibid* at [217]

wife was named in Forbes Kazakhstan's 2013 list of richest Kazakhs, which, the judge said, would have allowed the NCA to identify RA's former wife as independently wealthy.[39] These comments inspire questions about the lengths to which enforcement authorities must go to rule out potentially legitimate sources of funding for properties and the extent to which they are entitled to rely on assumptions. The problem is circular, because in many cases, the only way of determining legitimate sources of funds for a property is by having its owner provide evidence. Furthermore, requiring enforcement authorities to determine the credibility of (and attempt to verify) content generally available on the internet or published by media sources, for example, may be excessively burdensome in practice.

Post-*Baker*, an enforcement authority will need to weigh carefully the value of any new information provided by respondents if it wishes to retain the relevant UWOs, especially if that information challenges the assumptions on which the applications were originally based and is capable of operating to discharge the orders.

Not unduly onerous

This point was briefly considered at first instance in the *Hajiyeva* matter,[40] where it was found that any infringement by UWOs of Article 1 Protocol 1 of the ECHR (right to peaceful enjoyment of possessions) was proportionate because a requirement to provide information in relation to property constituted no more than a modest intrusion.[41] Objectively, the immediate consequence of an UWO is not inherently onerous for a respondent because it is merely a requirement to furnish information to which only the respondent may have access; an evidential principle already endorsed in the realms of tax law and criminal law.[42] So far, the Courts have only considered onerousness by reference to the requirement to furnish information pursuant to an UWO, possibly reasoning that the wider impact on property rights which may ensue through non-compliance with an UWO leading to a rebuttable presumption of the property's recoverability can be considered in the course of any subsequent civil recovery proceedings. There may be scope in the future for respondents to challenge UWOs on the basis that the terms of the orders themselves are inherently onerous because, for example, they require the production of documents which no longer exist, or because the defined response period is unrealistically short. However, the legislation provides that no presumption of recoverability will arise where a respondent has a 'reasonable excuse' for failure to comply,[43] and this defence is likely to allay judicial concern around potential unwarranted onerousness.

39 *ibid* at [68].
40 *National Crime Agency* v *Mrs A* [2018] EWHC 2534 (Admin).
41 *ibid* at [98]-[103].
42 See respectively: *Bi-Flex Caribbean Ltd* v *The Board of Inland Revenue Co (Trinidad and Tobago)* [1990] UKPC 35 and *Sheldrake* v *Director of Public Prosecutions Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264.
43 POCA, s 362C.

No less intrusive alternative available

In *Hussain*, the NCA established that it was not possible to obtain the information sought by less intrusive means by using the most obvious alternative tool for obtaining the information sought – disclosure orders served on third party financial service providers.[44] It argued that disclosure orders were unlikely to result in disclosure of transactions going back further than six years – the usual document retention period for many financial institutions – and would alert third parties to the fact that the NCA was interested in the respondent's wealth, which could be more intrusive than an order served directly on the respondent. On that basis, the High Court found that it was 'just, appropriate and proportionate' to grant the UWOs sought. This was an object lesson for the NCA on how to successfully navigate one aspect of proportionality, albeit in *Baker*, seeking disclosure orders would have had limited value for reasons of territorial jurisdictional limitations.[45] As a further alternative, the Code of Practice urges enforcement authorities to give consideration to approaching a potential respondent to request voluntary disclosure of information before resorting to a court application.[46] If an enforcement authority can demonstrate that it considered this option and had legitimate reasons for rejecting it, this may bolster its claim that an UWO is necessary.

An important aspect of the 'intrusiveness' of UWOs is the negative media attention to which respondents are exposed. Extensive publicity greeted each occasion on which respondents have sought to challenge UWOs (the *Baker* and *Hajiyeva* cases). The Courts have considered to a limited extent the reputational implications of UWOs. The CPR Practice Direction for civil recovery proceedings provides that UWO applications will be held in private unless the presiding judge directs otherwise.[47] Acknowledging the 'potentially disproportionate personal and reputational impact on a respondent of the fact that a UWO has been obtained if that fact is publicised,' Murray J observed in *Hussain* that CPR rule 39.2(3), which sets out the exceptions to the requirement that cases be held in public, is highly likely to be engaged for most UWO applications in future.[48] He did not address the significant publicity directed at challenges to UWOs, and it is possible, notwithstanding the implications for open justice, that such hearings may also be held in private post-*Baker*.

The emphasis on proportionality animating the decisions on UWOs is helpful in a legal landscape in which criminal-civil hybrid mechanisms, which utilise aspects of both criminal and civil procedure and of which UWOs are an example, are proliferating.[49] UWOs are civil investigation orders for which

44 POCA, s 357.

45 *Serious Organised Crime Agency* v *Perry* [2012] UKSC 35; [2013] 1 AC 182.

46 Code of Practice, n 3 above at [18]. Clearly, this will not be an option where there are concerns around potential dissipation of assets. Pursuant to POCA, s 362J, the enforcement authorities are empowered to apply for interim freezing orders in tandem with UWO applications 'if the court considers it necessary to do so for the purposes of avoiding the risk of any recovery order that might subsequently be obtained being frustrated.'

47 CPR PD (Civil Recovery Proceedings) 11.1.

48 *Hussain* n 21 above at [88].

49 See: J. Hendry and C. King, 'Expediency, legitimacy, and the rule of law: a systems perspective on civil/criminal procedural hybrids' (2017) 11 Cr L & P 733; A. Ashworth and L. Zedner,

applications are heard in the High Court, but involve criminal enforcement agencies making state-made claims of suspicion of benefit from criminality to pursue crime control ends. Writers have expressed concern that hybrid measures operate to allow the state, by designating them as 'civil' mechanisms, to circumvent the applicability of criminal procedural rights including the right to be presumed innocent.[50] Notwithstanding these concerns, the Court's emphasis on a strict adherence to proportionality principles in determining whether to sustain UWOs in *Baker* is a good example of the judiciary acting as a gatekeeper against state overreach in its utilisation of such measures.[51]

WHAT NEXT FOR UWOS?

In the case of UWOs, policy framers have argued that rebutting the presumption raised where an UWO is issued is a relatively straightforward matter: a 'blameless' respondent will simply furnish the required information to the enforcement authority to establish the legitimacy of their wealth.[52] There is some tension between this assertion and the potential intrusion into respondents' lives because of the adverse publicity for respondents who seek to challenge an order based on the premises on which it was sought (as was the case in *Baker*) and the potential impact on property rights. In attempting to balance competing interests, the Courts have so far been uncompromising, in *Baker* and elsewhere, in ensuring that the Statutory Tests are completely satisfied before orders are issued or sustained.

Baker has also, however, muddied the waters on the appropriate tests to be satisfied to obtain an UWO. Despite the applicable legislative provisions, the decision could be interpreted as suggesting that meeting the four Statutory Tests in applying for orders is by itself insufficient. It raises the possibility that enforcement authorities will need to present enough evidence to raise an irresistible inference that property could only have been derived from criminal conduct. This would be an exceptionally high standard to meet to obtain a civil investigative order. The decision will give pause to enforcement authorities who, post-*Baker*, will have to demonstrate that they considered and ruled out the possibility of legitimate sources of funds being used by the respondents

'Defending the criminal law: Reflections on the changing character of crime, procedure, and sanctions' (2008) 2 Cr L & P 21.

50 Discussing parallel concerns on punitiveness and the absence of criminal procedural safeguards in the context of another 'hybrid' mechanism, the Civil Preventative Order, see: M.D. James and G. Pearson, '30 Years of Hurt: The Evolution of Civil Preventive Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order' (2018) PL 44. For analysis on the approach of the European Court of Human Rights in negotiating the criminal/non-criminal divide, see: S.N.M. Young, 'Enforcing Criminal Law through Civil Processes: How Does Human Rights Law Treat "Civil for Criminal Processes"?' (2017) 4 J Int'l & Comp L 133.

51 On the function of the judiciary to provide a check to ensure that public bodies do not exceed the exercise of their statutory powers while simultaneously ensuring that the legislative intent is achieved see: H. Barnett, *Constitutional and Administrative Law* (Milton: Routledge, 13th ed, 2019) 557-559.

52 H. Booz Allen, *Comparative Evaluation of Unexplained Wealth Orders* (Washington DC: US Department of Justice, National Institute of Justice, 2012) *passim*.

in acquiring properties, and *may* need to present evidence sufficient to raise an irresistible inference that the assets are the product of crime. Pending judicial clarification on the points, enforcement authorities will need to tread ever more cautiously in seeking UWOs, and in weighing whether it is worthwhile to seek them at all.

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