

Bribery versus compliance:
how to change the culture

Unexplained Wealth

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Public Law Remedies

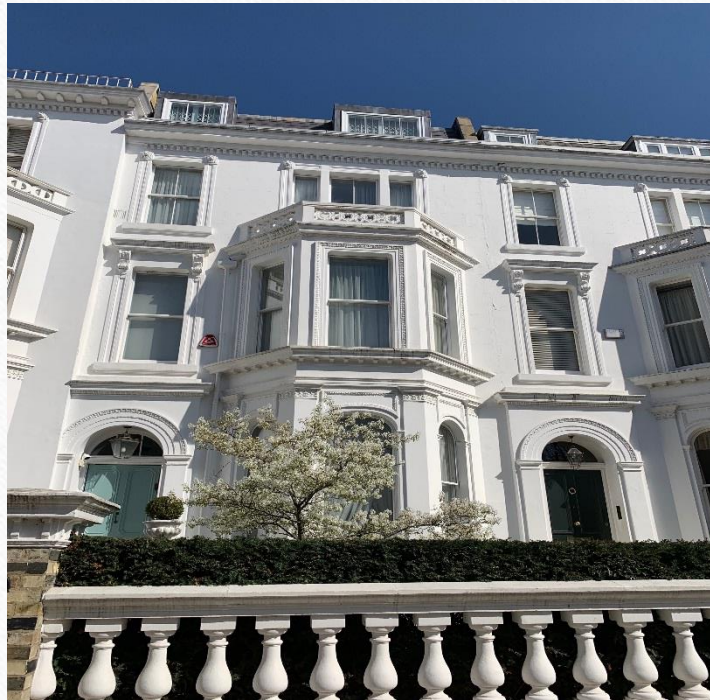
Unexplained Wealth Orders

- The *Proceeds of Crime Act 2002*, section 362A(3) (inserted by the *Criminal Finances Act 2017*) provides:
- “An unexplained wealth order is an order requiring the respondent to provide a statement –
 - (a) setting out the nature and extent of the respondent’s interest in the property in respect of which the order is made,
 - (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
 - (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
 - (d) setting out such other information in connection with the property as may be so specified.”

The Lady



The Property



The Store



The Plane



The Spend

- £11,500,000 property in Knightsbridge
- £16,309,077.87 at Harrods between 2006-2016 including £150,000 on one trip using 35 credit cards
- £10,500,000 on a golf and country club in Ascot near Windsor Castle
- Access to a \$42,000,000 Gulfstream G550 Jet
- Mr Hajiyeva's official annual salary as chairman of International Bank of Azerbaijan was a maximum of £54,000

The Context

- Global Witness report dated 17 March 2019 records:
- 87,000 properties in England and Wales are owned anonymously through companies registered in tax havens
- 40% of these are located in London
- The likely value of these properties is thought to be in excess of £100,000,000,000 or four times the GDP of Zambia

The Legislation

- The requirements for making an unexplained wealth order as contained in section 362B of the Proceeds of Crime Act 2002 and are, *inter alia*, as follows:
- The Holding Requirement: the court must have reasonable cause to believe that the respondent holds the property in question. For this requirement, it does not matter whether or not there are other persons who also hold the property or when the property was obtained by the respondent.

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- The Value Requirement: the court must have reasonable cause to believe that the value of the property is greater than £50,000.00.
 - The Income Requirement: the court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.

Income is lawfully obtained if it is obtained lawfully under the laws of the country from where the income arises.

“Known” sources of the respondent’s income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order.

- The Personal Characteristic Requirement: the court must be satisfied that the respondent is either (i) a politically exposed person, or (ii) there are reasonable grounds for suspecting that the respondent is or has been involved in serious crime.

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- A “politically exposed person” is a person who is—
 - (a) An individual who is, or has been, entrusted with prominent public functions by an international organization or by a State other than the United Kingdom or another EEA State,
 - (b) A family member of a person within (a),
 - (c) Known to be a close associate of a person within (a), or
 - (d) Otherwise connected with a person within (a).

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- For the purposes of determining whether a person:
 - (a) has been entrusted with prominent public functions,
 - (b) is a family member, and
 - (c) is known to be a close associate of another,

Article 3 of EU Directive 2015/849 of the European Parliament and Council of 20 May 2015 applies.

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- Article 3(9) of the 2015 Directive provides that a ‘politically exposed person’ “includes”: Heads of State, Ministers, Deputy or Assistant Ministers, MPs, members of the governing bodies of political parties, members of high-level judicial bodies, members of the boards of central banks, members of the administrative, management or supervisory bodies of State-owned enterprises.
 - Article 3(10) provides that ‘family members’, “includes”: the spouse or person considered to be the equivalent of a spouse, children and their spouses (or persons considered to be a spouse or parents of a politically exposed person).

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- Article 3(11) provides that ‘persons known to be close associates’, “means”:
 - (a) natural persons who are known to have joint beneficial ownership of legal entities or legal arrangements, or any other close business relations, with a politically exposed person;
 - (b) natural persons who have sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the de facto benefit of a politically exposed person.

The Application

- An application for an unexplained wealth order must be made to the High Court and may only be made by “an enforcement agency”.
- The National Crime Agency (‘NCA’) is one of five such agencies and applied *ex parte* to the High Court in London in February 2018 for an Unexplained Wealth Order (‘UWO’) against Mrs Hajiyeva.
- The application concerned The Property. The application was granted and Mrs Hajiyeva was ordered to provide information about how her husband acquired the property in 2009.
- Mrs Hajiyeva applied to discharge the order, *inter alia*, on the grounds: (a) her husband was not a politically exposed person; and (b) the income requirement had not been satisfied.

The Decision

- Before the Judge, Supperstone J., it was accepted that the application requirement and the holding requirement were satisfied. It was also accepted that: Mrs Hajiyeva was a “family member” of Mr Hajiyev; between March 2001 and March 2015 Mr Hajiyev was the chairman of the board of IBA; and as such was a member of the administrative and/or management body and thus was senior to a middle-ranking or junior official.

- The Judge found on the evidence:

- (a) Mr Hajiyeu was a politically exposed person because IBA was a state-owned enterprise and that he had been entrusted with prominent public functions (the contention that the trust had to be reposed by an international organization or state was rejected, it was sufficient that the character of the functions with which Mr Hajiyeu had been entrusted were prominent public functions regardless of the legal nature of the body that had entrusted them to him).

(b) There were reasonable grounds to suspect that Mrs Hajiyeva's lawfully obtained income would not have been sufficient to obtain the Property because: (i) there was reason to suspect that Mr Hajiyev was Mrs Hajiyeva's only source of income at the time of the purchase of the Property; and

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- (ii) there was no evidence that she had received significant capital or income from any source independent of her husband; and there were reasonable grounds to suspect that any monies originating from Mr Hajiyev were not lawfully obtained because:
- (1) There were multiple sources of evidence suggesting that Mr Hajiyev had been convicted of significant fraud offences in Azerbaijan.
 - (2) As a state employee between 1993 and 2015 it is very unlikely that Mr Hajiyev would have generated sufficient income to fund the acquisition of the Property.
 - (3) Although there was some evidence of Mr Hajiyev's outside business interests, this was not sufficient to undermine the suspicion in (2) above.

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- The Judge dismissed Mrs Hajiyeva's application to discharge the UWO.
 - Subsequently a further UWO was applied for and granted in respect of the golf and country club.

Private Law Remedies

Anglophone Africa

- There is a variety of remedies (of a personal and/or proprietary nature – see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] A.C. 250, UKSC) available to a victim of bribery in, for example, the procurement of a commercial contract, *inter alia*: Freezing orders; Search and Seize orders; *Norwich Pharmacal*/Third Party Disclosure orders
- Where these and other relevant orders are available within Anglophone Africa is set out below.
- First, however, is a very brief digression on the question of intra-jurisdictional enforcement interim orders.

Enforcement of private law interim remedies across borders: a digression

- It would appear that the Common Law countries mentioned on the next slide have enacted special statutory regimes to provide for the execution of decrees for any debt, damages or costs (obtained or entered up in a local court) to be enforced in the courts of another country to which the regime applies.

Enforcement of interim remedies across borders: a digression (cont.)

Country	Mechanism	Where enforceable?
Malawi	S3 of the 1912 Extension Ordinance (though may now be unconstitutional)	High Court in: Kenya, Tanzania, Uganda and Zanzibar
Tanzania	S3 of the Judgments Extension Act 1921	High Court in: Kenya, Malawi, Uganda and Zanzibar
Uganda	S1 of the Judgments Extension Act 1908	High Court in: Kenya, Malawi and Tanzania
Zambia	S1 of the Judgments Extension Decree 1908	High Court in: Kenya, Malawi, Tanzania and Uganda

Interim remedies: what's available where?

- Set out below and on the next slide in tabular form is a summary of the various types of interim relief discussed and the countries in which it is available

Type of interim relief	Countries in which relief is available
Interim injunction	Ghana, Kenya, Malawi, Nigeria, Sierra Leone, The Gambia, Tanzania, Uganda and Zambia
Interim interdict	Botswana, Lesotho, Namibia, Republic of South Africa, Swaziland and Zimbabwe
Freezing injunction (<i>Mareva</i> relief; anti-dissipation interdict)	Botswana, Kenya, Lesotho, Malawi, Namibia, South Africa, Swaziland, Uganda, Zambia and Zimbabwe
Search & seize order (<i>Anton Piller</i> relief)	Kenya, Lesotho, Malawi, Namibia, Nigeria, South Africa, Swaziland, Uganda, Zambia and Zimbabwe (and possibly Ghana, Tanzania, Sierra Leone and The Gambia)

Interim remedies: what's available where? (cont.)

Type of interim relief	Countries in which relief is available
<i>Norwich Pharmacal</i> relief	South Africa
<i>Mandament van spolie</i>	Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe
<i>Arrest suspectus de fuga</i>	Botswana, Lesotho, South Africa, Swaziland and Zimbabwe (all provided for in rules of court but doubtful that court would grant this relief)
Arrest of an absconding defendant	Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, The Gambia, Uganda and Zambia