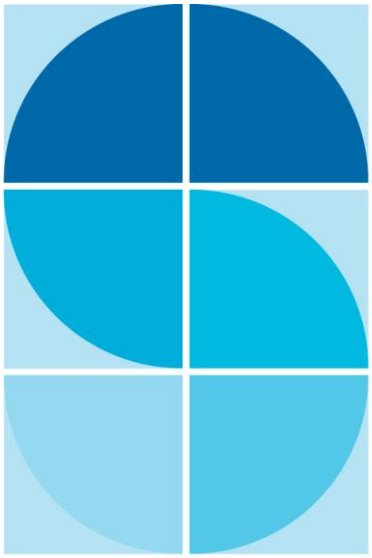

serle court

Unexplained Wealth Orders:

Practical and Legal Issues

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A. Introduction

1.01 An Unexplained Wealth Order (UWO) may be sought by certain public authorities (the National Crime Agency, the Serious Fraud Office, HMRC, the Financial Conduct Authority and the Crown Prosecution Service) against those holding public office or suspected of serious crime. If made, the order requires the respondent to provide a statement setting out the nature and extent of his interest in particular property, the means by which it was obtained and other specified information and documents. If the respondent does not comply with each of the order's requirements, or at least purport to do so, then it will be presumed that the property represents the proceeds of crime for purposes of civil proceedings to recover it under Part V of the Proceeds of Crime Act (the "**2002 Act**"). Furthermore, it is a specific criminal offence deliberately or recklessly to make false or misleading statements in response to a UWO and a failure to comply may also be sanctioned as a contempt of court or in other ways. Although non-compliance has specific consequences for civil recovery proceedings, the material obtained can also be used for purposes of other civil and criminal proceedings.[1] There are, additionally, powers to grant freezing orders ancillary to the order for information.

1.02 UWOs, which arise from powers enacted by the Criminal Finances Act 2017 (the "**2017 Act**"), are thus a potentially valuable tool for obtaining information, particularly since the threshold requirements for obtaining them are not on the face of it very onerous. The Explanatory Notes to the 2017 Act observe that under the existing provisions of the 2002 Act enforcement agencies often had grounds to suspect that identified assets were the proceeds of crime, but were unable to freeze or recover the assets due to an inability to obtain evidence, often because of the non-cooperation of other jurisdictions.[2] UWOs are intended to change that.

[1] It cannot, be used in evidence in criminal proceedings save for limited exceptions, including for purposes of criminal confiscation orders.
[2] Criminal Finances Act 2017 Explanatory Notes, at [12]

1.03 This document provides an overview of the powers, as well as addressing the consequences of non-compliance and their application to property held through companies and trusts. How the courts will apply the new powers remains uncertain in a number of significant regards. Nonetheless, the courts' approach to existing civil jurisdictions to grant injunctions and order the disclosure of information offers relevant guidance, which is drawn on here.

B. Requirements for obtaining an order

1.04 The basic requirements for obtaining an order are that:

- There must be reasonable cause to believe that the respondent has an interest in the relevant property and its value is greater than £50,000.
- There are reasonable grounds for suspecting that the respondent's legal sources of income reasonably ascertainable at the time of making the application would have been insufficient to obtain the property.
- Either (a) the respondent is a 'politically exposed person' or (b) there are reasonable grounds for suspecting that the respondent or a person connected with him has been involved in serious crime.
- It is just in all the circumstances to grant the order.

1.05 Each of these factors merits closer examination.

1.06 ***(i) There must be reasonable cause to believe that the respondent has an interest in the relevant property and its value is greater than £50,000*** The respondent must be the person whom the enforcement authority thinks holds the property with which the application is concerned.[3] Property for these purposes encompasses (a) money, (b) all forms of property, whether real or personal, heritable or moveable, and (c) things in action and other intangible or incorporeal property.[4] It is, in other words, expansively defined so as to encompass all property. Moreover, it does not matter where in the world the

[3] s 362A(2)(b)
[4] s 414(1)

property is situated.[5] The respondent himself may be situated anywhere in the world.[6]

1.07 The language of "*holding*" property is common to other parts of the 2002 Act. In s 84 of the 2002 Act (in Part 2, dealing with confiscation orders), it is provided that property is held by a person if he holds an interest in it.[7] The UWO provisions contain an expanded definition of "*holding*" which encompasses, among other things, all property held as beneficiary under a settlement.[8] It is also specifically provided that property is obtained if a person obtains an interest in it.[9] An interest in land encompasses a legal or equitable interest and a power, while an interest in anything else encompasses a right.[10]

1.08 The court "*must be satisfied that there is reasonable cause to believe*" that the respondent has such an interest in the property and its value is greater than £50,000. This test was introduced by way of an amendment to the Bill as originally drafted, which had required the court to be "*satisfied*" in this respect (by implication, on the balance of probabilities). It is again used elsewhere in the 2002 Act and common to a number of other statutes. In particular, it is the standard applicable to the requirement to show that the alleged offender has benefited from his criminal conduct for purposes of obtaining a restraint order under Part 2 of the 2002 Act. In that context, the Court of Appeal has recognised that, at the early stage at which such orders are sought, "*there will be many uncertainties*" and, whilst a detailed examination is required of the material put before the court, the presence of uncertainties as to a state of affairs is not incompatible with the existence of a reasonable cause to believe it exists.[11]

[5] ibid.
[6] s 362A(2)(b)
[7] s 84(2)(a)
[8] s 362H, considered further below
[9] s 414(3)
[10] ibid.
[11] R v Windsor [2011] EWCA Crim 143 at [53]; Jennings v Crown Prosection Service (Practice Note) [2005] EWCA Civ 746; [2006] 1 WLR 182 at [44]

1.09 This accords with a more general recognition in the authorities of the difference between the evidence required to assess risk at an interim stage of proceedings and that required at the final stage. The speech of Lord Nicholls in Re H (Minors) [1996] A.C. 563, for example, contrasted the evidence required at an interlocutory stage of care proceedings to make an interim care order or an interim supervision order under s 38 of the Children Act 1989 (where the relevant test is "*reasonable grounds for believing*" that the relevant conditions set out in s 31(2) of the Act are satisfied), with that required at the final stage where the court, before making a care order, had to be satisfied as a threshold condition that the child was suffering or was likely to suffer significant harm.[12] As Rix LJ observed in construing the test applicable to pre-action disclosure under the CPR:

> ***"****Where the future has to be predicted, but on an application which is not merely pre-trial but pre-action, a high test requiring proof on the balance of probability will be both undesirable and unnecessary: undesirable, because it does not respond to the nature and timing of the application; and unnecessary, because the court has all the power it needs in the overall exercise of its discretion to balance the possible uncertainties of the situation against the specificity or otherwise of the disclosure requested."*[13]

1.10 Thus quite apart from any specific indication given by the language of the statute, the interim context of the order informs the judicial view of the threshold test. This seems to be the basis on which, in CPS v Compton [2002] EWCA Civ 1720, Simon Brown LJ (at [38]) said that the standard for determining whether a defendant has an interest in property for the purposes of making a restraint order at the pre-confiscation stage is that of the good arguable case test applicable to civil freezing orders, even though the statute does not in that instance explicitly identify a threshold test.

1.11 Recent authorities in the civil arena have confirmed that the merits threshold as regards both freezing orders and *Norwich Pharmacal* orders is that of a "*good*

[12] c.f. Bestfort Developments v Ras al Khaimah Investment Authority at [79]-[80]
[13] Black v Sumitomo Corporation [2002] 1 WLR 1562, at [72]

arguable case", which in the most cited formulation is described as "*a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success.*" [14] Familiarity with this test may well colour the civil courts' application of the "*reasonable cause to believe*" test, yet the latter seems if anything to impose a somewhat lower threshold. The Court of Appeal has observed (in the context of the threshold that an applicant for a freezing order must meet with regard to demonstrating the existence of assets on which the order can bite) that there is "*not much difference*" between the tests of "*good arguable case*" and "*grounds for belief*". [15] In that situation it nonetheless adopted the latter test, on the basis that since a claimant cannot necessarily be expected to know of the existence of assets of a defendant, it should be sufficient that he can satisfy a court that there are grounds for so believing. The logic of that distinction seems apt in the present context. If all that need be shown is a reasonable cause to believe a state of affairs, the applicant may frankly admit that it does not know whether it exists, yet cite reasonable grounds for believing it to be so. In asserting the existence of a good arguable case, by contrast, the applicant is pinning his colours to the mast and asserting the existence of a state of affairs (even if that case may be one that is little more than barely capable of serious argument). As the Court of Appeal observed, the difference between these two approaches will in practice generally be slight.

1.12 ***(ii) There are reasonable grounds for suspecting that the respondent's legal sources of income reasonably ascertainable at the time of making the application would have been insufficient to obtain the property*** The applicable threshold here is even lower than that of reasonable grounds for believing, requiring only the existence of reasonable grounds for *suspecting*. Again, the phrase appears elsewhere in the 2002 Act as well as in other statutes, notably in connection with statutory powers of arrest by a constable. The authorities on the latter make clear that the threshold is a low one and a "*very limited requirement*" which could be satisfied where, for example, someone

[14] *The Niederschcen* [1983] 2 Lloyd's Rep 600, at 605Freezing orders: Holyoake v Candy [2016] 3 WLR 357; Norwich Pharmacal orders: Ramilos Trading v Buyanovsky [2016] EWHC 3175 (Comm) at [23].
[15] Ras al Khaimah Investment Authority v Bestfort Developments [2017] EWCA Civ 1014, at [39]

"*could possibly*" be associated with a robbery.[16] One may be dealing with a preliminary stage of an investigation and it is not necessary even to have formulated a prima facie case.[17] These authorities have been taken to apply equally to construing the phrase in the context of the 2002 Act.[18] The present context differs, in that it is for the court to determine at the outset whether reasonable grounds for the relevant suspicion exist, which must be a purely objective question (whereas in the context of, for example, a power of arrest the question is partly a subjective one and the court's role arises only on a subsequent challenge). Nonetheless, there seems no reason to doubt that the existing authorities' emphasis on the lowness of the threshold will equally apply.

1.13 The sources of the respondent's income that must be considered for these purposes are those "*reasonably ascertainable from available information at the time of the making of the application for the order*" and encompass earnings from both employment and assets (presumably, including any capital gains from the latter).[19] What is ascertainable about the respondent's income is thus to be assessed objectively. How onerous an obligation does this place on the prosecuting authority to investigate the respondent's sources of income so as potentially to reveal a source that may have been sufficient to acquire the property concerned? On the one hand, the other powers of investigation available to the authorities under the 2002 Act are substantial. Furthermore, since applications for UWOs may be made without notice to the respondent[20] and, one would anticipate, commonly will be so as to avoid the risk of the respondent taking steps to frustrate a subsequent claim to recover the property concerned, the authority will be subject to a duty of full and frank disclosure which encompasses an obligation to make proper enquiries and disclose any material facts that they reveal.[21] On the other hand, UWOs are "*an investigation tool…intended to assist in building evidence*" and thus potentially

[16] See the summary in Parker (aka Michael Barrymore) v Chief Constable of Essex Police [2017] EWHC 2140 (QB) at [32] and [37].
[17] O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] A.C. 286, at 293.
[18] For example, Chadwick v National Crime Agency [2017] UKFTT 0656 (TC) at [127]-[130]
[19] s 362B(6)(d)
[20] s 362I(1)
[21] Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 at 1356

of greatest assistance at a relatively early stage when the available information may be limited, even for purposes of identifying 'known unknowns' with regard to the respondent's possible sources of income.

1.14 The Draft Revised Code of Practice issued under the s 377 of the 2002 Act and providing guidance on the use of UWOs (the "**Draft Code of Practice**") suggests that applicants should be able to explain their suspicion by reference to disclosable intelligence or information about, or specific behaviour by, the person or entity concerned. It also suggests, surely correctly, that information reasonably ascertainable at the time of the application will extend to any relevant information that is publicly available, in whatever jurisdiction. The availability of such information is now greatly enhanced, particularly as a result of publicly available registers of beneficial ownership, and it is to be anticipated that the court will generally expect all relevant searches to have been made. It also seems likely that the information reasonably ascertainable would extend to information already in the government's hands, such as through relevant tax records, though only insofar as it could be obtained on making reasonable and proportionate enquiries (the extent of which may need to be explained in evidence where there is reason to think that such records could exist but have not been found). By contrast, it seems unlikely that, for purposes of meeting this jurisdictional threshold or complying with the duty of full and frank disclosure, applicants would be required to take steps to obtain information that is not in the public domain or reasonably identifiable from the records of government agencies. In particular, they would not be required to seek to obtain information through the assistance of the courts or other authorities of overseas jurisdictions (the difficulty sometimes encountered with such procedures providing part of the impetus for the creation of the new powers). As expanded on below, the fact that the information sought may be obtainable from another source will nonetheless be material to the exercise of the court's discretion whether or not to make the order. For this reason, where some other potential source for the information can be identified it will generally need to be brought to the court's attention on a without notice application, along with the reasons for not pursuing that source.

1.15 The question of the respondent's ascertainable sources of income as at the time of the application, being an objective question concerned with what is reasonably knowable, ought not to be in much doubt. In many instances, a straightforward comparison can then be drawn between the respondent's financial circumstances and the value of the property with which the application is concerned. The low threshold imposed by the 'reasonable grounds for suspecting' test may have a useful role to play in instances where ascertaining the value of the relevant property is difficult or potentially controversial. It is to be assumed that the respondent obtained the property for its market value (presumably, at the date on which it was acquired where that is known).[22] Account must be taken of any mortgage or other security that it is to be assumed may have been available to the respondent for the purpose of obtaining the property. This seems to imply that no account need be taken, however, of any unsecured lending, assuming (as seems correct) this is not to be taken to fall within the definition of income.[23]

1.16 The legality of the means by which income was obtained is to be assessed by reference to the laws of the country where the income arose.[24] It seems likely that the low evidential threshold will in many instances play a significant role with regard to the legality question. For example, it may be that it can be ascertained that the respondent has sources of income from other assets connected with him, the legality of whose ultimate source cannot be ascertained. The Court of Appeal has recently indicated that it would not be sufficient, for purposes of establishing grounds for belief that a respondent to a freezing order had assets on which the order could bite, just to show that the respondent was apparently wealthy so must have assets somewhere.[25] The position would be other were the court only required to find reasonable grounds for a suspicion and, by the same token, it seems likely that such generalising assumptions will be permitted to play a role.

[22] s 362B(6)(b)
[23] s 362B(6)(a)
[24] s 362B(6)(c)
[25] Ras al Kaimah v Bestfort (supra) at [39]

1.17 ***(iii) Either (a) the respondent is a politically exposed person or (b) there are reasonable grounds for suspecting that the respondent or a person connected with him has been involved in serious crime*** The concept of 'politically exposed person' (or 'PEP') is derived from EU anti-money laundering legislation. As set out in the 2002 Act (as amended by the 2017 Act), it refers to an individual who is, or has been, entrusted with prominent public functions by an international organisation or a state other than the UK or another EEA State, or a family member or known close associate of, or person otherwise connected with, such an individual.[26] The concepts of being entrusted with prominent public functions, family member and known close associate are each expanded by reference to the Fourth Anti-Money Laundering Directive (Directive 2015/849/EU).[27] The category of persons "*otherwise connected with*" a PEP, though, is to be construed by reference to English legislation, namely s 1122 of the Corporation Tax Act 2010, which contains an expansive definition.[28]

1.18 In contrast to the provision relating to persons involved in serious crime, where the requirement is of reasonable grounds for suspecting such involvement, no express words qualify the requirement that the court be satisfied that the respondent is a PEP. So far as PEPs are concerned, it is likely to be a matter of public record whether a person occupies an office satisfying the definition. Whether persons are family members of, or in particular whether they are known associates of or connected with, a PEP may well be more susceptible to dispute. The language of "*satisfied*" seems to suggest that the relationship will need to be demonstrated on the balance of probabilities. However, there is a persuasive argument that that test must necessarily be construed to take account of its application, as here, to an interim hearing which may well be taking place without notice to the respondent (so that it is not yet even known what the respondent has to say in response to the allegation). It is hard to see how a determination on the balance of probabilities can be made of the same kind that would take place after a trial, or even after (say) a summary judgment

[26] s 362B(7)
[27] s 362B(8)
[28] s 362B(9)(b)

application. Taking account of the surrounding context of the words of the statute, it may be sensible to construe the test as requiring the court to reach the view that the applicant appears to have the better argument and is more likely than not ultimately to succeed, thus resembling the test applicable to applications for service out of the jurisdiction.[29]

1.19 The alternative ground, namely the respondent's involvement in serious crime (or his connection with a person so involved) requires only that the court be satisfied of the existence of a reasonable suspicion. "*Serious*" crime is defined by reference to an expansive list in the Serious Crime Act 2007 (see in particular Schedule 1 to that Act). Notably, it includes money laundering offences: it is an offence to transfer or conceal property which the person even suspects to be a benefit from criminal conduct, so that the respondent holding property derived from a still wider range of criminal offences (or even suspecting that he does) can be brought within the category of serious crime.[30] Further, it is good enough for the respondent to be suspected of *involvement* in serious crime: under the 2007 Act, this extends to conduct facilitating another's commission of an offence and even to circumstances where the respondent "*has conducted himself in a way that was likely to facilitate the commission by himself or another person*" of a serious offence.[31] The serious crime may have been committed anywhere in the world: if outside the UK, the conduct must be criminal both under UK law and the law of the place where it occurred.[32]

1.20 ***(iv) It is just in all the circumstances to grant the order*** If the above threshold requirements are met, the court *may* make an order, but is not required to do so. The court will need to be satisfied that it is just in all the circumstances to make the order sought, including with regard to human rights considerations. Given that the threshold requirements do not appear especially strict, the court's discretion is likely to play a significant role in regulating the exercise of the jurisdiction. The exercise of the discretion will be fact-specific, but guiding

[29] C.f., in this regard, Brownlie v Four Seasons Holdings Incorporated [2017] UKSC 80
[30] s 327(3) of the 2002 Act (but note the court's disapproval of excessive use of money laundering offences in R v GH [2015] UKSC 24 at [49]
[31] s 2(4)(c) of the 2007 Act
[32] s 2(5) of the 2007 Act

principles will no doubt emerge in due course from the case law. The following are some preliminary observations.

1.21 The making of a UWO of course involves a degree of intrusion into the affairs of private parties and such compulsory intrusion will not be made without good reason. Much has been made of the reversal of the burden of proof which the statutory mechanism provides for on a failure to comply. However, the significance of this can perhaps be exaggerated. Whenever the court requires the production of information in civil proceedings, the order must be complied with or serious procedural consequences may follow. Commonly, orders are made in a form such that non-compliance will be punishable (potentially, by imprisonment) as a contempt of court.

1.22 A distinction between UWOs and, for example, *Norwich Pharmacal* orders or disclosure orders ancillary to freezing orders, however, is that in the latter instances the court will have considered the applicant's substantive claim and found that it has a good arguable case. There is no such merits threshold applicable to pre-action disclosure applications under the CPR, but the merits of the potential claim are nonetheless relevant at the discretion stage.[33] UWOs are explicitly concerned with aiding investigations and do not turn on any established likelihood of proceedings being commenced. Nonetheless, it is suggested that the application's relation to a possible future claim that has been identified may be relevant (and in some instances carry considerable weight) in the exercise of the discretion. By analogy with concepts familiar to civil courts through the *Norwich Pharmacal* jurisdiction, for example, applications are likely to be especially persuasive where it can be shown that the information sought may supply the missing piece of the jigsaw in an otherwise seemingly meritorious potential claim (most likely, but not necessarily, under Part V of the 2002).

1.23 Relatedly, it is suggested that whether the information sought is available by some other means (and what those means are) will be material to the exercise of

[33] Smith v Secretary of State for Energy and Climate Change [2014] 1 WLR 2283

the discretion. Especially relevant in this regard may be the scope, in the case of respondents resident abroad, for obtaining material with the assistance of overseas courts or investigatory authorities. As noted above, however, a key policy concern in relation to the introduction of UWOs was to prevent the non-cooperation of overseas bodies hampering the pursuit of investigations in cases of justifiable suspicion. In the light of this, where even marginal advantages are offered by the pursuit of an application in the English court, for reasons, say, of speed or cost, the court seems likely to be sympathetic.

1.24 The latter considerations will overlap with more general questions as to whether the English court is the appropriate forum for the granting of an order of the kind sought. In theory, the legislative provisions permit UWOs even in the absence of any connection between the English jurisdiction and any of the respondent, the property concerned and the alleged wrongdoing. In practice, the absence of any such nexus would, without more, seem a strong ground for refusing the application on the basis that it would be an exorbitant exercise of the court's jurisdiction.[34] However, in some circumstances an order might conceivably be sought to assist the authorities of other jurisdictions, which might by itself supply a sufficient rationale. Particularly where the relevant property is located inside the jurisdiction and/or there is a sufficient connection with the UK for purposes of proceedings under Part V of the 2002 Act, the evidential presumption arising on non-compliance with the order offers a powerful reason why orders should be made by the English court notwithstanding that the respondent is otherwise beyond its reach.

1.25 The court's discretion also extends to the permitted scope of any order made. The statute sets out three particular matters which the respondent may be required to provide in his statement in compliance with a UWO, namely (a) the nature and extent of his interest in the relevant property; (b) explaining how he obtained the property (including, in particular, how costs incurred were met); and (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. It further states

[34] See, for example, Mackinnon v Donaldson Lufkin and Jenrette Corp [1986] 1 Ch 482

that the respondent may be required to set out "*such other information in connection with the property as may be specified in the order*."[35] Particularly having regard to the consequences of non-compliance and given that the respondent may not yet be a party to substantive proceedings and is only suspected of wrongdoing, it seems likely that the court will keep the use of this latter catch-all provision within narrow bounds and limit any further information to what is strictly necessary to secure the overall purpose of the order. For the same reason, it will be astute to ensure that the orders are drafted so as to be clear and specific, which is also of crucial importance in connection with the consequences of non-compliance.

C. Compliance and sanctions

1.26 The following points arise with regard to the effect of the order and the respondent's compliance (or non-compliance) with it, which are further examined below:

- The statute contains 'intrinsic' sanctions for non-compliance, in the form of an adverse presumption in civil recovery proceedings and criminal penalties for false or misleading statements.
- It is submitted that this is without prejudice to other potential consequences of breaching the court order, such as committal proceedings or procedural sanctions.
- The combined effect of these consequences is to require strict compliance, including making reasonable enquiries so as to provide accurate information.

1.27 ***The statute contains 'intrinsic' sanctions for non-compliance, in the form of an adverse presumption in civil recovery proceedings and criminal penalties for false or misleading statements*** If the respondent fails "*without reasonable excuse*" even to purport to comply with the requirements of the order within the period specified, then the property to which it relates is to be presumed to be recoverable property for purposes of proceedings under Part V of the 2002

[35] s 362A(3)

Act.[36] This provision was controversial when the new powers were proposed. However, it seems questionable how significant a role it will play in practice.

1.28 In the first place, all that the respondent need do to avoid the presumption arising is *purport* to comply with the order's requirements.[37] Quite what this entails seems likely to attract argument. The statutory provisions specify that the respondent is to be taken to have failed to comply unless *each* requirement of the order is at least purported to be complied with.[38] So simply serving a blank document on time, for example, would not seem to relieve the respondent on the ground of purported compliance where a number of specific orders for the provision of information had been made. The specific criminal sanctions for false or misleading statements seem designed further to hem in the respondent in this regard. Even so, it may well be that even patently inadequate responses will, if related to each particular requirement of the order, be held to amount to purported compliance.

1.29 Secondly, however, even where the presumption arises it is expressly a rebuttable one. Where, in Part V proceedings, the prosecutor had set out the basis of a case (or even suspicion) that the property was recoverable property and the respondent produced nothing in response, the court would be bound in any event to draw an adverse inference, as it is fully entitled to do.[39] Where, on the other hand, the respondent subsequently puts forward a substantive case to dispute that the property concerned is recoverable property (no doubt also claiming that there was a reasonable excuse for the original failure to comply with the UWO), once the court has heard all the evidence presumptions will generally play a limited role in the final determination of that issue unless the evidence happens to be unusually finely balanced.

[36] s 362(c)(2)
[37] s 362(c)(5)(a)
[38] s 362(c)(5)(b)
[39] See, for instance, SOCA v Gale and others [2009] EWHC 1015

1.30 As noted, it is a criminal offence knowingly or recklessly to make a false or misleading statement in purported compliance with a UWO, punishable by imprisonment of up to two years or a fine (or both).[40]

1.31 ***It is submitted that this is without prejudice to other potential consequences of breaching a court order, such as committal proceedings or procedural sanctions*** Quite apart from the particular sanctions provided for in statute, a UWO is a court order requiring the respondent to provide various information, which like any other such court order must be obeyed. The court has wide powers to grant orders so as to enforce compliance with its previous orders under s 37(1) of the Senior Courts Act 1981 and there seems no reason why this jurisdiction should not be invoked in the context of UWOs which have not been complied with, whether the failure is partial or total.[41] It may well be, for example, that an order for cross-examination can be obtained on a statement given in purported compliance, by analogy with the practice in freezing order cases.[42] Furthermore, the respondent's breach of the order should be punishable by committal proceedings, which are potentially available in circumstances well outside those in which the breach takes the form of a deliberate or reckless falsehood.

1.32 ***The combined effect of these consequences is to require strict compliance including making all reasonable enquiries so as to provide accurate information*** As noted, the statute specifically envisages that UWOs will require the respondent's statement to set out the nature and extent of his interest in the relevant property and explain how he obtained the property. There is no qualifying language, such as "*to the best of the respondent's knowledge*". The obligation that such an order places on the respondent is to provide an accurate answer. If he fails to do so, he will be in breach of the order and technically in contempt of court, even if the inaccuracy was merely inaccurate. At any rate, so as to avoid being in contempt of court, the respondent must take all reasonable

[40] s 362E
[41] AJ Bekhor & Co Ltd v Bilton [1981] Q.B. 923
[42] See, for example, Jennington International v Assaubayev [2010] EWHC 2351 (Ch)

steps to obtain the relevant information and give an honest answer in light of that information.[43]

D. Trust and company structures

1.33 It is inherently unlikely that proceeds of crime will be held openly in the name of a corrupt official or other serious criminal. Commonly, they will be held (or nominally so) through company and/or trust structures, or other devices of varying degrees of complexity designed to obscure the assets' true ownership or source. The evidential difficulties of proving a criminal source where such devices are involved seems to have been a major factor in encouraging the introduction of the new powers. How they will operate in relation to such structures is therefore of key importance.

1.34 The 2007 Act contains specific provisions for the purpose.[44] The basic scheme is to extend the circumstances in which a person is to be taken to "*hold*" property to those where he "*has effective control over the property*" at issue, or is a trustee or beneficiary (whether actual or potential) of a settlement in which the property is comprised.[45] The concept of "*effective control*" is further defined so as to apply to a person if, "*from all the circumstances, it is reasonable to conclude that the person – (a) exercises, (b) is able to exercise, or (c) is entitled to acquire, direct or indirect control over the property*."[46] Importantly for the logic of these provisions, it is also provided that for purposes of establishing whether the respondent "*holds*" the property concerned it does not matter that there are others who also hold the property.[47]

1.35 Questions once again arise as to how the evidential threshold will be construed. The extension to the definition of "*hold*" in s 362H does not explicitly state that its provisions are subject to the overall "*reasonable cause to believe*" test

[43] Bird v Hadkinson [2000] C.P.Rep.21
[44] s 362H
[45] s 362H(2)
[46] s 362H(3)
[47] s 362B(5)(a)

applied by 362B(2) to the requirement that the respondent hold the property concerned. Such a construction seems the natural one, but account also needs to be taken of the different threshold provided for the concept of "*effective control*" (namely, of whether it is "*reasonable to conclude*" that the relevant control exists, which seems to suggest a higher threshold than either that of 'reasonable to suspect' or 'reasonable to believe'). Nor does a finding that it is *reasonable* to conclude something necessarily equate to actually concluding it. As with the other phrases employed, moreover, there is again a persuasive argument that the threshold is to be construed in the light of the early stage at which Parliament has provided for the application to be made.

1.36 Difficulty has arisen both in private civil proceedings and criminal confiscation proceedings with regard to the treatment of assets held in companies and trusts seemingly connected with the criminal or defendant. That is so primarily because, as a matter of property law, a company's assets belong to the company and the circumstances in which it is possible to 'pierce the corporate veil' are very limited.[48] Similarly, whilst under a fixed trust the beneficiary has an ownership interest in the trust assets, assets held in a discretionary trust or analogous arrangement do not belong to the discretionary beneficiary, whose 'interest' is limited to a right to be considered for a distribution.[49] The relevant UWO provisions apparently go a long way to cut through these difficulties, in particular by permitting an order in circumstances where there is evidence of control of assets (rather than ownership as such). This is in accordance with the direction in which the common law applicable to freezing orders has been travelling, but goes further than it has yet reached.

1.37 The 'effective control' provision is additional to the provision for beneficiaries under settlements. The latter will capture bare trusts and nominee arrangements. Since it extends to potential beneficiaries, it will also seemingly extend to discretionary beneficiaries, including those within a beneficial class, regardless of the fact that (as a matter of trust law) such a person has no property interest in the assets concerned. The 'effective control' provision may

[48] Petrodel Resources v Prest Ltd [2013] 3 WLR 1
[49] Gartside v Inland Revenue Commissioners [1968] AC 533, at 615-617

nonetheless need to be relied on in a range of scenarios involving trusts. An example is the (by no means uncommon) arrangement where a respondent has retained substantial powers in the position of protector of a trust, often in circumstances where the beneficiaries are family members or other connected persons. The circumstances in which, as a matter of trusts law, the trust assets can ultimately be treated as belonging to the respondent has been widening.[50] Nonetheless, the basis for such attacks on the trust will usually depend on details unavailable before the commencement of proceedings (such as the contents of the trust deed) and are likely to involve complicated factual disputes. Evidence of de facto control will be sufficient to enable a UWO nonetheless to be obtained in such circumstances.

1.38 The 'effective control' provision is also likely to play a significant role where assets are held in companies (or nominally so). In the context of freezing orders, it has been held that a respondent is not to be regarded as controlling assets merely because he does so in his capacity as director of a company.[51] However, it seems unlikely that the same will be held to apply in construing the provision of the 2007 Act since (unlike in the case of civil freezing orders) it seems clear that the scope of situations in which UWOs may be obtained extends beyond those in which the respondent has any ownership interest in the property concerned. Furthermore, the definition of effective control appears capable of encompassing a wide class potential respondents beyond directors (or even those who would satisfy the definition of shadow directors), although it can be argued that the language implies the need for some continuing control, or continuing ability to exercise control, rather than a one-off transaction.

1.39 It is specifically provided by the statute that, where the relevant property is held by the trustees of a settlement, the respondent may be ordered in his statement to set out specified details of the settlement.[52] A difficulty frequently encountered in general commercial litigation is that, on a substantive defendant being ordered to provide information in relation to a trust with which he is

[50] See in particular JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426 (Ch)
[51] Lakatamia Shipping Co Ltd v Su [2015] 1 WLR 291
[52] s 362A(3)(c)

connected, he responds that the trustees have refused to provide any such information to him. It may be difficult to show that, in such circumstances, there was not a "*reasonable excuse*" for failing to comply with the order for purposes of the presumption in Part V proceedings (and, indeed, generally). A powerful aspect of the UWO provisions is that they appear to permit applications (where appropriate, successively) to be made against a number of relevant parties in relation to any given property. It is specifically provided that orders may be available against trustees and, as noted above, they appear to be available against company directors as well as others with effective control of the company. Orders made in such circumstances may impinge on the privacy of third parties, such as other beneficiaries of trusts, which will no doubt be a factor for the court to take into account in the exercise of its discretion.

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