

UPDATE

English Court ruling demonstrates Unexplained Wealth Orders shouldn't be taken on face value.

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In a recent decision, which provides some reassurance for offshore service providers, the High Court dismissed the National Crime Agency's attempt to use unexplained wealth orders to seize homes in London.

The High Court of England and Wales recently (on 8 April 2020) handed down its judgment in relation to an application to discharge three unexplained wealth orders. Though the National Crime Agency (NCA) had earlier been successful in its first UWOs in relation to property held by Mrs Hajyeva (she of the infamous Harrods spending spree), the High Court decision brought this to a halt, and in doing so provided some reassurance for offshore service providers about the court's preparedness to intervene and to educate where incorrect assumptions are being made in relation to the use of UWOs.

In this case, the NCA asserted that three London properties were acquired as a means of laundering the proceeds of unlawful conduct of Rakhmat Aliyev, a former senior politician in Kazakhstan who died in prison in 2015 whilst awaiting trial for murder. The properties were all held by offshore structures, which was said by the NCA to be evidence in itself in support of the UWOs. In response, a letter was tendered by the registered owners of the properties. The letter provided extensive information about the purchase of the properties, details of the registered owners as well as who the ultimate beneficial owners were. In particular, it was said that two of the properties were owned by the ex-wife of Mr Aliyev, and the third by his son. Moreover, the purchase of the properties was said to be entirely unconnected to Mr Aliyev and any alleged criminal activities, and he was said to have never been the ultimate beneficial owner of them. Evidence was also tendered to show that Mr Aliyev's ex-wife and son both had independent means. When that explanation was not accepted by the NCA an application was made to discharge the UWOs. The Judge, after hearing full argument, granted the application and discharged the UWOs.

In doing so, he accepted that *'the NCA case which was presented at the ex parte hearing was flawed by inadequate investigation into some obvious lines of enquiry... Furthermore, I consider that the NCA failed to carry out a fair-minded evaluation of the new information provided by the UWOs and Respondents...'*. There were three aspects which he considered and dealt with in a way which should provide comfort to offshore service providers.

First, the Judge noted that the NCA *'placed significant weight on the 'complex and secretive' manner in which Property 1 was obtained and subsequently handled, eventually being transferred to a Panamanian foundation which is subject to strict secrecy laws, whilst being managed by property management companies in the UK.'* The Judge was also clearly alive to incorrect assumptions in relation to the use of offshore structures. He held that *'The use of complex offshore corporate structures or trusts is not, without more, a ground for believing that they have been set up, or are being used, for wrongful purposes, such as money laundering. There are lawful reasons – privacy, security, tax mitigation - why very wealthy people invest their capital in complex offshore corporate structures or trusts. 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.'* This should provide comfort to those faced with a UWO, that the courts will not regard the use of offshore structures as, of itself, evidence of wrong-doing. Whilst that might seem trite, it is helpful to have that confirmed in such clear and strident fashion.

Second, Mr Aliyev's ex-wife and his son argued that the properties had been purchased by them from their own means, which were unconnected with any alleged criminal activity of Mr Aliyev. In cases involving allegations of corrupt activities by politicians, assertions such as these can all too easily be taken with the proverbial handful of salt. However, the Judge considered the evidence carefully, accepted their arguments, and rejected the NCA's arguments to the contrary. Again, a helpful reminder that a forensic accounting exercise may be required and that it can, on occasion at least, reap rewards.

Third, in considering who had control over the properties, the Judge was asked to consider detailed evidence as to Panamanian law concerning the operation of foundations and how control is exercised. Again, the Judge, in detailed reasoning, set out why she accepted that control was exercised by the Foundation and its governing body the Foundation Council, and rejected the arguments of the NCA to the contrary.

This is positive news for offshore service providers. It shows that, if they become embroiled in an UWO – perhaps on behalf of a structure holding London property – a successful case can be made. If there is a good explanation, then it is worthwhile to take steps to put that explanation forward. Indeed, they may face criticism if they do not do so. As this case shows, a case brought by the NCA may not always be straight forward, and heeding the sort of inquiry and explanatory process undertaken in this case, is worthwhile. The court in this case was clearly prepared to take a stance that also helps to educate onshore authorities further about offshore structures. This will ensure that it is fully understood that the offshore finance industry is based on well understood rules of law, from the law of trusts and companies to those that apply to cross-border transactions.

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