

Unexplained Wealth Orders and Offshore Structures

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"...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." National Crime Agency v. Baker and Ors [2020] EWHC 822 (Admin) at paragraph 97.

On 8th April 2020, Mrs Justice Lang discharged three Unexplained Wealth Orders ('UWOs') that had been granted under the regime inserted into Part 8 of the *Proceeds of Crime Act 2002* ('the 2002 Act') by the *Criminal Finances Act 2017*.

The case underlines the need for criminal lawyers who seek to engage with offshore structures to be fully familiar with the civil laws governing the entities in the structure, the manner on which those entities are usually established and administered and the international context in which they operate.

It also demonstrates that those who are analysing the facts of individual cases to decide whether they justify a criminal or civil asset recovery investigation need to be sufficiently experienced in dealing with international cases that they can form a proper view as to their merits.

It is not sufficient, as the NCA did, to identify a case involving a 'high risk jurisdiction' (in this case, Kazakhstan), to dismiss a detailed explanation for what happened in the way recorded by the Judge at paragraph 95:

'95. Ms Kelly [the NCA witness] 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...'

and then simply to rely on the 'irresistible inference' cases such as *R v. Anwoir* [2008] EWCA Crim 1354 (see paragraphs 98 to 99 of Lang J's judgment).

It is, of course, right to warn against the opposite tendency, seen often enough, of analysing these case from a purely civil law perspective with insufficient experience of crime.

The Judgment

It is not possible to do justice to the judgment in a short article such as this. What follows is the briefest summary intended to illustrate these points.

The three UWOs concerned London property. The registered owners of two of the properties were Panamanian Foundations. The other property was registered in the names of a Curacao Foundation and an Anguillan company. The first and third UWOs sought information from the President of the Panamanian Foundations. The second UWO sought information from the Curacao Foundation. All three properties were initially purchased by BVI companies before being transferred to the above entities (although the relevant structures were very much more complicated than this summary

suggests). The allegation on which the NCA relied was that the acquisitions of the properties were the means of laundering the proceeds of crime of a Kazakh national (now dead).

Mrs Justice Lang examined the evidence of a connection between the Kazakh individual, his assets and the entities in some detail. This analysis demonstrates that investigators need to pay close attention to the detail of the various structures and to the links that they assert prove their case. It also demonstrates the dangers of relying on reports provided by NGOs or other publications published for different purposes.

The Judge then turned to the 'holding requirement', the 'value requirement', the 'income requirement' and the 'PEP / serious crime requirement' (see 362B of the 2002 Act).

In relation to the first property, the NCA asserted that the 'holding requirement' was satisfied because the President of the Foundation had 'effective control' over the property or was a trustee of a settlement within the meaning of the 2002 Act. The Judge considered the *Private Interest Foundation Law of Panama*, the Foundation Charter, the By-Laws of the Foundation, a Mandate Agreement and a Nominee Declaration. She concluded that the NCA had erroneously conflated the position of President with that of the Foundation Council and that the President was not in effective control of the Foundation. She went on to hold that the arrangement could fall within the broad definition of settlement (applying section 620 of the *Income Tax (Trading and Other Income) Act 2005*). However she said that the President was not a trustee. The property was not vested in him, but in the foundation. Management of the property was not vested in him either, but in the Foundation Council.

The NCA sought to satisfy the 'income requirement' by arguing that the known sources of the President's lawfully obtained income were not sufficient to justify the purchase price of the underlying property. Mrs Justice Lang, rightly, described this approach as '*artificial and flawed*'. She said that '*it cannot have been the intention of Parliament to dispense with the need for a meaningful application of the income requirement*' but acknowledged that it was '*less clear*' how the 'income requirement' was to be applied if the relevant asset is held by a trust and corporate structure. The Judge concluded (at paragraph 135) that a Court must look at the actual interest held by the Respondent and assess the 'income requirement' against the value of that interest. As she went on to say, that process would be difficult in the present case but that was because the President was the wrong Respondent.

In relation to the PEP / serious crime requirement the NCA sought to argue that the President was sufficiently connected to the Kazakh individual and / or he should have become aware of the grounds for suspicion when doing his due diligence. The Judge pointed out that the President was both a solicitor and a professional trustee and that the evidence did not establish the asserted connection between the Kazakh national and him or the Foundation asserted by the NCA.

The Judge's reasons in relation to the first property illustrate the points I make at the beginning. They are underlined by the reasoning in relation to the other properties. In relation to the Curacao Foundation there is an equally rigorous analysis of its background, creation and administration.

Conclusion

Offshore structures are often dismissed by onshore authorities as being badges of fraud which do not require serious analysis. However, the reality is that the offshore finance industry is built upon well recognised rules of law. These range from the laws of trusts, companies and other entities to rules of public and private international law. It is not possible to decide whether an offshore

structure is or has been involved in fraud without considering the rules of law on which it rests. This case demonstrates the dangers of not doing so.

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