National Crime Agency v Baker: Always Wear A Helmet When Cycling, Motorcycling or Jumping to Conclusions

In *National Crime Agency v Baker and Others* [2020] EWHC 822 (Admin) the High Court discharged three Unexplained Wealth Orders ("UWOs") and Interim Freezing Orders ("IFOs") granted in respect of three properties on an *ex parte* application by the National Crime Agency ("NCA").

The Court found that the NCA inadequately investigated obvious lines of enquiry and made unreliable assumptions regarding the source of the funds used to purchase the properties. It 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.

The Facts

The High Court granted the NCA three UWOs and related IFOs in respect of three properties whose registered owners were off-shore Private Interest Foundations ("PIFs").

The respondents sought the discharge of the UWOs on the following grounds:

1. Errors of law and approach by the NCA in the application of the requirements for making an UWO;
2. Material non-disclosure by the NCA at the *ex parte* hearing and inadequate enquiry; and
3. The information now available demonstrated that the orders were sought and made on a flawed basis.

Judgment of the High Court

The Court granted the respondents' application to discharge the UWOs.

The Court stated that its task was to determine whether the NCA's grounds for the making the UWOs were, as at the date of the discharge hearing, lawful and justified, taking into account evidence that was unavailable at the *ex parte* hearing. It emphasised that it was important not to lose sight of the limited purpose of UWOs; namely, they are simply an investigative tool to obtain information.

The Court commented on various aspects of the NCA's case.

a) The NCA's Case

As there were no known sources of income for any of the respondents, the NCA suspected that the respondent PIFs were founded and funded by Rakhat Aliyev ("RA"), a Kazakh national who had been a senior official in the Kazakh Government. RA, who died in 2015, was found guilty of various crimes in Kazakhstan in 2008. The NCA suspected that the PIFs' funds were the proceeds of RA's crimes. It also suspected that members of the Aliyev family had been involved in laundering these proceeds through the acquisition and handling of assets and that the properties were a means of laundering these proceeds.

The factors suggesting that RA was the ultimate founder of the PIFs included "strong links" between the properties and the Aliyev family and, "[f]inally, and significantly", these suspicions were strengthened by the complex and secretive manner in which the properties were obtained and handled:

- they were purchased outright by BVI companies incorporated shortly before the purchases; and
- the ownership of all of the properties was transferred in March 2013 to off-shore PIFs, entities subject to strict secrecy laws, within four days of each other.

b) The Court's Comments

i. Founding and Funding of the PIFs

In an August 2019 letter the respondents gave the NCA a detailed account of how Dariga Nazarbayeva ("DN"), RA's ex-wife, and their son, Nurali Aliyev ("NA"), had acquired the beneficial interests in the properties, founded the PIFs and arranged for the properties to be transferred to the PIFs in order to mitigate the UK's Annual Tax on Enveloped Dwellings introduced on 01 April 2013. Properties owned through off-shore corporate structures were liable to this tax whereas those owned by foundations were not.

The Court also noted that:

1. As DN is a successful businesswoman who had been named in the Forbes list of richest people in Kazakhstan and whose wealth could be identified from publicly available material, it was curious that the NCA did not mention the possibility of DN being the founder of any of the PIFs.

2. When assessing the likelihood of DN's involvement in laundering RA's suspected proceeds of crime, although the NCA had recognised that DN and RA divorced in 2007, it did not appear to have taken into account the breakdown of the relationship between DN and RA, nor that the properties were purchased after the divorce.

3. Investigation and confiscation proceedings against RA in Kazakhstan were not taken into account by the NCA. Those proceedings had confiscated RA's illegally acquired assets and had concluded that RA had not transferred illegally acquired funds or assets to DN or NA, and that neither DN nor NA held such funds or assets.

4. The NCA failed to take account of the fact that NA had no contact with RA following his parents' divorce.

5. It was surprised by the NCA's readiness, in response to the information provided about DN's estrangement from RA and the breakdown of the marriage, to rely on RA's "self-justifying and untested account" from his book in preference to DN's account and the divorce court, given that the NCA had described RA as having been involved in significant dishonesty offences.

6. Even on RA's account in his book, since the divorce all contact between RA and DN and their children was broken off. This made it "improbable" that DN and NA were involved in property transactions and money laundering on RA's behalf from 2008 onwards.

7. It was surprised that, given the 'Full and Frank Disclosure' section of its application stating that NA was a successful businessman in his own right, the NCA did not further investigate the possibility of

NA having purchased one of the properties for himself.

8. The NCA's "strong links" between the properties and the Aliyev family really meant 'links to RA', and there was no evidence to support this.

In light of this and the information provided by the respondents, the Court considered that the NCA's assumption that RA founded and funded the PIFs was "unreliable" and was rebutted by "cogent evidence" that DN and NA founded and funded the PIFs and were the ultimate beneficial owners ("UBOs") of the properties.

ii. Suspicions Based on the 'Complex and Secretive Manner' of Obtaining and Holding the Properties

The Court held that the "need for caution in treating complexity of property holding through corporate structures as grounds for suspicion" applies equally in the context of UWOs:

> 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.

Based on the principle established in *R v Anwoir* [2008] EWCA Crim 1354, the evidence on the manner in which the properties had been handled did not give rise to an "irresistible inference" that they were the product of unlawful conduct.

c) The UWO Threshold Conditions

The Court found that the UWO threshold conditions were not met:

- It was not satisfied that there was reasonable cause to believe that the respondent in relation to two of the properties 'held' the properties;

- It was not satisfied that there were reasonable grounds for suspecting that the known sources of the respondents' lawfully obtained income would have been insufficient to enable them to obtain the properties. Not only had the NCA identified the wrong respondent in relation to two of the properties and failed to take account of a mortgage obtained by the other, but the assumption that RA founded and funded the PIFs was unreliable and was rebutted by cogent evidence that DN and NA founded and funded the PIFS and were the UBOs of the properties; and

- It was not satisfied that there were reasonable grounds for believing that the politically exposed person or serious crime requirement was met. There was no evidence of a link between RA and the respondents, the PIFs or the properties, and the NCA's unreliable assumption that RA founded and funded the PIFs had been rebutted.

d) Material Non-Disclosure and Inadequate Investigation

Although there had not been material non-disclosure at the *ex parte* hearing, the Court held that the NCA case presented at the *ex parte* hearing was flawed by inadequate investigation into some obvious lines of enquiry. Furthermore, the Court considered that the NCA failed to carry out a fair-minded evaluation of the new information provided in the August 2019 letter.

Commentary

It is ultimately for the Court, not the relevant enforcement agency, to determine whether the UWO threshold conditions have been met. Thus the judgment and decision of the High Court is interposed as a safeguard between the opinion of the enforcement agency seeking the order and the consequences to the party to whom the order is addressed. The enforcement agency must satisfy the Court that the threshold conditions are met. Whilst the UWO threshold conditions are not onerous – only requiring a reasonable cause to believe and reasonable grounds for suspecting – this case makes it clear that enforcement agencies need to undertake detailed and considered investigation and analysis of all available information. Each UWO is fact-specific, so the level and depth of investigations and analysis will vary from case to case. However, it is clear from the comments of the High Court that all obvious lines of enquiry should be pursued in order to avoid unreliable conclusions and assumptions.

This is especially important when applications relate to high-net worth individuals as their property holding structures and funding arrangements can be complex. Following the Panama Papers scandal there is a tendency for complex property holding and funding structures to be damned as criminal without a second thought. Jumping to conclusions is always dangerous, and now the High Court has made it clear that these specific assumptions and conclusions are not permissible for UWOs: 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. Enforcement agencies will need to ensure that such simple reasoning does not form the basis of their applications, otherwise they may face substantial criticism from the Court and their applications may not be granted.

This case also serves as a salutary reminder as to the purpose of UWOs: they are information gathering tools, not punitive orders. Therefore, when information is provided in response to an UWO, in whatever guise, enforcement agencies must carry out further investigation and evaluation of the information provided. This must be conducted with an open and fair-minded approach, not tainted by any previous assumptions or conclusions and further assumptions should be avoided.

The NCA has said that it will appeal the High Court's decision to discharge these UWOs, so this story is not over yet. In the meantime, enforcement agencies will need to carefully consider the basis of their applications and ensure that they are not jumping to any unreliable or unfounded conclusions; at least, not without a helmet.

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