

McMafia Orders Back for an Easter Special - NCA v Baker & Others [2020] EWHC 822 (Admin)

At an ex parte hearing on 22 May 2019, Supperstone J made three UWOs, and related IFOs, pursuant to sections 362A to 362R POCA 2002. The UWOs obtained by the NCA related to three London properties worth approximately £80 million.

Broadly distilled, the UWOs (plus accompanying IFOs) and the respondents relationship to them, can be described as follows:

1. UWO1 concerned 32 Denewood Road. It was directed against Mr Baker, who is President of Villa Magna, which is the registered owner of the property ('Property 1').
2. UWO2 concerned 33 The Bishops Avenue. It was directed against Manrick. Manrick and Alderton are the registered owners of the property ('Property 2').
3. UWO3 concerns Apartments 9 and 14, 21 Manresa Road. It was directed against Mr Baker, who is President of Tropicana, which is the registered owner of the property ('Property 3').

It was the NCA's case that there was extensive evidence in support of the applications for UWOs to demonstrate that the properties were acquired as a means of laundering the proceeds of unlawful conduct by Mr Rakhat Aliyev ('RA'), a national of Kazakhstan, who died in prison in Austria on 24 February 2015.

By way of letter dated 9 August 2019, the respondents, together with the ultimate beneficial owners ('UBOs') of the three properties, voluntarily provided extensive information about the purchase and transfer of the properties, their registered owners, and the UBOs. The letter disclosed that the UBO of Property 1 and Property 3 is Mrs Dariga Nazarbayeva ('DN'), the ex-wife of RA. The UBO of Property 2 is their son, Nurali Aliyev ('NA'). However, the 9 August letter explained that the basis of the NCA's application was factually incorrect, as the purchases of the properties were unconnected to RA and his supposed criminal activities, and he was never the UBO of the properties.

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2. The Law—Obtaining a UWO

In order to obtain a UWO, an enforcement authority will need to satisfy the Court of a number of matters. The legal test for obtaining a UWO can most easily be understood by breaking down the elements into separate ‘requirements’:

- **‘the holding requirement’** – the court must be satisfied that there is reasonable cause to believe that the respondent ‘holds’ the property;
- **‘the value requirement’** – the court must be satisfied that there is reasonable cause to believe that the value of the property is greater than £50,000;
- **‘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 purpose of enabling the respondent to obtain the property;
- **‘the PEP or serious crime requirement’** - The court must be satisfied that: (a) the respondent is a PEP; or (b) that there are reasonable grounds for suspecting that: (i) the respondent is or has been involved in serious crime (whether in the UK or elsewhere); or (ii) a person connected with the respondent is, or has been, so involved.

3. Application to discharge the UWOs

On 10 and 11 March 2020, Lang J heard an application by the respondents to discharge the three UWOs, and related IFOs, made by Supperstone J. Whilst there were three grounds for discharge [§58], the judgment majors on the fact that there is information now available which demonstrates that the UWOs were sought and made on a flawed basis. In addition, Lang J was invited to consider discharge on the basis of material non-disclosure by the NCA at the ex parte hearing, and inadequate investigation by the NCA. For the reasons set out below, Lang J discharged all three UWOs, and related IFOs.

THE TEAM

Michael Bowes QC

Michael is Joint Head of Outer Temple Chambers. Michael is highly regarded as an expert in civil and criminal ‘cross-over’ work. He is described as “...one of the go-to barristers in England for a corporate crisis. He has a very practical approach to solving some of the more complicated problems.” “A great crossover practitioner from the Criminal Bar.

Michael specialises in business crime, civil fraud, financial services and international sanctions.

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UWO1

After considering the evidence relating to the funding of Property 1, Lang J stated that: *“the evidence as to the manner in which Property 1 has been handled in this case does not give rise to an ‘irresistible inference’ that it is the product of unlawful conduct”* [§99]. She went on to conclude that the NCA’s assumption that RA was the founder of Villa Magna and provided its funds, was unreliable. Further, that it was rebutted by the cogent evidence that DN was the founder of Villa Magna and the source of its funds, and the ultimate beneficial owner of Property 1 [§100].

Although Lang J acknowledged that the ‘value requirement’ was *“clearly met”* [§125], she was not satisfied that there was reasonable cause to believe that Mr Baker ‘holds’ Property 1 [§123]; nor was she satisfied that that there were reasonable grounds for suspecting that the ‘income requirement’ was met [§139] nor that the ‘PEP or serious crime requirement’ was met [§154].

UWO2

After considering the evidence relating to the funding of Property 2, Lang J stated that: *“the evidence as to the manner in which Property 2 has been handled in this case does not give rise to an ‘irresistible inference’ that it is the product of unlawful conduct”* [§196]. She went on to conclude that the NCA’s assumption that RA was the founder of Manrick and provided its funds, was unreliable. She also observed that it was rebutted by the cogent evidence that NA was the founder and beneficiary of Manrick, and the original source of its funding for the purchase of Property 2 was a legitimate bank loan [§197].

Lang J acknowledged that in this instance both the ‘holding requirement’ [§198] and ‘value requirement’ [§199] were met, but indicated that she was not satisfied that that there were reasonable grounds for suspecting that the ‘income requirement’ was met [§210] nor that the ‘PEP or serious crime requirement’ was met [§216].

UWO3

As with UWO1 and UWO2, after considering the evidence relating to the funding of Property 3, Lang J stated that: *“the evidence as to the manner in which Property 3 has been handled in this case does not give rise to an ‘irresistible inference’ that it is the product of unlawful conduct”* [§166]. She went on to conclude that the NCA’s assumption that RA was the founder of Tropicana and provided its funds, was unreliable. In addition, it was rebutted by cogent evidence that DN was the founder of Tropicana and the source of its funds, and the ultimate beneficial owner of Property 3 [§167].

Although Lang J acknowledged that the ‘value requirement’ was *“clearly met”* [§170], she was not satisfied that there was reasonable cause to believe that Mr Baker ‘holds’ Property3 [§169]; nor was she satisfied that that there were reasonable grounds for suspecting that the ‘income requirement’ was met [§171] nor that the ‘PEP or serious crime requirement’ was met [§172].

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Material Non-disclosure and inadequate investigation

Although Lang J did accept the respondents' submission that the NCA's case which had been presented at the *ex parte* hearing was flawed by inadequate investigation into some obvious lines of enquiry [§68 to §70, §178 & §217], she did not go so far as to suggest that there had been any material non-disclosure at the *ex parte* hearing [§217].

4. Summary & Takeaway

In summary, having considered all the available evidence fully, and all the arguments advanced by the parties, the court found that the evidence adduced by the NCA was insufficient to meet the relevant statutory criteria. It is, therefore, a case which turns on its facts rather than any principle of law. However the following three takeaways are worthy of note:

1. **“Complex and secretive” transactions do not always mean unlawful conduct** – the NCA placed considerable reliance on the “*complex and secretive*” manner in which (in particular) Property 1 was obtained and subsequently handled. The court relied on existing case law to re-iterate an important principle:

“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” [§97].

2. **The NCA must be careful not to place over reliance on reports produced by NGOs** – the judgment will be a salutary reminder to the NCA that they must not over rely upon reports from NGOs, and certainly not at the expense of their own investigations. Lang J observed that: *“The report on RA by Global Witness (which is a campaigning organisation whose goal is to expose corruption) was heavily relied upon by Ms Kelly in her investigation”* [§87]. Such comments must be read in the light of her conclusion that overall the NCA's investigation was inadequate and so flawed. This is likely to have ramifications for NGO's in the future provision of information to government agencies, and the scrutiny that government agencies will need to apply to the information provided.

3. **The inadequacy of the NCA's investigation** – the court held that the NCA's initial application for UWOs was *“flawed by inadequate investigation into some obvious lines of enquiry”* and that *“the NCA failed to carry out a fair-minded evaluation of the new information provided by the UBOs and Respondents under cover of the letter of 9 August”* [§217]. Such serious criticisms are likely to have an effect on future NCA applications for UWOs.

THE TEAM

Oliver Powell

Oliver is ranked in both Chambers & Partners (UK) and The Legal 500. One solicitor observed: *“He is superb to work with. He works night and day for his clients and always gets great results”*. Oliver is praised as *“an extremely confident and charming advocate”*. He undertakes instructions that involve the regulation of business activity and commerce. His practice encompasses: asset forfeiture & civil recovery; business crime; commercial fraud; financial services; indirect tax and sanctions.

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Conclusion

As at the time of writing, it is understood that the NCA “disagrees with the judgment and will appeal”. The authors opine that the decision to discharge the three UWOs was fact based and does not seem to me to involve any disputed principles of law, both in relation to the relevant statutory provisions and the relevant case law. On this basis, they are interested to see on what premise such an appeal is mounted.

The Authors

Michael Bowes QC and Oliver Powell were consulted on the Criminal Finances Bill, and in particular on UWOs, by Transparency International during the Bill’s passage through the two Houses. Their analysis and commentary on the Bill was used by MPs in preparing for debates in the House of Commons.

Michael and Oliver’s experience in this area means that they can speak authoritatively about the Criminal Finance Act 2017 and UWOs. In particular, they are ideally placed to advise those affected by UWOs and IFOs.

THE TEAM

Oliver Powell

Oliver is a contributor to ‘Lissack & Horlick on Bribery’ (Third edition), LexisNexis (to be published in 2020) and ‘Millington & Sutherland Williams on the Proceeds of Crime’ (Sixth Edition), OUP (to be published in 2021).

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