IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :-

ZAMIRA HAJIYEVA

Applicant

-and-

NATIONAL CRIME AGENCY

Respondent

NCA's SKELETON ARGUMENT
FOR THE HEARING ON 24.07.18 – 25.07.18[1]

INTRODUCTION

1. This skeleton argument is lodged on behalf of the National Crime Agency (**"NCA"**) in response to an application by Mrs Hajiyeva (**"R"**) dated 25.04.18 to discharge the Unexplained Wealth Order which was made by Supperstone J. on 27.02.18 (**"UWO"**) under s362B(1) of the Proceeds of Crime Act (**"POCA"**).

2. The application is opposed by the NCA. In summary:

   (1) R is a politically exposed person (**"PEP"**) under s362B(4)(a) of POCA;

   (2) There was no material non-disclosure on 27.02.18;

   (3) It was and remains appropriate to rely on information about the existing conviction of R's husband for offences of fraud and embezzlement;

   (4) The income requirement under s362B(3) was and remains satisfied;

   (5) It was and remains appropriate to include a penal notice in the UWO, and in any event this is not a ground for discharging the order;

   (6) The UWO does not interfere with any rights under A1P1, or alternatively any interference is justified in the circumstances;

   (7) The UWO does not offend the privilege against self or spousal incrimination, and any concerns should not prevent the order as a matter of discretion;

   (8) In all the circumstances, it was and remains appropriate to grant the UWO.

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[1] The Court should have received 7 bundles of material (excluding authorities) marked Bundles 1 – 7.

3. Essential pre-reading (t.e. ½ day), in addition to the parties' skeleton arguments:

3.1 *Bundle 1* ("the Core Bundle"):

(1) Witness statement of Nicola Bartlett dated 19.02.18 **("NB W/S")**;

(2) Schedule of Amendments of Nicola Bartlett dated 26.02.18

(3) The NCA's skeleton argument dated 19.02.18 **("the NCA's original skeleton argument")**;

(4) Transcript of the hearing before Supperstone J on 27.02.18;

(5) Transcript of the judgment of Supperstone J on 27.02.18;

(6) The UWO;

(7) R's perfected grounds dated 15.05.18 **("the Grounds")**;

(8) NCA's grounds of resistance dated 06.06.18;

(9) Witness statement of Zamira Hajiyeva dated 15.05.18;

(10) Witness statements of Agil Layijov dated 14.05.18 and 26.06.18;

(11) Witness statement of Fakraddin Mehdiyev dated 28.06.18;

(12) Reports of Professor Bowring dated 15.05.18 and 28.06.18.

3.2 *Bundles 2 – 3* (NCA's exhibits), particularly pp.51-97 (R's application for leave to remain), pp.122, 126, 145, 159, 164, 171, 195, 230, 235, 260, 263 (IBA material), pp.446 and 451 (Harrods material) and pp.563-612 (open source material) of Exhibit NB/1 **("NB/1")**.

3.3 *Bundles 4 – 7* (R's exhibits), particularly Exhibit ZH1, ZH2 and ZH3.

3.4 Section 362A – 362R of POCA;

3.5 Article 3 of Directive 2015/849.

4. Whilst R has indicated that she wishes for the hearing being held in private, no formal application has been made at this stage. At present, and pending service of a properly constituted application, the NCA reserves its position on whether it is appropriate to abrogate the open justice principle, whether in whole or in part.

LEGAL FRAMEWORK

5. The Court is referred to §§5-31 of the NCA's original skeleton argument for a summary of the legal framework. R does not dispute that the application requirements, the holding requirement and the value requirement are satisfied.

1. THE PEP ARGUMENT

(1) Introduction

6. Sub-sections 362B(4)(a), (7) and (8) of POCA include the following provisions:

> (4) The High Court must be satisfied that –
>
> (a) the respondent is a politically exposed person...
>
> (b) ...
>
> ...
>
> (7) In subsection (4)(a), "politically exposed person" means a person who is—
>
> (a) an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State;
>
> (b) a family member of a person within paragraph (a),
>
> (c) ...
>
> (d) ...
>
> (8) Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 [**"the 2015 Directive"**] applies for the purposes of determining –
>
> (a) whether a person has been entrusted with prominent public functions (see point (9) of that Article),
>
> (b) whether a person is a family member (see point (10) of that Article), and
>
> (c) ...

7. Article 3 of the 2015 Directive includes the following definitions:

> (9) 'politically exposed person' means a natural person who is or who has been entrusted with prominent public functions and includes the following:
>
> ...
>
> (g) members of the administrative, management or supervisory bodies of State-owned enterprises;
>
> ...
>
> No public function referred to in points (a) to (h) shall be understood as covering middle-ranking or more junior officials;
>
> (10) 'family members' includes the following:
>
> (a) the spouse, or a person considered to be equivalent to a spouse, of a politically exposed person;
>
> ...

8. It is common ground that:

(1) R is a 'family member' of Mr Hajiyev;

(2) Between March 2001 – March 2015, Mr Hajiyev was the Chairman of the Board the International Bank of Azerbaijan (**"IBA"**), and;

(3) As Chairman, he was a member of the administrative and/or management body who was above the level of a middle-ranking or more junior official.

9. However, R denies that she is a PEP within the meaning of s362B(4)(a) on 2 grounds:

(1) She maintains that the IBA was not a 'state-owned enterprise' during her husband's tenure within the meaning of Article 3(9)(g) of the 2015 Directive;

(2) Further or alternatively, as Chairman of the IBA, her husband was not entrusted with prominent public functions "*by an international organisation or by a State*" as she argues is required under s362B(7)(a) of POCA.

(2) <u>The IBA was a 'state-owned enterprise'</u>

10. **The Court is invited to interpret the meaning of a 'state-owned enterprise' ("SOE") in the following manner:**

10.1 This is a question of law, and not a question of fact to be determined by expert evidence on foreign company law. Section 362B(8)(a) of POCA identifies that Article 3(9) of the 2015 Directive 'applies' for the purpose of determining whether someone has been entrusted with prominent public functions. Accordingly, Parliament has decided to transpose or incorporate by reference the EC provision into the domestic law. Section 3(1) of the European Communities Act 1972 identifies that:

> For the purposes of all legal proceedings any question… as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court.[2]

[2] See also Case C-28/95 Leur-Bloem v Belastingdienst at [32]: "… where in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply".

10.2 The NCA is not aware of any decision of the European Court which defines the meaning of an SOE.[3]

10.3 Absent any direct jurisprudence on the point, the Court is invited to construe the meaning of an SOE in accordance with the general principles of construction which apply to EC instruments. The following guidance is cited in Bennion on Statutory Interpretation, 7th edn, at §28.1:

> In Customs & Excise Comrs v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party), Bingham J said:
>
> > "*The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires.*"
>
> ...
>
> In Shanning International Ltd v Lloyds TSB Bank plc, Lord Steyn said:
>
> > "*There is an illuminating discussion in Cross, Statutory Interpretation, 3rd edn. pp 105–112 of the correct approach to the construction of instruments of the European Community ... The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by Cross (at p 107): "You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration."*

10.4 **It is submitted that a 'state-owned enterprise' means an enterprise in which the state has a shareholding (whether a full, majority or minority shareholding, and whether held directly or indirectly)**:

(1) This is consistent with the natural and ordinary meaning of the words 'state-owned enterprise'. This suggests a straightforward test of *ownership*, and not a test of legal status, public service, financing, power and/or control.[4] A person will own something even if it is partly owned, or owned indirectly through another.

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[3] However, in Case C-3/88 Commission v Italian Republic, the Court at [10]-[11] described a requirement (that 'only companies in which all or the majority of the shares are directly or indirectly in public or State ownership' may conclude data-processing agreements) as a 'public ownership requirement'.

[4] In this regard, it can be contrasted with other EC concepts such as 'emanation of state' (direct effect) and 'body governed by public law' (public procurement). An entity will be an 'emanation of the state' if it has

(2) It is consistent with the approach in Article 3(6):

(a) This defines the 'beneficial owner' of a company as including a natural person who ultimately owns or controls an entity through 'direct or indirect ownership' of a sufficient percentage of shares or voting rights or ownership interest in that entity, with a shareholding of 25% plus one share (or an ownership interest of more than 25%) being an indication of ownership. However, this applies 'without prejudice' to the right of Member States to decide that a *lower* percentage may be an indication of ownership or control. In other words, there is no requirement for a beneficial owner to hold a specified shareholding.

(b) This is complemented by recital (12) of the 2015 Directive:

> (12) There is a need to identify any natural person who exercises ownership or control over a legal entity. In order to ensure effective transparency, Member States should ensure that the widest possible range of legal entities incorporated or created by any other mechanism in their territory is covered. While finding a specified percentage shareholding or ownership interest does not automatically result in finding the beneficial owner, it should be one evidential factor among others to be taken into account. Member States should be able, however, to decide that a lower percentage may be an indication of ownership or control.

(c) It is consistent with the approach in Article 3(9) itself. This provision is concerned with substance and not form. It is drafted in broad terms. It is inclusive (*'includes the following'),* not exhaustive. The categories of persons falling within its scope are wide, and not prescriptive.

(d) It also gives effect to the spirit and purpose of the 2015 Directive i.e. to establish effective measures to combat the threat of money laundering. It would be an obvious abuse if a person who was a senior manager of an SOE – and a PEP – could avoid measures on the giving of a 1% shareholding to a private entity.

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been 'made responsible, pursuant to a measure adopted by the State, for providing a *public service* under the *control* of the State and has for that purpose *special powers* beyond those which result from the normal rules applicable in relations between individuals': see Case C-188/89 Foster v British Gas plc. An entity will be a 'body governed by public law' if it is established for the specific purpose of meeting needs *in the general interest* (not having an *industrial or commercial character*), it has *legal personality*, and it is *financed* by or subject to the *management supervision* of the State, regional or local authorities (or other bodies governed by public law): see Article 2(4) of Directive 2014/24/EU and Article 3(4) of Directive 2014/25/EU.

11. **It is submitted that the IBA clearly satisfied this definition during Mr Hajiyev's tenure as Chairman between 2001 – 2015:**

11.1 The NCA continues to rely on the following evidence which was before the Court on 27.02.18:

(1) In 1991, the IBA was incorporated as a 'fully state-owned bank'.[5]

(2) On 28.10.92, the IBA became a joint-stock commercial bank and the Ministry of Finance of the Republic of Azerbaijan (**"MoF"**) became a 'majority shareholder' of the Bank.[6]

(3) On 01.03.05, a Presidential Decree was enacted which outlined 'the process for privatisation' of the state shareholding in the IBA's share capital. Under the Decree, the government had to 'reduce gradually' its share in the Bank's share capital, either by selling its existing shares or by issuing additional shares in the open market.[7]

(4) On 31.12.07, 50.2% of the IBA's paid-in share capital was owned by the MoF.[8]

(5) On 30.06.08, 50.2% of the IBA's paid-in share capital was owned by the MoF. [9] It was also recorded that the IBA and its subsidiaries ("the Group") were 'controlled' by the Azeri Government.[10]

(6) On 31.12.12, 51.06% of the IBA's paid-in share capital was owned by the MoF.[11]

(7) On 31.02.13, 60.06% of the IBA's paid-in share capital was owned by the MoF.[12] It was also recorded that the 'ultimate controlling party' of the Group was still the Azeri Government.[13]

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[5] pp.126 and 195 NB/1
[6] pp.126 and 195 NB/1
[7] pp.126 and 195 NB/1
[8] pp.126 and 145 NB/1
[9] pp.126 and 145 NB/1
[10] p.159 NB/1
[11] pp.195 and 235 NB/1
[12] pp.171, 195 and 235 NB/1
[13] pp.195 and 263 NB/1. It was also recorded that a significant concentration of customer accounts 'attracted' from a state organisation in the oil industry and a government body (p.230 of Exhibit NB), and

11.2 In summary, having been a fully state-owned bank, the IBA remained in majority State ownership and control (holding a shareholding of 51.06% - 60.06% between 2007 – 2013).

11.3 The recently disclosed witness statement of Mr Layijov dated 26.06.18 (at §§43-52) does not undermine this position:

(1) Insofar as R seeks to rely on this statement as 'expert evidence', permission should be refused. This is not a question of foreign law, and expert evidence is accordingly not reasonably required (CPR 35.1). In any event, Mr Layijov is not independent (PD 35, para 2.1),[14] it appears that this is not a matter within his expertise (PD 35, para 2.2),[15] and the statement does not comply with the important requirements in para 3.2 of PD 35 in any event.

(2) Even if treated as a witness:

(a) Mr Layijov accepts that the state has had a significant stake in the IBA. At §49 of his witness statement, he accepts that the MoF '*holds a large number of shares in the bank*'. At §52, he accepts that the IBA '*happens to have a large government investment*'.

(b) Otherwise, he considers the wrong test. The Court is concerned with whether the IBA was a 'state-owned enterprise' at the material times and not, as suggested by Mr Layijov, whether it was a 'state organisation', a 'state entity' or a 'public legal entity', or whether it had 'special administrative powers'. The test is one of *ownership*, not legal status or powers. It is perfectly possible for a company to be a 'commercial bank' or a Joint Stock Bank, but still be state-owned (indeed this is recognised in the OECD Guidelines, supra).

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that the Group had borrowed funds on behalf of the Government from certain institutions and state organisations for the purposes of providing loans to state-owned enterprises and government bodies (p.260 NB/1)

[14] Not only is he Mr Hajiyev's lawyer but, in his first witness statement (at §§6, 7 and 15), he acknowledges that he had a 'professional relationship' with Mr Hajiyev before becoming his lawyer.

[15] It appears that his field of expertise is in Azeri criminal law.

(3) **There is no additional 'entrustment' condition in s362B(7)(a)**

12. **It is submitted that the words '*by an international organisation or by a State other than the United Kingdom or another EEA State*' do not create an additional requirement for there to be a formal process of entrustment by the state:**

12.1 The starting point is that there is no such requirement in Article 3(9). R concedes that her argument is inconsistent with the terms of the Directive.

12.2 There is also no reason to conclude – indeed, it is implausible – that Parliament intended to impose an additional hurdle of identifying a formal process of appointment, entrustment or employment, so that individuals who might be caught by the definition of PEP according to the Directive, might be excluded from the ambit of the Act. If Parliament had intended such an additional hurdle, it would surely have set this out clearly and explained what additional matters had to be proven.

12.3 The plain intention of these words is not to include a new condition but to exclude non-UK and non-EEA PEPs from the ambit of the provision:

(1) The operative component of the clause is not '*by an international organisation or by a State*' (as emphasised by R) but '*other than the United Kingdom or another EEA State*'.

(2) The words '*by an international organisation or by a State*' add nothing of substance. Where a person is entrusted with *prominent public functions* (emphasis added), it necessarily follows that they will be entrusted to perform such functions 'by' a state or international body. This is demonstrated in the definition of 'foreign PEPs' in the 2012 Recommendations of the Financial Action Task Force on Money Laundering ("the FATF Recommendations")[16] at p.123:

> *Foreign PEPs* are individuals who are or have been **entrusted with prominent public functions by a foreign country**, for example Heads

[16] Recital (4) of the 2015 Directive identifies that: '*Union action should continue to take particular account of the FATF Recommendations and instruments of other international bodies active in the fight against money laundering and terrorist financing. With a view to reinforcing the efficacy of the fight against money laundering and terrorist financing, the relevant Union legal acts should, where appropriate, be aligned with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation adopted by the FATF in February 2012 (the 'revised FATF Recommendations').*'

> of State or of government, senior politicians, senior government, judicial or military officials, **senior executives of state owned corporations,** important political party officials. [emphasis added]

12.4 To the extent that there is any ambiguity as to the meaning of the words, the Court will be invited to apply Pepper v Hart [1993] AC 593:

(1) The NCA will seek leave to rely on an extract from Hansard *(Criminal Finances Bill Deb 17.11.2016, cols 84-85)* which contains statements made by the Security Minister during a debate before the Public Bill Committee, in response to a proposed amendment to remove the words '*other than the United Kingdom or another EEA state*'.

(2) The extract has been served on R in accordance with the Practice Note (Procedure: Reference to Hansard) [1995] 1 All ER 234.

(3) It is submitted that, subject to the Court concluding that the enactment is ambiguous or obscure, the conditions for referring to such statements are met. In particular, the statements:

(a) are set out in the official report of debates, namely Hansard;

(b) were made on the Bill for the Act containing the enactment in issue, namely the Criminal Finances Bill;

(c) were made by or on behalf of the promoter of the Bill, namely Mr Ben Wallace (the security minister);

(d) are clear and disclose the intention underlying the wording of s362B(7). The Minister identified that the provision was intended to distinguish between PEPs in the EEA (where there are tools to find evidence) and PEPs outside the EEA (where there are real operational challenges in gathering evidence).

(4) **In all the circumstances, R is a PEP**

13. Mr Hajiyev occupied precisely the type of role in Azerbaijan, a country with widespread corruption, at which the 2015 Directive (and the UWO regime) was aimed: c/f recital (12) of the Directive.

2. THE FULL AND FRANK ARGUMENT

(1) The nature of the duty

14. **It is of course accepted that, when making an *ex parte* application, the NCA owed a well-established duty of disclosure:**

14.1 The 'primary duty' when making an *ex parte* application is to make a full and fair disclosure of all the material facts (both those which are known at the time of making the application, and those which ought to have been known upon making proper enquires before making the application): Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 at p.1356F-H.

14.2 The 'material facts' are those which it is material for the judge to know in dealing with the application as made (and materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers); Brink's Mat at p.1356G-H:

(1) In Jennings v CPS [2006] 1 WLR 182, Laws LJ identified at [52]:

> The flowchart and Mr Mort's statement might, of course, have been disclosed. But given what I have said about sections 71(4) and 77 of the 1988 Act, they would not on a proper view of the law have affected the judge's decision whether or not to make a restraint order. Accordingly their non-disclosure was not a material failure.

(2) In NCA v Davies [2016] EWHC 899 (Admin), McGowan J rejected the submission that the NCA should have disclosed transcripts of oral evidence at a previous criminal trial, observing at [16(iii)]:

> No proper basis for the necessity of providing the information to the judge hearing the application has been established. The judge was informed of as much of the broad nature of the case as was necessary and crucially of the acquittals and their significance.

14.3 In Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428, Bingham J gave the following guidance at p.437:

> The scope of the duty of disclosure of a party applying *ex parte* for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application,

> and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state.

14.4 In Re Stanford International Bank (in liquidation) [2010] EWCA Civ 137, Hughes LJ identified at [191]:

> [The duty] is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice… In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.'

14.5 Whilst the duty is of utmost importance, the application of the principle should not be carried to extreme lengths. In Brink's Mat, Slade LJ emphasised at p.1359C-E:

> While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex. v. Kensington Income Tax Commissioners* [1917] 1 K.B. principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

(2) The NCA complied with this duty before Supperstone J

15. R relies on one breach of duty. In particular, she argues that the NCA 'grossly' mischaracterised her husband's role at the IBA.

16. **It is submitted that there was no breach of duty:**

(1) In carefully prepared witness evidence and written submissions, the Court was made aware of the following matters:

(a) The IBA was a joint-stock commercial bank;[17]

(b) The IBA was the largest bank in the country, and conducted major business both domestically and internationally.[18]

(c) The MoF had been a majority shareholder in the IBA between at least 2007 – 2013, with a shareholding ranging between 50.2% – 60.06%.[19]

(d) Mr Hajiyev was Chairman of the IBA from March 2001 – March 2015 (and, prior to this, had been Department Head of the Ministry of Foreign Economic Relations between 1993-1995, and Chairman of the IBA Credit Committee and Director of Credit and Investments from 1995).[20]

(e) It was possible that Mr Hajiyev was a successful and wealthy businessman in his own right, and it could be expected that R would raise this if put on notice of the hearing.[21]

(2) The Court was afforded sufficient time to consider this evidence. This was not a case allocated to a busy list in Court 37. Moreover, the Court was invited to allow 3 hours to read the NCA's application.[22]

(3) This amounted to full and fair disclosure of Mr Hajiyev's position. The Court would have been well aware of the broad nature of his role as was necessary in the circumstances, and the judge's attention was specifically drawn to the possibility that he could be a successful businessman.

(4) To the extent that R takes issue with the NCA's description of her husband being a 'state employee' (in the written documents) and 'government official', 'government functionary' and 'central banker' (at the hearing):

(a) The NCA repeats that the Republic of Azerbaijan had a controlling stake in the IBA. For example, at p.159 of Exhibit NB/1, the company's Auditor's Report dated June 2008 identified: *'The Group is controlled by*

[17] §§67.4-67.5 of NB W/S, and pp.126, 170, 195 NB/1.
[18] §§16, 18.3 and 75.9 NB W/S. The exhibits identified that it had over 30 branches, 1,200 employees and 800,000 customers (pp.126, 172, 195, 563 NB/1) and had received multiple awards (pp.164, 170 NB/1).
[19] §16 and 67.4-67.5 NB W/S, and pp.126, 145, 171, 195, 235 NB/1.
[20] §§16, 18.8, 60.2, 67.3-67.5 NB W/S, and pp.122, 164, 563-566 NB/1.
[21] §75.6 NB W/S and §42(2) of the NCA's original skeleton argument.
[22] §4 of the NCA's original skeleton argument.

the Government of the Republic of Azerbaijan... At 30 June 2008, the Group's employees held 6.30% of the total share capital'.

(b) It was clear that the IBA was not the Central Bank: see p.167[23] and p.195[24] of Exhibit NB/1.

(c) At most, this was an error of labelling and not substance.

(3) **Alternatively, the UWO should not be discharged**

17. **If the NCA's characterisation of the evidence did amount to a breach of duty, the Court is invited not to discharge the UWO:**

17.1 The Court has a discretion, notwithstanding proof of material non-disclosure, to continue or re-grant the order (in the same or altered form).

17.2 The Court is invited to exercise this discretion for the following reasons:

(1) First, the **gravity** of the failure was at the lower end of severity: (a) the NCA took its duty seriously and adopted a structured approach to disclosure; (b) it was not a wholesale failure to disclose information (but a failure to describe disclosed information correctly); (c) it was not deliberate or done in bad faith (but inadvertent and innocent), and; (d) there were no other failures.

(2) Second, no **prejudice** was caused. Despite relying on an analogy with the RBS Chairman, R has not adduced evidence that her husband in fact earned a significant income at the IBA. To the contrary, she has disclosed correspondence which suggests that he earned a net annual income of less than $71,000 between 2002 – 2008 (see below).

(3) Third, the **merits** of the UWO application were (and remain) strong:

[23] This was an IBA financial statement from Mr Hajiyev which identified: *'Of course, all the outcomes demonstrated by the International Bank of Azerbaijan have been backed... a reasonable and careful policy by the regulatory body, the Republic of Azerbaijan's Central Bank...'*

[24] This was a page in the IBA's Consolidated Financial Statements 2013 which identified: *'The Bank is regulated by the Central Bank of the Republic of Azerbaijan ('CBAR')...'*

(a) The order would properly have been granted even if Mr Hajiyev's role had been characterised differently. The NCA's case on the income requirement was not based solely on his role, but also included the evidence of: (i) his conviction for fraud and embezzlement; (ii) R's significant credit card expenditure in Harrods, and; (iii) the complex manner in which the property had been obtained and handled (relying on R v Anwoir [2008] 4 All ER 582) (see below).

(b) The recent evidence which has been disclosed by R only serves to confirm and strengthen the NCA's suspicion (see below).

(4) Fourth, it is in the **public interest** to continue or re-make the order:

(a) In Jennings (supra), Longmore LJ identified at [64]:

> The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say that there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified.

(b) In Director of ARA v Kean [2007] EWHC 112 (Admin), Stanley Burnton J held at [55]:

> The ARA exercises its powers in the public interest. If the Property (and the proceeds of its mortgage) were indeed obtained with the proceeds of crime, it is in the public interest that Mr Kean should be deprived of them. That possible result should not be put at risk by reason of a lack of care or misjudgement on the part of the ARA which is far from serious.

(c) In SFO v Saleh [2015] EWHC 2119, Andrews J made the following (obiter) remarks at [119]:

> In Jennings v Crown Prosecution Service [2005] EWCA Civ 746, [2005] 4 All ER 391, [2006] 1 WLR 182, the Court of Appeal made it clear that even if there is a non-disclosure of material facts in a case such as this, the fact that the prosecution acts in the public interest will generally militate against discharging an order if, after consideration of all the evidence, the court considers it is appropriate to make such an order. The conduct complained of has to be particularly egregious to justify what the Court of Appeal described as the "ultimate sanction" of discharge. Even if I had been satisfied that there was material non-disclosure in the present case, which I am not, this is nowhere near the type of scenario in

which it would be appropriate to exercise the court's discretion to discharge a PFO which is otherwise clearly justified.

(d) In NCA v Simkus [2016] 1 WLR 3481, Edis J held at [115]:

> I have concluded that there was non-disclosure of a material fact but that it was not so grave or, to use the word of Longmore LJ, "appalling" that the order should be discharged. In taking this decision I attach substantial weight to the public interest in the continuation of the order.

(e) In Davies (supra), McGowan J acknowledged at [15]:

> If material non-disclosure, with or without bad faith, is established that is not the end of the matter. This court would have to continue to consider the wider public interest before going on to discharge the PFO.

3. THE FOREIGN CONVICTION ARGUMENT

(1) The income requirement

18. R complains that it was wrong for the NCA to rely on her husband's conviction when seeking to satisfy the income requirement.

19. Sub-sections 362B(3) and (6) of POCA include the following provisions:

> (3) The High 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 purposes of enabling the respondent to obtain the property.
>
> (4) ...
>
> (5) ...
>
> (6) For the purposes of subsection (3) –
>
> (a) regard is to be had to any mortgage, charge or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purposes of obtaining the property;
>
> (b) it is to be assumed that the respondent obtained the property for a price equivalent to its market value;
>
> (c) income is "lawfully obtained" if it is obtained lawfully under the laws of the country from where the income arises;
>
> (d) "known" sources of the respondent's income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order;
>
> (e) ...

20. **The NCA makes the following observations about the income requirement:**

20.1 First, other than the duty which arises when an application is made without notice identified at §14.1 above, the requirement is not subject to any condition that the NCA must carry out extensive inquiries before making an application:

(1) There is no express condition to this effect. Section 362A(1) simply requires that, on an application by an enforcement authority, the High Court may make a UWO *'if the court is satisfied that each of the requirements for the making of the order is fulfilled'*. The income requirement is one of those requirements. When determining whether the income requirement is met, s362B(6) identifies that the Court must have regard to *'any mortgage, charge or other kind of security that is reasonable to assume was or may have been available'* and *'the sources of income... that are reasonably ascertainable from the available information at the time of the making of the application'*.

(2) Such a condition cannot have been intended. This an investigative order, sought at the beginning of an investigation, which is designed to assist law enforcement agencies to determine whether further investigatory or enforcement proceedings are justified. Indeed, the UWO provisions were specifically enacted to remedy the perceived mischief of evidential difficulties which are often encountered by law enforcement agencies at the start of their inquiries. See §§7, 12 and 14 of the NCA's original skeleton argument.

(3) An analogy can also be drawn with the requirement to have reasonable grounds for suspicion before a police officer exercises the power of arrest. For example, in Clayton & Tomlinson, *Civil Actions Against the Police* (3rd edn), it is identified at §§5-072 – 5-074:

> *To what extent are the police obliged to make further inquiries when there, prima facie, they have reasonable grounds for suspicion*? The leading case is Castorina v Chief Constable of Surrey. A burglary had taken place at the plaintiff's former workplace which appeared to be an 'inside job'. When asked if anyone had a grudge against the employer, the managing director said that she had recently dismissed the plaintiff but that she did not think that the plaintiff would have done it. The police then visited the plaintiff at home. They discovered that she was of good character but arrested her without further inquiry. The Court of Appeal overruled the judge at first instance and held that the arrest was lawful. Purchas LJ said that the crucial

> question was whether the officers had reasonable cause to suspect at the time of the arrest and that: '*courses of inquiry which may or may not be taken by an investigating police officer before arrest are not relevant to the consideration whether, on the information available to him at the time of the arrest he had reasonable cause for suspicion*'. Relying on Mohammed-Holgate v Duke the court held that "failure to follow an obvious course an exceptional circumstances may well be grounds for attacking the executive exercise of the power to arrest under the Wednesbury principle", but did not affect the objective question of reasonable grounds… This case was cited by approval in Lyons v Chief Constable of West Yorkshire, when the court held that officers were under no obligation to investigate matters furthers further once their own suspicion had been formed.

20.2 Second, the income requirement is not subject to any condition that the information which is ultimately presented to the Court must be in a particular form. In the analogous context of search warrants, the Supreme Court has recently identified in R (Haralambous) v St Albans Crown Court & Another [2018] 2 All ER 303 at [15]:

> In order for a magistrate to be able to issue a warrant under s 8(1) read with s 15(3) and (4), all that is required is that he or she be satisfied, from the information contained in the constable's application and from the constable's answers on oath to any questions put, that "there are reasonable grounds for believing" the matters set out in s 8(1)(a) to (e). Nothing in the language of these sections suggests that the material giving rise to such grounds must be of any particular nature, or take any particular form, or itself be admissible in evidence at any trial that might be envisaged. In the context of a procedure designed to be operated speedily by a constable at an early stage in a police investigation, that is unsurprising.

20.3 Third, once an application is made, it is for the Court – and not the NCA – to determine whether there are reasonable grounds. For example, in R (Bright) v Central Criminal Court [2001] WLR 662 (a case concerning Production Orders under PACE 1984), Judge LJ identified at p.676:[25]

> In my judgment, and contrary to Miss Montgomery's submission, it is clear that the judge personally must be satisfied that the statutory requirements have been established. He is not simply asking himself whether the decision of the constable making the application was reasonable, nor whether it would be susceptible to judicial review on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This follows from the express wording of the statute, "If … a circuit judge is satisfied that one … of the sets of access conditions is fulfilled". The purpose of this provision is to interpose between the opinion of the police officer seeking the order and the consequences to the individual or organisation to whom the order is addressed the safeguard of a judgment and decision of a circuit judge.

20.4 Fourth, it is for the enforcement authority to satisfy the Court that the income requirement is met. Again, in Bright, Judge LJ identified at p.677:

[25] This was also cited with approval by Dyson LJ in R (Malik) v Manchester Crown Court [2008] EWHC 1362 (Admin) at [34].

> In my judgment it is equally clear that the constable making the application must satisfy the judge that the relevant set of conditions is established. This appears to follow as an elementary result of the fact that an order will force or oblige the individual against whom it is made to act under compulsion when, without the order, he would be free to do otherwise. Again, if authority is required, I refer to the reasoning of Lord Diplock in *R v Inland Revenue Comrs, Ex p Rossminster Ltd* [1980] AC 952 where he said "the onus would be upon the officer to satisfy the court that there did in fact exist reasonable grounds".

20.5 Fifth, the test is ultimately concerned with reasons, not proof. As identified by Lord Hughes in Re ARA (Jamaica) [2015] UKPC 1 at [19]:

> Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extend conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the Applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. Nor is it helpful to attempt to expand on what is meant by reasonable grounds for belief, by substituting for 'reasonable grounds' some different expression such as 'strong grounds' or 'good arguable case'. There is no need to improve upon the clear words of the statute, which employs a concept which is very frequently encountered in the law and imposes a well-understood objective standard, of which the judge is the arbiter…

20.6 Sixth, suspicion does not impose a high threshold. In Hussien v Chong Fook Kam [1970] AC 942, Lord Devlin identified at p.948:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting-point of an investigation of which the obtaining the prima facie proof is the end.

(2) It was and remains appropriate to rely on Mr Hajiyev's conviction

21. In response to R's specific complaints at §§35-43 of the Grounds:

21.1 *It was appropriate to refer to press articles about the conviction.* The NCA was not required to prove the conviction to any standard, or to present information in any particular form (e.g. a certificate of conviction). It simply had to put material before the Court which demonstrated reasonable 'grounds' for suspicion.

21.2 *The NCA was not required to 'resolve for itself' whether the conviction was unfair, before making the application.* There was no statutory requirement to do so, and this cannot have been intended. There was no additional requirement under the ECHR.[26] The inquiries identified reports that Mr Hajiyev had been convicted of offences in Azerbaijan, that various assertions had been made about the fairness of those convictions, but that there was no evidence that the conviction had been challenged successfully (either in Azerbaijan or in Strasbourg). To do more would be to create an unrealistic threshold which would be wholly at odds with an investigative order.

21.3 *It was not otherwise wrong in principle to rely on the conviction.* Multiple reports, from various sources, identified that Mr Hajiyev had been convicted of serious crimes of fraud and embezzlement, what the allegations were, and what his defence appears to have been (p.570 of Exhibit NB/1). There was no evidence that the conviction had been challenged successfully. It was plainly appropriate to attach weight to this information – in conjunction with other factors – in concluding that there were reasonable grounds for suspicion.

21.4 *It remains appropriate to rely on the conviction.*

(1) In support of her application, R has filed a 50 page report from Professor Bowring (with 4 lever arch files of exhibits), an addendum report from Professor Bowring, and two witness statements from Mr Layijov.

(2) The Court is invited to refuse permission to rely on Professor Bowring's evidence. First, no application has been made for permission under CPR 35.4. Second, the evidence is not 'reasonably required' to resolve the issues before the Court (CPR 35.1), which concern the correctness of an investigative order rather than a final determination of any rights or liabilities. As acknowledged at §41 of the Grounds, the report simply provides a 'summary' of the 'well-known' reporting about deficiencies in the Azeri criminal system. Similar information was put before the Court on 27.02.18. It does not assist the Court in determining the central

[26] It is not clear how the case of Drodz and Janousek v France and Spain (1992) 14 EHRR 745 assists R. The Court was concerned with a different issue, namely whether detention was 'lawful' under Article 5(1) (and not whether it was appropriate to make an investigative order). In any event, the Court held at [110] that there was no obligation to verify whether a conviction complied with Article 6 ECHR, although it was obliged to refuse co-operation 'if it emerges that the conviction *is* the result of a flagrant denial of justice'. Even on the Respondent's case, the available media reports only showed a 'possibility' of this.

issue of whether the NCA has 'reasonable grounds for suspecting' that the known sources of R's lawfully obtained income was insufficient to obtain the property: c/f R (Virdee) v NCA [2018] EWHC 1119 (Admin) at [70]. Third, the report is contrary to the overriding objective. It is disproportionate and has been obtained unilaterally, without any attempt to agree the position (and, if appropriate, agree a single joint expert).

(3) In any event, the evidence of Professor Bowring and Mr Layiyov does not establish that it is now wrong to rely on the conviction:

(a) Similar concerns were identified when making the original application on 27.02.18: see §§75.3-75.5 NB W/S. For example, the Court was informed that Azerbaijan was regarded as a corrupt and authoritarian regime (where there were concerns about judicial independence), and that allegations had been made that: (1) Mr Hajiyev had been subject to illegal detention; (2) there had been a violation of fair trial principles during his trial (including changing allegations, gross procedural violations, a violation of his presumption of innocence, and failure to provide documents), and (3) Mr Hajiyev had maintained his innocence throughout (including *'I know they went to London but didn't find anything'*).

(b) The evidence confirms that the conviction has not been challenged, either in Azerbaijan or through a successful application to the ECtHR.

(c) The concerns do not ultimately demonstrate that Mr Hajiyev did not commit the acts for which he is convicted.

(3) **Alternatively, the income requirement is still met in any event**

22. Even if the Court determines that the NCA cannot rely on the foreign conviction (contrary to the above), it is submitted that the conviction was one of a number of factors relied upon by the NCA, and the income requirement is still satisfied for the reasons identified at sub-paragraphs 23.1(1), (2), (3) and (4)(b)-(d) below.

4. THE SECTION 362B(3) ARGUMENT

(1) The income requirement was met on 27.02.18

23. **It is submitted that the income requirement was clearly met on the evidence before the Court on 27.02.18:**

23.1 The material before the Court demonstrated reasonable grounds – indeed ample grounds – for suspecting that the known sources of R's lawfully obtained income would have been insufficient to obtain the property:

(1) First, reliable documentation identified that the property had been purchased in December 2009 for £11.5m, with the assistance of a mortgage of 'up to £7,474,000' which was discharged only 5 years later.

(2) Second, there was no evidence (despite inquiries being made) that R had been employed or had received any other independent source of income.[27] Indeed, correspondence from Gherson Solicitors suggested that she had been a full-time mother since 1998.[28]

(3) Third, Instead, there were strong indications that R's only source of income was from Mr Hajiyev. There was compelling evidence that he was her husband.[29] In June 2010, she informed the Home Office that she had received a gift of over £1m from him.[30] In June 2015, she informed the Home Office that she was receiving large sums from him (on average £20,000 per month over the course of the year).[31] Around the time of her husband's arrest, she took steps to sell multiple items at auction[32].

(4) Fourth, there were numerous reasons to suspect that any purchase or discharge funds from Mr Hajiyev were unlawfully obtained, given that:

(a) Multiple sources of evidence suggested that he was currently serving a 15 year prison sentence in Azerbaijan for offences of

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[27] §§43-58 NB W/S
[28] §§46-47 NB W/S
[29] §15 NB W/S
[30] §59.3 NB W/S
[31] §59.4 NB W/S
[32] §59.5 NB W/S

misappropriation, abuse of office, fraud and/or embezzlement involving very significant quantities of money.[33] To the NCA's knowledge, this conviction had not been quashed.

(b) His known employment history was unlikely to have generated sufficient income to pay the initial deposit of over £4m and the subsequent discharge monies. This was a man who had worked at the Ministry of Foreign Economic Relations between 1993 – 1995, before holding senior management positions at a state-owned bank in Azerbaijan.[34]

(c) The property itself had been obtained and handled in an unusual, complex and secretive manner.[35] For example, it was registered in the name of an offshore company ('Vicksburg Global'), which had been incorporated in the BVI shortly before the purchase. Documentation suggested that the property itself was comprised in a larger trust structure.

(d) R had spent some £16m on credit cards at Harrods between 2006 – 2016 (including a number of cards issued by the IBA).[36] For example, this included buying a Cartier item for £48,600 on 29.11.09 (less than a month before the property purchase), and three Boucheron items for £40,000, £42,000 and £39,000 on 11.12.09 (less than 2 weeks before the property purchase).[37]

23.2 Addressing the specific complaints raised by R at §§44-46 of the Grounds:

(1) *The NCA <u>did</u> consider the possibility that Mr Hajiyev may have generated a significant income.*[38] However, it is denied that his employment history gave rise to a 'likelihood' that he could afford to purchase a property for £11.5m in 2009. In any event, his employment history was one of a number of reasons for suspecting that the known

[33] §§17-18 and 60.1 NB W/S
[34] §§60.2-60.3 NB W/S
[35] §60.6 NB W/S
[36] §§20-21 NB W/S
[37] pp.446 and 451 NB/1
[38] For example, §42(2) of the NCA's original skeleton argument identified: *'it can be expected that she would... assert that he was a successful businessman (generating a significant income) in his own right'.*

sources of R's legitimately obtained income would have been insufficient to obtain the property.

(2) *The NCA did consider the possibility that the purchase was subject to due diligence and Know Your Customer ("KYC") checks.*[39] Due to the retention policy for Suspicious Activity Reports, it cannot be ruled out that concerns were raised but are no longer available.[40] In any event, the possibility of due diligence checks by a reputable company does not operate to defeat the reasonableness of the NCA's suspicion.

(3) *It is not clear how §46 of the Grounds has any bearing on whether the income requirement was met.* R has not been required to 'address the income requirement' (although, through bringing this application, she has elected to do so). To the extent that there were 'very likely monies legitimately available' to purchase the property, such evidence has not yet been provided.

(2) **The income requirement is still met**

24. **Further or alternatively, it is submitted that the evidence which has now been disclosed by R only serves to strengthen the NCA's suspicion:**

24.1 In summary:

(1) R has stated that the purchase of the property '*was my husband's responsibility*', he '*took care of everything*' and she has '*no knowledge of any of the payments made to purchase the property*' (§6 of her witness statement);

(2) Mr Layijov has confirmed that Mr Hajiyev was convicted and sentenced to 15 years' imprisonment (§58 of his first witness statement), and that there is currently no ongoing appeal against his conviction (§74 of his first witness statement).

[39] Ms Bartlett's witness statement identified that the conveyance was handled by Mischon de Reya LLP (§§28 and 30 NB W/S) and the UWO itself (at §8-9 of Schedule 3 and §5 of Schedule 4) requested details of third parties involved in handling the property and details of KYC checks.
[40] The published policy for the retention of SARs is that they must not be retained on the UKFIU database (ELMER) for more than 6 years.

(3) R has disclosed letters from the IBA which identify that her husband's net income was $29,062, $39,126, $35,924, $35,541, $65,252 and $70,648.70 in 2001, 2002, 2003, 2004, 2005 and 2008 respectively (pp.91-92 of Exhibit ZH/2). Although it appears that Mr Hajiyev also held shares in his name, these generated a net dividend of only $88,911 in 2008 (p.89 of Exhibit ZH/2).

(4) Whilst R suggests that her husband also had a number of legitimate business interests before joining the IBA, she has stated that she has 'no way of evidencing' this (§5 of her witness statement).

24.2 For these further reasons, there remain 'reasonable grounds' for suspecting that the known sources of R's lawfully obtained income would have been insufficient to obtain the property.

5. THE PENAL NOTICE ARGUMENT

(1) POCA does not 'oust' committal proceedings

25. Section 362C of POCA is material to this ground and is set out in full below:

362C Effect of order: cases of non-compliance

(1) This section applies in a case where the respondent fails, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period.

(2) The property is to be presumed to be recoverable property for the purposes of any proceedings taken in respect of the property under Part 5, unless the contrary is shown.

(3) The presumption in subsection (2) applies in relation to property –

(a) only so far as relating to the respondent's interest in the property, and

(b) only if the value of that interest is greater than the sum specified in section 362B(2)(b).

It is for the court hearing the proceedings under Part 5 in relation to which reliance is placed on the presumption to determine the matters in this subsection.

(4) The "response period" is whatever period the court specifies under section 362A(6) as the period within which the requirements imposed by the order are to be complied with (or the period ending the latest, if more than one is specified in respect of different requirements).

(5) For the purposes of subsection (1) –

(a) a respondent who purports to comply with the requirements imposed by an unexplained wealth order is not to be taken to have failed to comply with the order (see instead section 362D);

(b) where an unexplained wealth order imposes more than one requirement on the respondent, the respondent is to be taken to have failed to comply with the requirements imposed by the order unless each of the requirements is complied with or is purported to be complied with.

(6) Subsections (7) and (8) apply in determining the respondent's interest for the purposes of subsection (3) in a case where the respondent to the unexplained wealth order—

(a) is connected with another person who is, or has been, involved in serious crime (see subsection (4)(b)(ii) of section 362B), or

(b) is a politically exposed person of a kind mentioned in paragraph (b), (c) or (d) of subsection (7) of that section (family member, known close associates etc of individual entrusted with prominent public functions).

(7) In a case within subsection (6)(a), the respondent's interest is to be taken to include any interest in the property of the person involved in serious crime with whom the respondent is connected.

(8) In a case within subsection (6)(b), the respondent's interest is to be taken to include any interest in the property of the person mentioned in subsection (7)(a) of section 362B.

(9) Where an unexplained wealth order is made in respect of property comprising more than one item of property, the reference in subsection (3)(b) to the value of the respondent's interest in the property is to the total value of the respondent's interest in those items

26. **It is submitted that s362C does not oust, by implication or otherwise, the Court's power to attach a penal notice to a UWO and to enforce non-compliance with such an order through committal proceedings brought under CPR Part 81:**

26.1 It is understood that R relies on the canon of construction *expressio unius est exclusio alterius:* to express one thing is, by implication, to exclude other things of the same kind ("the *expressio unius* principle"). In particular, R suggests at §49 of the Grounds that s362C is intended to be a 'complete code' which 'exhaustively' sets out the consequences of non-compliance with a UWO, and that there is accordingly 'no room' for committal proceedings.

26.2 At the outset, it is important to identify that the *expressio unius* principle is by no means absolute and, indeed, must be treated with some caution. In Halsbury's Laws of England Vol. 96 (2012), it is identified at §1202:

> '*There is no room for the application of this principle where some reason other than the intention to exclude certain items exists for the express mention in question. Thus it may be intended merely as an example or be included for abundance of caution or for some other reason... Although all canons of construction have to be applied with circumspection, expressio unius has to used with particular caution if it is not to produce a doubtful result.*'

26.3 There are numerous contra-indications that the principle does not apply here, and that the committal procedure remains permissible:

(1) First, the **plain wording** of s362C itself identifies that the provision is not concerned with the general *consequences* of non-compliance concerned (as asserted by R), but with the *effect* of a UWO in cases of non-compliance. It is therefore narrow in scope. It does not, on a fair reading, 'express' or contain a complete code of the consequences of non-compliance, and therefore cannot be read to exclude them.

(2) Second, there is a strong **public interest** (quite separate from investigating and recovering unlawfully obtained property) in ensuring orders are not disobeyed at the option of a party. Civilised society depends upon the authority and effectiveness of orders made in its courts: Arlidge, Eady & Smith on Contempt (5th edn, 2017) at §12-5. It is to be presumed that, absent clear words, Parliament did not intend to legislate contrary to this public interest, leaving open the possibility of bringing contempt proceedings in appropriate cases.

(3) Third, the principle would have **adverse consequences** which cannot have been intended by Parliament. In particular, it would leave an evident 'enforcement gap'.[41] For example, it would mean that: (a) a holding company (with no personal interest in the property) could wilfully disobey an order; (b) a third party could assist a respondent to undermine an order (e.g. by destroying documents), and; (c) a respondent (who was not subject to an IFO) could transfer the property to another entity and refuse to answer questions, all without sanction.

(4) Fourth, the **explanatory notes** to the CFA 2017 clearly envisage at §68 that the contempt jurisdiction remains available: '*In addition to the specific criminal offence of making a false or misleading statement, a law enforcement agency may alternatively elect to bring contempt of court proceedings if an individual fails to comply with a UWO*'. It is well-established that explanatory notes are admissible aids to construction: Bennion, Ch. 24 at §24.14.

[41] Unlike Disclosure Orders (see s359(1) of POCA), there is not a criminal sanction for non-compliance.

(5) Fifth, the **Code of Practice** similarly envisages at §48 that the contempt jurisdiction remains available: '*When serving the order or notice under the order... a covering letter should be provided which includes the following information (unless it is already included in the order, warrant or the notice):... a warning in plain language that failure without reasonable excuse to comply with the requirement may be an offence and could result in prosecution or lead to contempt of court proceedings or, in the case of a UWO, civil recovery and/or contempt of court proceedings*'. The Code of Practice was revised by the Secretary of State under s377(8) of POCA, and subsequently laid before and approved by a resolution of each House of Parliament.[42]

(2) **It was appropriate to include the penal notice**

27. **Should the Court accept the above, it is submitted that the penal notice attached to the UWO is plainly appropriate:**

27.1 The contempt jurisdiction has not been 'ousted' and it is therefore a tool which remains available to the Court in appropriate cases.

27.2 The nature of the order is sufficiently important to warrant the inclusion of a notice. This is not a procedural order or case management direction, but an order requiring the provision of information about property which is suspected to have been unlawfully obtained. A useful analogy can be drawn with CPR 71.2(7) which requires that orders to obtain information from judgment debtors 'will' contain a penal notice.

27.3 It is appropriate to warn R (and any person who knows of the order) that non-compliance could result in contempt proceedings. Further, the NCA wishes to ensure that the order fully satisfies the requirements in CPR 81.9(1) and CPR 81.25(1),[43] so that any future enforcement action – if appropriate – is not unduly prejudiced.

[42] See the Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2018 (SI 2018/84)
[43] These provisions specify that, where a person disobeys an order, the order cannot be enforced by way of a committal order (under CPR 81.14) or a writ of sequestration (under CPR 81.20) *unless* a penal notice is 'prominently displayed' on the front of the order.

27.4 Finally, and to the extent that R takes issue with the *wording* of the penal notice itself, the notice is in standard form. For example, it is *identical* to the wording of the penal notices for the template interim freezing and search orders in the Annex to CPR Practice Direction 25A:

> **PENAL NOTICE**
>
> **IF YOU [ ] DISOBEY THIS ORDER YOU MAY BE HELD T O BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.**
>
> **ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

(3) **Alternatively, the order should be varied not discharged**

28. **If (notwithstanding the above) the Court considers that the penal notice was wrongly included, it is submitted that this does not justify discharge:**

28.1 The wrongful inclusion of a penal notice does not affect the validity of an order. It simply means that R was warned that she might face penal sanctions for non-compliance which will not occur: see Nuttall v NCA [2016] EWHC 1911 (Admin) at [4].

28.2 If necessary, the appropriate remedy is to vary the order to remove (or amend the wording) of the penal notice.

6. THE A1P1 ARGUMENT

(1) **The UWO does not interfere with any rights under A1P1**

29. Article 1 of Protocol 1 ECHR (**"A1P1"**) provides as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

30. In Sporrong and Lonnroth v Sweden (1982) 5 EHRR 35 at [61], the ECtHR identified that A1P1 comprises three rules:

(1) The general principle in the first sentence that every person is entitled to 'peaceful enjoyment of his possessions' (**"the first rule"**);

(2) The prohibition against 'deprivation' of property (**"the second rule"**);

(3) The right of states to 'control the use of property' in accordance with the general interest (**"the third rule"**).[44]

31. It is submitted that the second and third rules are plainly not applicable in this case:

31.1 The UWO does not 'deprive' R (or her husband) of property. There has been no *de jure* or *de facto* extinction of the legal rights of ownership over property. There has been no confiscation or expropriation. The presumption has not yet been engaged. A civil recovery order has not yet been made.

31.2 The UWO does not 'control' the use of property by R (or her husband). It does not impose any *restrictions* on the use of property, nor require any *positive action* to be taken in connection with the use of property: c/f R (Countryside Alliance) v A-G [2008] AC 719 at [20]-[22] and [128]-[129].

32. **It is submitted that the UWO does not otherwise interfere with the general right to peaceful enjoyment of possessions in rule 1**:

32.1 In order to establish an interference with this rule:

(1) It is not enough to show that a measure concerns property in a general sense. It is important to distinguish between the issue of whether a right is 'engaged' (i.e. whether the issue falls within the *scope* of the article) and whether there is an 'interference' with a right which requires justification. As emphasised by Lord Hope in R (L) v Metropolitan Police Commissioner [2010] 1 AC 410 at [23]:

[44] Before enquiring whether there has been an interference with the first rule, it is necessary to consider whether the last two rules are applicable: Sporrong at [61]. However, it has been recognised that the three rules are not unconnected: the second and third rules are concerned with particular instances of interference with the first rule and should therefore be construed in the light of the general principle it contains: see AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 at [22] and [108].

> 23. The word "engaged", which Ms Barton used when she said that article 8 was not engaged in this case at all, requires to be examined with some care. It does not form part of the vocabulary of the European Court and, as Laws LJ said in *Sheffield City Council v Smart* [2002] EWCA Civ 04, [2002] HLR 639, para 22, its use is liable to be misleading and unhelpful. In *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, para 47 I said that I would not for my part regard its use as objectionable, so long as there was no doubt what it means in this context. I drew attention to the words of Sir Gerald Fitzmaurice in his dissenting opinion in *Marckx v Belgium* (1979) 2 EHRR 330, in which he said that the question was whether the provision was "applicable" – a concept which is juridically distinct from that of whether the provision has been breached. In other words, the question is whether the issue that has been raised is within the scope of the article. If it is not within its scope, the question of a possible breach of it does not arise at all. If it is, the question whether there is an interference with it which requires to be justified under article 8(2) is a separate question. The question whether something falls within the ambit of any of the rights or freedoms set forth in the Convention for the purpose of the prohibition of discrimination in article 14 reflects this approach.

(2) It is not enough to show mere interference with the enjoyment of property. As identified by Carnwarth LJ in Thomas v Bridgend CBC [2012] QB 512 at [34]-[38]:

> 34. In spite of the wording of the first rule, it is clear that it is not enough to show mere interference with the enjoyment of property. *Clayton & Tomlinson* state, at para 18.81, that article 1 "*does not afford ... a right to peaceful enjoyment of possessions in a pleasant environment*". To similar effect is *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 2nd ed (2004), p 662: "*The state will be responsible under article 1 of the First Protocol for interferences which affect the economic value of property. Accordingly claims about interferences with the aesthetic or environmental qualities of possessions are protected, if they be protected at all, elsewhere in the Convention.*"
>
> ...
>
> 38 To summarise, loss of a quiet and pleasant environment, without evidence of loss of value, is not enough to engage article 1 of the First Protocol; nor article 8 of the Convention unless the effects are "direct and serious". Neither point provides an answer to this case.

Similarly, in Rayner v United Kingdom (1987) 9 EHRR 375 at p.14, the Commission held that the applicant's complaint (about noise from Heathrow Airport) did not disclose a violation of A1P1:

> The applicant has further invoked [A1P1] which guarantees the right to the peaceful enjoyment of possessions. This provision is mainly concerned with the confiscation of property and does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment. It is true that aircraft noise nuisance of considerable importance both as to the level and frequency may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property. However, the applicant has not submitted any evidence showing that the value of his property was substantially diminished on the ground of aircraft noise so as to constitute a disproportionate burden amounting to a partial taking of property necessitating payment of compensation.

32.2 Applying the above, it is submitted that there is no interference. The UWO only concerns property in a general sense. It is questionable whether complying with the order will affect R's enjoyment of property. R has simply been asked to provide information about the property. In any event, mere interference with enjoyment of possessions – even if established – is not sufficient. The order itself does not give rise to a diminution of value.

(2) **Alternatively, any interference with A1P1 is justified**

33. Whilst not expressly 'spelt out' in A1P1, it is well-established that any interference with the right – whether it concerns the first, second or third rule – can be justified if: (1) the interference complies with the principle of legality; (2) the interference pursues a legitimate aim (or is the 'public interest' or 'general interest'), and; (3) the means used are reasonably proportionate to the aim sought to be realised: see AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 at [22] and [108].

34. **Any interference is lawful**:

34.1 The principle of legality requires that: (a) an interference must have a domestic legal basis; (b) the law or rule in question must be sufficiently accessible, precise and foreseeable in its effects, and; (c) it should not operate or be applied in a manner which is arbitrary: see AXA at [116] and [119], and R v Shayler [2003] 1 AC 247 at [56].

34.2 First, any interference has a domestic legal basis. Sections 362A-I of POCA include detailed statutory rules on the making of UWOs (s362A-B), the effect of a UWO in the event of non-compliance (s362C), the effect of a UWO in the event of compliance or purported compliance (s362D) and offences for making false statements (s362E).

34.3 Second, the domestic law is sufficiently accessible, precise and foreseeable. In summary: (1) R must comply with *all* of the requirements imposed by a UWO within the period(s) specified (s362A(6)); (2) If R *complies* or *purports to comply* with all of the requirements in the UWO, the statutory presumption in s362C will not arise (s362D);[45] (3) If R *fails* without reasonable excuse to

[45] Further guidance on what amounts to 'purported compliance' is given in paragraphs 186, 188 and 189 of the Code of Practice (issued by the Secretary of State under s377 of POCA). This identifies that, if an

comply with all of the requirements in the UWO, the property will be presumed to be recoverable property for the purpose of any proceedings taken in respect of the property under Part 5, unless the contrary is shown. It is submitted that the meaning and consequences of these provisions are not difficult to understand and should be reasonably foreseeable. Put simply, compliance or purported compliance with all of the UWO requirements will avoid the presumption; non-compliance (without reasonable excuse) with any of the requirements will not. To the extent that there is any room for doubt, the ECtHR has emphasised that there is no requirement for absolute certainty (and legal provisions which are capable of more than one construction do not necessarily breach the foreseeability rule): see, for example, Sunday Times v United Kingdom (1979) 2 EHRR 245 at [47]-[49][46] and Goodwin v United Kingdom (1996) 22 EHRR 123 at [31]-[33],[47]

34.4 Third, the domestic provisions do not operate in a manner which is arbitrary. There are multiple safeguards, including: (1) the right to make an application to set aside a UWO (as has happened here); (2) the right to apply to vary the terms of a UWO (in the absence of written agreement from the NCA), including variations to the nature of the information requested and/or increasing time limits for compliance; (3) the defence of purported compliance; (4) the defence of reasonable excuse for non-compliance; (5) the right to show 'the contrary' in any subsequent Part 5 proceedings, and; (6) the existence of further appeal rights.

35. **Any interference pursues a legitimate aim**:

35.1 Parliament has decided that it is in the public interest to enact primary legislation to create this new investigative tool.

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individual has genuinely and fully engaged with the process and attempted to provide a response to each requirement of the order, and has not sought to withhold information or otherwise mislead the agency, then this would amount to purported compliance and the presumption will not arise.

[46] The Court acknowledged at [49]: "*Those consequences [i.e. the consequences which a given action may entail] need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice*".

[47] The Court recognised at [33] that in the area under consideration (an order requiring disclosure of a journalistic source): '*it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary and in the interests of justice*'.

35.2 The objectives pursued in enacting this legislation is identified inter alia at §§7, 12 and 14 of the NCA's original skeleton argument.

35.3 It cannot be said that Parliament's assessment is manifestly unreasonable: AXA at [31]-[33] and [124]-[125].

35.4 The UWO in the present case, which has been made pursuant to the new legislative scheme, pursues the aims of combatting and investigating serious crime (including money laundering and international corruption), and recovering the fruits of crime.

36. **Any interference is proportionate:**

36.1 The issue of proportionality can be expanded into the following question (AXA at [34] and [126], Thomas at [49] and Sporrong at [69]): Does the interference with the right to peaceful enjoyment of possessions strike a 'fair balance' between the demands of the general interest of the public and the requirements of the protection of the fundamental rights of R and her husband, or does it impose a disproportionate and excessive burden on them?

36.2 It is submitted that any interference clearly strikes a 'fair balance':

(1) First, there are grounds to believe that the property has been obtained through unlawful conduct. R has stated that the property was purchased by her husband. Between January – September 2008 (shortly before purchasing the property for £11,500,000), records suggest that Mr Hajiyev's net income was only $70,648. He has subsequently been convicted of serious offences of fraud and embezzlement in connection with his tenure at the IBA (convictions which have not been overturned on appeal). The property itself has been obtained and handled in a complex manner. A fair balance does not require any finding that the property *is* the proceeds of crime at this stage: e.g. see, for example, Raimondo v Italy (1994) 18 EHRR 237 at [24]-[33].

(2) Second, this is (at most) a modest interference with the peaceful enjoyment of property. The UWO plainly does not have an 'extraordinarily severe effect', or impose an excessive burden. It does not restrict or reduce the right in A1P1 to such an extent that the 'very

essence' is impaired. Paragraph 32.2 above is repeated. R is being asked to provide information about one residential property. This is in circumstances where she has apparently lived in the property for several years and has informed the Home Office that she is a beneficial owner of the BVI company which is the registered proprietor.

(3) Third, the terms of the order are clearly defined and restricted to ascertaining relevant information in connection with the property.

(4) Fourth, the NCA has attempted to act promptly and minimise delay. The order was initially subject to a 6 week response period. This has since been extended, and now stayed, at R's request.

(5) Fifth, the NCA has considered whether alternative tools of investigation could be used (in accordance with §176 of the Code of Practice). However, given the information known at this stage, the difficulty in obtaining further information, and the nature of the information required, the NCA does not consider that the necessary objectives can be achieved by less intrusive means.

(6) Sixth, there are multiple safeguards, both procedural and substantive, which mitigate any risk of abuse. These afford R and her husband a reasonable opportunity to challenge the order, as well as the subsequent application of any presumption. Paragraph 34.4 above is repeated.

7. THE PRIVILEGE ARGUMENT

(1) The privileges against self and spousal incrimination

37. Section 14(1) of the Civil Evidence Act 1968 (**"the 1968 Act"**) is declaratory of the common law[48] and provides as follows:

> **14. Privilege against incrimination of self or spouse or civil partner**
>
> (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—

[48] In re Westinghouse Uranium Contract [1978] AC 547 at p.636E (per Lord Diplock).

(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and

(b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

38. Put simply, a person will ordinarily have a right in civil proceedings to refuse to answer any question or produce any document or thing if to do so would tend to incriminate him or her (**"the privilege against self incrimination"**) or his or her spouse (**"the privilege against spousal incrimination"**) to proceedings for a criminal offence (or for the recovery of a penalty).

39. However, this right is subject to a number of well-established limitations.

40. First, the privileges only apply as regards to the risk of prosecution for criminal offences and penalties 'under the law of any part of the United Kingdom'. They do not extend – as of right – to *offences under foreign law*. This is clear from s14(1)(a) of the 1968 Act (see also Westinghouse (supra) at p.636E-F). However, the risk of prosecution abroad can nevertheless be a relevant factor when the deciding whether to exercise a *discretion* to order disclosure.

41. Second, there is a threshold test: the Court must be satisfied that the claim discloses a 'real and appreciable risk' of prosecution/criminal proceedings:

41.1 The following summary is provided in *Matthews and Malek on Disclosure* (Sweet & Maxwell, 5th edn) at §13.11:

> The mere fact that the party concerned believes, even swears, that his supplying information would tend to incriminate him is not conclusive. Instead, what matters is that the risk should be apparent to the court. The court does not try to assess the probability of the risk of proceedings being taken. But it must be satisfied that 'there is reasonable ground to apprehend danger' to the party claiming privilege, or that the risk is 'reasonably likely' or that 'there must be grounds to apprehend danger to the witness, and those grounds must be reasonable, rather than fanciful', or that there is a 'real and appreciable' risk of prosecution if the documents are produced for inspection. A 'mere possibility' of grounds for charge being disclosed is insufficient.

41.2 The Court should satisfy itself of the risk of prosecution and not simply adopt the conclusion of a representative, whose conclusion may or may not be correct: R (CPS) v Bolton Magistrates' Court [2004] 1 WLR 835 at [25].

41.3 It is necessary to provide more than just a bare assertion of privilege. In JSC BTA Bank v Ablyazov [2009] EWCA Civ 1125, Sedley LJ identified at [39]:

> What can the courts do to redress the balance? One step is close scrutiny of a claim to this privilege. Although it is not – or not yet – an issue in this case, one would expect that more will be required for a sustainable claim than a bare statement that documents and facts capable of incriminating the deponent are being withheld. One would expect any such claim, like any claim for legal professional privilege, to be specific in identifying the material document or class of fact and to explain, insofar as the description itself does not do so, why it is potentially incriminating…

41.4 It is necessary to consider whether there is a 'clear link' between the answers and the offences. In Rensworth Ltd v Stephansen [1996] 3 All ER 244, Neill LJ identified at p.250:

> In deciding whether the claim for privilege should be upheld, the court will have to examine… [w]hether there is a clear link between the answers and the offences. Thus, in some cases the evidence available may suggest that a number of possible offences have been committed, but that to some of these offences the answers ordered will have no relevance…

41.5 The privilege cannot be invoked where the provision of information does not create a material increase to an existing risk of incrimination or does not strengthen the case against a Defendant: R v Khan [2008] Crim LR 391 at [30].

42. Third, the privileges can be abrogated by statute, either expressly or impliedly/by necessary implication:

42.1 *Express abrogation under s13 of the Fraud Act 2006.* Section 13 of the 2006 Act contains an important express abrogation of the privileges:

> (1) A person is not to be excused from—
>
> (a) answering any question put to him in proceedings relating to property, or
>
> (b) complying with any order made in proceedings relating to property,
>
> on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related offence.
>
> (2) But, in proceedings for an offence under this Act or a related offence, a statement or admission made by the person in—
>
> (a) answering such a question, or
>
> (b) complying with such an order,
>
> is not admissible in evidence against him or (unless they married or

became civil partners after the making of the statement or admission) his spouse or civil partner.

(3) "Proceedings relating to property" means any proceedings for—

(a) the recovery or administration of any property,

(b) the execution of a trust, or

(c) an account of any property or dealings with property,

and "property" means money or other property whether real or personal (including things in action and other intangible property).

(4) "Related offence" means—

(a) conspiracy to defraud;

(b) any other offence involving any form of fraudulent conduct or purpose.

42.2 *Statutory implied abrogation.* Examples of the courts holding that the privilege against self-incrimination has been abrogated by implication include:

(1) In Bank of England v Riley [1992] Ch 475, the Court of Appeal held that the privilege was impliedly excluded in s42 of the Banking Act 1987. Ralph Gibson LJ identified at pp.484-485:

> In my judgment the language of section 42(1)... does by necessary implication provide that a person suspected of contravening section 3 or section 35, when required to provide information pursuant to the power there given, is under a duty to provide that information and is not excused from so doing because the information would tend to show that he has indeed contravened those provisions of the Act or any other provision of the criminal law... Morritt J. referred to emasculation of section 42 if the privilege against self-incrimination were not impliedly removed. He did not, as I understand his judgment, mean that the section would be left with no function at all, because plainly the section could be used to obtain information from persons who were not, and could not claim that they were, suspected of committing any offence or in danger of incriminating themselves if they responded to the request for information. There would be, however, sufficient destruction of the obvious purpose of section 42 for the point to be a good one. Parliament, in my judgment, did not intend that section 42 should be operated subject to the continuation of the privilege against self-incrimination.

(2) In Bishopsgate Investment Management Ltd v Maxwell [1993] Ch 1, the Court of Appeal held that the privilege was impliedly excluded in ss235 and 236 of the Insolvency Act 1986. Dillon LJ identified at p.20:

> Two recent decisions of this court in which it has been held that the privilege against self-incrimination is, by implication, not available to a person questioned under a statute, since otherwise the obvious purpose of the statute would be stultified, are *In re London United Investments Plc.*

> [1992] Ch 578… and *Bank of England v. Riley* [1992] Ch. 475… The essence of both decisions is that if Parliament, in the public interest, sets up by statute special investigatory procedures to find out if the affairs of a company have been conducted fraudulently, with the possibility of special remedies in the light of an inspector's report, or to find out if there have been infringements of certain sections of the Banking Act 1987 which have been enacted for the protection of members of the public who make deposits, Parliament cannot have intended that anyone questioned under those procedures should be entitled to rely on the privilege against self-incrimination, since that would stultify the procedures and prevent them achieving their obvious purpose.

(3) In R v Hertfordshire CC ex parte Green Environmental Industries Ltd [2000] 2 AC 412, it was common ground that the privilege was excluded in s71 of the Environmental Protection Act 1990. Having cited *inter alia* Dillon LJ's comments in Bishopsgate, Lord Hoffmann said at p.420:

> Mutatis mutandis, it seems to me that this reasoning is applicable to the powers of investigation conferred by section 71(2). Those powers have been conferred not merely for the purpose of enabling the authorities to obtain evidence against offenders but for the broad public purpose of protecting the public health and the environment. Such information is often required urgently and the policy of the statute would be frustrated if the persons who knew most about the extent of the health or environmental hazard were entitled to refuse to provide any information on the ground that their answers might tend to incriminate them. Parliament is more likely to have intended that the question of whether the obligation to provide potentially incriminating answers has caused prejudice to the defence in a subsequent criminal trial should be left to the judge at the trial, exercising his discretion under the Act... For these reasons I would regard the case for implied exclusion of the privilege as even stronger than it was in the cases under the Banking and Companies Acts.
>
> …
>
> My Lords, in the process of construction, the public interest in obtaining the information is only one side of the coin. As Lord Mustill said in *Reg. v. Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1, 32, it is necessary also to identify what variety of the right to silence would be affected by the power and the strength of the grounds for preserving it. As I have said, the request under section 71(2) does not in itself form a part, even a preliminary part, of any criminal proceedings. It does not therefore touch the principle which prohibits interrogation of a person charged or accused. Nor is there any question of the potential abuse of investigatory powers which those rules are designed to prevent. The section does not provide for oral interrogation and the recipient of the request may answer upon advice and at his leisure. Nor does the obligation to give the information prejudice the fairness of a possible trial, since the accused would still have the protection of section 78 of the Act…

(4) In Beghal v DPP [2016] AC 88, the Supreme Court held that the privilege was impliedly excluded in sch.7 of the Terrorism Act 2000. Lord Hughes identified at pp.117-118:

> 61. A statute may, however, exclude this privilege in a particular situation, and may do so either expressly or by necessary implication: the *Bishopsgate case* [1993] Ch 1, 39. Because the privilege is firmly

> embedded in the common law, such necessary implication must be established with clarity and is not to be assumed…
>
> 62. For the appellant Mr Matthew Ryder QC correctly submitted that such a parliamentary intention will often be gathered from an ancillary provision preventing the use in criminal prosecutions of answers or material disclosed, or sometimes limiting such use to specific kinds of prosecution, such as for giving false information on the occasion of the questioning. As he says, no such ancillary provision is present here.
>
> 63. That, however, is to overstate the position. There is no parliamentary consistency of practice. Sometimes, a statute which provides for an obligation to provide information or to answer questions will indeed say that no privilege against self-incrimination may be claimed. Sometimes there will be added a provision that any answer given may not be relied on in a subsequent criminal prosecution, or only in prosecutions for making a false statement in answer… But other provisions which are clearly intended to impose an unqualified obligation to answer do not contain one, or either, of such stipulations. An example is afforded by the provisions considered in the *Bishopsgate* case… Another illustration is *R v Hertfordshire County Council, Ex p Green Environmental Industries Ltd*…
>
> 64 The same applies to the present provisions. The Schedule 7 powers are patently not aimed at the obtaining of information for the purpose of prosecuting either the person questioned or his spouse. Whilst that does not by itself mean that there is no real risk that such information could be so used subsequently, it is an indicator that the process of information gathering is not to be limited by the operation of privilege. The reality is that Schedule 7 powers would be rendered very largely nugatory if privilege applied. The necessary implication is that it does not.

(2) **R is unable to invoke either privilege as of right**

43. **With regards to the alleged risk of prosecution (to R and her husband) for criminal offences outside the UK, s14(1) of the 1968 Act establishes that there is no right to invoke either privilege.** Paragraph 40 above is repeated.

44. **With regards to the alleged risk of prosecution (to R and her husband) for criminal offences in the UK, there is also no entitlement to invoke either privilege. This is for three reasons:**

44.1 First, and most straightforwardly, the claim to privilege – as currently drafted – does not demonstrate a real and appreciable risk:

(1) As identified above, the Court must be satisfied, notwithstanding the conclusions of R's legal advisers, that there is a real and appreciable risk that R or her husband will be prosecuted for offences the UK.

(2) It is submitted that the claim currently discloses no such risk:

(a) The starting point is that §2 of R's witness statement includes only a bare assertion of both privileges.[49] Notably, it does not identify the requested information which gives rise the alleged risk, or the alleged offence(s) for which R or her husband are at risk of prosecution by providing such information. This is a case where the Court should expect more (see paragraph 41.3 above).

(b) The claim to privilege is difficult to reconcile with R's current assertion at §46 of the Grounds that *'what does appear from the limited documentary material which has been identified is that there were very likely monies legitimately available to the Respondent's husband sufficient to purchase the property'*. If this is not the case, the Grounds should be amended accordingly.

(c) The claim to privilege – which is of a blanket nature – is also difficult to reconcile with the terms of the order itself. For example, the order requires information about R's interest in the property, the occupants, the price and costs of the purchase, the involvement and nature of third parties (such as Vicksburg Global) and details of any trust structure. It is not immediately clear how there is any 'clear link' between providing *all* of this information and a material increase in the risk of prosecution.

(d) In any event:

(i) R is expressly protected from prosecution in the UK by the 'use immunity' clause in s362F(1) of POCA.[50]

(ii) Her husband is currently serving a 15 year prison sentence in Azerbaijan.

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[49] *'In response to the questions posed in Schedule 3 to the UWO, and the requirement to produce documents in Schedule 4 to the UWO, I assert my privilege against self-incrimination, and my privilege against incriminating my husband, Mr Jahangir Hajiyev. I am advised that my responses to these questions could be used to incriminate me and/or my husband in criminal proceedings here in the UK or in Azerbaijan'*

[50] Section 362F(1) provides: *'A statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings'* (subject to the limited exceptions in s362F(2)).

44.2 Second, even if R's claim discloses a real and appreciable danger of prosecution in the UK, the privileges have been abrogated:

(1) This is implicit within the language of the UWO provisions:

(a) A UWO imposes a clear requirement to provide information. Section 362A(3) and (5) identify that it is an order 'requiring' the respondent to provide a statement setting out information and to produce documents. Section 362A(6) identifies that the respondent 'must' comply with those requirements: see Riley (pp.483-485).

(b) Section 362F contains a 'use immunity' clause which restricts the use of material, disclosed by a person pursuant to a UWO, in any criminal proceedings against that person in the UK. As acknowledged by Lord Hughes in Beghal (supra) at [62], a Parliamentary intention to exclude the privilege will 'often be gathered' from such a provision.

(c) It is also notable that s362G(1)-(2) (incorporating s361 by reference) provides that a UWO does not confer a right to require a person to answer a question, provide information or produce documents which are protected by *legal* professional privilege (but does not extend that protection to self and spousal incrimination).

(d) The existence of a "reasonable excuse" defence does not justify construing the provisions as retaining the privilege. Such a defence is concerned with such matters as physical inability to comply with a requirement arising from illness, accidental destruction etc: see Riley (supra) at p.482 and p.485.

(2) Further and in any event, such an intention necessarily follows from the scope and nature of the UWO procedure. Parliament, acting in the public interest, has created a special investigatory procedure to ascertain whether property has been obtained unlawfully. It cannot have intended that someone who is required to disclose information or documents under such a procedure should be entitled to rely on the privileges against self or spousal incrimination, since this would 'stultify' the

procedure and prevent it from achieving its purpose: Riley, Bishopsgate, Green Environmental and Beghal (supra).

44.3 Third, even if POCA has not abrogated the privileges by necessary implication, it is submitted that the privileges are excluded by s13 of the Fraud Act 2006 on the particular facts of this case:

(1) As identified above, s13(1) of the 2006 Act provides that a person is *not* to be excused from complying with any order made 'in proceedings relating to property' on the ground that this may incriminate him or his spouse of an offence under the Fraud Act or a 'related offence'. In Kensington International Ltd v Republic of Congo [2008] 1 All ER (Comm) 934, Moore-Bick LJ identified at [36]:

> ... it is quite clear that s 13 of the 2006 Act does remove the privilege in the context in which it applies. If there is any uncertainty, it is only in relation to the precise range of proceedings to which it applies. However, the loss of privilege is largely, if not entirely, balanced by rendering information disclosed pursuant to the section inadmissible in proceedings for an offence under the 2006 Act itself or a related offence. That reflects a balance of competing interests set by Parliament and since it must be taken to have thought that balance to be in the overall interests of society, I do not think that the court should be astute to construe the section restrictively.

(2) It is submitted that this is an order made *'in proceedings relating to property'*. At the very least, these are proceedings for 'an account of any property of dealings with property' within the meaning of s13(3).

(3) Whilst R has failed to identify the offence(s) for which she (and her husband) are said to be at risk of prosecution, it is anticipated that any offence will comprise a qualifying offence, namely:

(a) An offence under the Fraud Act 2006 (s13(1)), and/or;

(b) Conspiracy to defraud (s13(4)(a)), and/or;

(c) Any other offence 'involving any form of fraudulent conduct or purpose' (s13(4)(b)). This requirement has been construed broadly as including bribery (Kensington, supra) and entering into a money laundering arrangement (JSC BTA Bank v Ablyazov [2010] 1 WLR 976).

(3) **The UWO should not be discharged on a discretionary basis**

45. **Whilst R is not entitled to invoke the privileges as of a right (for the reasons given above), it is accepted that any risk of prosecution – whether in the UK or abroad – can in principle be a relevant factor when determining whether to exercise the *discretion* to make a UWO under s362A(1) of POCA. For example:**

45.1 In Arab Monetary Fund v Hashim [1989] 1 WLR 565, Morritt J held at p.574 that the risk of prosecution for offences under foreign law was a factor which could be taken into account when deciding whether to grant an ancillary order for provision of information in a freezing order.

45.2 In Dubai Bank v Galadari (No. 2) [1990] 1 WLR 731, Slade LJ acknowledged at p.743 (in the context of an order to disclose documents which had been 'referred' to in an affidavit):

> It must always be a matter of concern for the court when it is asserted that the effect of a proposed order, if made, will be to place individuals in personal jeopardy at the hands of a foreign state. Due weight must always be given to such assertion. In our judgment, however, the judge gave careful consideration and due weight to this point in the balancing exercise which he had to perform in the exercise of his discretion, for which purpose he had to have regard also to the proper safeguards of the interests of the plaintiff, which asserts that it has lost large sums through serious frauds which it is attempting to recover by means of a tracing operation. In our judgment, the exercise of his discretion cannot be impeached on any valid grounds.

45.3 In JSC BTA Bank v Ablyazov [2014] EWHC 2788 (Comm) (a case concerning an application for disclosure), Popplewell J identified at [113]:

> The privilege, properly so called, attaches only where there is a danger in relation to proceedings in part of the United Kingdom. But it is well recognised that where such a danger arises in relation to proceedings abroad, the court has a discretion to refuse disclosure which may take account of, and protect, the same interests of the disclosing party as give rise to the privilege in domestic proceedings: *Brannigan v Davison* [1997] AC 238, 2 BHRC 395, [1996] 4 LRC 716. On the current application, I proceed on the basis that the risk of incrimination in foreign proceedings should be a bar to disclosure to the same extent as would apply in respect of proceedings within the UK (cf *R v Khan* [2007] EWCA Crim 2331 at 26, [2008] Crim LR 391).

45.4 In R (River East Supplies Ltd) v Crown Court at Nottingham [2017] 4 WLR 135 (a case concerning an application for a search warrant under s8 of PACE 1984), Simon LJ identified at [45]:

> Although *In re Westinghouse Electric Corpn* concerned a penalty that was held for the purposes of section 14 of the Civil Evidence Act 1968 to be a penalty

provided for "by the law ... of the United Kingdom", it was common ground before us that where production of a document would tend to expose a person to proceedings for an offence in a foreign jurisdiction, the court had a discretion to refuse disclosure, and could then properly proceed on the basis that the risk of self-incrimination in foreign proceedings should be a bar to production to the same extent as would apply in respect of proceedings within the United Kingdom: *Brannigan v Davison*[1997] AC238, applied in *JSC BTA Bank v Ablyazov (No 13)* [2014] EWHC 2788 (Comm) at [113], with reference to *R v Khan (Mohammed Ajmal)* [2007] EWCA Crim 2331 at [26]. We are prepared to proceed on that well-recognised basis in the present case.

46. **It is submitted that the considerations raised by R should not cause the Court to exercise its discretion to discharge the UWO in this case:**

46.1 The order is in the public interest. As the occupant of the property, and an ultimate beneficial owner of its registered proprietor, R should be in a position to provide relevant information about the property.

46.2 Disclosure of information under the UWO will not give rise to a real or appreciable risk of prosecution for offences in the UK (to R or her husband). Paragraph 44.1 above is repeated.

46.3 Disclosure of information will not give rise to a real or appreciable risk of prosecution for offences in Azerbaijan (to R or her husband):

(1) Again, R has made only a bare assertion to privilege at this stage, and has not identified the information which would tend to expose her or her husband to a risk of criminal proceedings in Azerbaijan, or the likely nature of the offences.

(2) Any information which is ultimately provided by R will be provided to the NCA, and not the Azeris.

(3) Even if such information were to be obtained by the Azeris, it is prima facie difficult to see how this could materially increase the risk of prosecution. Mr Hajiyev is currently serving a 15 year prison sentence, having been convicted of multiple offences. R has been arrested in absentia and has been declared 'wanted': §19 of Ms Barlett's witness statement. The NCA relies on the following observation of Sedley LJ in JSC BTA Bank v Ablyazov [2009] EWCA Civ 1125 at [40]:

> My second and related concern is with the submissions of Mr Doctor QC about the state of affairs in Kazakhstan. He has suggested repeatedly that the rule of law does not operate in that country and that his clients, if returned, face arbitrary arrest, a prearranged trial, severe punishment and confiscation of their assets. If this is a fair account of what would await them if returned (and we are told there is no extradition treaty), then their possible disclosure of incriminating material is beside the point: the Kazakh state does not need further evidence. If it is not a fair account – and the material we have seen, including a detailed draft indictment, does not very obviously support it – then Mr Doctor's case may actually be stronger. But he cannot have it both ways.

(4) If there is in fact a risk that information could expose R or her husband to unfair criminal proceedings (or any other disadvantage) in Azerbaijan, this is not a reason for discharging the order. This is because the NCA, as a public body, has a duty to act consistently with the ECHR, and specifically like other public bodies in this field must comply with the Overseas Security and Justice Assistance (**"OSJA"**) guidance which sets out carefully structured and regulated processes for deciding whether onward disclosure would give rise to an impermissible risk.

8. THE DISCRETION ARGUMENT

47. **In all the circumstances, it is submitted that it was – and remains – appropriate to continue (or re-make) the UWO against R in the same terms.** The statutory criteria are met. The order is in the public interest. Any interference is modest and proportionate. The terms of the order itself are justified.

48. Addressing R's specific concerns at §§65-70 of the Grounds:

48.1 The concern that Mr Hajiyev is unable to participate meaningfully in the UWO process is not a reason for discharging the order. The order has been made against R – not Mr Hajiyev – in circumstances where she is his wife, she has lived at the property for many years, and has informed the Home Office that she is the UBO of the registered proprietor.

48.2 The concern that Mr Hajiyev will be unable to participate meaningfully in any future civil recovery proceedings is not a reason for discharging the order. The case remains at an investigative stage. *If* such proceedings are

ultimately justified, and he asserts an interest in the property and wishes to defend them, or seeks to participate as a witness, then consideration will need to be given to enabling a fair trial of the claim at that stage.

48.3 The concern that the NCA is inviting the Court to be a 'handmaiden' of abusive Azeri criminal proceedings – through provision of information to the Azeri authorities – has already been addressed above.

CONCLUSION

49. For all of the above reasons, the Court is invited to dismiss the application.

50. Should the Court dismiss the application, the NCA repeats §8.1 of its grounds of resistance. The obligations under the UWO have been stayed and not extinguished. R will therefore have the balance of the response period to comply with the UWO in full. For the avoidance of doubt, the sealed envelope which has been filed with the Court will not constitute compliance.

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