



## **THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **“Unexplained Wealth: A Draconian Remedy or a Powerful Tool?”**

*An Address by the Director of Public Prosecutions for Fiji, Mr Christopher Pryde, at the ODDP Annual Conference 2022 on 25<sup>th</sup> June at the Warwick Fiji.*

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1. Criminals all over the world are becoming smarter and they are making enormous sums of money. This is a problem not just because of the grief it causes to individual victims but because the enormous amounts stolen and laundered through the banking systems can destabilise economies and, in some cases, whole countries and so it becomes a security issue.
2. In Russia at the end of the Soviet era during the government’s privatization plans, instead of 150 million Russians sharing the spoils of mass privatization, 22 oligarchs managed to own 39% of the economy while the average Russian lived in poverty.<sup>1</sup> To put that figure into perspective, we are not talking about 1% of the population,

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<sup>1</sup> P.84 Red Notice: A True Story of Corruption, Murder and One Man’s Fight for Justice by Bill Browder

we are talking about 0.000015% of the population controlling 39% of the country's economy.

3. The sums are enormous and the money has to be spent somewhere. It is often channelled into plush real estate around the world, into priceless works of art, into football clubs in England such as the Chelsea football club and even, as Fiji has seen recently, into a US\$350,000,000 superyacht. In fact, the alleged beneficial owner of the yacht, Sulieman Kerimov, is reputed to have a net worth of US\$14.6 billion making him the 14<sup>th</sup> richest man in Russia and the 118<sup>th</sup> richest person in the world. To put that into local perspective, Fiji's total gross domestic product as a country is only US\$5.48 billion so he is about 3 times richer than the entire country.
4. But how do we deal with people who appear to have vast wealth but with no identifiable source for their wealth? Should we even care especially if they have not committed any crime, or not committed a crime that we can prove? What do we do when the partners of people who have committed crimes transfer their ill-gotten booty to family members?
5. In 2019, suspicions were raised in the UK when the wife of the gaoled Azerbaijani banker, Jahangir Hajiyev, managed to spend £16m (F\$45m) at Harrod's London Department Store over a ten-year shopping spree in which she treated the store in Knightsbridge, London, like a corner shop, popping in for £24,000 worth of tea and coffee, spending £10,000 on fruit and veg, and £32,000 on Godiva chocolates.<sup>2</sup> She also owned a £15m five-bedroom home in

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<sup>2</sup> <https://www.theguardian.com/business/2019/may/28/court-releases-16m-harrods-shopping-list-in-mcmafia-case>

Knightsbridge (near Harrods), a £10m golf course and a £42m Gulfstream jet! Her husband had been convicted in 2016 of defrauding the International Bank of Azerbaijan out of £2.2 billion of public funds and she was unemployed.

6. The UK government's response was to make use of a new type of court order that can be issued to compel a person to reveal the sources of their unexplained wealth. Nicknamed the *McMafia law* after a BBC organised crime drama, Unexplained Wealth Orders were first introduced in the UK by the Criminal Finances Act 2017 and are governed by the Proceeds of Crime Act 2002.
7. The justification for the introduction of Unexplained Wealth Orders was a 2017 Impact Assessment Report where the UK Home Office concluded that the size of the UK financial and professional services sector, the open economy and the attractiveness of its property market to overseas investors made the UK unusually exposed to financial crime.<sup>3</sup>
8. It found that the current anti-money-laundering regime was inadequate and considered that the new measures proposed and subsequently introduced by the Criminal Finances Act 2017 would increase the effectiveness of enforcement agencies in combating financial crimes.

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<sup>3</sup> [https://www.skrine.com/insights/alerts/august-2021/the-mcmafia-laws-unexplained-wealth-orders-explain#\\_edn2](https://www.skrine.com/insights/alerts/august-2021/the-mcmafia-laws-unexplained-wealth-orders-explain#_edn2)

9. Mrs Hajiyeva challenged the Unexplained Wealth Orders on the grounds that they were “intrusive” and based on the “grossly unfair trial of her husband”. Her barrister at the proceedings commented that “Spending money, however exorbitant, is not a criminal offence. Spending that sort of money in Harrods might be offensive but it’s not a criminal offence in law”.<sup>4</sup>
10. Her final appeal was dismissed by the UK’s Supreme Court in December 2020 who effectively found that her wealth was out of keeping with her husband’s official government salary. As a result, she now must provide the National Crime Agency with a detailed account of the source of her wealth and, if she is unable to do so, stands to lose a sizable amount of her wealth.
11. There have been only three applications since then and none since 2019 and all have been brought by the National Crime Agency and although other agencies such as the DPP’s Office and the Serious Fraud Office have the authority to use them, none have so far done so.
12. The reticence of crime agencies in the UK to make use of Unexplained Wealth Orders suggests they are not easy to obtain and in the case of *National Crime Authority v Baker*<sup>5</sup>, the court held that the agency bringing the application to court was liable not only for its own costs but the costs of the defendant which can be very significant. In the

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<sup>4</sup> <https://www.theguardian.com/business/2019/dec/12/woman-who-spent-16m-in-harrods-says-court-order-is-intrusive>

<sup>5</sup> *National Crime Agency v Baker & Ors* [2020] EWHC 822 (Admin) (08 April 2020) (upheld by Lady Justice Carr on appeal).

*Baker* case, it was reported that the potential costs could be as much as half the agency's £4m annual budget.

13. Obviously, the *Baker* decision will make agencies more careful in bringing such applications to court. It is also clear that the UK courts will very closely scrutinise any applications for Unexplained Wealth Orders no doubt fully cognizant of the potential for misuse of a law that has been described by some commentators as draconian.
14. What is the situation in Fiji?
15. Fiji has some of the most up-to-date laws in the Pacific for dealing with the proceeds of crime and this now also includes a 2012 amendment to the *Proceeds of Crime Act* which allows the Director of Public Prosecutions in an appropriate situation to apply to the High Court for an Unexplained Wealth Declaration requiring a person who lives beyond their apparent means to justify the legitimacy of their financial circumstances.<sup>6</sup>
16. In the event that the Court makes a declaration that the property or income is “unexplained wealth”, then the amount that is unexplained will be forfeited to the State.
17. Interestingly, the introduction of Unexplained Wealth Declarations into Fijian law predates the UK law by 5 years.

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<sup>6</sup> Part 5B Unexplained Wealth, section 71 Fijian POC Act 1997 as amended wef 1 September 2012.

18. There are, however, some significant differences.
19. In the UK, the High Court may grant an Unexplained Wealth Order in respect of any property if it is satisfied that:
- i. there is reasonable cause to believe that the Respondent holds the property (whether in entirety or in part with others) and that the value of the property is greater than £50,000;<sup>7</sup>*
  - ii. there are reasonable grounds for suspecting that the known sources of the Respondent's lawful income would have been insufficient for the purposes of enabling the Respondent to obtain the property;<sup>8</sup> and*
  - iii. the Respondent is either a Politically Exposed Person or there are reasonable grounds for suspecting that the Respondent (or a person connected to the Respondent) is, or has been, involved in serious crime (anywhere in the world).<sup>9</sup>*
20. Under Fijian law, there is no minimum value requirement or any requirement that obliges the DPP to satisfy the court that the person against whom the Unexplained Wealth application is directed is a politically exposed person or has been involved, or connected to a person who is involved, in serious crime.

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<sup>7</sup> Section 362B(2) of UK POCA.

<sup>8</sup> Section 362B(3) of UK POCA.

<sup>9</sup> Section 362B(4) of UK POCA.

21. In other words, the DPP can pursue an Unexplained Wealth Declaration against anyone for any amount without the restrictions that apply under the UK law.
22. For public policy reasons, however, it is highly unlikely that an application in Fiji would be made in circumstances where there is no link to a serious crime having been committed. We are not in the business of targeting individuals simply because they have wealth (even if they are Russian oligarchs) and there would need to be a connection to a crime or, at least, a strong suspicion that the property or income is related to a crime before an application would be considered.
23. In Fiji, we are also faced with considerable potential costs in bringing the application to court, and the Proceeds of Crime Act specifically provides for the costs of the respondent to an application to be recovered from the State if the application is successfully defended.<sup>10</sup> For these reasons also, we need to be cautious in how we proceed.
24. The UK law also specifically provides for extraterritoriality which allows UK courts to pursue applications against non-British citizens and against property not located in the UK. Although there is no specific extraterritoriality provision under Fiji's Proceeds of Crime Act, there is no specific prohibition either since the application is a civil application and not made under the Crimes Act which does limit Fijian jurisdiction. If we were to pursue a person or their assets overseas, we would follow the provisions laid down in the Mutual Legal Assistance

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<sup>10</sup> Section 73 Fijian Proceeds of Crime Act 1997

Act but it is likely that the costs involved would inform whether it was worth pursuing.

25. In 2020 however the planets aligned to allow us to bring to court our first successful Unexplained Wealth Declaration in relation to \$28,000 cash found in the possession of the wife of an alleged drug dealer.<sup>11</sup> The cash was found in her possession after a police search of the vehicle she was travelling in on 1 March 2019. She claimed that the money had been the proceeds from the sale of another vehicle. We said that the money was the proceeds from the sale of illicit drugs for which her husband was under active investigation.
26. The nature of the application and the power of the application lies in the reverse onus principle where it is the responsibility of the respondent, in this case the wife, to provide to the court *a satisfactory explanation*, that the money is legitimate. In other words, the DPP does not have to prove that the money is illegitimate.
27. It should also be noted that the usual civil standard of balance of probabilities that is the standard of proof in other parts of the Proceeds of Crime Act does not appear at first glance to apply to an Unexplained Wealth Declaration.<sup>12</sup>
28. Section 71F requires a respondent to an Unexplained Wealth Declaration application to provide *“a satisfactory explanation”* which

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<sup>11</sup> DPP v Keshni Lata; Civil Action No. HBM 10/2020

<sup>12</sup> Section 72 Fijian POC states that the balance of probabilities applies under the POC Act other than in proceedings under part 5

is, arguably, a lower threshold although the court will only make a declaration if it is satisfied on the balance of probabilities that it is more likely than not that the respondent's total wealth is greater than his her lawfully acquired wealth.<sup>13</sup> It is uncertain why the legislature preferred to use the threshold term of *satisfactory explanation* in section 71F but used the balance of probabilities threshold in section 71K. It is probable that both phrases are synonymous.

29. The court agreed with us that the money was disproportionate to the wife's standard of living having regard to a number of factors; she had a modest income and had been unemployed for a prolonged period; her story of the money being the proceeds of the sale of car was investigated and found to be untrue; her husband was under active investigation for the supply of illicit drugs; and the money was hidden in the car and wrapped in Burger King wrappers.
30. The court having taken all these factors into account did not accept her explanation for being in possession of the money as satisfactory and concluded that the money was more likely than not to be the proceeds from her husband's illegal activity. The court then made a declaration that the money was unexplained wealth and the money was subsequently forfeited to the State.

### **Conclusion**

31. Fiji is one of the few common law countries to have an unexplained wealth provision as part of its proceeds of crime arsenal and it is a

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<sup>13</sup> Section 71K Fijian POC Act.

potentially major weapon (or “powerful tool” to use the vernacular of the conference topic) in the fight against the criminals who seek to hide their illicit wealth from the authorities.

32. But it is not a crime to have wealth, even extraordinary amounts of wealth such as we see with Russian oligarchs and others. Unexplained Wealth Declarations are not tools to be used wantonly against people of whom the public is jealous because of their wealth or even at people who we may suspect or are rumoured to have illicit wealth or conduct shady business deals. It is not a tool for the redistribution of wealth.
33. It is a tool to be used to call certain people to account for their wealth in limited circumstances. It would be draconian and contrary to well-established constitutional rights, and, indeed, the public interest, for the State to be given the power to deprive a person of their property or wealth without first going through a careful and rigorous analysis that connects the respondent to some form of criminal activity committed either by themselves or a closely-connected person such as a partner, relative, or close business associate.
34. Just because we can, does not mean we should or we must and the right of all persons to acquire wealth and to enjoy quiet possession of their property must be respected and balanced against the need to fight crime.
35. The State must never lose sight of the balance that needs to be struck between an individual’s right to own property and the right to spend their money howsoever they choose and the duty of the State to

prevent the proceeds of crime from flowing freely through the economy.

36. Unexplained Wealth Declarations are a powerful and legitimate tool in assisting the State to remove the profit from illegal drug activity and which, if used judiciously and with care will, in time, increase the effectiveness of enforcement agencies in Fiji in combating crime, particularly financial crime.
37. Importantly, criminals are forewarned that the business risk of imprisonment after conviction for a crime, now also includes the added risk that their property and wealth, even in the hands of their relatives, is in jeopardy.

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