



## The Unexplained Wealth Order for the Recovery of Corrupt Assets: Imminent instrument for Malaysia?

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### Abstract

The Unexplained Wealth Order in the United Kingdom allows the recovery of proceeds of corruption without conviction. The burden of proof lies on the asset owner to prove its legitimate source. This study addresses the applicability of the Unexplained Wealth Order in Malaysia based on a doctrinal study. Analysis of the Unexplained Wealth Order is required as part of civil means to regain the corruption proceeds in Malaysia. The study may assist the stakeholders in Malaysia in understanding the concept of the Unexplained Wealth Order and determining its viability.

Keywords: corruption; proceeds of corruption; civil mechanism; asset recovery

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### 1.0 Introduction

Global efforts to combat corruption and address the proceeds of corruption have drawn increased international attention in recent years (Harvey, 2020). Under the United Nations Convention against Corruption (UNCAC), recovery of proceeds of corruption is vital, where strengthening asset recovery is a target for the United Nations Sustainable Development Goal (International Anti-Corruption Academy, 2017). It is a challenge to recover the proceeds of corruption as corruption is not easy to ascertain and probe. In many cases, it is a part of a plot between agreeable parties (Dornbierer, 2021). The perpetrators can relish the proceeds of their corruption. Many jurisdictions have attempted to tackle this quandary by establishing laws allowing the recovery of corrupt assets without proving the act of corruption that gave rise to these proceeds to either a criminal or civil standard of proof (Dornbierer, 2021). In Malaysia, both criminal and civil mechanisms of recovery of corrupt assets are available. Section 41 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act 2009") and section 56 of the Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUA 2001") provide for the civil mechanism of recovery of corrupt assets. In 2018, it was reported that Malaysia is considering introducing the Unexplained Wealth Order ("UWO") (The Edge Financial Daily, 2018), as practised in the United Kingdom ("UK"). The UWO is a new investigatory instrument in the UK (Stringer-Fehlow & Steen, 2019) established under the Criminal Finances Act 2017 ("CFA 2017") and enforced on 31 January 2018, following Australia and Ireland's footsteps (Esoimeme, 2020). The UWO allows the authorities to be gradually more effective in seizing the proceeds of crime (Wadhwa, 2020) and is hailed as a useful supplementary tool against the proceeds of corruption (Lukito, 2020).

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Under the UWO, the respondent must explain his interest in the assets that seems inconsistent with his known legitimate wealth and how are the assets acquired (Alexander & Cook, 2020). If no adequate explanation or unsatisfactory evidence is given, the assets will be considered as “recoverable property” under the Proceeds of Crime Act 2002 (“POCA 2002”) (Clancy, 2020). Implementation of the UWO is more intricate and less potent than what it is perceived to be, and to date, there are 15 UWOs in four cases (Anton Moiseienko, 2021). The research thus aims to explore the viability of the UWO in Malaysia. The research objective is to enhance the law and regulation in Malaysia on civil means of asset recovery, where the methods of the UWO implemented in the UK are lessons to be studied.

## 2.0 Literature Review

Corruption is a form of unethical behaviour and wrongdoing, which is the outcome of abuse of power for an individual's or group's benefit against the common good (O'Hara, 2014). Corruption is damaging to a country because decisions are taken not for public use but to serve private interests (Søreide, 2005). Other scholars maintain that reputation matters (Sampath et al., 2018). These writings unanimously stand on the same idea of corruption. Literature is replete with the necessity of laws to curtail corruption (Balasingam, 2021; Campbell, 2018; Ekwueme, 2021; Mukwiri, 2015) and prevent the proceeds of corruption's enjoyment (Greenberg & Samuel, 2009; Minefee & Bucheli, 2021; Tromme, 2019). Willebois (de Willebois & Brun, 2013) emphasised civil law remedies can complement criminal sanctions by attacking the economic base of corrupt activities. His view is supported by Anastasia Sotiropoulou (Sotiropoulou, 2015), who emphasised the advantages of civil law as an easy and effective choice when criminal law means are unavailable. The Stolen Asset Recovery Initiative (StAR) recommends multiple channels for asset recovery, including civil forfeiture and the UWO (Transparency International, 2015). Tommaso Trinchera accentuated confiscation decreases the motivation to commit bribery by removing the fruits of the illicit acts (Trinchera, 2020). Nicola Sharp stressed CRO is a simpler alternative to seeking a conviction and then looking to recover assets when the case does not meet the criteria for prosecution (Nicola, 2020). Jennifer Hendry and Colin King opined that the CRO is implemented due to the criminal law's perceived ‘failure’ in tackling organised crime to target financial assets arising from illegal activities (Hendry & King, 2015). Justine Wadhwa observed the difficulty in bringing civil recovery proceedings where there was not much information about an individual's wealth source, which resulted in the creation of the UWO (Wadhwa, 2020).

The current MACC chief commissioner, Datuk Seri Azam Baki, highlighted Malaysia has a solid legal and regulatory framework for asset recovery (Bernama, 2020). However, there is a shortage of literature in Malaysia on asset recovery vis-à-vis civil forfeiture focusing on corruption, where the topic is less explored. Aurasu and Aspalella A. Rahman (Aurasu & Abdul Rahman, 2016) emphasised that a scarce study has been done on the efficacy of civil forfeiture in Malaysia. They further stated that as civil forfeiture is a recent law, its application by the local enforcement agencies is not equivalent to criminal forfeiture. However, it is more efficient than the criminal approach, which only focuses on reprimanding the individual criminal but failed to diminish the illegal operations as a whole (Aurasu & Abdul Rahman, 2018). Indeed, Aspalella Abdul Rahman (A. Rahman, 2021) contended that Malaysia should implement a more efficient and practicable legal solution for civil forfeiture. The UWO may be one of the solutions at hand.

The abovementioned literature review contributes to add knowledge and valuable recommendations on the recovery of proceeds of corruption. There is no in-depth study on the area of the civil mechanism, including the UWO that compares Malaysia and the UK best practices. The research attempts to close this gap. The timely inclusion of the UWO may surmount the hindrances of civil forfeiture.

## 3.0 Methodology

The research is based on a doctrinal study. Legal rules take on the quality of being doctrinal because they are not just casual or convenient norms but rules that apply consistently and evolve organically and slowly (Hutchinson & Nigel, 2019). The study undertakes an armchair researcher approach (Ali et al., 2017) comprising the critical analysis on the primary sources of related statutes and legal cases and supported by the analytical review of the literature. Secondary sources on corruption, civil forfeiture or civil recovery order (“CRO”), and the UWO are subjected to critical literature reviews. Thematic and content analyses are used to analyse the qualitative data using the grounded theory technique. The technique involved establishing codes and categories and extracting themes from the collected data.

## 4.0 Findings

### 4.1 CRO and the UWO in the UK

In the UK, CROs under the POCA 2002 (King & Lord, 2018) allows the proceeds of crime recovery (Ferguson, 2018) to be returned to the government or the victims (Lukito, 2020). The POCA Guidance 2018 states CROs can make an essential contribution to the reduction of crime when: (i) it is not feasible to secure a conviction, (ii) a conviction is obtained, but a confiscation order is not made, (iii) readily identifiable assets (including cash) can be seized and forfeited effectively, or (iv) the public interest will be better served by using those powers rather than by seeking a confiscation order (irrespective of there also being a connected criminal investigation/proceedings) (The Proceeds Of Crime Act 2002 (POCA) Guidance Under Section 2A January 2018, 2018). CROs do not depend on a criminal conviction. The forfeiture is *in rem*, not *in personam*, and the proceedings take place in the civil and not criminal courts (Serby, 2013). However, the CRO was limited to exceptional cases where criminal prosecution was unattainable or unsuitable (Ali Shalchi, 2021). The UWO was

enacted to address the insufficiency of the previous legislation (Holland, 2020). A few requirements must be met before the order be made by the High Court (Section 362B of the Proceeds of Crime Act 2002).

Amongst others, there is a reasonable cause to believe that the respondent holds the property. The property value is more than £50,000. There are also reasonable grounds to suspect the respondent's lawfully obtained income is insufficient to acquire the property.

Further, the UWO applies to a foreign politically exposed person ("PEP") who holds his prominent public functions outside the UK or the European Economic Area (EEA), suspects of serious crimes and persons connected to them. The UWO can apply to companies if there is a connection with a PEP or persons connected to the PEP. If the order is issued, the respondent must respond within the specified time frame (*Proceeds of Crime Act 2002*, 2002). A false, misleading and reckless statement amounts to an offence under Section 362E POCA 2002. The interim freezing order can be simultaneously applied with the UWO, prohibiting the respondent from dealing with them (Ali Shalchi, 2021). The UWO has a higher likelihood of success (Freckleton, 2020). The application is more extensive as it can be made against the respondent's estate after his death. The prosecution does not need to prove the assets are the proceeds of crime as the onus of proof lies on the respondent. Tan argues that since the UWO is imposed on reasonableness and possibility, it provides an essential path for authorities to tackle money laundering in the real estate industry (Tan, 2018). There is no requirement to prove a link between a property and the UK, as assets can be subject to the UWO irrespective of location. The UWO provides the authorities with effective control (Tan, 2018). In *National Crime Agency ("NCA") v Hajiyeva (Rev 1) [2018] EWHC 2534*, the respondent sought to discharge the UWO obtained against her concerning her luxury home in London (Stephenson Harwood, 2020), all of which were dismissed (Alexander & Cook, 2020). In granting the UWO, the Court held that the respondent's husband fell within the scope of a PEP. Thus, she constituted a PEP and must comply with the UWO (Ali Shalchi, 2021).

The NCA successfully obtained the UWOs against eight properties owned by Mansoor Mahmood Hussain, suspected of being involved in serious crime (*NCA v Hussain and others [2020] EWHC 432*). A settlement agreement was reached through a sealed recovery order on 2 October 2020. Most of his assets, including almost £10 million in properties and cash, were handed over (Holland, 2020). However, the NCA failed in *NCA v Baker and others [2020] EWHC 822*, where three UWO relating to properties in London were discharged. The Court stated that the use of complex offshore corporate structures or trusts was not grounds for believing that they had been set up for wrongful purposes. There had to be some additional evidential basis for the belief.

#### 4.2 Civil Forfeiture in Malaysia

Below is the table highlighting the features of civil forfeiture provisions in Malaysia under Section 41 of the MACC Act 2009 and section 56 of the AMLATFPUA 2001:

Table 1. Civil forfeiture provisions in Malaysia

Civil Forfeiture	MACC ACT 2009	AMLATFPUA 2001
Section	41	56
Scope of offence	The offence under the MACC Act	The offence of money laundering or a terrorism financing offence
Time frame	Before 18 months from the date of the seizure	Before 12 months from the date of the seizure, or freezing order
Court	Sessions Court	High Court
Application by Public Prosecutor for order of forfeiture	Upon satisfaction <ul style="list-style-type: none"> <li>The property relates to an offence under the MACC Act 2009 ("the MACC Act 2009 Property")</li> </ul>	Upon satisfaction <ul style="list-style-type: none"> <li>the property relates to the offence of money laundering or a terrorism financing offence under AMLATFPUA 2001;</li> <li>terrorist property;</li> <li>the proceeds of unlawful activity; or</li> <li>the instrumentalities of an offence ("the AMLATFPUA 2001 Property")</li> </ul>
Order of forfeiture by a judge on the property	Upon satisfaction <ul style="list-style-type: none"> <li>the MACC Act 2009 Property; and</li> <li>no purchase in good faith for valuable</li> </ul>	Upon satisfaction <ul style="list-style-type: none"> <li>the AMLATFPUA 2001 Property; and</li> <li>no purchaser in good faith for valuable</li> </ul>

Third-party	consideration in respect of the MACC Act 2009 Property A notice is published in the <i>Gazette</i> calling anyone claiming to have an interest in the property to attend Court to show cause as to why the property should not be forfeited ("Notice")	consideration in respect of the AMLATFPUA 2001 Property Subject to Section 61, i.e. bona fide third parties: <ul style="list-style-type: none"> <li>• Notice;</li> <li>• Property to be returned to the claimant upon satisfaction of claims by the claimant</li> </ul>
A time frame of the release of the seized property when the Public Prosecutor makes no application for an order of forfeiture	18 months from the seizure date	12 months from the seizure date
Standard of proof	Silent	Balance of probabilities

(MACC Act 2009 and section 56 of the AMLATFPUA 2001)

The High Court in *Mohd Arif bin Ab Rahman v Pendakwa Raya* [2020] MLJU 1115 allowed the appellant's appeal as the prosecution's documentary evidence is insufficient under Section 41 of the MACC Act 2009. The standard of proof that the Court applied is on the balance of probabilities. In *Ng Boon Ann v Public Prosecutor* [2020] MLJU 293, the High Court stated that the prosecution could apply under Section 41(1) of the MACC Act 2009 to forfeit any property which was the subject matter of or was used in the commission of an offence. The case was an appeal from the sessions court decision, which ordered the sum of RM 1,865,000.00 be forfeited to the government under Section 41(1) of the MACC Act 2009. Cases on Section 56 of AMLATFPUA 2001 highlighted the courts adopting a strict approach in evaluating the evidence presented, where particular importance is placed on the sufficiency and admissibility of evidence (SKRINE et al., 2021). In *Public Prosecutor v Jakel Trading* [2020] MLJU 1206, the prosecution failed to forfeit RM628,314.00 in the respondent's Maybank Berhad current account. There was a failure to prove that there is no purchaser in good faith for valuable consideration. In *Pendakwa Raya v Habib Jewels Sdn Bhd* [2020] 12 MLJ 757, the High Court dismissed the application for forfeiture. The prosecution failed to prove the commission of the predicate offence under Section 23 of the MACC Act 2009. In another case on Section 56(1) AMLATFPUA 2001, the Federal Court, in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* (2021] 2 MLJ 469 [2021] 2 MLJ 469, affirmed the Court of Appeal's decision. No documentary evidence was tendered to show that the properties were procured from the proceeds of any illegal activity. Recently, the High Court dismissed the application to forfeit RM114 million seized by the police at Pavilion Residences on 17 May 2018, allegedly belonging to the former Malaysian prime minister Datuk Seri Najib Razak. There was a failure to prove that the money was the proceeds from money laundering (Bernama, 2021). The money has since been returned to him (MalaysiaNow, 2021).

## 5.0 Discussion

### 5.1 Challenges within the existing civil forfeiture in Malaysia

#### 5.1.1 Complicated modalities of money laundering

Aurasu and Abdul Rahman (2018) contends one of the significant limitations confronted by the authorities in Malaysia is the lack of evidence in money laundering cases.

#### 5.1.2 Evidence procurement

It is difficult to obtain evidence from another country if the money laundering involves more than one state as the variances in each countries' classifications of money laundering and the extent of the crime have led to hitches (Aurasu & Abdul Rahman, 2018).

#### 5.1.3 Third party

Zaiton Hamin (Hamin et al., 2015) highlighted the civil forfeiture in Malaysia raises a few implications for law enforcement, the assets owner, and the innocent third party. Firstly, as civil confiscation is *in rem* proceeding, the owner's innocence is irrelevant. Secondly, it is difficult for the asset owners to prove good faith. Thirdly, the standard of proof does not seem to favour the asset owners. (Hamin et al., 2017).

#### 5.1.4 Recovery of corrupt assets

In June 2019, civil forfeiture amounting to RM270m was filed by the MACC against 41 entities for the forfeiture of monies allegedly belonging to 1 Malaysia Development Berhad (1MDB), considered to be the most significant civil forfeiture proceeding in Malaysia (Abdul Rahman, 2020). The actual amount is much higher, where at least \$4.3 billion (\$1 = 4.1135 ringgit) more is said to be unaccounted for (Reuters, 2021). As of date, successful recovery stands at RM13.4 billion (Basyir, 2021).

## **5.2 UWO in the UK**

### **5.2.1 Advantage**

Under the UWO, the High Court will merely have to be satisfied on reasonable grounds that the respondent's lawfully obtained income would have been inadequate to acquire the property (Cullen Commission, 2020).

### **5.2.2 Trust**

The *NCA v Hajiyeva (Rev 1)* [2018] EWHC 2534 case has provided trustees with clear guidance on the potential scope of the UWO and its application (Alexander & Cook, 2020). Stephen Alexander and Mathew Cook (Alexander & Cook, 2020) state that a respondent may be a beneficiary, even with a discretionary interest in the trust property in question, or potentially a trustee.

However, trustees cannot be subjected to the UWO unless they are suspected, in their capacities as trustees of being involved in a serious crime or are themselves or connected to a politically exposed person.

Furthermore, assets held under trust may be subject to confiscation unless all sources of wealth are genuinely proven to be legitimate.

### **5.2.3 Enforcement Issue**

The judge in *NCA v Baker and others* [2020] EWHC 822 had criticised the investigation approach of the NCA. It seemed to suggest that more onerous requirements may need to be met by enforcement authorities when applying for the UWO instead of what is stated in the legislation (Clancy, 2021). Áine Clancy (2021) further says that the case law may affect the NCA's inclination for future applications and creates reservations on the viability of the UWO due to few reasons. Amongst others, the Court highlighted the use of complicated offshore corporate ownership structures as a ground of suspicion should be treated with caution. The Court emphasised the need to balance a potential intrusion of a respondent's individual rights against the importance to citizens of pursuing criminal activity proceeds. The UWO will be deemed necessary and proportionate if the authorities can establish the use of the UWO is justified. Anton Moiseienko (2021) stated that the respondent's unconvincing response to the UWO does not constitute non-compliance, as the legislation stipulates that 'purported compliance' is to be treated as compliance. It thus remains to be seen where the courts will draw the boundary.

### **5.2.4 Business risks**

As per Skirmantas Bikelis (Bikelis, 2020), a grave danger exists if some businesses are subject to civil confiscation under the impression that they might be under the control of organised crime. An uncertain business environment may be created where destructive damage to the business might have occurred before the final stage of the civil confiscation proceedings.

## **5.3 Malaysia's position vis-à-vis the UWO**

There are numerous apparent signs of unexplained wealth among politicians and public officials, like extravagant houses and luxury cars (Pandiyan, 2018). Newspaper coverage is filled with news on corruption. On 5 April 2021, it was reported that the MACC raided a house of an alleged leader of a cartel that allegedly monopolised RM3.8 billion worth of government projects in which luxury cars, real estates were seized, and bank accounts were frozen. Judicial decisions highlighted the challenge of gathering sufficient evidence from the prosecution in civil forfeiture cases. Hence, the UWO may be the best option to complement the existing civil forfeiture legal framework as the respondent must prove his assets are legitimate.

## **6.0 Conclusion and Recommendations**

In summary, the suggestion to emulate UWO as practised in the UK aims at eliminating financial gains by the corrupt. The current civil forfeiture application and implementation are inefficient in recovering the proceeds of corruption. Thus, learning from the newly introduced practice of UWO in the UK may assist in patching the loopholes. The *raison d'être* is laudable. Perhaps it is time for Malaysia to follow suit by adopting and adapting the UWO to suit the Malaysian requirements and simultaneously enhance civil forfeiture mechanisms. Limiting the types of legal frameworks that exist presently may result in Malaysia losing the opportunity to capture proceeds of corruption due to insufficient evidence. Reasonable grounds to suspect the known source of the respondent's lawfully obtained income is inadequate to enable the respondent to acquire the property may exist. By applying the UWO, the onus is shifted to the respondent to prove his income is legitimate. Given the primary objective of the UWO to deprive criminals of benefiting from unlawful activities, applying the UWO as adopted by the UK with necessary modifications may mitigate the risk of corruption in Malaysia. In essence, the corrupt must not enjoy the gains from dishonest acts. Future research should delve more into the remedial framework for the victim of wrongful enforcement conduct of the UWO.

## **Paper Contribution to Related Field of Study**

The study is in tandem with item 16 of the United Nations 2030 Agenda for Sustainable Development on Peace, Justice and Strong Institutions. In particular, the target under Goal 16.4 is that by 2030, the recovery and return of stolen assets are strengthened. All forms of organised crime are combatted, which oblige States to enhance the legal instrument system.

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