



# Proceeds of Crime Act 2002

## 2002 CHAPTER 29

### PART 8

#### INVESTIGATIONS

### CHAPTER 3

#### SCOTLAND

#### *f<sup>1</sup>* Unexplained wealth orders

#### Textual Amendments

- F1** Ss. 396A-396I and cross-heading inserted (27.4.2017 for specified purposes, 31.1.2018 in so far as not already in force) by [Criminal Finances Act 2017 \(c. 22\)](#), [ss. 4, 58\(1\)\(6\)](#); [S.I. 2018/78](#), [reg. 3\(a\)](#)

#### **396A Unexplained wealth orders**

- (1) The Court of Session may, on an application made by the Scottish Ministers, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled.
- (2) An application for an order must—
  - (a) specify or describe the property in respect of which the order is sought, and
  - (b) specify the person whom the Scottish Ministers think holds the property (“the respondent”) (and the person specified may include a person outside the United Kingdom).
- (3) An unexplained wealth order is an order requiring the respondent to provide a statement—
  - (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,

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- (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
  - (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
  - (d) setting out such other information in connection with the property as may be so specified.
- (4) The order must specify—
- (a) the form and manner in which the statement is to be given,
  - (b) the person to whom it is to be given, and
  - (c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.
- (5) The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order.
- (6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).

### **396B Requirements for making of unexplained wealth order**

- (1) These are the requirements for the making of an unexplained wealth order in respect of any property.
- (2) The Court of Session must be satisfied that there is reasonable cause to believe that—
- (a) the respondent holds the property, and
  - (b) the value of the property is greater than £50,000.
- (3) The Court of Session 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) The Court of Session must be satisfied that—
- (a) the respondent is a politically exposed person, or
  - (b) there are reasonable grounds for suspecting that—
    - (i) the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or
    - (ii) a person connected with the respondent is, or has been, so involved.
- (5) It does not matter for the purposes of subsection (2)(a)—
- (a) whether or not there are other persons who also hold the property;
  - (b) whether the property was obtained by the respondent before or after the coming into force of this section.
- (6) For the purposes of subsection (3)—
- (a) regard is to be had to any heritable security, 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;

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- (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) where the property is an interest in other property comprised in a settlement, the reference to the respondent obtaining the property is to be taken as if it were a reference to the respondent obtaining direct ownership of such share in the settled property as relates to, or is fairly represented by, that interest.
- (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) known to be a close associate of a person within that paragraph, or
  - (d) otherwise connected with a person within that paragraph.
- (8) Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 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) whether a person is known to be a close associate of another (see point (11) of that Article).
- (9) For the purposes of this section—
- (a) a person is involved in serious crime in a part of the United Kingdom or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007 (see in particular sections 2, 2A and 3 of that Act);
  - (b) section 1122 of the Corporation Tax Act 2010 (“connected” persons) applies in determining whether a person is connected with another.
- (10) Where the property in respect of which the order is sought comprises more than one item of property, the reference in subsection (2)(b) to the value of the property is to the total value of those items.

### **396C 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 396B(2)(b).

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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 396A(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 396D);
  - (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 396B), 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 396B.
- (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.

### **396D Effect of order: cases of compliance or purported compliance**

- (1) This section applies in a case where the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order in respect of any property in relation to which the order is made before the end of the response period (as defined by section 396C(4)).
- (2) If an interim freezing order has effect in relation to the property (see section 396J), the Scottish Ministers must—
  - (a) consider whether the Lord Advocate should be given an opportunity to determine what enforcement or investigatory proceedings, if any, the Lord Advocate considers ought to be taken by the Lord Advocate in relation to the property, and
  - (b) determine whether they consider that any proceedings under Part 5 (civil recovery of the proceeds of unlawful conduct) or this Chapter ought to be taken by them in relation to the property.

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- (3) If the Scottish Ministers consider that the Lord Advocate should be given an opportunity to make a determination as mentioned in subsection (2)(a), the Lord Advocate must determine what enforcement or investigatory proceedings, if any, the Lord Advocate considers ought to be taken by the Lord Advocate in relation to the property.
- (4) A determination under subsection (2)(b) or (3) must be made within the period of 60 days starting with the day of compliance.
- (5) If the determinations under subsections (2)(b) and (3) are that no further proceedings under Part 5 or this Chapter and no further enforcement or investigatory proceedings ought to be taken in relation to the property, the Scottish Ministers must notify the Court of Session of the nature of the determinations as soon as reasonably practicable (and in any event before the end of the 60 day period mentioned in subsection (4)).
- (6) If there is no interim freezing order in effect in relation to the property—
  - (a) the Scottish Ministers may (at any time) determine whether they consider that any proceedings under Part 5 or this Chapter ought to be taken by them in relation to the property, and
  - (b) the Lord Advocate may (at any time) determine what, if any, enforcement or investigatory proceedings the Lord Advocate considers ought to be taken by the Lord Advocate in relation to the property.
- (7) A determination under this section to take no further proceedings under Part 5 or this Chapter or no further enforcement or investigatory proceedings in relation to any property does not prevent any such proceedings being taken subsequently (whether as a result of new information or otherwise) in relation to the property.
- (8) For the purposes of this section—
  - (a) the respondent complies with the requirements imposed by an unexplained wealth order only if all of the requirements are complied with,
  - (b) references to the day of compliance are to the day on which the requirements imposed by the order are complied with (or, if the requirements are complied with over more than one day, the last of those days), and
  - (c) where an order requires the sending of information in writing to, or the production of documents at, an address specified in the order, compliance with the order (so far as relating to that requirement) occurs when the written information is received, or the documents are produced, at that address,and in paragraphs (a) to (c) references to compliance include purported compliance.
- (9) In this section “enforcement or investigatory proceedings” means any proceedings in relation to property taken under—
  - (a) Part 3 (confiscation proceedings in Scotland), or
  - (b) this Chapter.

### **396E Offence**

- (1) A person commits an offence if, in purported compliance with a requirement imposed by an unexplained wealth order, the person—
  - (a) makes a statement that the person knows to be false or misleading in a material particular, or
  - (b) recklessly makes a statement that is false or misleading in a material particular.

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- (2) A person guilty of an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both, or
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years, or to a fine, or to both.

### **396F Statements**

- (1) 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.
- (2) Subsection (1) does not apply—
- (a) in the case of proceedings under Part 3,
  - (b) on a prosecution for an offence under section 396E,
  - (c) on a prosecution for perjury, or
  - (d) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement mentioned in subsection (1).
- (3) A statement may not be used by virtue of subsection (2)(d) against a person unless—
- (a) evidence relating to it is adduced, or
  - (b) a question relating to it is asked,
- by the person or on the person's behalf in proceedings arising out of the prosecution.

### **396G Disclosure of information, copying of documents, etc**

- (1) An unexplained wealth order does not confer the right to require a person to answer any question, provide any information or produce any document which the person would be entitled to refuse to answer, provide or produce on grounds of legal privilege.
- (2) An unexplained wealth order has effect in spite of any restriction on the disclosure of information (however imposed).
- (3) The Scottish Ministers may take copies of any documents produced by the respondent in connection with complying with the requirements imposed by an unexplained wealth order.
- (4) Documents so produced may also be retained for so long as it is necessary to retain them (as opposed to a copy of them) in connection with an investigation of a kind mentioned in section 341 in relation to the property in respect of which the unexplained wealth order is made.
- (5) But if the Scottish Ministers have reasonable grounds to believe that the documents—
- (a) may need to be produced for the purposes of any legal proceedings, and
  - (b) might otherwise be unavailable for those purposes,
- they may be retained until the proceedings are concluded.

### **396H Holding of property: trusts and company arrangements etc**

- (1) This section applies for the purposes of sections 396A and 396B.
- (2) The cases in which a person (P) is to be taken to “hold” property include those where—

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- (a) P has effective control over the property;
  - (b) P is the trustee of a settlement in which the property is comprised;
  - (c) P is a beneficiary (whether actual or potential) in relation to such a settlement.
- (3) A person is to be taken to have “effective control” over property if, from all the circumstances, it is reasonable to conclude that the person—
- (a) exercises,
  - (b) is able to exercise, or
  - (c) is entitled to acquire,
- direct or indirect control over the property.
- (4) Where a person holds property by virtue of subsection (2) references to the person obtaining the property are to be read accordingly.
- (5) References to a person who holds or obtains property include any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom.
- (6) For further provision about how to construe references to the holding of property, see section 414.

### **396I Supplementary**

- (1) An application for an unexplained wealth order may be made without notice.
- (2) Provision may be made by rules of court as to the discharge and variation of unexplained wealth orders.
- (3) An application to discharge or vary an unexplained wealth order may be made to the Court of Session by—
  - (a) the Scottish Ministers, or
  - (b) any person affected by the order.
- (4) The Court of Session may—
  - (a) discharge the order;
  - (b) vary the order.]

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