

**PROCEEDINGS AT HEARING  
OF  
DECEMBER 15, 2020**

**COMMISSIONER AUSTIN F. CULLEN**

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**December 15, 2020**

**(Via Videoconference)**

**(PROCEEDINGS COMMENCED AT 9:30 A.M.)**

THE REGISTRAR: Good morning. The hearing is now resumed, Mr. Commissioner.

THE COMMISSIONER: Yes, thank you, Madam Registrar.

Ms. Patel, do you have conduct of this portion of the hearing?

MS. PATEL: Yes. Thank you, Mr. Commissioner. Today we are hearing from two witnesses who are based in the UK, Helena Wood and Anton Moiseienko of the Royal United Service Institute.

THE COMMISSIONER: Yes.

MS. PATEL: They're both prepared to affirm.

THE COMMISSIONER: Thank you.

THE REGISTRAR: Can each of you please state your full name and spell your first name and last name for the record. I will start with Ms. Wood.

MS. WOOD: Hello. I'm Helena Wood. My first name is H-e-l-e-n-a, and my surname is W-o-o-d.

THE REGISTRAR: Thank you. And Mr. Moiseienko.

MR. MOISEIENKO: Hello. I'm Anton Moiseienko. First name A-n-t-o-n, surname, M-o-i-s-e-i-e-n-k-o.



1 A (HW) That's correct.

2 Q And I'll just refer to that from now on as RUSI,  
3 if that's all right with you.

4 A (HW) Absolutely.

5 Q Okay. And you have been since 2015?

6 A (HW) That's correct, yes.

7 Q You've completed in that role multiple financial  
8 crime research projects both for RUSI and for  
9 the National Police Chiefs Council?

10 A (HW) That's right, yes.

11 Q Prior to that, you were with the National Crime  
12 Agency, previously the Serious Organized Crime  
13 Agency in the UK?

14 A (HW) That's correct.

15 Q Can you tell us a little bit about the work that  
16 you did there.

17 A (HW) Yes. A variety of roles during my time,  
18 what was the Serious and Organized Crime Agency  
19 and is now the National Crime Agency. So roles  
20 ranging from intelligence, investigations and  
21 strategy formation, including leading on  
22 strategy around civil confiscation for what was  
23 the Serious Organized Crime Agency, and also  
24 roles looking at combatting counter-narcotics in  
25 Afghanistan during the campaign around a decade

1                   ago.

2           Q     And you were a senior policy officer in the  
3                   Proceeds of Crime Department in which capacity  
4                   your résumé tells us you were the lead policy  
5                   contributor to the home office consultation on  
6                   changes to the Proceeds of Crime Act 2002 asset  
7                   recovery powers.

8           A     (HW) Absolutely, yes, and that was focusing  
9                   primarily on the role of civil confiscation in  
10                  the UK following the closure of the Assets  
11                  Recovery Agency and those powers being expanded  
12                  to the Serious Organized Crime Agency and others  
13                  at that time.

14          Q     You've also led a UK -- you were the UK project  
15                  lead on the Financial Action Task Force study  
16                  into barriers to recovering criminal assets  
17                  across international borders; is that right?

18          A     (HW) That's correct, yep.

19          Q     And you also worked at the treasury as a project  
20                  officer for the Financial Action Task Force  
21                  evaluation of the UK's anti-money laundering and  
22                  counter-terrorist controls?

23          A     (HW) That's correct. That was the last  
24                  evaluation, not the one that's just been, but  
25                  the one in 2007.

1           Q     And I'll just mention that amongst your  
2                   publications, you've authored a paper on  
3                   non-criminal based confiscation in the UK for  
4                   RUSI in 2019 titled "Reaching the Unreachable:  
5                   Attacking the Assets of Serious and Organized  
6                   Criminality in the UK in the Absence of a  
7                   Conviction." Is that your publication?

8           A     (HW) That's correct, yes.

9           MS. PATEL: Okay. And I'll just note for the record  
10                   that it is, Mr. Commissioner, in appendix --  
11                   it's appendix C to an overview report on  
12                   international publications, which is  
13                   exhibit 374, I believe.

14           THE COMMISSIONER: Thank you.

15           MS. PATEL:

16           Q     Mr. Moiseienko, you are a research -- pardon me.  
17                   Let me just ask Madam Registrar to pull up your  
18                   CV if we can. Thank you, Madam Registrar.

19                   Mr. Moiseienko, you recognize this as your  
20                   CV?

21           A     (AM) Yes.

22           MS. PATEL: And I believe, Mr. Commissioner, if we  
23                   could have this marked as the next exhibit that  
24                   we're at, 381.

25           THE COMMISSIONER: Very well, 381.

1 THE REGISTRAR: Exhibit 381.

2 EXHIBIT 381: Curriculum Vitae of Anton

3 Moiseienko

4 MS. PATEL:

5 Q Mr. Moiseienko, you're a research fellow at the  
6 Centre for Financial Crime and Security Studies  
7 of the Royal United Services Institute of RUSI;  
8 is that right?

9 A (AM) Yes, I am.

10 Q You've been a fellow since April 2019, but prior  
11 to that you were a research analyst with RUSI?

12 A (AM) Correct.

13 Q Okay. And you -- I understand that earlier in  
14 your career you were a practising lawyer in  
15 Ukraine?

16 A (AM) Yes, correct. I worked part-time in a  
17 Ukrainian law firm.

18 Q And you then received your PhD in law from Queen  
19 Mary University of London?

20 A (AM) Correct.

21 Q And you wrote a thesis relating to the  
22 imposition of immigration sanctions against  
23 individuals suspected of corrupt  
24 [indiscernible]; is that right?

25 A (AM) Yes, that's right.

1           Q     And I understand that was later published as a  
2                    book.

3           A     (AM) Yes.

4           Q     While at RUSI you, I understand, have published  
5                    and conducted research on a number of topics,  
6                    and I was wondering if you could just tell us a  
7                    little bit about some of those areas that you  
8                    focused on.

9           A     (AM) Yes. There is a relatively broad variety  
10                  of topics that I've had the chance to research  
11                  while at RUSI. A substantial part of that  
12                  relates to the proceeds of corruption and  
13                  different ways of tackling that. For example,  
14                  with the director of our centre, Tom Keatinge, I  
15                  wrote a paper of the exfiltration of the  
16                  proceeds of corruption from Pakistan and the  
17                  role of the financial system in that.

18                         I have also published a paper with the same  
19                         co-author on the use of beneficial ownership  
20                         transparency and different approaches to  
21                         beneficial ownership registers that countries  
22                         implement. Another significant part of my  
23                         research relates to new technologies and  
24                         financial crime, including risks related to  
25                         financial crime in various online sectors

1 ranging from cryptocurrency to e-commerce and  
2 finally a significant portion of my work over  
3 the recent years has related to free-trade zones  
4 and freeports.

5 So as I say, it's a fairly wide range of  
6 financial crime and occasionally illicit  
7 trade-related matters.

8 Q Madam Registrar, we can take down  
9 Mr. Moiseienko's CV now.

10 Mr. Moiseienko, Ms. Wood, you published --  
11 you didn't publish, you wrote a paper for the  
12 commission on unexplained wealth orders and,  
13 Madam Registrar, I'm just wondering if you can  
14 pull that up now from tab 4. Ms. Wood,  
15 Mr. Moiseienko, do you recognize this as the  
16 paper that you prepared for the commission?

17 A (HW) Yes.

18 (AM) Yes.

19 MS. PATEL: And that's "Unexplained Wealth Orders UK  
20 Experience and Lessons For British Columbia."  
21 And I would ask, Mr. Commissioner, if this could  
22 be marked the next exhibit, which I believe is  
23 382.

24 THE COMMISSIONER: Very well. Exhibit 382.

25 THE REGISTRAR: Exhibit 382.

1                   **EXHIBIT 382: Unexplained Wealth Orders: UK**  
2                   **Experience and Lessons for BC - October 2020**

3           MS. PATEL: Madam Registrar, we can take that down  
4           for now.

5           Q     Before we launch into the topic of today's  
6           evidence, which of course is unexplained wealth  
7           orders, and you've written a paper that focuses  
8           on the UK experience with unexplained wealth  
9           orders, but you also look at the experiences in  
10          other countries, notably Ireland and Australia.

11                   Before we get into that, I was wondering,  
12          Mr. Moiseienko, if you could tell us a little  
13          bit about what RUSI is and the work that it  
14          does.

15          A     (AM) RUSI or, as you said, the Royal United  
16          Service Institute, is an independent research  
17          institute based in London. It was founded in  
18          1831 by the Duke of Wellington in order to  
19          conduct research on matters related to defence  
20          and security. It has largely retained that  
21          mandate. But over the past decade or so, the  
22          scope of work that RUSI undertakes has increased  
23          significantly in order to address new challenges  
24          to national security and defence and indeed  
25          international and global security and defence as

1 well. Helena and I work at the Centre for  
2 Financial Crime and Security Studies at RUSI,  
3 which is one of the research programs within the  
4 institute. And we do research on financial  
5 crime legislation, regulation, policy responses  
6 as well as occasionally operational responses.  
7 It's important to mention two things. First we  
8 don't conduct investigations, so we do work at a  
9 high level of generality looking at policy  
10 responses predominantly, as I said. And  
11 secondly we're not affiliated to any government  
12 in the UK or otherwise. So we're an independent  
13 research establishment.

14 Q And the Centre for Financial Crime and Security  
15 Studies that you've just mentioned, does it also  
16 look at issues around money laundering?

17 A (AM) Correct. That's a central part of what the  
18 centre researches.

19 Q I'm going to proceed into our discussion of  
20 unexplained wealth orders and to keep some  
21 order, I will proceed by directing my questions  
22 specifically at one or the other of you. I may  
23 at times get the target of my question wrong and  
24 if that's the case and if your colleague is  
25 better placed to answer the question, please

1                   feel free to refer it to them.

2                   So with that, Ms. Wood, I was wondering if  
3                   you could start by giving us some basics --  
4                   telling us basics about unexplained wealth  
5                   orders. I understand from your paper that  
6                   there's a number of different powers arising  
7                   under non-criminal based asset forfeiture that  
8                   can be called unexplained wealth orders. So is  
9                   there a common thread that can be -- that  
10                  describes them?

11                 A     (HW) So speaking in the UK context, the  
12                   unexplained wealth order is purely an  
13                   investigative tool. It sits under part 8 of the  
14                   Proceeds of Crime Act 2002 with a range of other  
15                   investigative tools that you may be familiar  
16                   with from your domestic legislation, such as  
17                   production orders, disclosure orders, account  
18                   monitoring orders. So it should absolutely in  
19                   the UK context be seen as an investigative tool  
20                   to be used to gather information and evidence to  
21                   support a wider investigation. And that would  
22                   be in this case in the UK under part 5 of the  
23                   Proceeds of Crime Act 2002, which is the part of  
24                   our legislation that holds our non-conviction  
25                   based asset forfeiture legislature and regime.

1 Q And are unexplained wealth orders conceived of  
2 differently in different jurisdictions?

3 A (HW) Yeah, that's absolutely right. I focus  
4 primarily on the UK experience, and I know Anton  
5 has looked in more detail at some of the other  
6 jurisdictions so I'll pass it over to him to  
7 talk about those aspects if I may.

8 Q Thank you.

9 A (AM) Yes, thank you. I would add to this that  
10 there is no consistent uniform international  
11 understanding of what an unexplained wealth  
12 order is because different countries may be  
13 using the term in various ways. So any  
14 jurisdiction can create a tool that they would  
15 call an unexplained wealth order and it does not  
16 necessarily follow that in substance that would  
17 be the same as a similarly named tool in a  
18 different jurisdiction.

19 In terms of what we have seen from our  
20 research, I think it's helpful to think of three  
21 varieties of unexplained wealth orders. The  
22 first one is the kind of order that you would  
23 see in Australia, that's the federal or  
24 commonwealth level. If a person has wealth that  
25 exceeds that person's lawful income an order may



1                   slightly more complicated still version of what  
2                   it calls the unexplained wealth order and it  
3                   combines what you see in Australia with an  
4                   additional element on top of that. I know that  
5                   we will get into more detail about how the UK  
6                   model operates, but in broad terms there has to  
7                   be a person with unexplained wealth, so a person  
8                   whose wealth exceeds the lawful income. Other  
9                   requirements have to be satisfied in order for  
10                  the UWO to be issued and then the reversal in  
11                  the burden of proof only happens if a person  
12                  fails to provide the information that is  
13                  requested by the law enforcement agency. So the  
14                  road from person having more wealth than they  
15                  seem to be able to have, the road from that to  
16                  the reversal of the burden of proof is more  
17                  complicated and convoluted in the UK. That's  
18                  why I think it's helpful to think of three  
19                  different models of unexplained wealth orders in  
20                  different jurisdictions.

21                  Q     Thank you for that comprehensive summary. Quite  
22                          a bit of material which we'll endeavour to  
23                          unpack as the evidence progresses.

24                                 And I just wanted to note for the record, I  
25                                 know that I go back and forth between saying

1 unexplained wealth order or UWO. If I say UWO  
2 are we all in the same understanding that we're  
3 talking about unexplained wealth orders? Thank  
4 you. I see you're both nodding, so I'll take  
5 that as understanding.

6 In your paper at page 21 you say -- you  
7 refer to a study by the US law firm Booz Allen  
8 Hamilton which was conducted in 2011, a survey  
9 of unexplained wealth order regimes or civil  
10 asset forfeiture regimes around the world and  
11 there you quote that report, saying unexplained  
12 wealth order is described as:

13 "Any legislation that creates a  
14 presumption that a person's property  
15 constitutes the proceeds of crime."

16 And do you accept that as a fair generalized  
17 description of what an unexplained wealth order  
18 is, Mr. Moiseienko?

19 A (AM) Yes. But as I say, it's a matter of the  
20 English language in that some people might  
21 disagree with that characterization, so they  
22 could say that, for example, if one were to  
23 adopt a stricter definition of what an  
24 unexplained wealth order is, then, for instance,  
25 the Irish legislation would not fall into that

1 category because the trigger for the reversal of  
2 the burden of proof is not unexplained wealth  
3 per say but some other information at the  
4 disposal of the law enforcement agency. But for  
5 present purposes, yes, I definitely agree with  
6 the definition used by Booz Allen Hamilton as a  
7 good working definition.

8 (HW) If I may add to that. I would say some  
9 element of reverse onus seems to be a kind of  
10 common feature throughout all of this  
11 legislation. You know, the UK example differs  
12 slightly in that it's a staged process, but the  
13 reversed onus seems to be a key feature of  
14 unexplained wealth orders wherever they present  
15 themselves.

16 Q Thank you. Ms. Wood, I was wondering -- I'm  
17 going to address this question in the first  
18 instance that you -- but if you can tell us a  
19 little bit about the origins, the international  
20 origins of unexplained wealth orders.

21 A (HW) Again, I'll can kind of touch if I may on  
22 the UK context. That's where my research and  
23 experience lies. Certainly from the UK  
24 experience, this wasn't a kind of government  
25 push to go for the legislation. It was borne

1 out of a coalition of civil society  
2 organizations, pro bono lawyers and other  
3 interested parties forming a grouping basically  
4 on the basis of frustration -- from my personal  
5 view, frustration at the lack of progress  
6 against tackling illicit wealth in the UK,  
7 particularly that which is of corruption  
8 proceeds origin on the basis that London had  
9 become a focal point and centre for global  
10 proceeds of corruption, particularly the London  
11 real estate market.

12 So the onus behind the legislation in the UK  
13 came out of, again, my personal view, a  
14 frustration about this lack of progress. And a  
15 lot of work was done outside of government to  
16 look at different models and then put forward a  
17 potential model to the UK government, which they  
18 then accepted, again a personal view, but partly  
19 as a way of appeasing a kind of disquiet within  
20 civil society about the lack of progress. And  
21 they were very ready to adopt any new  
22 legislation which would give them something to  
23 announce in the press and something to appease  
24 that civil society group. So I think it very  
25 much means that the implementation in the UK,

1                   which we'll go on to discuss in the way that's  
2                   kind of borne out in practice, needs to be seen  
3                   in the context of this being not a government  
4                   initiated legislative change but something which  
5                   was pushed for at frustration in civil society  
6                   and kind of wider media and government disquiet  
7                   about the state of affairs in the UK.

8                   Q     I understand from what you've just said that a  
9                   strong concern was grand corruption in the UK.  
10                  And maybe, Mr. Moiseienko, you could address  
11                  this. But the concern about grand corruption of  
12                  course is not seen just in the UK but it's been  
13                  addressed by the UN Convention Against  
14                  Corruption. I'm wondering if you can speak to  
15                  the impact of that convention on the development  
16                  of unexplained wealth orders before we come back  
17                  to the UK situation specifically?

18                 A     (AM) Yes. So there's been some thinking  
19                 happening at the international level as to how  
20                 unexplained wealth should be addressed in  
21                 particular in the context of public officials  
22                 because some would argue that if you're a public  
23                 official then there is a strong societal  
24                 interest in knowing where your wealth comes from  
25                 and there is therefore a premium on your ability



1                   provision, is contained in the Inter-American  
2                   Convention Against Corruption, and to the best  
3                   of my knowledge, Canada has entered a  
4                   reservation in relation to that provision based  
5                   on its incompatibility with the presumption of  
6                   innocence.

7                   The second provision of relevance in the UN  
8                   Convention Against Corruption is article 31  
9                   paragraph 8, which deals with confiscation. And  
10                  just a moment, if I may, so that I can cite the  
11                  exact wording of the provision.

12                  "State parties may consider the  
13                  possibility of requiring that an offender  
14                  demonstrate the lawful origin of ...  
15                  alleged proceeds of crime or other  
16                  property liable to confiscation, to the  
17                  extent such a requirement is consistent  
18                  with the fundamental principles of their  
19                  domestic law and with the nature of  
20                  judicial and other proceedings."

21                  So in other words, the person in question might  
22                  be required to demonstrate the lawfulness of the  
23                  manner in which they acquired property, and that  
24                  provision does not specify whether it deals with  
25                  criminal confiscation following a conviction or

1                   with civil confiscation or civil forfeiture as  
2                   well, but the technical guide published by the  
3                   UN Office on Drugs and Crime says that this is  
4                   the only provision in the convention that deals  
5                   with civil forfeiture as well. So regardless of  
6                   the precise legal import of these provisions --  
7                   and I should emphasize again that they're not  
8                   mandatory anyway -- it demonstrates two strands  
9                   of thinking at the international level in  
10                  relation to tackling unexplained wealth. One is  
11                  taking a criminal law approach and treating  
12                  having unexplained wealth as a criminal offence.  
13                  And the other less far-reaching approach is to  
14                  say it might not be a criminal offence, but if  
15                  you have unexplained wealth countries might  
16                  choose to confiscate it.

17                  Q     And just for reference, that article 31-8 of the  
18                         UN convention against corruption, that part that  
19                         you just cited is found at page 10 of your  
20                         report.

21                         I understand you've spoken a bit in your  
22                         paper about the stolen asset recovery  
23                         initiative, and we heard a little bit about that  
24                         yesterday. I'm wondering if you can tell the  
25                         Commissioner a little bit about what that

1 international initiative is.

2 A (AM) So Stolen Assets Recovery Initiative is a  
3 joint initiative by the World Bank and UN Office  
4 on Drugs and Crime. And as the name suggests,  
5 they focus on facilitating the recovery of  
6 stolen assets, specifically assets diverted  
7 through corruption. I'm not intimately familiar  
8 with the mandate of this initiative, but from my  
9 general knowledge I understand them to be both  
10 publishing reports on legislation and regulator  
11 requirements that countries might wish to  
12 implement or practices that they might wish to  
13 adopt in order to facilitate the return of  
14 assets and also they maintain the publicly  
15 accessible database of corruption-related asset  
16 recovery cases. So one can search that database  
17 and find links to, for example, indictments or  
18 court judgments in cases that are relevant to  
19 the initiatives mandate.

20 Q And just to provide another definition to ground  
21 this discussion as we move forward, we'll speak  
22 occasionally about grand corruption and can you  
23 just give us a quick definition of what grand  
24 corruption is understood to be.

25 A (AM) There is no universally accepted

1 definition, but broadly people understand it,  
2 from my experience, to refer to corruption that  
3 is perpetrated at high levels of government and  
4 therefore corruption that is not likely to be  
5 investigated or prosecuted in the country that  
6 it happens because the people involved in that  
7 held so much sway over the operation of  
8 government and law enforcement machinery in  
9 their country.

10 Other terms that are often used to denote  
11 grand corruption include kleptocracy or simply  
12 large-scale or endemic corruption. Although I  
13 suppose seem people would say that each of those  
14 different terms has its own semantic nuances.

15 Q Ms. Wood, returning to the UK context in  
16 particular, I'm wondering if you can ground us a  
17 bit by describing the UK's history,  
18 pre-unexplained wealth order, with non-criminal  
19 based confiscation.

20 A (HW) So yes, the UK introduced its  
21 non-conviction based asset forfeiture regime  
22 with the POCA 2002, so that's the Proceeds of  
23 Crime Act 2002, and it came into force in 2003.  
24 The original agency which had sole power to use  
25 the new civil powers of forfeiture was the

1                   Assets Recovery Agency, which has since been  
2                   disbanded. But this is a kind of basic civil  
3                   confiscation regime which reduces the burden of  
4                   proof on the authorities trying to kind of go  
5                   against these assets. As other regimes it's an  
6                   in remember process, and it, you know, doesn't  
7                   remove -- it wasn't any sort of a reverse  
8                   burden. There wasn't any attempt to follow the  
9                   Irish model in adopting the UK's model. It very  
10                  much went for reducing the balance of  
11                  probabilities and there was initially no reverse  
12                  burden. And this was kind of debated at great  
13                  length at that time, but it was thought to be  
14                  contrary to the UK's traditions at that time.  
15                  So they preferred to go for, you know, the  
16                  burden remaining on the enforcement authority,  
17                  which at the time was the assets recovery agency  
18                  to prove the case, albeit to the lower standard  
19                  of proof in the civil courts.

20                         The Assets Recovery Agency had a slightly  
21                         checkered history. It had been set up with a  
22                         slightly difficult mandate to be self-funding  
23                         within five years, which had perhaps failed to  
24                         anticipate the level of challenge to the law in  
25                         the courts and the level of litigation that it

1                   would face, and indeed the cost burden that  
2                   would incur. So it very much missed its  
3                   self-funding targets by quite a wide margin.  
4                   And this led the UK system to become somewhat of  
5                   a political football. So the UK's  
6                   non-conviction based asset forfeiture regime  
7                   became mired in controversy, which ultimately  
8                   led to the disbandment of the Assets Recovery  
9                   Agency in around 2008 and then the kind of  
10                  disbursement of those powers to a wider  
11                  constituency of agencies in the UK, including  
12                  what was the Serious Organized Crime Agency, my  
13                  former employer, and then others including our  
14                  Crown Prosecution Service and what was the  
15                  Revenue and Customs Prosecution Office. Again,  
16                  now disbanded, sadly. So it's been a history  
17                  that we have to understand when we come to see  
18                  where the unexplained wealth order fits in and  
19                  some of the perhaps perceived challenges that's  
20                  faced.

21                               Ultimately if we look at non-conviction  
22                               based asset forfeiture in the UK it's never  
23                               really achieved the scale that was intended. So  
24                               while the powers were expanded out to other  
25                               agencies other than now what is the National

1                   Crime Agency, was the Serious Organized Crime  
2                   Agency, those powers were expanded out to the  
3                   Crown Prosecution Service, our main prosecution  
4                   agency in the UK. However, they've never picked  
5                   up those powers. They've never chosen to work  
6                   with them. They're also expanded to the Serious  
7                   Fraud Office who views them intermittently, but  
8                   they've never been expanded to the kind of scale  
9                   that was perhaps anticipated at the disbandment  
10                  of the Assets Recovery Agency over 10 years ago.  
11                  A number of reasons for that, but I think it  
12                  goes back to that legacy of the assets recovery  
13                  agency becoming somewhat of a political football  
14                  due to this failure to meet its self-funding  
15                  target and some of the challenges the Assets  
16                  Recovery Agency faced in its high court  
17                  litigation and ultimately leading to these huge  
18                  kind of costs it was facing and kind of running  
19                  way over budget.

20                         So I think that kind of legacy in context  
21                         around non-conviction based asset forfeiture  
22                         kind of becomes more important, I guess, as we  
23                         go into the discussion to understand that this  
24                         is perhaps something that kind of mirrored the  
25                         way the system had been deployed in our near

1 neighbour, the Republic of Ireland, where the  
2 powers are largely uncontroversial and in fact  
3 very much in public consciousness, very much  
4 politically supported on both sides of the  
5 benches in Ireland. It's been a much more  
6 controversial and checkered history with the use  
7 of non-conviction based asset forfeiture in the  
8 UK.

9 Q The use of the forfeiture powers is seen to  
10 carry some political risk in the UK by those  
11 entities that have the statutory power to use  
12 them but might hesitate to?

13 A (HW) Absolutely. And this was compounded  
14 shortly after the Serious Organized Crime Agency  
15 took over those powers, and indeed the staffing  
16 contingent of the Assets Recovery Agency. So it  
17 almost picked up the agency and put it within  
18 what was the Serious Organized Crime Agency.

19 They had a quite a high-profile case around  
20 kind of the turn of the 2010, so I think it was  
21 around 2011, 2012, the NCA SOCA v. Perry was a  
22 very high-profile failure by the agency to win  
23 that case. And to give you a bit of context on  
24 this particular case which continues to cast a  
25 shadow of over the UK's non-conviction based

1           asset forfeiture regime, Mr. Perry was a  
2           convicted fraudster in Israel. He'd served his  
3           term but had chosen to reside in London. In  
4           this case, what was the Serious Organized Crime  
5           Agency, sought to tackle his assets both in the  
6           UK and in Israel. And it was a highly litigious  
7           case in which the points of law were challenged  
8           around international reach of the powers which  
9           ultimately led to an extension of the Proceeds  
10          of Crime Act under the Crime and Courts Act 2013  
11          to look at that international jurisdiction  
12          piece. However, ultimately the Serious  
13          Organized Crime Agency were unsuccessful in  
14          their case and then faced a potential litigation  
15          around costs incurred by Mr. Perry around loss  
16          of earnings to the tune of 220 million pounds.  
17          Obviously not an insignificant sum. To put that  
18          in context, that was half of the Serious  
19          Organized Crime Agency's budget at that time.

20                 Now, perhaps gratuitously for my former  
21          employer, Mr. Perry died during those  
22          proceedings, and this case was subsequently  
23          settled by his children at a much lower level.  
24          We don't actually know the level they settled  
25          to, but I believe it's in the low millions

1                   rather than the hundreds of millions. But I  
2                   think that case was very high profile and it got  
3                   a lot of media coverage. It certainly caused  
4                   huge ripples across government and across  
5                   prosecutorial agencies in the UK. And I think,  
6                   again, along with this context of ARA being  
7                   somewhat of a political football and the Perry  
8                   case, again this has cast somewhat of a risk of  
9                   a shadow over the use of the powers by others.

10            Q     And do you think that the failure of the Assets  
11                Recovery Agency was due principally to  
12                exaggerated expectations at its outset, or  
13                errors in implementations, implementation of the  
14                powers that it had or maybe a combination?

15            A     (HW) It would be difficult to -- it would be  
16                very difficult to place the blame in one area.  
17                These were very new powers that had only been  
18                adopted by a minority of jurisdictions at that  
19                time -- Ireland being one that we've  
20                mentioned -- but at that time there were only a  
21                handful of jurisdictions that had non-conviction  
22                based asset forfeiture regimes. So this was  
23                really, really untested water.

24                                And one of the failures that I could point  
25                                to is perhaps the lack of anticipation of quite

1                   how challenged these powers would be in the high  
2                   courts and not giving cost comfort to the agency  
3                   around those powers.

4                   One of the failures one might point to is  
5                   around this slightly naive setting of a  
6                   self-funding target by the then heads of the  
7                   agency, which was ultimately doomed to failure,  
8                   and again, it goes back to that point of not  
9                   anticipating the litigious nature of those  
10                  powers. People were perhaps always going to  
11                  challenge them in the court because they could  
12                  and they were so new and so novel. So that  
13                  perhaps led to the downfall of the agency in  
14                  that way.

15                 I think if they had have anticipated some of  
16                 the costs they would have faced and sought  
17                 comfort around that, that may have kind of saved  
18                 them the death knell of being disbanded as they  
19                 were. But ultimately -- and I think personally  
20                 I see some of the successes. They did establish  
21                 some really important case law at the time,  
22                 which has been an ongoing legacy for those using  
23                 the power today. They established new kind of  
24                 competencies around managing assets. They  
25                 managed some really challenging assets that have

1 never been managed in the UK before, from race  
2 horses to very complex businesses, just some  
3 quite weird and wonderful areas. They did  
4 establish a lot of competence for others in the  
5 UK. I think the only criticism I really have is  
6 around a slight naivety around this kind of  
7 self-funding. The other thing I perhaps point  
8 to finally is around the model that was  
9 established for the Assets Recovery Agency.  
10 They were unable to initiate their own cases at  
11 the time. They were entirely relying on  
12 referrals from other law enforcement agencies,  
13 which limited the kind of cases they could take  
14 on. And often they were handed cases that  
15 perhaps law enforcement didn't want to deal with  
16 within their own law enforcement agencies which  
17 were perhaps of a lower level than were  
18 anticipated. But certainly the profile of cases  
19 now that can be self-generated by the National  
20 Crime Agencies are hugely different from what we  
21 saw back in the start of the induction of the  
22 powers where you were seeing quite low-level  
23 mortgage frauds, low-level drug dealing, and not  
24 the kind of powers for which the powers were  
25 initially established

1           Q     I want to return to that, but first I want to  
2                    touch on the issue of unrealistic expectation  
3                    and the relationship to the acceptance of risk.  
4                    You don't look at South Africa in this piece  
5                    that you've written for us, but in the other  
6                    piece that I mentioned, the "Reaching the  
7                    Unreachable" paper, which we have in one of our  
8                    overview reports, you suggest that one of the  
9                    reasons that the South African non-criminal --  
10                   non-conviction based forfeiture regime was  
11                   successful was an attitude at the outset that  
12                   there would be risk and specifically litigation  
13                   risk and an acceptance of that at an  
14                   institutional and a government level. Can you  
15                   tell us a bit about that.

16           A     (HW) Yes. Absolutely. I think the South  
17                    African system was set up with a much greater  
18                    appetite for risk and a much greater  
19                    expectation. Actually, one of the clear  
20                    outcomes in the early years would be to  
21                    establish case law. That was not the case  
22                    for ARA. I don't think they'd really  
23                    anticipated that. It certainly wasn't one of  
24                    their kind of strategic objectives. It was very  
25                    much seen as take the risk, take the cases that

1                   are more difficult because only by doing so can  
2                   you establish the requisite case law on which  
3                   the rest of the organization we founded.  
4                   Another thing I'd point to in the South African  
5                   regime is a really clear mandate for their  
6                   agency and that mandate was around tackling  
7                   serious and organized crime. And although the  
8                   legislative intent around the Proceeds of Crime  
9                   Act was again around tackling so-called Mr. Bigs  
10                  and tackling those people deemed untouchable by  
11                  the criminal law, the mandate of ARA wasn't  
12                  quite so defined around organized crime or those  
13                  higher level targets which one ultimately ended  
14                  up dealing with, some much lower level cases,  
15                  and I think that was -- perhaps, you know, with  
16                  hindsight, benefit of hindsight, it was  
17                  perhaps -- it would have been better to really  
18                  focus the agency around that kind of top tier of  
19                  criminality.

20                  Q   Returning to the second point that you made  
21                      about one of the weaknesses of the Assets  
22                      Recovery Agency was that it was entirely  
23                      dependent on referrals. Is it the case that the  
24                      non-conviction based forfeiture powers are now  
25                      available to law enforcement agencies that

1                   conduct their own investigations?

2                   A     (HW) So yeah, I'll kind of explain two of the  
3                   nuances. Absolutely the main user, so the  
4                   primary user of the powers to date has been the  
5                   National Crime Agency, previously Serious  
6                   Organized Crime Agency, and they have adopted  
7                   the hybrid model named the Roskill model in the  
8                   UK. So this is where lawyers and investigators  
9                   sit together and kind of joint work those cases.  
10                  And the same can be said for the serious fraud  
11                  office. Again, they have this Roskill model  
12                  where they have joint prosecutorial and  
13                  investigators sitting together working those  
14                  cases together. And they can very much now --  
15                  very different model, they can self-generate  
16                  their own cases. They can start a case on a  
17                  criminal track and take it off on the civil  
18                  route. So it's a much stronger model, and they  
19                  can almost look at their suite of targets and  
20                  pick those which are suitable for civil recovery  
21                  investigation.

22                                The nuance I should explain in the UK around  
23                                wider use of the powers, the Crown Prosecution  
24                                Service has access to the powers. However,  
25                                unlike the NCA and unlike the SFO, it doesn't

1                   have it's own cadre of investigators.

2                   So it would be, were it to adopt the powers,  
3                   be reliant on policing to provide that  
4                   investigative input. And so far that's been a  
5                   slight barrier to the greater adoption. Because  
6                   it's not quite clear how the funding model would  
7                   work. I know there are moves within the UK  
8                   system to put in place a Roskill-esque model for  
9                   policing and prosecutors, but ultimately I think  
10                  the rub will come around funding, as always, in  
11                  the public sector, particularly in these  
12                  straightened times, you know, who pays for what  
13                  and who carries the risk. Ultimately that risk,  
14                  that cost risk we carry by the Crown Prosecution  
15                  Service in the UK, which is, I can say,  
16                  chronically underfunded and has been for some  
17                  time. Yeah, so just a slight nuance to be aware  
18                  of in the UK system. The ability to kind of  
19                  push that out across a broader law enforcement.  
20                  Law enforcement don't actually have access to  
21                  the powers. It's actually the prosecutorial  
22                  authorities that sit separately to them.

23                  Q    Okay. And can the non-conviction based  
24                  forfeiture proceeding, can it proceed at the  
25                  same time as a criminal process, a criminal

1 investigation and criminal charges?

2 A (HW) I wouldn't be qualified to comment on  
3 that. I'm a nonlawyer, unfortunately. I would  
4 say it would be very unusual for it to do so.  
5 It's usually the case that either tack is taken,  
6 but I'm afraid I wouldn't be qualified to  
7 comment on that, on a point of law.

8 Q Mr. Moiseienko, are you able to address that?

9 A (AM) No, I'm afraid not, this question.

10 Q Just returning to some fundamentals of the UK  
11 system. What are the types of assets that are  
12 susceptible to forfeiture and what I mean  
13 specifically by that, in British Columbia we  
14 have a system of civil asset forfeiture that  
15 allows our civil forfeiture authority to target  
16 assets that are alleged to be either proceeds of  
17 crime or assets that are alleged to have been  
18 instruments of crime. What types of assets are  
19 susceptible to forfeiture in the UK system under  
20 the Proceeds of Crime Act? Sorry, Ms. Wood, you  
21 are muted.

22 A (HW) Sorry, yes, it's the theme of 2020.

23 Yes, we have -- this is wholly -- our own  
24 civil forfeiture is purely proceeds of crime.  
25 We have separate legislation dealing with

1                   instrumentalities, which I'm no expert on that  
2                   particular field, but primarily under our  
3                   customs laws and kind of other aspects of our  
4                   Criminal Code. Not under the proceeds of crime.  
5                   It's purely for the proceeds of crime.

6                   Q    And moving back to the kind of the factual and  
7                   the political environment that preceded the  
8                   amending of the Proceeds of Crime Act to add to  
9                   the unexplained wealth order powers, can you  
10                  just go back to that context and explain what it  
11                  was that was the catalyst for amending the act  
12                  to add these powers.

13                 A    (HW) So yes, I think I'll point primarily to  
14                  growing voice within civil society. The UK's  
15                  got a very active civil society contingent.  
16                  Some organizations you'll be familiar with from  
17                  Canada, such as Transparency International. The  
18                  UK chapter is very, very active. And others  
19                  like Global Witness, Spotlight on Corruption and  
20                  other corruption bodies. There'd been a growing  
21                  disquiet generally about growing evidence of  
22                  grand corruption wealth landing primarily in  
23                  London but also in the wider UK, particularly  
24                  real estate market and growing kind of levels of  
25                  investigative journalistic material coming out

1                   about London as a kind of centre for the  
2                   proceeds of crime or money laundering and  
3                   criminality more generally. And I think that  
4                   led to this groundswell of disquiet. I'd also  
5                   add in, it's not linked specifically to the  
6                   proceeds of crime, but the Skripal poisonings  
7                   and the Salisbury poisoning, which you may be  
8                   aware of in the UK where -- I should say alleged  
9                   Russian poisoning of their former colleagues  
10                  from the FSRB had led to a groundswell of  
11                  concern generally about the Russian influence in  
12                  the UK. So within that context, that included  
13                  the levels of Russian wealth landing  
14                  specifically in London and the southeast of  
15                  England. So there have been this broad context  
16                  and broad political pressure on the UK  
17                  government to be seen to be doing something  
18                  about this level of wealth.

19                Q    You've spoken about the impetus for unexplained  
20                  wealth orders being grand corruption. Was the  
21                  impetus for the Proceeds of Crime Act 2002, was  
22                  it aimed at a different type of problem?

23                A    I'd say very much so. So if we look back to the  
24                  then Blair government and his delivery unit  
25                  based -- he wrote up the kind of basic blueprint

1                   for our Proceeds of Crime Act. It was more  
2                   disquiet about the kind of senior criminal  
3                   figures which were kind of quite high profile  
4                   in -- particularly again in London, and there  
5                   was a growing disquiet about their very visible  
6                   wealth which seemed to be reasonably untouchable  
7                   by the kind of criminal confiscation powers that  
8                   were in place at the time. So very different  
9                   drivers, I'd say.

10            Q     And just to put a time frame on the unexplained  
11                   wealth orders amendments, when were they  
12                   introduced and when did they come into force?

13            A     (HW) So I'll hand to my colleague about the  
14                   kind of passage through parliament; he is much  
15                   more familiar. But they were introduced with  
16                   the Criminal Finances Act 2017.

17                   (AM) Yes, that's correct. They were introduced  
18                   in 2016 as part of the criminal finances bill  
19                   that then became the Criminal Finances Act 2017.  
20                   And to cycle back to the point that was being  
21                   discussed about the role of civil society. I  
22                   think the first mention in publicly available  
23                   documents of the idea of introducing unexplained  
24                   wealth orders in the UK was in the paper  
25                   published by Transparency International UK in

1                   2015 that was based on the results of the  
2                   considerations of the UK's framework by a task  
3                   force that had been convened by Transparency  
4                   International to study specifically the  
5                   challenges of confiscating and repatriating the  
6                   proceeds of grand corruption. Unexplained  
7                   wealth orders were one of the areas that the  
8                   report paid attention to. It drew significantly  
9                   on the Booz Allen Hamilton report prepared by  
10                  the firm for the US Justice Department in 2012  
11                  that you have already referred to. But the task  
12                  force made certain suggestions as to how the  
13                  powers might be adjusted in order to better fit  
14                  the UK context and avoid some of the adverse  
15                  human rights and civil liberties implications.  
16                  And effectively that shape of the proposal was  
17                  so influential that it made its way into the  
18                  criminal finances bill that was announced by the  
19                  then security minister in parliament and then  
20                  those provisions made their way into the final  
21                  text of the act with relatively few changes  
22                  along the way.

23            Q       And you mentioned that the first concept of the  
24                    unexplained wealth orders, including some  
25                    modifications to other international models to

1 address human rights civil liberties concerns.

2 What were those modifications?

3 A (AM) So basically the starting point for the  
4 consideration by the task force of what an  
5 unexplained wealth order is was the report by  
6 Booz Allen Hamilton that drew significantly on  
7 the Australian and Irish experience. That was  
8 really the focus of the report. So that's the  
9 material that the task force was working with  
10 and I've touched upon some of the main features  
11 of both the Australian and the Irish model.

12 But the main change that was made by the  
13 task force was to convert unexplained wealth  
14 orders in the Australian iteration into an  
15 information gathering tool to say what we're  
16 going to do when we find unexplained wealth and  
17 when the respondent is either a politically  
18 exposed person or suspected of involvement in  
19 serious and organized crime, what they're going  
20 to do then is not to ask the person to prove  
21 their wealth is legitimate in origin but to  
22 require them to provide information that we can  
23 then use. And this idea of repurposing  
24 unexplained wealth orders as an information  
25 gathering investigative tool is to the best of

1                   my knowledge something that has emerged from the  
2                   work that was done by the task force and this is  
3                   the model that the UK has subsequently adopted  
4                   in its law.

5                   Q    I understand that concerns were raised in both  
6                   houses of parliament when the amendments were  
7                   tabled. Can you tell us a little bit about what  
8                   the principal concerns expressed about the shape  
9                   of the unexplained wealth order tools were?

10                  A    (AM) So interestingly, these were not concerns  
11                   around civil liberties. So it seems that the  
12                   work of the task force has been tremendously  
13                   successful in that, and the form of this  
14                   information gathering investigative UWO did not  
15                   raise the fears that one might have expected it  
16                   to raise.

17                   The concerns were mostly about some of the  
18                   provisions in the act in terms of its  
19                   application. So one of those was the question  
20                   of when the reverse burden of proof kicks in, so  
21                   what should be the trigger for a person to be  
22                   required to prove that they have legitimately  
23                   acquired property.

24                   The way that the current legislation is  
25                   framed states that if you get an unexplained

1                   wealth order served against you and you as  
2                   respondent fail to comply, then that's when the  
3                   property in question is deemed to be  
4                   recoverable. In other words, it's treated as  
5                   though it were proceeds of crime for the purpose  
6                   of civil recovery. And the act in its final  
7                   iteration states that purported compliance is  
8                   not to be treated a non-compliance. That might  
9                   seem to be a relatively nuanced technical point,  
10                  but some of the members of parliament both in  
11                  the House of Commons and in the House of Lords  
12                  were worried that this wording of the provision  
13                  means that effectively you as a respondent can  
14                  provide a spurious explanation that is patently  
15                  wrong, but because on some level you would be  
16                  complying with the requirements of the order, or  
17                  at least you would be purporting to comply, then  
18                  the reverse burden of proof, this sanction for  
19                  not complying with the order would not really  
20                  kick in. That was one of the considerations in  
21                  parliament.

22                         The second area of concern is something  
23                         that Helena has foreshadowed in relation to the  
24                         costs that would be born by enforcement  
25                         agencies. And clearly that follows from the

1 overall UK's law enforcement experience with  
2 civil forfeiture and the sense that if you  
3 target sophisticated wealthy people, be they  
4 overseas politicians or organized crime figures,  
5 they're likely to push back, and you might be  
6 embroiled in long and costly litigation.

7 A proposal was made to cap the costs  
8 incurred by enforcement agencies when applying  
9 for an unexplained wealth order and litigating  
10 its issuance, but that was rejected by the  
11 government on the grounds that the ordinary  
12 principle in civil litigation is loser pays and  
13 there was no reason in the view of the  
14 government as expressed in parliamentary debates  
15 to depart from that principle in that particular  
16 instance.

17 And, finally, another point that was raised  
18 but not probably discussed in the amount of  
19 detail that one might have expected it to be  
20 covered in was the issue of what to do with the  
21 proceeds of crime that are recovered as a result  
22 of any unexplained wealth orders. And  
23 especially in the context of international  
24 corruption, there is the longstanding debate  
25 about what to do with the proceeds of corruption

1                   that have come from one country but have been  
2                   invested and seized in another country. So you  
3                   have the proceeds of corruption from elsewhere  
4                   invested in the UK and the UK law enforcement  
5                   agencies confiscated those proceeds. Do you  
6                   share with the country of origin and to what  
7                   extent do you share; how much does that depend,  
8                   for instance, on the involvement of the country  
9                   of origin in the investigation? And that issue  
10                  was floated during parliamentary debates but not  
11                  discussed in any great depth, and I understand  
12                  that the current position in relation to  
13                  unexplained wealth orders is the same as in  
14                  relation to civil forfeiture more broadly, which  
15                  is that the money is basically shared between  
16                  the home office, 50 percent goes to them, and  
17                  then the remaining 50 is shared between the  
18                  investigating agency, the prosecuting agency and  
19                  the courts. And then it's up to the government  
20                  to decide if it wants to repatriate any of its  
21                  share to the country of origin, if any.

22                  Q    So you've explained how the last issue is dealt  
23                  with in practice. Returning to the first two  
24                  issues, the issue of what is it -- what does it  
25                  mean to purport to comply and at what point is a

1 person understood to have complied with an  
2 unexplained wealth order and the issue of costs.  
3 How have those concerns borne out in practice?  
4 A (AM) So the first issue remains terra incognita,  
5 I would say, at this stage. This is because to  
6 date we have only seen one successful challenge  
7 against an unexplained wealth order and that  
8 related -- so that was a challenge against the  
9 issuance of an unexplained wealth order in the  
10 first place. In the case of NCA v. Baker and  
11 others, the respondents who were served with the  
12 UWO went to court and said look, different  
13 conditions for the issuance of the order had  
14 never been satisfied, therefore we should not  
15 have received it. And they did not really get  
16 to the point of discussing what compliance or  
17 purported compliance means because they actually  
18 never purported to comply with the unexplained  
19 wealth order in the first case. And that really  
20 is the current state of discussion surrounding  
21 what purport to comply means in this context.

22 There were some discussions in parliament  
23 and there are some commentary pieces written by  
24 petitioners who would say that presumably there  
25 is some degree of good faith engagement that you

1                   have to show with the actual requirements in the  
2                   order, so for instance, you cannot give a blank  
3                   piece of paper or you cannot answer something  
4                   that is silly and clearly has no relevance at  
5                   all to the issues that you are being inquired  
6                   about. But beyond that, there is really little  
7                   to no guidance on that.

8                   In relation to cost capping, once again,  
9                   the best case that we have as an illustration of  
10                  how that might play out is NCA v. Baker, and  
11                  that has been reported in the press that  
12                  currently I think as of the latest news items  
13                  that I had seen about this case, the issue was  
14                  under consideration by the courts, but the NCA  
15                  expected to be hit with a very significant cost  
16                  order in the millions of pounds and of course  
17                  one might expect that to lead to at least  
18                  reconsideration of whether the people who argued  
19                  for some sort of cost capping during  
20                  parliamentary discussions were on the right side  
21                  of that debate. Because one would think that if  
22                  you have a cost order that potentially derails  
23                  any appetite to undertake UWO-related  
24                  investigations in the future or seek the  
25                  issuance of those orders in the future, then

1                   either the order is not really workable or you  
2                   have to somehow adjust the conditions in which  
3                   that order is supposed to be issued, namely you  
4                   have to address the question of costs in order  
5                   to make UWOs attractive. But I think all of  
6                   that should be somewhat qualified by the fact  
7                   that after NCA v. Baker as you have seen in the  
8                   report, there's also been a case where the  
9                   application of unexplained wealth orders has  
10                  yielded much more success for the NCA. So even  
11                  though the there remain challenges around costs,  
12                  it is clear that they do not play out in the  
13                  same way in all cases where the orders are  
14                  issued and it's still possible to rely on  
15                  unexplained wealth orders with some degree of  
16                  success.

17                Q   And we'll look shortly at a couple of those  
18                  cases where there has been successful use of the  
19                  unexplained wealth order, but before we get into  
20                  that, I wanted to look at the unexplained wealth  
21                  order itself and I'm going to ask you to give a  
22                  bit of explanation of how it functions in  
23                  practice. And perhaps the best way to do this  
24                  is to actually bring up the Proceeds of Crime  
25                  Act.

1                   Madam Registrar, I think we have this at  
2                   tab 6. We have an excerpt of the Proceeds of  
3                   Crime Act 2002 starting at section 362a, I  
4                   believe, which is in part 8, investigations.  
5                   This is just an excerpt from the act.

6                   Mr. Moiseienko, feel free to ask Madam  
7                   Registrar to scroll up or down as needed, but I  
8                   think it's helpful to have the actual language  
9                   in front of us as you walk us through what  
10                  exactly the unexplained wealth order is, and how  
11                  it functions.

12                A       (AM) Yes, thank you. So this is the part of the  
13                  Proceeds of Crime Act that was inserted by the  
14                  Criminal Finances Act 2017 that sets out what an  
15                  unexplained wealth order is, what its effect is,  
16                  how it can be issued and what the effects of  
17                  non-compliance or even lying in response to an  
18                  unexplained wealth order are.

19                So here if we look at subsection (3) that  
20                  sets out what the respondent might be required  
21                  to explain if an unexplained wealth order is  
22                  issued against them. And you can see that the  
23                  provisions are quite broad in their scope, so  
24                  the respondent might be requested to set out the  
25                  nature and the extent of their interest in the

1 property and importantly explain how they had  
2 obtained that property in the first place.

3 So this is really the substance of what an  
4 unexplained wealth order is in the UK and what  
5 it requires the respondent to do.

6 Q And -- just to stop you there. I understand  
7 that there's quite a bit of leeway on the part  
8 of the authority applying for the order to  
9 specify exactly what information is required by  
10 way of a response; is that right?

11 A (AM) Yes, correct. Yes, and you can see -- you  
12 can see point D here in relation to setting out  
13 such other information in connection with the  
14 property as may be specified, so definitely the  
15 list provided in this subsection is not  
16 exhaustive.

17 If we scroll down to 362B, please. Thank  
18 you. This is the section that sets out the  
19 requirements for an unexplained wealth order to  
20 be made. And as I mentioned, this is the issue  
21 that has acquired particular importance in some  
22 of the litigation, in particular NCA v. Baker,  
23 the case of the National Crime Agency lost.

24 If we look at subsection 2, then we see  
25 some of the basic requirements in relation to

1                   who the respondent is and what property may  
2                   become subject to an unexplained wealth order.  
3                   The respondent has to hold the property and the  
4                   raw provisions elsewhere in this part of the  
5                   Proceeds of Crime Act that specify that trustees  
6                   can be deemed to hold the property even though  
7                   they're not the beneficial owners of the  
8                   property. So the holding requirement is  
9                   interpreted quite broadly.

10                   Then there is also a requirement that the  
11                   property must be valued at more than  
12                   50,000 pounds. I recall that during the initial  
13                   discussions of the Criminal Finances Act, that  
14                   threshold stood at 100,000 pounds, and that was  
15                   lowered. Presumably as a means to ensure that  
16                   the assets of organized crime groups of -- I  
17                   would not say relatively insignificant, but of  
18                   lower value than the kinds of assets that you  
19                   would associate with, for instance, the proceeds  
20                   of grand corruption can nonetheless be captured  
21                   by the operation of UWOs.

22                   Q   And if I could ask you just returning back to  
23                   something that you mentioned at the beginning  
24                   about different forms of unexplained wealth  
25                   orders. This form of unexplained wealth order

1                   contemplates identifying a particular -- a  
2                   specific piece of property, is that right,  
3                   rather than one's general wealth?

4           A        (AM) Yes, correct.

5           Q        Thank you?

6           A        (AM) Yes. And in fact in NCA v. Baker, the  
7                   cause for all the troubles that were encountered  
8                   by the NCA was that they had specific property  
9                   in mind, but they were not actually sure who is  
10                  the legal owner of that property. So the whole  
11                  process in that case was driven by the  
12                  identification of property that they thought  
13                  might be owned by someone with connections to  
14                  organized crime or someone who was a politically  
15                  exposed person, but they were not quite sure and  
16                  therefore they had to serve the unexplained  
17                  wealth orders against trustees and corporations  
18                  that held that property on behalf of the  
19                  ultimate beneficiary. And then it turned out  
20                  that the ultimate beneficiary was not exactly  
21                  the person whom the NCA had expected that person  
22                  to be. But I digress.

23                         Perhaps if we move on to -- if we just look  
24                         at subsection 3. The High Court must be  
25                         satisfied that there are reasonable grounds for

1                   suspecting that the lawfully obtained income of  
2                   the respondent would have been insufficient to  
3                   obtain the property. And this is a very low  
4                   standard indeed. It's not even suspect -- so  
5                   it's not even belief; it's reasonable grounds to  
6                   suspect. So not very difficult for a law  
7                   enforcement agency to satisfy, one would  
8                   imagine. And therefore the provisions that are  
9                   of particular importance are the provisions that  
10                  follow, which specify in subsection 4 that the  
11                  respondent to an unexplained wealth order has to  
12                  be one of the two categories of people. Either  
13                  the respondent has to be a politically exposed  
14                  person or there are reasonable grounds for  
15                  suspecting involvement in serious crime. And  
16                  there are further provisions in the act that  
17                  make it clear that when this provision talks  
18                  about -- when 4(A) talks about a politically  
19                  exposed person what is really meant is  
20                  politically exposed person from outside the  
21                  European economic area. That was touched upon  
22                  during the parliamentary debates and the  
23                  explanation for that limitation was that  
24                  cooperation with European economic area nations,  
25                  so the EU and several other countries in Europe,

1 is relatively well established and smooth, and  
2 therefore it does not raise the same concerns as  
3 politically exposed people from some other more  
4 far-flung jurisdictions.

5 Then if we move on to 362C. Thank you. In  
6 subsection 2, what we see is the real sanction  
7 for non-compliance with the unexplained wealth  
8 order. Subsection (1) details what  
9 non-compliance is, and it says that if the  
10 respondent fails without reasonable excuse to  
11 comply with the requirements imposed by an  
12 unexplained wealth order then the sanction  
13 envisaged in subsection (2) kicks in, and that  
14 is that the property is to be presumed to be  
15 recoverable property for the purposes of part 5,  
16 Proceeds of Crime Act. And that is the civil  
17 forfeiture legal framework that Helena has been  
18 referring to. So in other words, the property  
19 that you have not explained, if you have not  
20 responded to an unexplained wealth order in  
21 relation to property, that property is deemed to  
22 be effect of the proceeds of crime.

23 Q And just in terms of process, is it presumed to  
24 be recoverable and is it then confiscated or is  
25 it then subject to a further process?

1           A     (AM) It is then subject to further civil  
2                    forfeiture process, and it is a rebuttable  
3                    presumptive, so it would be possible in further  
4                    civil forfeiture process to bring further  
5                    evidence that shows that the property is not in  
6                    fact the proceeds of crime. But the presumption  
7                    is triggered by non-compliance with the  
8                    unexplained wealth order.

9                            And one issue that some commentators have  
10                           pointed to is that this really is the crux of  
11                           what makes unexplained wealth orders unusual in  
12                           the UK in that in effect you have the sanction  
13                           for non-compliance with the court order, which  
14                           is to say your property, the property in  
15                           question, is deemed to be recoverable, so normal  
16                           sanctions for non-compliance with a court order  
17                           would include things like fines or potentially  
18                           imprisonment or contempt of court. They would  
19                           not typically be of this rather esoteric nature,  
20                           because you have an information gathering order  
21                           that requires you to provide information and  
22                           then if you fail to provide that information the  
23                           sanction is that the property in relation to  
24                           which the order has been issued is deemed  
25                           recoverable. So that really goes to show the



1 application for an unexplained wealth order.  
2 Although maybe then in the life of an  
3 investigation you acquire more information and  
4 stand the prospects of prosecuting someone for  
5 this offence become more realistic. But that  
6 clearly is an important safeguard in principle  
7 for the integrity of the scheme, in that if you  
8 provide false information and lie, you are  
9 liable to criminal prosecution.

10 I would say that's it in terms of the brief  
11 overview of how the system operates. One other  
12 point I should make, that if we perhaps scroll  
13 back to the beginning of the excerpt, so you can  
14 just stay here. If we go to subsection 7 of  
15 this article, then you can see the list of  
16 enforcement authorities. And as Helena, I  
17 think, has mentioned, so far the National Crime  
18 Agency is the only agency that has actually  
19 applied for an unexplained wealth order, but  
20 theoretically there is a possibility for other  
21 agencies to do the same.

22 Q Thank you, Madam Registrar.

23 I think -- Mr. Moiseienko, can we take this  
24 down now?

25 A (AM) Yes. Thank you.

1           Q     And to round it out, what is the process if a  
2                    respondent provides a response as required by  
3                    the unexplained wealth order?  What then  
4                    happens?

5           A     Then the order would no longer be in effect.  So  
6                    the -- I believe the NCA or another enforcement  
7                    authority that has applied for the order  
8                    would deem with order to be fulfilled.  I'm not  
9                    sure exactly what form that takes in practice,  
10                  but the respondent would be deemed compliant.  
11                  And then most importantly, the information that  
12                  the enforcement authority has obtained can be  
13                  used in further civil forfeiture proceedings  
14                  against the respondent.

15                         There is, however, a limitation in the act  
16                         in that subject to several limited exceptions  
17                         such as perjury, this information cannot be used  
18                         in criminal proceedings against that person.  
19                         That was done in order to comply with the rules  
20                         surrounding the privilege against  
21                         self-incrimination.  And a point of note, in  
22                         that context might be that in one of the cases  
23                         involving a woman called Hajiyeva, she claimed  
24                         that the issuance of an unexplained wealth order  
25                         against her was illegal because it infringed

1                   against English law rules on spousal privilege  
2                   and that the information could be used against  
3                   not her but against her husband. And the judge  
4                   in that case deemed that that is self-evident  
5                   from the operation of unexplained wealth orders  
6                   and because there is no exception there for any  
7                   sort of spousal privilege rules; it is to be  
8                   taken that the parliament expected the law to  
9                   operate in that way. So basically the  
10                  information that you provide can be used against  
11                  your relatives, including your spouses in  
12                  criminal proceedings.

13                  A     (HW) It's worth very briefly touching on one  
14                  again slightly limiting or perhaps controversial  
15                  area of the law as well. Once the response to  
16                  the unexplained wealth order has been received,  
17                  the enforcement authority, if it has an interim  
18                  freezing order on the property in place, has  
19                  60 days to respond setting out what its next  
20                  course of action is, whether that would be to  
21                  embark on a full part 5 investigation or whether  
22                  to take forward proceedings of another nature.  
23                  We're going to discuss some of the limitations  
24                  and strengths of the power of course, but that  
25                  60-day limit particularly when looking at

1 gathering evidence across borders is one area  
2 where authorities using the power of sorts to  
3 kind of push back and perhaps seek further  
4 future amendments to the law.

5 Q I think I'd like to move on, if it's convenient  
6 to the practical UK experience with unexplained  
7 wealth orders. In your paper you touch on four  
8 particular instances where unexplained wealth  
9 orders have been issued. Actually, before I do  
10 that, I'm sorry, I did have one question about  
11 the -- we touched on the use of the information  
12 that's provided. The information that's  
13 provided in response to an unexplained wealth  
14 order, is that information which at the -- what  
15 happens to it at the point of being offered? Is  
16 it offered in a publicly filed document? Does  
17 it -- is it information that becomes available  
18 to anyone with access to court records? What is  
19 its status?

20 A (AM) I believe it is provided to the enforcement  
21 authority in question.

22 Q And does it later become public if there's  
23 further litigation?

24 A (AM) It may become -- I believe it may become  
25 public to the extent that it is referred to and

- 1                   relied on in litigation, in that litigation  
2                   involving unexplained wealth orders is public.  
3                   So the initial application for the order to be  
4                   issued is made ex parte, so the respondent is  
5                   not there. The public is not admitted. But  
6                   then subsequent litigation does involve public  
7                   being there. There is no anonymity in relation  
8                   to against whom the unexplained wealth order was  
9                   issued, and of course anyone could sit in court  
10                  and listen to the pleadings of the counsel.
- 11                 Q     And one just further question about the process.  
12                   Is it -- the initial order, is that made on  
13                   an -- the initial application, is that made on  
14                   an ex parte basis?
- 15                 A     (AM) Correct.
- 16                 Q     And in your report you say that it's often  
17                   accompanied by an application for an interim  
18                   freezing order; is that --
- 19                 A     (AM) That's right.
- 20                 Q     And is that invariably the practice?
- 21                 A     (AM) I believe in all the cases so far that has  
22                   been the practice.
- 23                 Q     Moving back, then, to the UK's experience in  
24                   using the unexplained wealth order. First of  
25                   all, has there been the power -- the amendment

1                   came into force I believe in 2018, and do you  
2                   have any idea of how many unexplained wealth  
3                   orders have been successfully sought since then?

4           A       (HW) So yeah, limited. So just the -- to our  
5                   knowledge just the four that have been referred  
6                   to in Anton's paper.

7                   (AM) If I may just add to this. There have been  
8                   different indicators of what the appetite is in  
9                   relation to using unexplained wealth orders. So  
10                  the original impact assessment produced by the  
11                  home office said that they expected around  
12                  20 unexplained wealth orders to be issued per  
13                  year. Interestingly, the impact assessment also  
14                  predicted that the costs associated with each  
15                  unexplained wealth order would roughly be  
16                  equivalent to the costs of seeking a disclosure  
17                  order, and as the Baker case demonstrates, that  
18                  has not been entirely borne out in practice.

19                         But then there have been press reports  
20                         around more than 100 unexplained wealth orders  
21                         being potentially considered by the National  
22                         Crime Agency. There have been reports about  
23                         unexplained wealth orders being considered by  
24                         the London Metropolitan Police, although  
25                         approximately 20 of them, but this is all rumour

1                   and speculation, and as Helena says, these are  
2                   not official statements by any means, so we only  
3                   have the definitive information about those four  
4                   cases and 15 orders in those cases that we cited  
5                   in the paper and the rest is just rumour.

6                   A     (HW) If I can add slightly on to that. I refer  
7                   back to the issue around the limited appetite in  
8                   our Crown Prosecution Service and lack of  
9                   investigative capacity and their wider risk  
10                  appetite around this particular power. They  
11                  don't currently have any expertise around civil  
12                  litigation in the Crown Prosecution Service. It  
13                  is, as the name suggests, a criminal prosecution  
14                  service. So at the moment they just don't have  
15                  the expertise to pick up these powers at scale.  
16                  Although there have been huge political appetite  
17                  for these powers to be used at speed and scale,  
18                  that was matched by the capacity and capability  
19                  available in the system to do so.

20                 Q     Mr. Moiseienko, can you tell us a little bit  
21                  about two cases where there has been success on  
22                  the part of National Crime Agency in seeking  
23                  unexplained wealth orders that -- two cases you  
24                  mention in your report are one that you've  
25                  alluded to, Ms. Hajiyeva, and another one was a

1 case of Mr. Hussain. If you could tell us about  
2 those.

3 A (AM) These are both, as you indicated, cases  
4 where the National Crime Agency has been  
5 successful, albeit in different ways so far.

6 So in the Hajiyeva case, that was the first  
7 time that an unexplained wealth order was issued  
8 in the UK. The order related to properties  
9 owned by an Azerbaijani citizen and the wife of  
10 a former high-ranking public official from  
11 Azerbaijan who headed a state-owned bank in that  
12 country. Her husband had been convicted of a  
13 crime in his home country, that is Azerbaijan,  
14 but she had property in London that became the  
15 subject of the unexplained wealth order.

16 She challenged the issuance of the  
17 unexplained wealth order both in the high court  
18 and then later in the court of appeal, and she  
19 failed in both those instances on a variety of  
20 grounds. That is to say, different grounds for  
21 appeal were offered and rejected by the court of  
22 appeal.

23 One of those that might be of some interest  
24 is the argument that her husband was not in fact  
25 a politically exposed person because although he

1                   was chairing a state-owned bank that was  
2                   essentially commercial activity and the bank  
3                   happened to be owned by the state doesn't make  
4                   him a state official and the court of appeal  
5                   rejected that argument and deemed him to be a  
6                   politically exposed person and therefore as  
7                   someone who is affiliated to that politically  
8                   exposed person is someone who's their spouse,  
9                   this woman herself could be a legitimate  
10                  respondent to an unexplained wealth order.

11                  We --

12                  Q    I'll just -- I had a question, you reminded me I  
13                      had a question that I meant to ask before which  
14                      is does the Proceeds of Crime Act 2002 define a  
15                      politically exposed person?

16                  A    (AM) Yes, I believe so. So the section on  
17                      unexplained wealth orders specifically does  
18                      contain a definition of who a politically  
19                      exposed person is. I don't have that provision  
20                      in front of me at the moment, but I believe that  
21                      it refers to the criteria from the European  
22                      Union's money laundering directives and  
23                      clarifies that the PEP definition only applies  
24                      to non-EEA PEPs, as I have discussed already.

25                  Q    Thank you.



1 settling with the National Crime Agency and in  
2 August 2019, so only several months after the  
3 UWO had been issued to begin with, a settlement  
4 was reached whereby he surrendered almost  
5 10 million pounds in property to the National  
6 Crime Agency. And that is a significant success  
7 partly because of the amount involved and partly  
8 because it happened to arrive on the heels of  
9 NCA v. Baker, the case that we have referred to  
10 many times already today and the case that was a  
11 high-profile loss for the NCA. So that was  
12 followed by this instance of success.

13 Q You say in your paper that the -- Mr. Hussein --  
14 we don't need to go there, but it's page 16,  
15 just for the reference -- Mr. Hussein, according  
16 to the NCA, submitted a very lengthy response to  
17 the unexplained wealth order, and that had some  
18 impact on the eventual settlement. Can you tell  
19 us what you know about that. And I appreciate  
20 it's from public reports from the NCA itself.

21 A (AM) Correct. We only know what is there in the  
22 NCA press release and it's a quote that the  
23 statement inadvertently gave NCA investigators  
24 clues to make a bigger case against him. And  
25 it's interesting to think about what that might

1                   entail because as we discussed, this information  
2                   would not be used in criminal proceedings  
3                   against him. It would only be used in civil  
4                   forfeiture proceedings against him or  
5                   potentially in criminal proceedings against  
6                   someone else whom he implicated or provided  
7                   information in relation to. But for whatever  
8                   reasons he decided that it was worth to settle  
9                   on the terms that the settlement eventually took  
10                  place rather than risk that information that he  
11                  provided being used in whatever way the NCA  
12                  envisaged to use it, whether it's to confiscate  
13                  or seek confiscation of more property or perhaps  
14                  go after other members of the organization that  
15                  he was involved with. We simply don't know.

16                  Q     And just a clarification. Mr. Hussein was not  
17                  suspected of grand corruption. He was a local  
18                  organized crime -- suspected local organized  
19                  crime figure?

20                  A     (AM) Correct. Yes. He was suspected of being a  
21                  professional money launderer for a range of  
22                  organized criminals in the Leeds area in the, I  
23                  think, north of England, unless my knowledge of  
24                  geography fails me.

25                  Q     And you mentioned very briefly an unexplained

1                   wealth order issued against [REDACTED]. Can you  
2                   tell us -- the mention in your paper is very  
3                   brief, so I'm assuming you know very little  
4                   about it, but can you tell us what is known  
5                   about this particular order?

6                   A     (AM) Yes. This is based on public reporting,  
7                   which as you indicate is sparse in this  
8                   instance. We know that an unexplained wealth  
9                   order has been issued in relation to properties  
10                  owned by a woman called [REDACTED], and some  
11                  reporting indicates that she has been suspected  
12                  of ties with Irish -- northern Irish  
13                  paramilitary groups involved in cigarette  
14                  smuggling, which arguably makes this case of  
15                  some public interest, but as you say, we know  
16                  very little about it except the fact that an  
17                  unexplained wealth order has been issued.

18                 Q     And finally returning to the NCA v. Baker, a  
19                  case that you've already touched on, can you --  
20                  my understanding is that this is an instance  
21                  where the NCA ran into difficulty with the  
22                  drafting of the Proceeds of Crime Act itself and  
23                  how the unexplained wealth order is formulated.  
24                  Can you tell us about why there was a failure in  
25                  this case, what exactly happened.

1           A       (AM) Yes. That's right. So it might be helpful  
2                   to begin with a bit of context about the  
3                   investigation.

4                   The NCA obtained several unexplained wealth  
5                   orders in relation to three properties in the  
6                   UK. The NCA suspected that these properties had  
7                   been purchased by a man who at one point was a  
8                   public official in Kazakhstan, and he was also  
9                   allegedly involved in serious and organized  
10                  crime in Kazakhstan.

11                  By the time that the NCA applied for  
12                  unexplained wealth orders, that man was already  
13                  dead. He died in, I believe -- well, it doesn't  
14                  matter when, but he died in an Austrian prison  
15                  awaiting extradition to Kazakhstan to stand  
16                  trial for the crimes that he allegedly  
17                  committed. So the NCA issued or applied for  
18                  unexplained wealth orders to be issued in  
19                  relation to those properties and the respondents  
20                  in those cases as I've indicated were a  
21                  professional trustee and several companies that  
22                  were the formal legal owners of that -- of those  
23                  properties. Those respondents provided  
24                  information to the NCA after they received an  
25                  unexplained wealth order. The judgment is

1                   silent as to whether the respondents purported  
2                   to comply with the unexplained wealth order or  
3                   perhaps they simply sent a letter to the NCA  
4                   saying, we're not even pretending to comply with  
5                   the order, but here is additional information  
6                   that you might find useful that will show why  
7                   the unexplained wealth order should never have  
8                   been issued in the first place. And that  
9                   information supplied to the NCA indicated that  
10                  the actual owners of the property were two  
11                  family members of that man who had died. One of  
12                  them is a politically exposed person from  
13                  Kazakhstan in her own right. She happens to be  
14                  the daughter of the former late president of  
15                  Kazakhstan. Her name is Dariga Nazarbayeva, so  
16                  she is the person that most people, I believe,  
17                  would associate with this case because she was  
18                  really the face of the litigation, so to speak.  
19                  She is the most high-profile person involved.  
20                  And one of the properties was owned by their  
21                  son, so her son and the son of the man who had  
22                  died in Austria who the NCA thought had  
23                  purchased the property in the first place. And  
24                  information was provided to the NCA to the  
25                  effect that the woman in question was

1 independently wealthy, she received very little  
2 money from her husband, who was allegedly  
3 involved in serious organized crime, and she and  
4 her son had purchased the property out of the  
5 proceeds of their legitimate business activities  
6 and using their family wealth.

7 So that was the story that was offered to  
8 the NCA, and the judge in the High Court  
9 Ms. Justice Lang made extensive reliance and  
10 referred often to this explanation that was  
11 provided by the owners of the property.  
12 However, there were also legal questions  
13 involved that really it seems from the judgment  
14 determined the outcome. And that is the fact  
15 that the legislative scheme is drafted in such a  
16 way that the requirements for an unexplained  
17 wealth order to be issued only really makes  
18 sense if you have in mind the beneficial owner  
19 of the property. So, for instance, if I am a  
20 criminal or a politically exposed person and I  
21 held property in the UK through a series of  
22 intermediaries such as professional trustees,  
23 the Proceeds of Crime Act says that you can seek  
24 an unexplained wealth order in relation to the  
25 trustee. There is a special provision that

1 enables that because the trustee is thought to  
2 hold property, and therefore is a permissible  
3 respondent. However, then you bump into all the  
4 other requirements for an unexplained wealth  
5 order to be issued because the trustee is not  
6 himself a politically exposed person. He is not  
7 involved in serious and organized crime.  
8 Another requirement that was particularly  
9 problematic in this context is that for an  
10 unexplained wealth order to be issued as we have  
11 discussed there has to be a discrepancy between  
12 the overall wealth of the person and their  
13 lawful income. So when the NCA faced the judge,  
14 the judge asked well, okay, what are we talking  
15 about here; where is the discrepancy between the  
16 wealth of the professional trustee and the  
17 lawful source of income? And of course that's  
18 when the whole scheme entirely breaks down and  
19 you have to engage in a lot of gymnastics to  
20 make sense of it because of the way in which the  
21 provisions of the act are drafted, and there was  
22 a lot of clever lawyering involved. For  
23 example, the NCA made the argument that perhaps  
24 the professional trustee was involved in  
25 laundering the proceeds of crimes and therefore

1                   he himself was to be treated as someone who's  
2                   engaged in serious and organized crime, and the  
3                   judge would have none of that. So at the end of  
4                   the day the decision was that unexplained wealth  
5                   orders should not have been issued in the first  
6                   place in that instance. And perhaps  
7                   surprisingly for some, the court of appeal  
8                   denied the mission to appeal and therefore that  
9                   is currently the latest statement in case law in  
10                  relation to how the provisions on unexplained  
11                  wealth orders should be applied to professional  
12                  trustees or other intermediaries.

13                Q    So for jurisdictions who are looking perhaps to  
14                  draft their own unexplained wealth orders,  
15                  perhaps a caution about thinking about those  
16                  relationships between the holders of property  
17                  and the beneficial owners and what exactly the  
18                  legislation requires to be shown and of whom it  
19                  requires information?

20                A    (AM) Yes, correct. It would seem that there was  
21                  simply a breakdown in the fabric of the  
22                  legislative scheme and with more foresight of  
23                  those issues, it should be possible to remedy it  
24                  in a relatively straightforward way, I would  
25                  imagine.

1           Q     Ms. Wood, were you going to add to that?

2           A     (HW) Yes, the judgment is a very long and  
3                   detailed judgment, which I encourage you to read  
4                   should you have the time. But the other facts  
5                   that Justice Lang picked up on were some of the  
6                   failures in the investigations. So as Anton  
7                   referred to, the respondents provided a whole  
8                   raft of information explaining in part the  
9                   wealth, and there were issues in there that  
10                  could have been, you know, lines of inquiry that  
11                  could have been followed by the investigators  
12                  which could have potentially have been  
13                  counselled, but for one reason or another, which  
14                  we are not aware of, those lines of inquiry were  
15                  not followed. Particularly around the issues of  
16                  who ultimately held the property, where the  
17                  actual wealth came from the, and the status of  
18                  that property. So there were some criticisms in  
19                  the judgment around the actual investigation.  
20                  And then kind of learning, I guess, for others  
21                  considering analogous powers would be that, you  
22                  know, a UWO isn't a shortcut for a comprehensive  
23                  and wide-reaching investigation into the  
24                  underlying property. It shouldn't be seen as a  
25                  full reverse onus power. They should have been

1                   kind of armed for those facts and should have  
2                   been seen to respond. So whilst I wouldn't see  
3                   this case as a failure of the ultimate  
4                   legislation overall, you know, the facts need to  
5                   turn on this particular case, I would say.  
6                   However, I think it's a cautionary tale on the  
7                   need to not see the UWO as a shortcut as to a  
8                   kind of more fulsome investigation.

9                   Q    We're going to look at non-UK examples of  
10                   unexplained wealth orders, but before we do  
11                   that -- and of course we'll have the opportunity  
12                   to compare them, but before we do that, can we  
13                   wrap up the discussion -- I'd like to wrap up  
14                   the discussion of the unexplained wealth order  
15                   in the UK by asking for your conclusions as to  
16                   its strengths, its weaknesses and its  
17                   effectiveness in achieving what was its goal in  
18                   the first instance of fighting grand corruption.  
19                   And perhaps Ms. Wood, I'll start with you?

20                   A    (HW) I think it's tempting with the recent Baker  
21                   case to kind of see this as a failure of  
22                   legislation. In many ways I would disagree. I  
23                   mean, what we learned from the Baker case is UWO  
24                   is quite a useful tool to get behind some of  
25                   these hugely complex ownership structures that

1                   have become such a feature particularly in grand  
2                   corruption cases increasingly and kind of more  
3                   mainstream organized crime. Although the case  
4                   in and of itself has failed and will have cost  
5                   implications for the NCA, we've learned a lot  
6                   more about the ownership structure behind those  
7                   properties and no doubt the NCA will be using  
8                   that information in the future to some end, I  
9                   would hope. So I wouldn't see the Baker case as  
10                  a failure.

11                   I think they shouldn't be seen as a volume  
12                   tool in investigations in the UK. That's  
13                   absolutely not the intention parliament had when  
14                   adopting them. They were only ever to be seen  
15                   as a tool not of last report, but of limited  
16                   application. So if we look at the code of  
17                   practice that sits behind the law, there's a  
18                   statutory code of practice that must be adhered  
19                   to by those using the powers and this absolutely  
20                   says being cognizant of the really intrusive  
21                   nature of the UWO, the other powers should and  
22                   must be considered before reaching the UWO  
23                   stage. So this should be seen in that context.  
24                   They're not a bullying tool. They're a tool  
25                   that should only be used where it's absolutely

1                   necessary and when no other investigative power  
2                   can get at the information you're looking at.  
3                   And arguably the Baker case, although it was  
4                   flawed and there have been some controversy of  
5                   the investigation which will cast a shadow over  
6                   the use of the powers in the future, arguably it  
7                   shows the power of the UWO to get behind complex  
8                   ownership structures.

9                   Secondly, I turn to the point of the  
10                  Mansoor Hussein case, and we repeatedly as an  
11                  institute have referred to the serious organized  
12                  crime limb of the UWO as having the most  
13                  potential. We always would have expected that  
14                  the PEP limb, those targets that were being  
15                  sought and the UWO legislation would be those  
16                  that would have the most complex ownership  
17                  structures that would have the legal might to  
18                  fight against what are, you know, under resourced  
19                  state law enforcement agencies and that would  
20                  have the most stake in terms of their reputation  
21                  and the veneer of respectability under which  
22                  they operate. But the serious organized crime  
23                  limb, those targets are less likely to use  
24                  complex structures, they're less likely to need  
25                  a veneer of respectability as they operate and

1                   are less likely to want to reveal the kind of  
2                   greater expense of their criminal empire, as  
3                   happened in the Mansoor Hussein case. When he  
4                   tried to recover those tracks, he wasn't able to  
5                   do so and in fact tripped himself up and  
6                   revealed the extent of his full criminal empire.  
7                   So I think for me the real strength of the UWO,  
8                   the PEP case, it always is going to run up  
9                   against the limitations that all of other  
10                  investigative tools meet when they reach these  
11                  PEP targets that operate across multiple  
12                  jurisdictions with huge legal prowess and  
13                  complexity behind them. I think its strength in  
14                  time will be in this serious organized crime  
15                  limb, and that we're seeing the evidence of that  
16                  through the Mansoor Hussein case, so I would  
17                  expect that bit to be a kind of pivot towards  
18                  using them all. Although that was not the kind  
19                  of genesis of the powers, I would say they're  
20                  pivoted towards the more organized crime side.

21                               In terms of their limitation as Anton has  
22                               referred to repeatedly, there are various  
23                               hurdles put in place before you can reach this  
24                               reverse onus and even then while you do so  
25                               you're still able to rebut those presumptions

1 kind of when we revert to the part 5  
2 investigation. On a personal level I'd say it's  
3 quite right that those protections are afforded.  
4 This is a really -- some might say this standard  
5 non-conviction based asset forfeiture regime  
6 kind of butts up against human rights provisions  
7 enough, so this should absolutely perhaps should  
8 be those protections, and that's absolutely  
9 what's behind implementing a power that didn't  
10 go for this full reverse onus or illicit wealth  
11 provisions Anton's correctly referred to. But  
12 again, it's going to end up in the case that as  
13 with all the other investigative tools it will  
14 be problematic in those cases where it's perhaps  
15 most needed and that is in these grand  
16 corruption cases or the kind of global  
17 laundromat cases that operate behind these  
18 complex and shady structures. So it will have  
19 limitations, but I don't think the Baker case  
20 should be seen as a failure. I think we should  
21 perhaps say that if we want to protect human  
22 rights, then obviously the powers are going to  
23 have those limitations and you have to find some  
24 balance between protecting property rights and  
25 enabling enforcement agencies to tackle illicit

1                   wealth. Whether that balance is right is  
2                   perhaps to be told in the longer term. This is  
3                   quite a new power in the UK, I would say.

4                   But again, I point to that case as well.  
5                   There is perhaps in implementing powers, however  
6                   they are conceived under unexplained wealth  
7                   orders perhaps a conception that you -- they're  
8                   a shortcut to a kind of shorter, a less  
9                   litigious process for regaining illicit wealth,  
10                  and that's absolutely been proven untrue in the  
11                  case of the UK variant of the unexplained wealth  
12                  order. You know, there's still a need to have a  
13                  really wide reaching and stringent investigation  
14                  into the underlying wealth if you are to counter  
15                  some of the legal might that you will face if  
16                  you are tackling these hugely powerful and  
17                  well-resourced individuals. The limit would be  
18                  definitely this inference in the mind of the  
19                  investigator that there is a shortcut, they  
20                  absolutely are not when you look at the UK  
21                  example.

22                  Q     Mr. Moiseienko, do you have anything to add to  
23                          the assessment of the effectiveness of the UK  
24                          power?

25                  A     (AM) I would echo that it is definitely not a

1 shortcut. I think I would also inject slightly  
2 more scepticism of the assessment. I hope  
3 Helena will forgive me for that. But the way  
4 that I would approach thinking about their  
5 effectiveness is looking at it from three  
6 different angles. One is are unexplained wealth  
7 order a good way of seizing criminal property.  
8 So this is where the discussion around the  
9 reverse burden of proof and all of that really  
10 centres. Are we thinking about unexplained  
11 wealth order as a means of tackling criminal  
12 wealth. And if so, then why do you have to take  
13 such long and winding route to the actual  
14 reversal of the burden of proof. And I don't  
15 want to foreshadow too much by way of discussion  
16 what other countries are doing, but if you come  
17 to the conclusion that in some cases it is okay  
18 to reverse the burden of proof, for example when  
19 there's an overwhelming public interest in  
20 making sure that public officials can account  
21 for their wealth, or perhaps there are other  
22 safeguards in place. For instance, you have to  
23 justify your belief that someone is involved in  
24 serious and organized crime and you provide  
25 evidence to court of that. Then maybe that is

1                   enough of a triggering event in order to have  
2                   the reversed burden of proof. It's not entirely  
3                   clear why the UK has chosen such a difficult and  
4                   complicated approach to that. And I think that  
5                   might be in the end one of the reasons why  
6                   unexplained wealth orders will not lead to  
7                   significant confiscations of criminal wealth.  
8                   Although we don't know. I don't think the jury  
9                   is still out. The second the information  
10                  gathering aspect of unexplained wealth orders,  
11                  because that's really what they say on the tin  
12                  they do. And as Helena has underscored, the  
13                  statutory guidance is very unambiguous about  
14                  unexplained wealth orders being an information  
15                  gathering tool. And there I think it's just  
16                  very difficult to assess the effectiveness of  
17                  them. How do you assess the amount and quality  
18                  of information that is gathered. Do you try to  
19                  assess them by relevance to the success of civil  
20                  forfeiture cases that might follow the issuance  
21                  of an unexplained wealth order? I think that's  
22                  another area where we simply don't have the  
23                  answer yet. And I would be -- if I were a  
24                  jurisdiction coming at it with a blank slate, I  
25                  would ask myself well, is it actually a good

1                   idea to have a new information gathering tool  
2                   that would only be used in 20 cases per year?  
3                   Because if we are talking about an information  
4                   gathering tool would it not be good to have a  
5                   tool that is more broadly applicable, and if so  
6                   and what is the information gathering problem  
7                   that we're trying to solve here and maybe we  
8                   could better address it by tweaking our  
9                   disclosure regime in some other elements. I  
10                  think that's the information gathering aspect of  
11                  UWOs. And finally the most speculative aspect  
12                  of their effectiveness or the lack thereof is  
13                  the news reports in some media to the effect  
14                  that there are people from countries around the  
15                  world who are now reconsidering their  
16                  investments of dirty money in London and there  
17                  are clients from certain high-risk jurisdictions  
18                  coming to their lawyers in London and asking  
19                  well, are you sure I'm not going to be hit with  
20                  an unexplained wealth order? Sort of the  
21                  overall deterrent effect of the legislation and  
22                  the power that it has had in terms of conjuring  
23                  up this image of a country that is tackling  
24                  illicit wealth seriously, and it might well be  
25                  that that is a significant benefit of having

1 unexplained wealth order provisions. Because  
2 ultimately everyone is playing a bit of a PR  
3 game as well, and it's important to demonstrate  
4 political resolve, and maybe unexplained wealth  
5 orders do have this symbolic effect, but it's  
6 virtually impossible to estimate. So this is  
7 the kind of consideration that a policy maker  
8 might bear in mind, but if you go back and try  
9 to assess how much of an impact you've made, I  
10 would imagine that's practically impossible.

11 Q Thank you. Mr. Commissioner -- oh, I'm sorry,  
12 Ms. Wood, did you have something?

13 A (HW) It was just one point, if I may. Just to  
14 come back on Anton's very well-made point about  
15 the UWO as an information gathering tool, which  
16 is absolutely what it is, and the legislation is  
17 very clear on that and the code of practice  
18 behind it. But when we speak to investigators,  
19 they're often of the view that the disclosure  
20 order also imparts aids of our Proceeds of Crime  
21 Act which allows you to make a written notice of  
22 the need to provide documentary evidence or  
23 return to an interview or give up further  
24 information to the investigation. That was  
25 extended as well into the criminal finances to

1 non-conviction based asset forfeiture  
2 investigations, and in their view that's a much  
3 more impactful information gathering tool.

4 So I think UWO should be seen as part of  
5 that suite and often the disclosure order is the  
6 preferred tool. Although it has had less media  
7 attention, in terms of investigatory impacts the  
8 people we talk to say that's been the biggest  
9 game changer.

10 The second point, again leading on Anton's  
11 point about deterrent effect, we also -- again  
12 it's difficult to prove in any sort of empirical  
13 sense, but we hear that in the kind of more  
14 standard mainstream part 5 civil investigations,  
15 there's been a greater willingness to engage in  
16 non-order based information giving based on the  
17 fact that people do not want to be faced with a  
18 UWO given the level of media scrutiny on the  
19 respondents in those cases. So information is  
20 being more willingly put forward now in the  
21 non-UWO part 5 cases because the respondents in  
22 those cases do not wish to have the media  
23 spotlight shone on them. So although it's very  
24 difficult to measure the real and true impact of  
25 a kind of reportive level from investigators

1                   that having the threat of a UWO is actually  
2                   extremely useful, even if it's not deployed to  
3                   any scale.

4           Q     Thank you.

5           MS. PATEL:   Mr. Commissioner, this would probably be  
6                   a good time for us to take a short break.

7           THE COMMISSIONER:   Sorry. Thank you, Ms. Patel, we  
8                   will take 15 minutes then.

9           THE REGISTRAR:   This hearing an adjourned for a  
10                   15-minute recess until 11:36 a.m.

11                   **(WITNESSES STOOD DOWN)**

12                   **(PROCEEDINGS ADJOURNED AT 11:22 A.M.)**

13                   **(PROCEEDINGS RECONVENED AT 11:35 A.M.)**

14                                   **HELENA WOOD, a witness**  
15                                   **for the commission,**  
16                                   **recalled.**

17                                   **ANTON MOISEIENKO, a**  
18                                   **witness for the**  
19                                   **commission, recalled.**

20           THE REGISTRAR:   The hearing is resumed,  
21                   Mr. Commissioner.

22           THE COMMISSIONER:   Thank you, Madam Registrar. Yes,  
23                   Ms. Patel.

24           MS. PATEL:   Thank you, Mr. Commissioner.

25                   **EXAMINATION BY MS. PATEL (continuing):**

1           Q     Moving on from the UK context, your report  
2                   addresses principally the Proceeds of Crime Act  
3                   of Ireland and the Proceeds of Crime Act of  
4                   Australia as well as various state and  
5                   territorial pieces of legislation that have some  
6                   form of unexplained wealth order, and I think  
7                   unless there's anything -- your report does  
8                   mention very briefly, for example, Italy and  
9                   Georgia. Unless there's anything specific in  
10                  those nations' legislation that you would like  
11                  to touch on, I'd ask Mr. Moiseienko, if you  
12                  could take us to the Irish situation.

13           A     (AM) Yes, certainly. And by way of prefacing  
14                   that, perhaps its worth saying that the  
15                   legislative schemes in countries like Italy and  
16                   Georgia are similar to the Irish experience in  
17                   that there is a reversed burden of proof and  
18                   there is some sort of situation or something  
19                   that a law enforcement agency has to prove in  
20                   order to trigger that reversal, and the reversal  
21                   is predicated on something more than simply a  
22                   discrepancy in the wealth of people concerned.  
23                   So, for instance, in Georgia the person  
24                   concerned has to be a public official and has to  
25                   have been accused of a number or one of a number

1                   of crimes. But as you say, the Irish example is  
2                   worth focusing on in greater detail. Partly  
3                   because as Helena has briefly alluded to  
4                   earlier, the Irish experience is often held out  
5                   as an example of best practice internationally.  
6                   Partly that is probably a function of factors  
7                   other than legislation, but there is certainly a  
8                   perception that the legislation is part of that.

9                   So the respective piece of legislation in  
10                  Ireland is the Proceeds of Crime Act 1996. And  
11                  what it enables the Criminal Assets Bureau to do  
12                  is to gain an interlocutory order if there are  
13                  reasonable grounds to believe that certain  
14                  property constitutes the proceeds of crime, and  
15                  once that interlocutory order is granted the  
16                  burden is then on the respondent to prove on  
17                  the -- to prove to the civil standard that the  
18                  property does not in fact constitute the  
19                  proceeds of crime.

20                  What is important to mention is that, first  
21                  of all, I should correct something that I said  
22                  earlier, which is that I referred to the wrong  
23                  standard. I said that it was the reasonable  
24                  ground to suspect, and I've probably been  
25                  affected by the UK experience which uses this

1 term. Actually, in Ireland the proper wording  
2 is reasonable grounds for belief that certain  
3 property, and specific property has to be  
4 identified, constitutes the proceeds of crime.

5 So you can see that this system, this  
6 legislative scheme is relatively straightforward  
7 in comparison to the one in use in the UK in  
8 that there is a defined criterion, a defined  
9 threshold that the Criminal Assets Bureau has a  
10 satisfy, then the burden reverses to the  
11 respondent and then the proceedings take place.  
12 And probably one thing I would note in relation  
13 to the Irish experience is that very often when  
14 you read commentary on that -- and I should be  
15 upfront about the fact that our report is based  
16 on what we saw in publicly available information  
17 regarding the Irish experience -- publicly  
18 available sources tend to highlight the fact  
19 that the Criminal Assets Bureau is highly  
20 resourced, while reputed in the local  
21 communities, and also importantly it brings  
22 together people of varying backgrounds and areas  
23 of expertise, including financial investigation.  
24 And so arguably all of those contextual factors  
25 are important, at least as important to

1                    understanding the success of the Irish scheme as  
2                    the actual legislation in place.

3                    And finally, a point of terminology when we  
4                    started, I made the point of listing different  
5                    kinds of provisions that people might deem to  
6                    constitute unexplained wealth orders. I expect  
7                    that some people of a kind of purist persuasion  
8                    would say that I'm entirely wrong to refer to  
9                    Ireland in this context because Ireland does not  
10                   have unexplained wealth provisions, because as  
11                   we've discussed, the trigger for the reversal of  
12                   the burden proof is not the discrepancy in  
13                   wealth per se, but as we touched upon in the  
14                   beginning, that really is a matter of  
15                   terminology rather than substance.

16                Q     And, again, the Irish provision that you just  
17                   walked us through, it addresses specific pieces  
18                   of property?

19                A     (AM) Sorry, could you clarify that.

20                Q     The authority, I suppose it would be the  
21                   Criminal Assets Bureau, goes into court not  
22                   making allegations about somebody's wealth at  
23                   large like you've just said, but they've  
24                   identified a specific piece of property?

25                A     (AM) Yes, that is absolutely correct.

1           Q     And I -- Ms. Wood, I know that you have  
2                   written -- you mention the Criminal Assets  
3                   Bureau in the other paper of yours that we've  
4                   mentioned today, the "Reaching the Unreachable."  
5                   And I wonder if you have anything to add on the  
6                   perceived effectiveness of the Irish system and  
7                   whether it is due to a superior or an  
8                   effective -- not superior but an effective  
9                   legislative scheme or is it in the operations of  
10                  the Criminal Assets Bureau itself?  
11           A     (HW) I think it would be a mix of those. I  
12                   mean, primarily one of the strengths that really  
13                   backs up the Irish system is just the  
14                   groundswell of kind of cross party political  
15                   public support for their action. And that could  
16                   be seen in the kind of background and context in  
17                   which their non-conviction based forfeiture  
18                   system was implemented in the first place, being  
19                   on the back of a very high-profile murder of a  
20                   journalist in Ireland by serious and organized  
21                   criminals which led to a level of public  
22                   opprobrium that meant that political action  
23                   against the issue was perhaps inevitable, and on  
24                   the back of that, they were one of the first  
25                   jurisdictions to implement such provisions.

1                                   And I mention that because I think it's  
2                                   protected the Criminal Assets Bureau. That kind  
3                                   of level of political and public support has  
4                                   protected them through, you know, various levels  
5                                   of public austerity over the past 10 years that  
6                                   we've seen globally. That budget has been  
7                                   protected, and I think that's a really key  
8                                   factor when we compare it perhaps to the UK  
9                                   system more broadly. The UK system has broadly  
10                                  been under resourced and it's left it open to  
11                                  challenge by high-profile cases where the UK  
12                                  system has been outgunned legally in resourced  
13                                  terms. The same can't be said in Ireland where  
14                                  they have a much better resource system that's  
15                                  predicated on this kind of groundswell of public  
16                                  support for what they do. If you walk down the  
17                                  street in, say, Dublin and mention CAB, people  
18                                  will know who you're talking about and they'll  
19                                  know what civil asset forfeiture is. You walk  
20                                  down the street in London, and you would get a  
21                                  reasonably blank look about civil forfeiture, so  
22                                  it's a really different cultural context.

23                                  Whilst the legislation is in one part  
24                                  useful, I wouldn't say the reverse onus  
25                                  provisions are key to the success over there.

1                    Though they can be useful in certain instances,  
2                    I wouldn't say they're key to success. In fact  
3                    the modelling of the Irish system is in some way  
4                    limited because they have this very strict  
5                    provision in their reverse owner scheme, which  
6                    means you have to wait seven years before  
7                    forfeiting the asset if it's not explained,  
8                    which is quite a long term particularly if the  
9                    CAB are forced to manage the asset, if it's not  
10                   a kind of piece of real estate. That's quite a  
11                   long arm, seven years, so they have got quite a  
12                   rigid measure, again, to protect people's human  
13                   rights, which is absolutely right and proper.  
14                   But actually their reverse onus scheme could be  
15                   seen as fairly being rigid in places.

16                                So if I can summarize that, I would say  
17                    actually the success of the CAB is primarily  
18                    more down to that operating model and the kind  
19                    of level of public support and resourcing more  
20                    than it is down to simply the fact that they  
21                    have a reverse onus provision in their  
22                    legislation, in my personal view. But I know  
23                    you're hearing more from others who are more  
24                    closer to that system tomorrow.

25                    Q        Yes, we are. It's still useful for us to hear

1                   the comparison, though, from somebody sitting  
2                   inside another system. One thing you mentioned  
3                   was the protected budget and I'm wondering if  
4                   you can comment on the need -- the AR -- the  
5                   Assets Recovery Agency was supposed to be  
6                   self-funded, and my understanding is there's no  
7                   such expectation of the Criminal Assets Bureau.  
8                   Can you comment on what impact that has on its  
9                   ability to be effective?

10            A       (HW) Absolutely. The whole discussion in  
11                   Ireland isn't around whether POCA pays for POCA,  
12                   which has become a bit of a term in the UK.  
13                   It's whether taking it where the asset has a  
14                   wider community benefit. So in their kind of  
15                   adoption model of cases, they don't simply look  
16                   at whether it's, say, a commercially viable  
17                   principle, if you look at it, say, as a normal  
18                   civil litigation case, which is the way the  
19                   commercial litigator would look at it. They  
20                   look at in terms of the wider community impact.  
21                   So, for example, if it was to cost a million  
22                   pounds to take away a million-pound property,  
23                   then within the Irish system that would be  
24                   absolutely fair. That's not to say those  
25                   principles don't apply in Britain, but I think

1                   going back to the legacy that the UK system  
2                   operates under due to the legacy of the Assets  
3                   Recovery Agency, there is still this notion that  
4                   the impact of asset recovery should be measured  
5                   in financial terms rather than in the more  
6                   difficult to measure community impacts or  
7                   dismantling of criminal schemes terms. I think  
8                   that the UK continues to labour under that  
9                   position that POCA should pay for POCA when  
10                  absolutely that's not the legislative intention  
11                  of any of these provisions across the world.  
12                  It's to impact on criminality and not to be in  
13                  any way commercially viable.

14                  Q     And I don't mean to cut short the discussion of  
15                          Ireland, Mr. Moiseienko, if you had anything  
16                          that you thought was important to add to the  
17                          discussion, but if not I was going to ask you to  
18                          move to a description of the Australian, the  
19                          national and then the state and territorial  
20                          schemes?

21                  A     (AM) Yes. Nothing to add on Ireland. So happy  
22                          to move on to Australia.

23                          Australia is an interesting example in terms  
24                          of how simple its regime looks. It's worth  
25                          noting that unexplained wealth orders were first

1                   adopted in Australia in 2010. I believe New  
2                   South Wales was the first state to do so. And  
3                   then shortly thereafter unexplained wealth  
4                   orders were also adopted at the commonwealth  
5                   level. So they're now part of the Proceeds of  
6                   Crime Act 2002 in Australia. And currently  
7                   seven out of nine Australian states and  
8                   territories have unexplained wealth orders in  
9                   place. Although as we might discuss, it does  
10                  not seem that they're always being vigorously  
11                  used.

12                                 In terms of what the legislative scheme  
13                   looks like in broad terms, as I have alluded to  
14                   if we look at the commonwealth level as an  
15                   example, a law enforcement agency would apply to  
16                   a court for what is known as a preliminary  
17                   unexplained wealth order, and that would be  
18                   predicated on the disparity between the overall  
19                   wealth of the person and their lawful income.  
20                   Then the person in question would be required to  
21                   appear before the court at a hearing and provide  
22                   explanation as to how a property was purchased.

23                                 And then if the court is not satisfied that  
24                   all of the property comes from legitimate  
25                   sources, then the court is authorized to make

1                   the unexplained wealth order. In Australian  
2                   parlance, the unexplained wealth order basically  
3                   stands for the confiscation order that is the  
4                   culmination of those proceedings. And the  
5                   unexplained wealth order can be made in relation  
6                   to the difference between the person's overall  
7                   property and the part of the property that has  
8                   been proven to come from lawful sources,  
9                   provided that that difference is more than  
10                  \$100,000.

11                  So that is really the scheme of the  
12                  commonwealth level. It's important to note that  
13                  its operation is limited to offences that are  
14                  recognized under the law of the commonwealth.  
15                  So basically what you have to prove as a  
16                  respondent is that your property does not derive  
17                  from any of the offences recognized under the  
18                  law of the commonwealth as opposed to the laws  
19                  of states and territories. And given the  
20                  inertia that has apparently existed in some  
21                  states and territories -- or maybe inertia is  
22                  not a kind word, but really the lack of  
23                  resourcing and other factors that have  
24                  constrained the application of unexplained  
25                  wealth orders, given all of that in recent years

1                   there has been a shift towards giving greater  
2                   powers to law enforcement agencies at the  
3                   federal or commonwealth level and empowering  
4                   them to also confiscate property that has been  
5                   obtained in breach of the laws of states and  
6                   territories, not only federal law. And that I  
7                   think is now possible since 2018, when the  
8                   cooperative scheme was created with a view to  
9                   facilitate on this application of unexplained  
10                  wealth order by the Australian Federal Police  
11                  and federal agencies.

12                                 So that's broadly the scheme at the  
13                                 commonwealth level.

14                  Q     If I could just draw out a couple of points from  
15                                 what you've said. One of the key points from  
16                                 the commonwealth scheme, I understand, in  
17                                 comparison to the Irish scheme, the Irish scheme  
18                                 requires that the Criminal Assets Bureau come --  
19                                 I assume it's the Criminal Assets Bureau come to  
20                                 court and show that there are reasonable grounds  
21                                 for belief that a particular piece of property  
22                                 constitutes the proceeds of crime. And then  
23                                 they get an order to freeze. In Australia  
24                                 there's no requirement at the commonwealth level  
25                                 with respect to this unexplained wealth order to

1 show a suspicion that -- or grounds for belief  
2 that a particular piece of property is a  
3 proceeds of crime or indeed that one's wealth in  
4 general is the proceeds of crime. But rather  
5 the preliminary test is met by showing there's  
6 reasonable grounds for suspicion that a person's  
7 total wealth exceeds the wealth of their --  
8 exceeds the value of their wealth that was  
9 lawful acquired?

10 A (AM) Yes.

11 Q Okay. And then in fact there is no requirement  
12 at any point for -- I mean, I suppose that the  
13 commonwealth could prove, it could endeavour to  
14 show that a person's wealth was unlawfully  
15 acquired, but it has no obligation to do so.  
16 Rather the onus is on the respondent to show the  
17 negative, to show that it was not unlawfully  
18 acquired?

19 A (AM) Yes, correct. I should perhaps qualify  
20 "unlawfully" by reiterating the point that I  
21 just made about you as a respondent having to  
22 prove that your property does not originate in a  
23 list of offences under the laws of the  
24 commonwealth.

25 Q Or for an indictable offence?

1           A     (AM) That's right.

2           Q     And you mentioned the national cooperative  
3                    scheme. Can you tell us a little bit more about  
4                    that and just in brief, appreciating we will  
5                    have evidence from Australia later this week.  
6                    So I won't put that burden on you.

7           A     (AM) Yes, yes, when we've got a good  
8                    international cohort. But the genesis of that  
9                    scheme lies in, I think, three factors. The  
10                   first is that there has been so far limited  
11                   uptake of unexplained wealth orders at the  
12                   federal level. So if you look at annual reports  
13                   published by the Australian Federal Police, for  
14                   example, they only refer to a very small number  
15                   of cases. You could count them on the fingers  
16                   of one hand where unexplained wealth orders have  
17                   been sought. And I think the latest state of  
18                   affairs is that currently no investigations are  
19                   being pursued with unexplained wealth orders.  
20                   So you've got the relative paucity of practice  
21                   at the commonwealth level, and then you also  
22                   have two reviews that were launched into the  
23                   operation of unexplained wealth orders in two  
24                   states and territories, and one of them being  
25                   Western Australia and the other being Tasmania.

1                   And both of those reviews have shown a mixed  
2                   record of implementation of unexplained wealth  
3                   orders, and by "mixed record" I mean that it's  
4                   impossible to discount their utility in  
5                   principle. It seems as though they might be  
6                   useful but equally they're not being applied  
7                   often in practice.

8                   And so across the board in Australia, there  
9                   seems to be this sense that unexplained wealth  
10                  orders could be useful but something is  
11                  currently missing in how they're being applied.  
12                  And one solution that had been discussed for  
13                  some time and has culminated in its actual  
14                  establishment in 2018 is the national  
15                  cooperative scheme whereby the Australian  
16                  Federal Police would be empowered to apply for  
17                  unexplained wealth orders and they would not be  
18                  constrained by the limitation of the list of  
19                  offences to those under the laws of the  
20                  commonwealth. So even if property originates in  
21                  offences against the laws of states and  
22                  territories that take this part in the scheme,  
23                  then the powers would be there to seize that  
24                  property. Though to my understanding is that  
25                  not all states and territories are willing to

1                   take part in the scheme and that will obviously  
2                   constrain its effectiveness overall.

3           Q       We don't need to go into this in detail, given  
4                   the -- that we will be hearing evidence on  
5                   Australia and the state and territorial schemes  
6                   later this week, but are there any particular  
7                   details of a state or a territorial scheme with  
8                   respect to unexplained wealth orders that you  
9                   think should be highlighted for the commission?

10          A       (AM) I think there are small differences. And  
11                   you can find them in the report. I mean, it's  
12                   really words like "reasonable suspicion,"  
13                   different standards that are used to kind of,  
14                   you know, trigger the reversal in the burden of  
15                   proof.

16                               So, for example, in New South Wales,  
17                   Queensland and Victoria, you do need to show  
18                   reasonable suspicion that a person has been  
19                   engaged in serious crime, and that of course is  
20                   something that is closer in its mindset and in  
21                   its approach to the model followed in the UK  
22                   than the commonwealth level legislation. So  
23                   there are slight distinctions in how different  
24                   states and territorial schemes operate. But  
25                   from the research that we have done, I do not

- 1                   feel that any of them has been tremendously  
2                   consequential or definitive in terms of the  
3                   effectiveness of the overall regime. I think  
4                   subject to what you hear from the much better  
5                   informed Australian experts, it seems as though  
6                   Australia is much less often presented  
7                   internationally as an example of best practice  
8                   in this area than, for instance, Ireland. And  
9                   going back to my earlier point, that must  
10                  refer -- that must be due not to weaknesses in  
11                  legislation but to other contextual factors
- 12                  Q   Indeed they look on the face of them to be  
13                   extraordinarily powerful legislative provisions.
- 14                  A   (AM) Yes, exactly. Very easy to apply. It  
15                   would seem extraordinarily powerful.  
16                   Specifically adopted it might be worth saying  
17                   with a view to combatting organized crime, so it  
18                   would seem from what I've read that corruption  
19                   was much less of a concern in Australia, and yet  
20                   it just does not seem to be used to a  
21                   significant extent.
- 22                  Q   Ms. Wood, do you have anything to add to the  
23                   consideration of the various Australian schemes?
- 24                  A   (HW) Nothing further from me.
- 25                  Q   I'd like to move on back to the reasons that we

1                   are here, and I'd like to ask for your thoughts  
2                   based on your review of the legislation in the  
3                   UK, in Ireland and Australia, and your knowledge  
4                   generally of these kinds of schemes and of  
5                   non-conviction based forfeiture what British  
6                   Columbia should keep in mind if it considers  
7                   drafting some kind of unexplained wealth order  
8                   for its own civil forfeiture authorities. And  
9                   maybe base that -- your thoughts around what are  
10                  the kind of legislative considerations that will  
11                  have to be borne in mind and what are the  
12                  operational considerations that will have to be  
13                  borne in mind and perhaps I'll start with  
14                  Ms. Wood.

15                A    (HW) Yes. Let's start with the operational  
16                  considerations. You know, based on the  
17                  experience not just of UWOs but the kind of  
18                  wider non-conviction based scheme in the UK. I  
19                  think the cases were operating reasonably well  
20                  after the initial establishment by the case law  
21                  that we've referred to by the Assets Recovery  
22                  Agency. But as I've previously referred to, the  
23                  kind of targets of those orders were primarily  
24                  kind of lower to mid-tier criminality and  
25                  certainly not into the grand corruption realm.

1                   As, you know, there's been kind of a political  
2                   and media push towards using the powers as they  
3                   were originally intended against kind of top  
4                   tier organized criminal targets and the kind of  
5                   grand corruption targets that we have referred  
6                   to that led to the kind of groundswell of  
7                   support for the implementation of UWOs. We've  
8                   seen a considerable outgunning of the  
9                   political -- sorry, the legal might available to  
10                  government when faced with kind of multiple  
11                  benches of QCs, sort of top tier of lawyers in  
12                  the UK. So I think the big lesson for anyone  
13                  is, you know, you have to have an equality of  
14                  arms when you're going against these top  
15                  targets.

16                         So at the moment the UK has a cadre of  
17                         civil litigation expertise within its ranks, but  
18                         arguably, given the kind of pay disparity  
19                         between public sector pay and some of the bigger  
20                         private legal firms to which the respondents to  
21                         these orders have recourse, they've been  
22                         considerably outgunned. And that's not to  
23                         undermine the expertise of former colleagues in  
24                         National Crime Agencies. There's certainly some  
25                         great talent there. However, to attract the

1 right pool of talent and expertise, you really  
2 do have to at some level match the pay the kind  
3 of civil litigators are being offered in the  
4 private sector. I think that for me that's --  
5 more the primary problem in the UK for me at the  
6 moment is capacity. Yes, you know, it's been an  
7 under resourced area, but it's also capability  
8 and the struggle to attract significant kind of  
9 commercial civil litigation expertise to come  
10 into what is a kind of quasi-criminal sphere has  
11 been really, really difficult and secondly  
12 retaining that expertise, given, you know,  
13 burgeoning property prices in London in the  
14 southeast meaning the kind of public sector pay  
15 isn't matching that kind of scale. So there's  
16 been a sort of hemorrhaging of expertise due to  
17 those pay disparities. Not an easy circle to  
18 square, I admit, but I think that's something  
19 that's really key to me.

20 In terms of the legislation, as Anton's  
21 referred to, some of the debates in parliament  
22 didn't centre so much on the human rights  
23 aspects of this, but there was certainly in the  
24 framing of the law consideration, a full reverse  
25 onus provision wasn't something the UK had

1                   appetite for, nor would it fit with the kind of  
2                   legal traditions in the UK. So I guess it  
3                   depends on that legal appetite. It's a  
4                   really -- as you already know, there's  
5                   significant controversy around the use of civil  
6                   confiscation powers without unexplained wealth  
7                   orders being brought in and it's finding that  
8                   correct balance between empowering investigators  
9                   with tools at their disposal while not running  
10                  roughshod over people's property rights. I  
11                  think building in enough kind of weight to allow  
12                  people to vent themselves is key, but finding  
13                  the balance between those two areas is really  
14                  difficult, and whether the UK's found the right  
15                  balance, I think will only come out in time as  
16                  the powers are tested to their full potential.  
17                  I don't think we've seen them yet. Certainly  
18                  early examples suggest that these powers are  
19                  going to face as much if not more litigation  
20                  than the underlying civil litigation scheme  
21                  faced when the assets recovery was set up. I  
22                  think finding that balance is really key. And I  
23                  think that goes down to political and cultural  
24                  appetite within the Canadian legal tradition.

25                  Q       Mr. Moiseienko?

1           A       (AM) I think that in terms of approaching the  
2                    design of a legislative scheme I would start  
3                    with a very simple question of are we okay with  
4                    the idea of a reverse burden of proof in civil  
5                    forfeiture proceedings, because if the answer is  
6                    no then the rest of the discussion falls by the  
7                    wayside. You cannot have any sort of  
8                    unexplained wealth order provisions.

9                                If the answer is yes, we're okay with that  
10                               in certain circumstances, then the issue becomes  
11                               well, what are those circumstances. And that  
12                               can be approached in a variety of ways. You  
13                               could think about the characteristics of the  
14                               respondent, so for instance, you've got the  
15                               Italian example where people suspected of  
16                               affiliation to a Mafia type group are treated  
17                               differently and there the reverse burden of  
18                               proof is possible. You've got the Georgian  
19                               example where the focus is on public officials.  
20                               You've got the UK example which combines the two  
21                               approaches and enables UWOs to be issued in  
22                               respect of either non-EA PEPs or people involved  
23                               in serious and organized crime. You can have  
24                               requirements around the standard that the law  
25                               enforcement agency has to satisfy, whether it is

1                   something like reasonable grounds to suspect,  
2                   reasonable ground to believe or even anything  
3                   higher than that. It really depends on sort of  
4                   what options you've got in your country. And  
5                   then it's also possible to play around with  
6                   parameters such as what is the value of property  
7                   in respect of which the UWO can be sought. Does  
8                   the court have a discretion or should the court  
9                   issue an order automatically if certain  
10                   requirements are satisfied?

11                   So there are different pieces of the  
12                   puzzle, and I think that if you line them up in  
13                   the right configuration, provided that there is  
14                   no overarching constitutional human rights  
15                   objection to the principle of the reversal of  
16                   the burden of proof in civil forfeiture, then  
17                   it's possible to come up with a scheme that is  
18                   relatively permissive, such as in Australia, or  
19                   exceedingly complicated -- or not exceedingly,  
20                   but definitely quite complicated like in the UK.  
21                   And where you fall on that spectrum will really  
22                   depend on, as Helena says, your appetite and the  
23                   legal tradition and the sense of what is  
24                   appropriate and what is not appropriate. So I  
25                   would imagine that's -- that's it in broad

1 terms.

2 One other issue I would mention is if you  
3 do approach unexplained wealth orders as an  
4 information gathering tool, like the UK approach  
5 has been, then it strikes me as necessary to  
6 consider that in the context of other  
7 information gathering tools, so how do our  
8 disclosure orders work, what other means do we  
9 have of getting information about property that  
10 we might want to confiscate and how exactly  
11 would some sort of unexplained wealth order, for  
12 example, like the one used in the UK, how would  
13 that be helpful in that endeavour. I think I'll  
14 stop here.

15 Q If I could layer on to the question by asking  
16 how does your assessment -- what is useful to a  
17 jurisdiction change if the principal target, the  
18 principal political issue, the facts that are  
19 being addressed by civil forfeiture aren't grand  
20 corruption but are rather organized crime? How  
21 does that change the assessment for the  
22 jurisdiction, say that's the situation here.  
23 Not saying that it is. But hypothetically does  
24 that change the assessment of what is the best  
25 approach?

1           A       (HW) Should I start there or Anton? Yeah. So  
2                   my personal perspective, and certainly I think  
3                   we've touched on this today in the Mansoor  
4                   Hussein case, the UK system I personally think  
5                   will be most effective in the cases against  
6                   organized crime, and I think it's well designed  
7                   for this, although it was not the intention  
8                   initially behind initiating this legislation.  
9                   But where the reverse onus is triggered by the  
10                  lack of response to a request for information, I  
11                  would suppose that an organized crime target  
12                  would be more willing to be non-compliant with  
13                  an order and walk away, particularly looking at  
14                  the example of Mansoor Hussein where he actually  
15                  implicated himself further by the fact of  
16                  responding and may have simply have had a  
17                  smaller order had he have not responded at all  
18                  to the UWO, the UWO revealing a greater pool of  
19                  wealth that became part of the wider part 5  
20                  case. And I would suppose that those targets  
21                  will be less likely, if they're domestically  
22                  based targets, to use the complex trust and  
23                  shell company structures that we've become  
24                  familiar with in terms of politically exposed  
25                  targets. I guess it depends on the design. I

1                   would think the UK system is well designed to  
2                   target those individuals who are less likely and  
3                   less willing to be able to explain away their  
4                   wealth. As compared to a politically exposed  
5                   person who has been structuring their wealth all  
6                   along to give a veneer of respectability in a  
7                   way that a serious organized crime target  
8                   doesn't always have in the back of their mind  
9                   when they are seeking to move that wealth.

10            Q     Mr. Moiseienko, do you have any thoughts on  
11                   that?

12            A     (AM) I would think that if you have a very  
13                   permissive approach, for example if you can  
14                   issue a UWO in respect of virtually anyone, then  
15                   it doesn't really matter whether you have in  
16                   mind PEPs or serious and organized crime figures  
17                   because the tool that you have is so powerful  
18                   and can be applied, well, to anyone. If on the  
19                   other hand you have to limit its application and  
20                   tailor its application in a much more focused  
21                   way, for instance if you have to impose certain  
22                   requirements on the law enforcement agency, then  
23                   it might make sense, for instance, to require  
24                   them to demonstrate reasonable belief that  
25                   someone is involved in list your -- wish lists

1                   of different kinds of organized crime that you  
2                   are particularly interested in. I think that  
3                   would be the difference in approach. Because if  
4                   the application of UWOs is intended to be  
5                   narrowly focused on organized crime figures,  
6                   then the legislation can be framed with that in  
7                   mind and presumably some of the civil liberties  
8                   concerns and human rights concerns would be less  
9                   acute just because the legislation is quite  
10                  narrowly targeted to certain specific cases.

11                  One practical point that might be worth  
12                  recalling is that in the UK in light of the  
13                  possible application of UWOs against organized  
14                  crime figures the property threshold was lowered  
15                  from 100,000 pounds to 50,000 pounds, so it's  
16                  also one of the things to bear in mind. What  
17                  sort of property do you intend to be seizing and  
18                  how often do you intend for the tool to be  
19                  applied? Do you want it to be applied once a  
20                  year against a mansion of \$10 million worth or  
21                  is it going to be a much more consistent  
22                  application against a wide array of lower valued  
23                  targets? That would probably really impact on  
24                  the way in which you frame the legislation to  
25                  begin with.

1 MS. PATEL: Unless either of you has anything -- any  
2 final thoughts to add on advice for British  
3 Columbia, I'm going to move forward and my  
4 friends have some questions that they would like  
5 to put to you.

6 Mr. Commissioner, those are my questions for  
7 these witnesses.

8 THE COMMISSIONER: Thank you, Ms. Patel.

9 I think Ms. Hughes on behalf of the province  
10 has some questions and has been allocated 10  
11 minutes.

12 MS. HUGHES: Yes, thank you, Mr. Commissioner. I  
13 don't intend to use the entire 10 minutes.

14 **EXAMINATION BY MS. HUGHES:**

15 Q I have but one question for the panelists, and  
16 it's specific to the report that you've  
17 provided. And perhaps I don't need to have the  
18 report brought up. I can ask my question and if  
19 necessary we can go there. In the report when  
20 discussing why in the UK an unidentified wealth  
21 order, we have the two criteria. There's the  
22 politically exposed persons and then serious  
23 organized crime. The politically exposed  
24 persons is limited to those from non-EA  
25 countries, and the comment in the report is that



1                    basically EU member countries plus a couple of  
2                    other European countries that once again have  
3                    relatively strong and well-established  
4                    corporation with the UK.

5                                       One of the obvious questions is how that  
6                    might change now that the UK is no longer a  
7                    European union member and that has been, as you  
8                    might imagine, a subject of heated and active  
9                    discussion, and I think the broad sense on both  
10                    sides, both in the UK and in the EU is that  
11                    there will continue to be a significant extent  
12                    of law enforcement and security corporation  
13                    because no one wants to lose access to the  
14                    information and corporation and expertise from  
15                    the other party, so in practice one might expect  
16                    that to some extent even though the UK is out,  
17                    the rationale for this particular provision  
18                    broadly stands and survives Brexit.

19                    MS. HUGHES: Thank you, Mr. Commissioner -- unless  
20                    Ms. Wood has anything to add, that is my  
21                    question for this panel. Thank you.

22                    THE COMMISSIONER: Thank you, Ms. Hughes.  
23                    Ms. Magonet.

24                    MS. MAGONET: Thank you. Sorry.

25                    THE COMMISSIONER: Just to situate you for the



1 Mackenzie and Yale Hamilton Smith about the  
2 effectiveness of asset focused interventions  
3 against organized crime. And you refer to it I  
4 think once or twice in this paper. Would you  
5 agree those researches found that it's actually  
6 unclear that asset forfeiture approaches reduce  
7 organized crime?

8 A (HW) I'd give it a slightly different nuance.  
9 I'd say there's a lack of empirical evidence and  
10 my memory, appreciating that this is information  
11 I read almost sort of two years ago now, but my  
12 memory of what was written there was around --  
13 it's very difficult to prove the impact, given  
14 some of the impacts are not quantitative in  
15 nature. It's very difficult to prove deterrent  
16 effects, for example, in the -- proving a  
17 negative is extremely difficult. So I wouldn't  
18 disagree with you, but I'd say it's a slightly  
19 different nuance. They kind of challenge the  
20 very fact there's an ability to measure in any  
21 sort of true empirical way the real impact of  
22 asset-focused interventions. However, as I  
23 refer to in the report, there is a -- I mean,  
24 the policy basis across the globe is a more  
25 morale imperative for ensuring that crime

1                   doesn't pay.

2                   Q    Thank you.  But you would agree they found at  
3                   least at this point there's not empirical  
4                   evidence that enables us to say that these --  
5                   despite maybe the moral imperative or their  
6                   popularity there isn't empirical evidence  
7                   establishing their effectiveness?

8                   A    I would definitely say there are considerable  
9                   research gaps in this field.  It's a massively  
10                  underresearched field both in the UK and  
11                  globally, and there's only a handful of  
12                  researchers, some of whom are giving evidence  
13                  before this committee, so I would prefer to --  
14                  Dr. Colin King, who is giving evidence tomorrow,  
15                  is one of the experts.  I believe you also have  
16                  taken evidence from Jeffrey Simser.  Again it's  
17                  a very small pool of research, and it's a vastly  
18                  under researched area when compared to other  
19                  areas of their fight against kind of illicit  
20                  finance, including money laundering and  
21                  terrorist finance.  So I would definitely agree  
22                  it's an under researched area that would be value  
23                  in a greater evidence base for the  
24                  interventions.

25                  Q    Thank you.  In this paper -- and we don't have

1           to go to the page unless you would find it  
2           helpful, but you also talk about the  
3           incentivization scheme for civil forfeiture in  
4           the UK, and would you agree that you conclude  
5           that it's problematic because it can lead  
6           authorities to prioritize cases based on  
7           potential revenue rather than community impact  
8           and harm reduction?

9           A     (HW) I would absolutely agree with that. So the  
10          UK is currently undergoing a review of its  
11          incentivization scheme, and my public response  
12          to that has said that I think we should scrap  
13          all incentivization. Personally I think it  
14          skews priorities, and we've see that most  
15          acutely in the United States where their own  
16          civil forfeiture regime has been subject to a  
17          considerable level of public criticism because  
18          it has been subject to skewed incentives where  
19          law enforcement have even been able to keep the  
20          actual assets to use themselves. So I do agree  
21          that incentivization is hugely problematic.  
22          And, again, it goes back to my point of the UK  
23          scheme has been mired in this kind of POCA pays  
24          for POCA rather than looking at the real impacts  
25          of the legislation. It shouldn't be -- in my

1 view it should not be judged in financial terms;  
2 it should be based on its other merits which are  
3 kind of removing kind of criminal -- criminals  
4 from the environments, so removing those  
5 incentives for others to enter crime, disrupting  
6 criminality, removing criminal capital, all  
7 those other things. I am -- my personal view is  
8 that incentivization can skew priorities and I'm  
9 definitely a proponent of scrapping the UK's  
10 incentivization scheme.

11 Q Thank you. I now just have some questions of  
12 effectiveness of UWOs more generally. Madam  
13 Registrar, you can take that document down.  
14 Thank you.

15 Are you aware of any empirical research  
16 showing that the UWO regime in the UK is  
17 reducing money laundering?

18 A (HW) I would personally say -- again I refer to  
19 it being a vastly under resourced area -- under  
20 researched area, forgive me. And I think it's  
21 too early to make any judgment on the actual  
22 impact to the UK scheme. It's very young. It's  
23 yet to establish it's kind of full base of case  
24 law. And even if there were to be research  
25 undertaken I don't think you could make that

1                   specific link between a few individual cases and  
2                   a kind of aggregate reduction in money  
3                   laundering. I'll refer to other areas. My  
4                   colleague Anton referred to there will be  
5                   without a doubt a deterrent effect that the UWO  
6                   has. I would personally say it would be near  
7                   impossible and almost folly to try and measure  
8                   that in empirical terms, but it's undoubtedly  
9                   the case that it does and will have a deterrent  
10                  effect.

11                Q    And earlier when you provided evidence about the  
12                   fact that individuals may be more willing to  
13                   voluntarily disclose information to avoid the  
14                   media attention that a UWO would attract, was  
15                   that anecdotal evidence just from speaking with  
16                   people working in this field?

17                A    Absolutely, yeah. Purely anecdotal. There's no  
18                   kind of -- again, it's quite a young power.  
19                   There's no kind of wholesome research been  
20                   conducted on that. It's absolutely just  
21                   anecdotal evidence we received on that.

22                Q    Okay. Thank you. I now have some questions  
23                   about the report that both of you prepared along  
24                   with Mr. Keatinge for the Cullen Commission. I  
25                   don't think we need to pull it up, though,

1                   unless -- I think that they're more general  
2                   questions. Just as a first point, the UWO  
3                   regime in the UK, in order for the state to be  
4                   able to seek a UWO there's no need to show a  
5                   nexus between the property sought and the  
6                   alleged criminality; is that correct?

7                   A     (HW) That's correct. As I understand it.

8                   (AM) Yes, same here.

9                   Q     Earlier you both explained that the politically  
10                  exposed person route of obtaining a UWO only  
11                  applies to individuals outside the European  
12                  economic area. Would you agree that this has a  
13                  potential discriminatory impact by only  
14                  targeting individuals from certain countries?

15                 A     (AM) I haven't looked into this question in  
16                  detail, so I would not be able to dismiss the  
17                  concern out of hand or confirm it. I think the  
18                  way to look at it, and my understanding of how,  
19                  for example, the European Court on Human Rights  
20                  would look at it is to first identify a  
21                  disparity in treatment, and there is clearly a  
22                  disparity in treatment, but then look at whether  
23                  it is justified, and that really is the crux of  
24                  the matter because arguably the UK has other  
25                  ways of dealing with misconduct of politically

1 exposed persons within the UK than the  
2 application of unexplained wealth orders and  
3 there are more investigative means at the UK's  
4 disposal. And then the reason why politically  
5 exposed persons from other EU countries -- well,  
6 at the time the UK was obviously still a  
7 member -- other EU countries are not covered is  
8 something that we have discussed already. So  
9 there's also a rationale for that.

10 Q Thank you. In your report you discuss that the  
11 effect of a UWO may prompt a regulated entity to  
12 drop business relations with the respondents  
13 regardless of the merits of the order, which is  
14 problematic from a human rights standpoint, you  
15 write. Can you elaborate on the types of human  
16 rights concerns that this may raise.

17 A (AM) So to give you a bit of context, this is  
18 based on a report published by ACAMS, the  
19 Association of Certified Anti-Money Laundering  
20 Specialists, who look specifically at the impact  
21 of unexplained wealth orders on the regulated  
22 financial sector and how compliance officers  
23 working there might approach doing business with  
24 someone who has faced an unexplained wealth  
25 order. In terms of human rights concerns, I

1                   would not be prepared to couch that in any legal  
2                   terms or refer to any particular problem under  
3                   the UK Human Rights Act, but I think from a  
4                   broad human rights civil liberties how do we  
5                   treat others perspective, if you have not been  
6                   convicted of a crime and if you have been  
7                   subject to a mere investigatory measure but that  
8                   measure has been widely publicized and led to  
9                   significant impact on your life and the quality  
10                  of your life, even though ultimately there might  
11                  have been no there there, right, so there might  
12                  have been no reason for that and perhaps the  
13                  investigatory measure, the unexplained wealth  
14                  order simply resulted in you providing more  
15                  information and the investigation never having  
16                  happened. Even if -- notwithstanding all of  
17                  that you still feel negative consequences on  
18                  your private and professional life as a result  
19                  of being subject to that measure, the  
20                  unexplained wealth order, that is clearly  
21                  problematic. And I think that's a general  
22                  concern in relation to how financial  
23                  institutions might occasionally treat high-risk  
24                  customers in a way that would not necessarily  
25                  enable them to carry on normal life and, you

1 know, sometimes that is quite difficult to  
2 reconcile with the idea that you should only  
3 face significant negative consequences if you've  
4 been convicted of wrongdoing by a court.  
5 (HW) Yeah, I definitely wouldn't think this  
6 confines itself to unexplained wealth orders.  
7 We know that production orders and other  
8 investigative tools under the Proceeds of Crime  
9 Act can often act as a trigger for so called  
10 de-risking by banks and that's driven by the  
11 more heavy-handed approach to anti-money  
12 laundering regulation generally. It's kind of a  
13 problematic feature of the wider anti-money  
14 laundering regime in its totality rather than  
15 very specific to UWO. I think it's important to  
16 recognize that it's an issue that requires wider  
17 consideration, and indeed colleagues in the  
18 Royal United Services Institute are researching  
19 just that at the moment, looking at the impact  
20 of financial crime measures on financial  
21 inclusion. So do what you have with that  
22 report, but I think it shouldn't be confined to  
23 unexplained wealth orders. Though I would say  
24 they have received disproportionate attention in  
25 the UK media, perhaps given they've been couched

1                   as kind of mafia laws, but yes, just to give you  
2                   that wider context.

3           Q       Thank you. You would agree that the type of  
4                   information that the state can seek using a UWO  
5                   in the UK may be extremely personal information?

6           A       (AM) I think it depends on what you mean by  
7                   extremely personal. But certainly, you know,  
8                   this is not information that you would give to  
9                   someone you don't know or even a friend. It is  
10                  information about people's financial affairs.

11          Q       Thank you. And you would agree that the  
12                  constitutionality of the UK's UWO regime has not  
13                  yet been assessed by the courts?

14          A       (AM) Well, the courts have upheld the issuance  
15                  of UWOs. There have been a human rights  
16                  based -- well, not human rights based arguments  
17                  per se. But as I mentioned in one of the cases  
18                  the issue of spousal privilege came into play,  
19                  which is quite close to a human rights issue in  
20                  its nature.

21                         In terms of constitutionality, I think the  
22                         UK operates -- and I'm by no means an expert on  
23                         the UK's constitutional law, but given that  
24                         there is no written constitution, basically an  
25                         act of parliament is the law of the land, and

1                   under the Human Rights Act, the court, the High  
2                   Court, could make a declaration of  
3                   incompatibility if anything that parliament  
4                   adopts is contrary to the Human Rights Act,  
5                   which implements the European Convention on  
6                   Human Rights. In that instance the act would  
7                   still in force, but a declaration of  
8                   incompatibility ideally would prompt parliament  
9                   to reconsider the legislation.

10                   So I don't think that we can really speak in  
11                   the UK context about challenging the  
12                   constitutionality of unexplained wealth orders  
13                   in the same way as you would in some other  
14                   countries

15                   Q     Sorry, that was my mistake. I shouldn't have  
16                   used the word "constitutionality." What I meant  
17                   to ask about was that the compliance of the UWO  
18                   regime in the UK with the Human Rights Act  
19                   implementing the European Convention of Human  
20                   Rights, that hasn't been tested yet  
21                   specifically?

22                   A     (AM) I don't know. I'm not sure if human  
23                   rights, if arguments based on the *Human Rights*  
24                   *Act* have been raised. If that's correct and  
25                   they haven't been raised it could be because

1                   they were deemed hopeless by litigants or it  
2                   could be that the issue will crop up in the  
3                   future. But I think as I hope we made clear  
4                   during the presentation, the compliance of the  
5                   overall civil forfeiture regime has been -- the  
6                   overall civil forfeiture regime is human rights  
7                   compliant in the UK as per judgments by UK  
8                   courts and the European court on human rights.  
9                   And the way that the unexplained wealth orders  
10                  are implemented in the UK is very heavily  
11                  steered towards human rights compliance, given  
12                  how difficult it is for you to get to a point  
13                  where the reverse burden of proof provisions get  
14                  into effect, so it's not immediately obvious to  
15                  me where that challenge would come from, but  
16                  I'll defer to Helena. I think she wanted to  
17                  jump in.

18                  (HW) I think there's also a point in the report  
19                  where we point to the fact that reverse onus  
20                  provisions have been tested through the European  
21                  Court of Human Rights and have been deemed  
22                  compliant. So whilst this isn't a strict  
23                  reverse onus, in fact if anything it's much more  
24                  protective of human rights, we might say, and  
25                  that's absolutely the way it was intended to be

1                   drafted. But a more strict and perhaps,  
2                   depending on your viewpoint, a more severe  
3                   reverse onus provision has been deemed compliant  
4                   by the European Court of Human Rights, so that  
5                   it's not specific to the UK. So I would opine,  
6                   and it's clearly opining, that lawyers acting  
7                   for respondents have judged a challenge on human  
8                   rights grounds to be unmerited and not a good  
9                   use of litigants' money.

10                Q    Thank you. I think I'm just about out of time,  
11                   so I'll just ask one last question. Is it  
12                   correct to say that in your report you conclude  
13                   that there's no international consensus on the  
14                   desirability of UWOs from a human rights  
15                   perspective?

16                A    (AM) I would say there is no international  
17                   consensus in their desirability, period. And  
18                   part of that is the fact that different  
19                   countries have a different understanding of what  
20                   unexplained wealth orders are, so I did not get  
21                   the sense that there is any fundamental basic  
22                   human rights objection to unexplained wealth  
23                   orders that all countries would subscribe to.  
24                   That's certainly not the case and that as we  
25                   discussed there are different ways in which you

1                   could design your unexplained wealth order  
2                   legislation and the degree of intrusiveness,  
3                   which really depend on that. It's very  
4                   difficult to speak of unexplained wealth orders  
5                   in the abstract given the different  
6                   manifestation that one might come across in  
7                   different countries.

8                   Q     Do you want to add anything, Ms. Wood?

9                   A     (HW) It's only a more general point and  
10                  definitely not a point of law, but I think it's  
11                  that balance between the kind of human rights of  
12                  the kind of victims of grand corruption which  
13                  need to be perhaps balanced against the rights  
14                  of the individual, and as we've seen I'm  
15                  referred repeatedly to the complex corporate  
16                  structures behind which this illicit wealth is  
17                  hidden globally being such a now commonplace  
18                  feature that it comes to a point where the  
19                  criminal law is impotent and even -- we've got  
20                  to a point where even the civil standard of  
21                  proof is proven no match for these complex  
22                  global structures. So I think when we're  
23                  talking about these provisions in the context of  
24                  human rights, it's, you know, whose human rights  
25                  are we talking about. Is it the countries who

1                   have been robbed of the kind of schooling roads  
2                   health provisions by kleptocrats, or is it the  
3                   human rights of a single individual? And I  
4                   think finding the right balance between those  
5                   two concepts of human rights is a really  
6                   important part of the discussion.

7                   MS. MAGONET: Thank you both.

8                                 Those are my questions, Mr. Commissioner.

9                   THE COMMISSIONER: Thank you, Ms. Magonet. And now  
10                   Mr. Rauch-Davis on behalf of Transparency  
11                   International, who has been allocated  
12                   15 minutes.

13                   MR. RAUCH-DAVIS: Thank you, Mr. Commissioner.

14                   **EXAMINATION BY MR. RAUCH-DAVIS:**

15                   Q     Mr. Moiseienko, I take it from your evidence  
16                   this morning that the UWO orders are used as a  
17                   tool in information gathering, investigation and  
18                   destruction of money laundering. Is that a fair  
19                   characterization?

20                   A     (AM) Yes, correct.

21                   Q     And you went through the Baker case in some  
22                   detail in your evidence this morning about how  
23                   the EWOs only are really effective if you have  
24                   in mind or have information on the beneficial  
25                   ownership of the corporations or complex trusts?

1           A       (AM) Yes.

2           Q       So my question to you is doesn't the UK's  
3                    corporate beneficial ownership registry assist  
4                    in that type of information gathering or that  
5                    type of investigation?

6           A       (AM) I think it would if one is interested in  
7                    the affairs of a UK registered company, but then  
8                    of course regardless of whether the UK has or  
9                    does not have a publicly accessible beneficial  
10                   ownership register, which it does happen to  
11                   have, that information would be available to UK  
12                   law enforcement agencies anyway. So the  
13                   challenge here is that we're talking about  
14                   companies or other legal entities incorporated  
15                   or based elsewhere in the world and the Baker  
16                   case in particular involved several Panamanian  
17                   foundations, and that poses a challenge in terms  
18                   of investigating who owns -- who is the ultimate  
19                   beneficial owner of the property, what do you  
20                   know about them, and then building your case  
21                   based on that information. That is very  
22                   difficult because that information might not be  
23                   forthcoming and you would be trying to piece  
24                   together what you learned from different sources  
25                   about an exceedingly complex corporate

1 structure.

2 Q I guess part of the problem there is the  
3 voracity of the information coming from these  
4 international companies to the registry itself.  
5 Would you agree with that?

6 A (AM) I would. Yes. And maybe I'll give the  
7 floor to Helena. She's been meaning to jump in.

8 Q Oh, yes --

9 A (HW) I'll just give you a bit of wider context  
10 on beneficial ownership of the UK, if it's of  
11 interest.

12 So there is currently a bill due to be  
13 introduced to the UK parliament, though we don't  
14 yet have a date for that, which you may be aware  
15 of from your colleagues in the UK, which will  
16 require corporate -- overseas corporate owners  
17 of real property in the UK to name their  
18 beneficial owner. And that is due to come  
19 forward hopefully in the next session. There's  
20 been quite a push to bring that onto the  
21 legislative books.

22 Q And the expectation, I take it, Ms. Wood, you  
23 would agree that the expectation is that that  
24 type of regime would work in tandem with the UWO  
25 regime to create an overall more effective civil

1 forfeiture regime; is that correct?

2 A (HW) I think the intention behind the  
3 registration of overseas ownership is slightly  
4 separate. It's kind of dealing with a problem  
5 of kind of the opaqueness of who is putting  
6 assets into the UK economy. That said, I think  
7 it will be a really helpful investigative source  
8 of all kind of forms of illicit wealth entering  
9 the UK. And again, I refer back to that  
10 deterrent effect. It may deter those who have  
11 hidden behind overseas corporate structures in  
12 purchasing high net worth properties,  
13 particularly in London.

14 Q Wouldn't it assist in the investigation and the  
15 discretion to implement these types of  
16 proceedings, UWO proceedings or any civil  
17 forfeiture proceedings?

18 A (HW) In my personal view it might negate the  
19 need for a UWO in some circumstances because  
20 sometimes the need for a UWO is there where  
21 there's no other way to get at that information  
22 and that's often the case in these complex  
23 ownership structures. So where a beneficial  
24 ownership register of overseas owned properties  
25 is in place, that information should be there,

1                   whether -- I go to your point on voracity. It  
2                   relies on the ability to verify that data and  
3                   sanction those who provide false data to  
4                   account. So it will be one measure, but the  
5                   proof will be in whether sanctions are put  
6                   against those who provide false information and  
7                   how well the registry is policed.

8                   What we know from the current corporate  
9                   transparent and open register the UK has is  
10                  transparency is not the only answer and there's  
11                  a particular problem with lack of verification  
12                  of data in the UK, which is currently under  
13                  scrutiny and should be legislated for shortly.

14                 Q   And the Hussein matter that's referenced in the  
15                     RUSI report, Mr. Hussein, I take it, hid most of  
16                     his assets through complex shell corporation  
17                     structures and things like that. Isn't that  
18                     right?

19                 A   (HW) I'll defer to my colleague as well on this  
20                     one. But to my knowledge they were UK-based  
21                     companies through which he held his property  
22                     rather than overseas complex shell structures.  
23                     He was, one might opine, a slightly less  
24                     sophisticated criminal.

25                 Q   Mr. Moiseienko, was that your understanding as

1 well?

2 A (AM) To be honest, I don't know. I'm not sure.

3 I need to go back to the judgment to check if it  
4 makes any comments on that.

5 Q Thank you. Ms. Wood, I guess the final topic of  
6 questions I have are just on the economics of  
7 the UWO regime, and you gave evidence this  
8 morning that it was slightly naive, I think, of  
9 the previous regime of setting a self-funding  
10 target and that it was doomed to fail because of  
11 the litigious nature of some its opponents or  
12 some of its -- the people who are against such a  
13 regime. Could you expand on that? Was that not  
14 anticipated prior to setting the budget and this  
15 type of thought?

16 A (HW) Yeah, I don't think the authorities had  
17 really done their due diligence on how -- on the  
18 litigation they should be expecting and perhaps  
19 a naivety that people would perhaps walk away  
20 from their assets. But as we've learned through  
21 the course of the regime people are very, very  
22 keen to hang on to their illicit wealth.  
23 Perhaps prison, whilst prison can be seen as an  
24 occupational hazard people really don't want to  
25 let go of their property. So I think that has

1                   been a slight naivety on the part of the  
2                   authorities, yes.

3           Q       So my understanding was that evidence was for  
4                   the prior regime to the UWOs; right? I see your  
5                   nodding your head.

6           A       (HW) That's correct, yes. So that was the  
7                   original operation. That was the ethics  
8                   recovery agency where we had a sole agency in  
9                   the UK who was able to initiate civil  
10                  proceedings under part 5 of the Proceeds of  
11                  Crime Act. Since then that agency has been  
12                  disbanded and the power spread across the range  
13                  of agencies who are able to kind of  
14                  self-generate kind of arguably higher quality  
15                  cases.

16          Q       Do you share the same sentiment on the current  
17                   regime, or is there the same type of target on  
18                   the current UWO regime?

19          A       (HW) No, it was absolutely a point, kind of a  
20                  learning from our experience that financial  
21                  targets and incentives in place. In POCA we  
22                  used to have a very kind of target-driven  
23                  approach to the Proceeds of Crime Acts. Whether  
24                  that was under part 5 under the criminal  
25                  confiscation regime or cash forfeiture, it was

1                   very driven by targets, and that has led to  
2                   widespread problems both in the criminal  
3                   confiscations and civil. So we've ended up with  
4                   a huge legacy on the criminal side, for example,  
5                   of unenforceable orders; we have a value-based  
6                   rather than asset-based criminal regime in the  
7                   UK. So those financial targets were done away  
8                   with, and I refer back to that point that the  
9                   system should be judged on its impact against  
10                  criminality rather than it being a kind of cost  
11                  centre or income generator.

12                 Q    I guess so instead of purely assessing its  
13                   impacts on the tangible revenue it produces, the  
14                   focus is trying to shift or is shifting towards  
15                   the less discernible financial benefits  
16                   associated with all anti-money laundering  
17                   effects; is that fair?

18                 A    (HW) Yes. But again I refer back to one of my  
19                   previous answers. It's a hugely under  
20                   researched area. And I certainly think there'll  
21                   be value globally, not just parochial in the UK,  
22                   and better understanding in articulating the  
23                   benefits of asset recovery. Intuitively we know  
24                   that it will have an impact. Intuitively we  
25                   know that criminals don't want to give up that

1                   wealth, and it will provide a disincentive to  
2                   further reengage in crime. But there's just a  
3                   fundamental global lack of an empirical research  
4                   basis for that, so I would encourage more  
5                   research in this area to prove their kind of  
6                   case or not around the utility of asset recovery  
7                   in general.

8                   Q     Thank you. Those are my questions.

9                                 Unless, Mr. Moiseienko, do you have anything  
10                   to add on that final question?

11                   A     (AM) Yeah. I think I would only add that it's  
12                   exceedingly difficult to estimate the impact of  
13                   any legislative regulatory or other intervention  
14                   on the overall scale of money laundering because  
15                   it's so difficult to measure money laundering in  
16                   the first place. So if we're talking about  
17                   effectiveness in those terms I think it's  
18                   probably a dead end, to be honest, so I would  
19                   imagine that any research into this subject  
20                   would really involve trying to understand the  
21                   experiences of organized criminals and how they  
22                   approach, you know, what keeps them up at night;  
23                   right? It's probably much more of a sort of  
24                   ethnographic research that one would have to  
25                   undertake. Because whenever you operate with,

1                   you know, billions or trillions that are  
2                   allegedly laundered around the world every year,  
3                   it's never possible to quantify that. And even  
4                   in any given country on a smaller scale. And  
5                   then it's never possible to attribute any change  
6                   in the status quo to the effect of any  
7                   particular intervention. It might just be  
8                   haphazard and happenstance. So just a couple of  
9                   cautionary words about the difficulties of doing  
10                  that kind of research.

11                Q    I take you point, Mr. Moiseienko, that there are  
12                   difficulties in the research, but there is  
13                   research to the effect of eliminating these  
14                   types of proceeds of crime in a local economy  
15                   will have benefits in terms of increased market  
16                   confidence, benefits to small businesses and  
17                   other legitimately run businesses. That type of  
18                   research is out there, isn't it?

19                A    (AM) Yes. I mean, there's no doubt in the fact  
20                   that it's good to take away the proceeds of  
21                   crime, but it's just that there are different  
22                   strands of research that are happening in this  
23                   domain, and some of them have proven more  
24                   difficult. Others are probably more promising.  
25                   That was the point I was making.

1 MR. RAUCH-DAVIS: Thank you. Those are my questions.

2 THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

3 Ms. Magonet, did you have anything arising?

4 MS. MAGONET: No, Mr. Commissioner. Thank you.

5 THE COMMISSIONER: Ms. Hughes?

6 MS. HUGHES: No, Mr. Commissioner. Nothing arising.

7 THE COMMISSIONER: Ms. Patel?

8 MS. PATEL: Nothing arising. Thank you, Mr.  
Commissioner.

9 THE COMMISSIONER: Thank you, Ms. Wood and

10 Mr. Moiseienko. We're very appreciative of your

11 engagement with the commission and the insights

12 and understanding you've provided to us in an

13 area of considerable interest. So you're now

14 excused from further testimony. Thank you.

15 **(WITNESSES EXCUSED)**

16 THE COMMISSIONER: I think we'll adjourn now until

17 tomorrow morning at 9:30.

18 MS. PATEL: Yes, Mr. Commissioner.

19 THE COMMISSIONER: Thank you.

20 THE REGISTRAR: The hearing is now adjourned until

21 December 16th, 2020 at 9:30 a.m.

22 **(PROCEEDINGS ADJOURNED AT 12:47 P.M. TO DECEMBER 16,**

23 **2020)**

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