

Be aware of the proceeds of crime

A recent decision of the Court of Appeal has clarified the extent of a lawyer's obligation to make a report to the National Criminal Intelligence Service (NCIS) under the Proceeds of Crime Act 2002 (POCA) if during the course of litigation he or she discovers information leading to a suspicion that criminal property might be involved.

Until now the reporting obligation under s.328 of POCA has caused considerable difficulties for lawyers and delays in litigation. A person commits an offence under this provision:

"if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person".

However, that person does not commit an offence if he or she makes an authorised disclosure by reporting the arrangement to NCIS.

The difficulty for the lawyer who is acting for a client in legal proceedings is that he or she might during the course of those legal proceedings discover or suspect that funds belonging to his or her client or indeed the opponent's client are the proceeds of crime. If that happens and the lawyer is to avoid committing an offence he or she has to report the matter to NCIS. Once reported he or she can't act on the case until NCIS gives its consent to proceed, which may cause the litigation to be delayed.

The position is made more difficult because POCA makes no distinction between degrees of criminality. The meaning of

criminal property has the same impact whether it is applied to a small sum obtained by benefit fraud or tax evasion, or to substantial proceeds from drug trafficking. This has resulted in a proliferation of cases, particularly in family proceedings.

The Court of Appeal's decision in *Bowman v Fels* should now change this. In its judgment, the Court of Appeal concluded that the ordinary conduct of litigation resolving the rights and duties of parties, according to the law, did not amount to becoming 'concerned in an arrangement' and that s.328 did not apply to the ordinary conduct of legal proceedings. It went further by saying that it also regarded settlement as a feature of the conduct of legal proceedings, so that if a lawyer suspects that a settlement might involve the transfer of criminal property, there is no requirement to report that arrangement to NCIS.

Although this decision removes any difficulties that s.328 of POCA may have imposed on lawyers acting in litigation, the extent of the reporting obligations on lawyers involved in transactional work remains unresolved and they should remain vigilant against becoming involved in any arrangement envisaged by that provision.

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