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Guideline 13: The Proceeds of Crime Act 2002: Guidance for arbitrators and mediators

1. Introduction

1.1 It is generally accepted in most, if not all, jurisdictions that the relationship between a third party dispute resolver (such as an arbitrator, mediator, adjudicator, expert determiner, early neutral evaluator) and the party or parties who have appointed him is one of confidence. However, the obligation is not absolute and that in exceptional circumstances (for example, if the dispute resolver obtained reliable knowledge that the parties were conducting the proceedings with the intention of furthering a criminal purpose) the dispute resolver might be justified or even obliged under the general law applicable to the proceedings to disclose such criminal intent to the relevant authorities. It is not however the purpose of this Guideline to explore in detail the broader question whether and in what circumstances a dispute resolver may be justified or obliged to disclose to the authorities material which has come to his or her knowledge in the course of the proceedings.

1.2 This Guideline examines the narrower question whether and in what circumstances a dispute resolver who does not make such a disclosure may himself or herself be at risk of being prosecuted for having committed a criminal offence. In the United Kingdom, this question depends largely on the effect of the Proceeds of Crime Act 2002 ("POCA") and a decision of the Court of Appeal, *Bowman v. Fels*. Since that decision was itself heavily based on Council Directive of 10th June 1991 (91/308/EEC) as amended by Council Directive of 4th December 2001 (2001/97/EEC), one can see that the interest of this question spreads at the very least across the European Union. Since then, Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing has repealed the 1991 Directive (Article 44) and effectively does the same to the 2001 Directive. Like its predecessors, though, the 2005 Directive does not prevent Member States from imposing stricter rules to prevent money laundering.

1.3 Part 7 of POCA creates a series of criminal offences relating to money laundering. These offences are defined in loose generalised language. For example it is an offence to enter into or "become concerned in" an "arrangement" which the person charged knows or suspects "facilitates" the acquisition, retention use or control of "criminal property", unless that person has made a disclosure under Section 338 or intended to make such disclosure but had a reasonable excuse for not doing so. The definition of "criminal property" is extremely broad and refers to property known or suspected to constitute or represent a person's benefit from criminal conduct in whole or in part, directly or indirectly. It is not surprising, given the width of this language, that there have been well-founded fears relating to the position of arbitrators mediators and other third-party dispute resolvers. For example, if a settlement resulting from a mediation could be shown to be an "arrangement" which facilitated the use of the proceeds of crime, might the mediator be held to have been "concerned" in that arrangement and if so might he be at risk of being prosecuted under the Act unless he had made a disclosure before becoming concerned in the arrangement?

1.4 Fortunately authoritative guidance on the proper interpretation of POCA was given by the Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 229. The central issue in that case was whether Section 328 covered or affected the ordinary conduct of litigation by legal professionals. It was held that it did not do so. The Court of Appeal also held that Section 328 did not have the effect of overriding legal professional privilege and the terms on which lawyers are permitted to have access to documents disclosed in the litigation process. Finally the Court of Appeal considered the question which has been concerning mediators and other dispute resolvers, whether the Act might apply to steps taken to dispose of the whole or any aspect of legal proceedings on a

consensual basis. The Court did not specifically mention the position of mediators or other dispute resolvers and it was concerned solely with legal professionals; but it did hold (albeit *obiter*) that Section 328 was not intended to apply to legal professionals negotiating or implementing a consensual resolution of issues in a litigious context. It drew "a distinction between consensual steps (including a settlement) taken in an ordinary litigious context and consensual arrangements independent of litigation."

2. A Comparative View

2.1 The 2005 EU Money Laundering Directive does not apply to dispute resolution professionals as such

2.1.1 Articles 2.1(3)(b) and 9.5 and Recital (20) extend the directive to lawyers but only in relation to activities which do not concern dispute resolution in any way. They also exclude lawyers giving legal advice unless the lawyer is taking part in the money laundering or terrorist financing or the lawyer knows that this is the purpose of the advice. This exclusion is reflected Article 9.5 of the Directive.

2.1.2 Arbitrators or mediators do not appear to be covered by the 2005 Directive at all. This, though, does not prevent local law from applying or extending the Directive's application to arbitration or mediation.

Australia

2.2 In New South Wales the relevant provisions are found in the Crimes Act 1900. Section 316 of the *Crimes Act 1900* (NSW) makes it a crime punishable by imprisonment for two years for a person who knows or believes that someone has committed a "serious indictable offence" and who has information that could assist in the apprehension, prosecution or conviction of the offender to fail without reasonable cause to provide that information to the police. A prosecution may not be commenced without the approval of the Attorney-General where the person learns of the information "in the course of practising or following a profession, calling or vocation" prescribed by the Regulations.

2.3 Regulation 6(i) and (j) of the Crimes (General) Regulations 2005 includes within those practising or following a profession or vocation, mediators and arbitrators. Consequently, any prosecution in relation to such activities must be approved by the Attorney General under section 316(4).

3. The Relevant Provisions of POCA

3.1 Introduction

3.1.1 The criminal offences created by Part 7 of POCA fall into two broad categories namely, (a) those which are of general application and (b) those which only affect "the regulated sector." It is proposed to focus on the provisions of Part 7 which are of general application, before considering whether mediators arbitrators and adjudicators might be held to be carrying on business within the regulated sector.

3.1.2 Among the provisions of general application there are three key aspects of possible relevance:

- (i) acting in relation to an arrangement (Sections 328, 335 and 338).
- (ii) "tipping off" (Section 333A).
- (iii) prejudicing an investigation (Section 342).

The statute contains no statement as to the scope of application of the relevant Chapter of the Act and section 461 limits some chapters to various parts of the UK. Consequently, the normal criminal law rules apply on territoriality namely that an offence can only be committed while in the United Kingdom. The nationality of the parties makes no difference. Criminal property meets that description of it is the proceeds of a crime committed in the UK or would be if the act had been committed in the UK (Section 340(2)).

3.2 Acting in Relation to an Arrangement

3.2.1 Section 328 makes it an offence to enter into or become concerned in a relevant arrangement. Realistically, this is the only offence of which an arbitrator, adjudicator or mediator acting in good faith could fall foul of. The section reads:

“Arrangements

(1) A person commits an offence 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.

(2) But a person does not commit such an offence if: -

- (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent
- (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
- (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.”

“Criminal property” is defined in section 340(3):

“(3) Property is criminal property if

- (a) it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
- (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.”

“Criminal conduct” is defined in section 340(2):

“(2) Criminal conduct is conduct which –

- (a) constitutes an offence in any part of the United Kingdom, or
- (b) would constitute an offence in any part of the United Kingdom if it occurred there.”

3.2.2 Consequently, Section 328 involves asking the following questions:

- (a) Did the person charged “enter into” or become “concerned in” “an arrangement”?
- (b) Did the arrangement facilitate the acquisition, retention, use or control of “criminal property” (ie property constituting “a person’s benefit from criminal conduct”) by or on behalf of another person?
- (c) Did the person charged know or suspect this?

3.2.3 Much difficulty arises from the use of the word “arrangement.” What is the proper definition of an “arrangement”, given that the arrangement must be one which facilitates the acquisition, retention, use or control of criminal property? Are there limits to what can be an “arrangement” or is the concept entirely open-ended?

3.2.4 Further difficulty arises from the vague concept “become concerned in” an arrangement. To “enter into” an arrangement involves a single act at a single point in time? Does the same apply to “becom(ing) concerned in” an arrangement? The point at which someone can be said to have “become” concerned may be open to much argument.

3.2.5 Again uncertainty can arise from the words “knows or suspect”. While the expression imports a mental element, there can be many degrees of suspicion and the required degree of suspicion is nowhere clarified in the legislation. It seems that “suspicion” is a personal and subjective state of mind. It is concerned with a state of mind arrived at after consideration of known facts out of which an apprehension that a person might possibly have committed an offence is created.

3.2.6 The scheme adopted by Section 328 is that a person who might otherwise commit an offence can avoid doing so if “before he does the act mentioned in subsection (1)”, he makes a disclosure to the Serious Organised Crime Agency (SOCA) in the prescribed form (Sections 338 and 339) and receives the consent of SOCA to do the act (Section 335). Such consent may consist of either express consent or deemed consent. Express consent arises where actual consent is given. (In many cases informal consent is forthcoming within 24 hours of the disclosure being made to SOCA). If no actual consent is given but no notice is received from SOCA that the consent is refused within 7 working days starting with the first working day after the disclosure is made, the consent of SOCA must be treated as having been given. Finally, if before that period has ended, the person who has made the disclosure receives a notice from SOCA that consent is refused, he must wait for a further 31 days (the “moratorium period”) before doing the act.

3.2.7 In summary, Section 328 gives rise to a possibility that, if a dispute resolver knew or even suspected that the dispute between the parties related to the recovery or attempted recovery of property which one or other party had acquired as a result of criminal conduct, then any

settlement resulting from the proceeding might constitute an “arrangement” prohibited by Section 328 and the dispute resolver might be held to have become “concerned in” that arrangement by virtue of facilitating the settlement. If so the dispute resolver might commit a criminal offence unless before doing the act (e.g. continuing with a mediation) he made a disclosure to SOCA in the prescribed form and waited until either the express consent of SOCA was received to his continuing with the mediation or other proceeding or the consent of SOCA could be treated as having been given.

3.2.8 It would ordinarily be a breach of confidence for any disclosure to be made to SOCA, unless the terms on which the mediator had agreed to conduct the mediation permitted this. However Section 338(4) provides:
“An authorised disclosure is not to be taken to breach any restriction on the disclosure of information (however imposed).”

3.3 “Tipping Off”

3.3.1 This offence, which was never likely to be committed by an arbitrator, mediator or adjudicator, ceased to have any relevance when it was limited in 2007 to cases where the “information on which the disclosure is based came to the person in the course of a business in the regulated sector”. (Section 333 was replaced by section 333A which introduced the regulated sector requirement.) Dispute resolution professionals are almost certainly not operating in the regulated sector.

3.3.2 The only category of participants in that sector that could be included are legal practitioners who provide services to

“other persons when participating in financial or real property transactions concerning—
(a) the buying and selling of real property or business entities;
(b) the managing of client money, securities or other assets;
(c) the opening or management of bank, savings or securities accounts;
(d) the organisation of contributions necessary for the creation, operation or management of companies; or
(e) the creation, operation or management of trusts, companies or similar structures,

and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.”

3.3.3 It is broadly inconceivable that this would include an arbitrator, adjudicator or mediator. Consequently, none of the detailed regulations required by the 2005 Regulations apply to arbitration, mediation or adjudication activities.

3.3.4 The offence of tipping off requires a report to SOCA to have been made already before the person tipping off told the parties concerned (Section 333A(2)). Discussing the possibility of making such a report is not covered by this offence.

3.4 Prejudicing an Investigation

3.4.1. Section 342(2) creates the offence of prejudicing an investigation. The section applies

“if a person knows or suspects that an appropriate officer or (in Scotland) a proper person is acting (or proposing to act) in connection with a confiscation investigation, a civil recovery investigations, a detained cash investigation or a money laundering investigation which is being or is about to be conducted.”

The offence is committed if the person

“(a) ... makes a disclosure which is likely to prejudice the investigation, or
(b) ... falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which are relevant to the investigation.”

3.4.2 However, under subsection (3) a person does not commit an offence under (a) “if he does not know or suspect that the disclosure is likely to prejudice the investigation or if the

disclosure falls within the legal professional exception." That exception, defined in subsections (4) and (5) covers disclosures to a client or his or her representative by a professional legal adviser in connection with the adviser giving legal advice to the client or to any person in connection with actual or contemplated legal proceedings so long as it is not made with the intention of furthering a criminal purpose.

3.4.3 The more serious offence in Section 342(2)(b) cannot be committed if the individual concerned "does not know or suspect that the documents are relevant to the investigation, or...does not intend to conceal any facts disclosed by the documents from any appropriate officer or (in Scotland) proper person carrying out the investigation."

3.4.4 It follows from all this that a dispute resolution professional acting in good faith has nothing to fear from the offence of prejudicing an investigation.

4. The Result of *Bowman v Fels*

4.1 The Judgment

4.1.1 The main effect of the judgment is to uphold what the Court described as "a restricted understanding of the concept of "being concerned in an arrangement" in Section 328(1). That restriction was to exclude from the meaning of "arrangement" the ordinary conduct of legal proceedings.

4.1.2 The Court held, albeit *obiter*, that a consensual settlement forms part of the ordinary conduct of legal proceedings. It said:

"100. ... Any consensual agreement can in abstract dictionary terms be called an arrangement. But we do not consider that it can have been contemplated that taking such a step in the context of civil litigation would amount to "becoming concerned in an arrangement which ... facilitates the acquisition, retention, use or control of criminal property" within the meaning of s 328. Rather it is another ordinary feature of the conduct of civil litigation, facilitating the resolution of a legal dispute and of the parties' legal rights and duties according to law in a manner which is a valuable alternative to the court-imposed solution of litigation to judgment.

101. We appreciate that this means that there is a distinction between consensual steps (including a settlement) taken in an ordinary litigious context and consensual arrangements independent of litigation. But this is a distinction that is inherent in recitals (17) and (18) and in the second paragraph of article 6(3) of the 2001 Directive, as well as in ss 330(10)(c), 333(3)(b), and 342(4)(b) of the 2002 Act The 2002 Act makes it clear that the distinction is between situations where there are existing or contemplated legal proceedings and other situations, and this seems to us consistent (18) also with the language of recitals (17) and (18) and the second paragraph of article 6.3 of the 2001 Directive.

102. If the view expressed in the preceding paragraph were wrong, the question would arise at what, if any, point a legal professional advising on, negotiating or concluding on his client's behalf a settlement of legal proceedings on the merits could or should be said to have "become concerned in an arrangement which ... facilitates the acquisition, retention, use or control of criminal property", if he suspected that the settlement embraced or would in practice fall to be satisfied out of criminal property. We would not wish without further argument to be thought to accept that this could necessarily be said in any of these situations. The position could be different if one were concerned with a settlement which did not reflect the legal and practical merits of the parties' respective positions in the proceedings, and was known or suspected to be no more than a pretext for agreeing on the acquisition, retention, use or control of criminal property."

4.2 Implications for Mediators

4.2.1 *Bowman v Fels* resolves most if not all of the problems created by POCA which can affect mediators. It follows from the decision that:

(1) a mediator, whether he is a lawyer or not, will generally not be at risk of being concerned in an "arrangement", if he merely facilitates a consensual resolution of a dispute

in the context of litigation;

(2) it is not necessary for litigation to have actually been commenced; see the reference to “existing or *contemplated* legal proceedings”; and

(3) similarly a mediator will not generally be at risk if he merely facilitates a consensual resolution of a dispute in the context of an existing or contemplated arbitration.

4.2.2 There are however limits to the protection afforded by *Bowman v Fels* and problems for mediators may still arise in at least two different types of situation:

(a) where there are no existing or contemplated legal or arbitration proceedings or where the link between the mediation and such proceedings is tenuous;

(b) where (even if there are existing or contemplated proceedings) the settlement did not “reflect the legal and practical merits of the parties’ respective positions in the proceedings and was known or suspected to be no more than a pretext for agreeing on the acquisition, retention, use or control of criminal property”.

4.2.3 As regards (a), it must be emphasised that the actual decision in *Bowman v Fels* was to exclude from the meaning of “arrangement” the ordinary conduct of legal proceedings (in which arbitration must be included); consequently the decision does not apply where a dispute resolution procedure is taking place independently of litigation or arbitration. On the other hand the public interest considerations applying to ADR within the context of the litigation process apply in a broadly similar way to the informal resolution of disputes by a mediator outside the litigation process. The need for the effective resolution of disputes unhindered by concerns that one of the participants might have to report concerns about criminal property to the necessary authorities apply equally to mediation within the litigation framework to situations where court action or an arbitration has yet to be commenced. It is therefore to be hoped and expected that, if the point arose, the Court would extend the reasoning of *Bowman v Fels* to mediations when there are no actual or contemplated legal or arbitration proceedings. At present however it cannot be stated confidently that a mediator is at no risk of being concerned in an “arrangement” if he facilitates a consensual resolution of a dispute where there are no actual or contemplated legal or arbitration proceedings. In such a situation, therefore, a mediator should be particularly careful to ensure, before any settlement takes place, that he does not know or suspect that it will facilitate the acquisition, retention, use or control of criminal property and, if he does know or suspect this, he should consider carefully whether to withdraw from the mediation before a settlement is made and whether to make a disclosure to SOCA.

4.2.4 As regards (b), it should be noted that the Court approved in general of settlements which reflected the “practical merits” of the parties’ respective positions in the proceedings. Many mediations are concerned with practical considerations as much as (or indeed more than) the legal merits of the case. The protection afforded by *Bowman v Fels* is not lost merely because a settlement may not, or does not reflect the legal merits of the case where other legitimate interests are taken into account. The important point being made by the Court of Appeal would seem to be that, if the parties are known or suspected to be using the ADR process as “no more than a pretext for agreeing on the retention, use or control of criminal property”, then the ADR process may be no more than a sham or a device to launder illicit money, or other criminal property. If there is knowledge or suspicion on the part of a mediator or other dispute resolver that this is the case he will be at risk of committing an offence under Section 328 unless, before any settlement is reached, he makes an authorised disclosure to SOCA.

4.2.5 *Bowman v Fels* raises the threshold at which a mediator should become concerned that he will be committing an offence under Section 328. Occasional cases, though, will still arise where a mediator will be at risk of committing an offence under the Act unless, before continuing with the mediation, he makes a disclosure to SOCA. At present, no better guidance can be given than that mediators should ask themselves whether the situation falls into either of two categories (a) or (b) referred to above and, if so, should act with particular care in the light of the considerations outlined above.

4.2.6 Should a mediator know or suspect that the parties are using the mediation as “no more than a pretext for agreeing on the acquisition, retention, use or control of criminal property” it will almost certainly be ethical for him to withdraw from the mediation once suspicions of this kind are aroused. But problems will still arise as to whether he should inform the parties of his suspicions before so doing and whether he should make a disclosure to SOCA.

4.2.7 If a mediator informs the parties that he is considering withdrawing from the case because of his knowledge or suspicions concerning possible money laundering, there is no risk of his being held to be guilty of "tipping off" under Section 333A. (That offence can only be committed by disclosure after a report to SOCA has been made and does not apply outside the regulated sector anyway.) Nor is he likely to be held to be "prejudicing an investigation" within Section 342. Consequently it is considered that before withdrawing he should consider giving the parties an opportunity to rebut any suspicion he may hold that the mediation is being used as a pretext for agreeing on the acquisition, retention use or control of criminal property. There can however be no general rule applicable in all such situations and in some cases it may be wiser to withdraw without giving any reasons for so doing.

4.2.8 As regards making a disclosure to SOCA, it is perhaps worth stressing that while disclosures authorised by POCA will not provide grounds for an action for breach of confidence, a disclosure to SOCA that is not required by the Act might do so. Consequently mediators should avoid taking the view that they are "acting on the safe side" if in all doubtful cases they make a disclosure to SOCA. The question whether the disclosure is authorised by POCA may depend, not only on whether the mediator has the requisite knowledge or suspicion, but also on whether by the time of withdrawal he had "become concerned" in a relevant arrangement. There is still an unresolved problem as to whether "becoming concerned in" an arrangement involves a single act at a single point in time. All that can be said is that if the mediator withdraws as soon as his suspicions are aroused, if his participation in the mediation has been limited and if no "arrangement" (i.e. settlement) has yet occurred, the chances of his being held to have become concerned in an arrangement appear to be somewhat remote and, if this is so, a disclosure to SOCA may be neither required nor authorised by POCA.

4.2.9 Finally, in the course of a mediation, allegations of criminality are sometimes made in respect of dealings by one or other party which are not the subject of the mediation. Just because a mediator has been informed of such matters does not mean that he has become concerned in an arrangement prohibited by Section 328 or that a mediator should consider withdrawing from the mediation or making a disclosure to SOCA.

4.3 Implications for Arbitrators

Following *Bowman v Fels*, it appears that the only situation in which an arbitrator may be at risk of becoming concerned in an arrangement prohibited by Section 328 is if, at the request of the parties, he issues an agreed award following a settlement; see Section 51 of the Arbitration Act 1996. It is not unknown for parties to an illegal operation to use an agreed arbitration award as a way of "laundering" the proceeds of crime. If an arbitrator knows or suspects that a request for an agreed award is, or may be, a prelude to an arrangement by which criminal property is to be acquired, retained, used or controlled he should of course refuse to issue such an award (as permitted by Section 51(2)). Normally, in such circumstances a disclosure to SOCA will be neither required nor authorised by POCA.

4.4 Implications for Construction Adjudicators

So far, POCA does not seem to have raised special problems peculiar to construction adjudicators and, following *Bowman v Fels* it is thought that adjudicators are in little danger of entering or becoming concerned in an arrangement prohibited by Section 328.

5. 2007 Money Laundering Regulations - do Mediators and Arbitrators fall within "the Regulated Sector"?

5.1 The 2007 Money Laundering Regulations (SI 2007/2157) which implement the 2005 Directive discussed earlier (and repeal the 2003 Regulations) only apply to the regulated sector. This does not include arbitrators, mediators or adjudicators. It only covers legal professionals in the limited circumstances essentially set out in the 2005 Directive. Consequently, the 2007 Regulations do not apply to arbitration, mediation or adjudication activities.