

## APPENDIX 4

# Law Society guidance on money laundering issues after *Bowman v. Fels*

[March 2005]

### ***BOWMAN v. FELS* (2005) EWCA Civ 226**

This Annex replaces the previous version of Annex 3, the Law Society's guidance about the case of *P v. P* (2003) EWHC Fam 2260, which appeared in the pilot money laundering guidance booklet published in January 2004 ('the guidance'). Annex 4 was guidance issued by the National Criminal Intelligence Service ('NCIS'), which has also been withdrawn. The judgment effectively overturns the decision in *P v. P*.

This Annex forms an important addendum to Chapter 2 of the guidance, as it clarifies how the Proceeds of Crime Act (2002) ('POCA') applies to the work of solicitors.

It also supersedes paragraphs 4.55–4.58 of the guidance, 'acting in confiscation proceedings'.

### **1. Introduction**

- 1.1 The *Bowman v. Fels* Court of Appeal judgment ('the judgment') arose as a result of County Court litigation involving a property dispute between ex-cohabitantes. Shortly before the County Court hearing a party's legal adviser reported the other side to NCIS for money laundering. This resulted in the legal adviser seeking to adjourn the hearing because of a belief that 'appropriate consent' would not be forthcoming by the hearing date. The court was concerned about the potential impact of the report upon the usual course of the court proceedings.
- 1.2 The Law Society intervened in the case to clarify the impact of POCA upon the work of solicitors, particularly regarding the interpretation of 'arrangements' under section 328. The Bar Council and NCIS also intervened. The judgment imposes important limitations on the reporting requirements under POCA for those undertaking certain activities, considered at paragraph 2.3 below.
- 1.3 The case had in fact settled but, with the agreement of the parties, the Court of Appeal wanted to give a judgment as it was aware that the orderly

conduct of litigation was being affected by POCA, and this was a matter of importance not only for courts and lawyers, but also for the public.

- 1.4 This Annex is intended to act as an introduction to the impact of this case, but it cannot be a substitute for reading the judgment in full. Nominated officers within solicitors' firms will wish to inform themselves of the full judgment, available from [www.bailii.org/ew/cases/EWCA/Civ/2005/226.html](http://www.bailii.org/ew/cases/EWCA/Civ/2005/226.html).
- 1.5 Solicitors concerned about whether they need to report may obtain guidance on money laundering from the Law Society's Professional Ethics helpline: 0870 606 2577, although they may require legal advice.

## 2 Litigation

- 2.1 Sections 327–329 of POCA are money laundering offences which apply to all citizens in the UK, see paragraphs 2.13–2.18 of the guidance.
- 2.2 There is a defence to these offences if an 'authorised disclosure' is made under section 338, see paragraphs 2.19–2.22 of the guidance. If an authorised disclosure is made before a prohibited act under section 327–329, appropriate consent is required, see paragraphs 2.23–2.27 of the guidance.
- 2.3 The *Bowman v. Fels* judgment excludes certain activities from the scope of the section 328 arrangements offence, which is considered at paragraph 2.17 of the guidance. The judgment describes the excluded activities as 'litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgement' (see paragraph 83 of the judgment). The Law Society's view is that this extends to dealing with the final division of assets in accordance with a judgment or settlement, including the actual handling of the assets which are 'criminal property'.
- 2.4 This exclusion also covers consensual resolution of issues in a litigious context (see paragraph 99–102 of the judgment). The Law Society's view is that the logic of the exclusion in relation to both litigation and consensual resolution must also apply to Alternative Dispute Resolution ('ADR').
- 2.5 The qualifications of the person performing the excluded activity is not a consideration, as the court were anxious for reasons of policy as well as statutory interpretation, that activities involving the resolution of rights and duties of individuals according to law should not be affected by POCA (see paragraph 62 and 99–102 of the judgment).
- 2.6 In practical terms this means that those conducting litigation, including preparatory stages (including pre-action) or diversion from the court system, such as settlements, negotiations, out of court settlements, and ADR, are not involved in section 328 'arrangements' and therefore do not need to make authorised disclosures. The Law Society's view is that logically solicitors will also not be committing section 327 or section 329 offences in these circumstances (see paragraph 95 of the judgment).

- 2.7 Sham litigation created for the purposes of money laundering remains within the ambit of section 328 (see judgment paragraph 102). In these circumstances solicitors should also bear in mind their ethical duties, e.g. Principle 12.02 which outlines when instructions must be refused, and Principle 21.01 regarding duty not to mislead the court.

NOTE: See [www.guide-online.lawsociety.org.uk](http://www.guide-online.lawsociety.org.uk), or telephone the Law Society's Professional Ethics helpline between 11am and 1pm or 2pm and 4pm: 0870 606 2577

- 2.8 Also, it is important to note that whilst the litigation and related processes may fall outside of the ambit of the offences, the property itself remains 'criminal property' for the purposes of section 340(3) of POCA, see paragraph 2.10 of the guidance. Therefore any future dealings with the property after the terms of any judgment or settlement have been carried out will require a re-examination of whether a report to NCIS is required.
- 2.9 However, solicitors may need to advise their clients about their own position if ownership of criminal property by them falls outside a court order or other type of settlement covered by the exclusion, as considered above at paragraph 2.3. The section 329 offence of acquisition, use and possession, may be particularly relevant in these circumstances, see paragraph 2.18 of the guidance.

### **3. Transactional work**

- 3.1 Information subject to legal professional privilege may not be disclosed under the authorised disclosure regime, which applies to all of the principal offences, sections 327–329.
- 3.2 Legal professional privilege is discussed in full at chapter 4 of the guidance.
- 3.3 The Law Society, in consultation with the Bar Council, is considering the impact of the judgment upon transactional work. Further guidance will be issued about this area

### **4. Solicitors' costs**

- 4.1 Solicitors concerned about their receipt of costs, including payment on account, should have regard not only to paragraph 2.30 of the guidance which describes the 'adequate consideration' defence to the section 329 offence, but also this judgment which confirms that legal professional privilege excludes the reporting requirement under the other principal offences, namely section 327 and 328.