P v P (ANCILLARY RELIEF: PROCEEDS OF CRIME) [2003] EWHC 2260 (Fam)

Family Division

Dame Elizabeth Butler-Sloss P

8 October 2003

Financial provision – Proceeds of Crime Act 2002 – Suspicion that assets might be criminal property – Duty to disclose – Whether fact of disclosure might be disclosed to client or opponents

The wife's legal advisers became concerned that part of the matrimonial assets at issue in the financial relief proceedings might be 'criminal property' within the meaning of the Proceeds of Crime Act 2002, and that settlement of the wife's application for financial relief might involve an arrangement which facilitated 'the acquisition, retention, use or control of criminal property' by the wife. They sought to protect themselves and their client by writing to the National Criminal Intelligence Service (NCIS) making disclosure of their suspicions, and asking for a response within 7 days as to whether the solicitors 'should continue to take steps in the proceedings'. They also asked whether they could disclose their actions to the husband's solicitors. NCIS did not respond in writing to that letter. The wife's solicitors telephoned the duty officer at NCIS, who advised, inter alia, that under the Proceeds of Crime Act 2002 the wife's solicitors were not permitted to tell either the husband's legal team, or their own client, that the disclosure report had been made. Having had no further response from NCIS, despite requesting clarification of that advice, the wife's counsel and solicitors applied on an urgent ex parte basis for directions, 3 days before the date listed for the financial dispute resolution (FDR), arguing that they had been placed in an untenable position. The judge vacated the listed FDR date, and adjourned the application to give NCIS, the Inland Revenue, the Law Society and the Bar Council the opportunity to be heard. The judge also ordered that neither the husband nor his legal representatives were to be given a copy of any order other than that to vacate the date of the FDR. In fact, the husband's legal representatives obtained, quite properly, a copy of the transcript of the hearing, and made an urgent application to attend the hearing, which was granted on condition that they were not to tell their client. Immediately before the hearing NCIS granted the wife's solicitors consent to act in the proceedings.

Held – granting declarations that the wife's representatives could disclose to their client, and to the husband and his representatives, a copy of their report to NCIS; that the consent given by NCIS to the wife's solicitors extended to counsel and the wife herself, and that the consent extended to implementation of any arrangement agreed; also setting aside the order preventing the husband's representatives from making disclosure to their client –

(1) Nothing in s 328 of the Proceeds of Crime Act 2002 prevented a lawyer from taking instructions from a client. However, if having taken instructions the lawyer knew or suspected that the client would become involved in an arrangement that might involve the acquisition, retention, use or control of criminal property, then an authorised disclosure should be made, and the appropriate consent sought from the relevant body under s 335. The act of negotiating an arrangement would amount to being 'concerned in' the arrangement. If it seemed to the lawyer that there were grounds for suspicion that any arrangement being sought from the court or negotiated between the parties would be contrary to the requirements of s 328(1), then authorisation should be sought. It seemed that this would also be the position in relation to ss 327 and 329 (see paras [48], [49]).

(2) Following an authorised disclosure, there would then be a 7-working day notice period during which the lawyer could not take further steps in relation to the arrangement. If the lawyer received consent, or did not hear from the relevant body within the 7-day notice period (deemed consent), he or she could resume acting in relation to the arrangement at the end of the notice period. If consent was refused, the lawyer could not act for a further 31 days, starting with the day on which the refusal notice was received, after which he or she could resume acting in relation to the arrangement. In practice therefore, the longest possible time for which a lawyer could be prevented from taking steps in relation to an arrangement, after sending a notice to the relevant body, would be 31 days plus 7 working days (see paras [51], [52]).

(3) If a solicitor made an authorised joint disclosure on behalf of himself/herself, counsel and the client, then all three would be protected from prosecution. Where the solicitor acted for the innocent party, it would be sensible as a matter of practice for the solicitor to make the authorised disclosure, but if a solicitor were disclosing suspicions about his own client it might be a different matter (see para [55]).

(4) A central element of advising and representing a client was the duty to keep one's client informed and not to withhold information from him or her. In general terms the professional duties in family proceedings attracted the protection of ss 333(3) and 342(4), permitting a legal adviser to inform, for instance, the other side that an authorised disclosure either would be or had been made to the relevant body. Provided disclosure was not being made 'with the intention of furthering a criminal purpose', a lawyer was entitled to communicate such information to the client and the opponent as was necessary and appropriate in connection with the giving of legal advice or acting in connection with actual or contemplated proceedings, even where the result would be to tip off their client. The legal professional exemptions in ss 333(3) and 342(4) would be meaningless if every disclosure to the client automatically involved an intention to further a criminal purpose. The intention of the legal adviser in choosing to make disclosure belonged to the adviser alone and the legal professional exemption would not be lost unless the lawyer had been acting with an improper purpose (see paras [60], [62], [65]).

(5) Having complied with the requirements to make an authorised disclosure to NCIS, there was nothing in the statute to require a solicitor acting without improper intention to delay in informing the client (see para [66]).

Per curiam: in most cases a delay of 7 working days before informing a client would not generally cause particular difficulty to the solicitor's obligations to the client or the opponent. As a matter of good practice, where appropriate consent was refused, and a 31-day moratorium had been imposed, the legal adviser and NCIS or other relevant investigating body ought to try to agree on the degree of information which could be disclosed during the moratorium period without harming the investigation. In the absence of agreement, or in other urgent circumstances where even a short delay in disclosure would be unacceptable (such as where a hearing or FDR was imminent, or orders for discovery required immediate compliance) the guidance of the court might be sought (see para [67]).

The order giving legal representatives permission to attend a hearing on condition that they were not to inform their client was of a type rarely made, and whilst clearly necessary at the time in the extremely unusual circumstances of the case, it was to be hoped that it would seldom be necessary in the future. The procedures suggested by the Court of Appeal in *C v S and Others (Money Laundering: Discovery of Documents) (Practice Note)* and *Governor and Company of the Bank of Scotland v A Ltd and Others* might usefully be adapted to family financial proceedings where a disclosure had been made. It would be appropriate for legal advisers seeking the advice of the court in such cases to make the application without notice to the other side, making the relevant body (eg NCIS) the respondent to the application. The application would be within the ambit of existing court proceedings, and the court might make any appropriate order, including, in the High Court, declarations. It would not be necessary for the court generally to grant declarations, but rather to deal with

the practical consequences of the authorised disclosure to NCIS. The application would be heard in private, and the court should direct that any mechanical recording of the proceedings should not be disclosed or transcribed without leave of the judge (see paras [8], [68]).

It would not be necessary to make repeated disclosures on the same facts unless it was proposed to enter into a new arrangement or a variation of the same arrangement. Each time a further disclosure was made, time would start running again (see para [69]).

Statutory provisions considered

Police and Criminal Evidence Act 1984, s 10
Drug Trafficking Offences Act 1986, s 27
Criminal Justice Act 1988, s 93D
Proceeds of Crime Act 2002, Parts 7, 8, ss 327–330, 333–335, 338–340, 342
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6
Family Proceedings Rules 1991 (SI 1991/1247), r 2.61A–E
Money Laundering Regulations 2004

Cases referred to in judgment

C v S and Others (Money Laundering: Discovery of Documents) (Practice Note) [1999] 1 WLR 1551, [1999] 2 All ER 343, CA
Clibbery v Allan [2002] EWCA Civ 45, [2002] Fam 261, [2002] 2 WLR 1511, [2002] 1 FLR 565, [2002] 1 All ER 865, CA
Governor and Company of the Bank of Scotland v A Ltd and Others [2001] EWCA Civ 52, [2001] 1 WLR 751, [2001] 3 All ER 58, CA
Jenkins v Livesey (Formerly Jenkins) [1985] AC 424, [1985] 2 WLR 47, [1985] 1 All ER 106, sub nom *Livesey (Formerly Jenkins) v Jenkins* [1985] FLR 813, HL
R v Central Criminal Court ex parte Francis & Francis [1989] 1 AC 346, HL
R v Cox and Railton 14 QBD 153, Crown Case reserved

Nicholas Mostyn QC and *Christopher Pocock* for the applicant
Florence Baron QC and *Deborah Bangay* for the respondent
Andrew Mitchell QC for the National Criminal Intelligence Service
Andrew Tidbury and *Kennedy Talbot* for the Inland Revenue
Nicholas Elliott QC for the Law Society
Philip Moor QC for the Bar Council

Cur adv vult

DAME ELIZABETH BUTLER-SLOSS P:

[1] An application was made to me on 15 July 2003 by Mr Mostyn QC, on behalf of the wife to seek the ruling of the court as to the effect of the Proceeds of Crime Act 2002 (POCA) on his client's application for ancillary relief in divorce proceedings. Counsel and solicitors acting for the wife sought urgent directions from the court in respect of their obligations under the POCA. Exceptionally they did so without giving notice to the respondent (the husband), his solicitors or counsel. The genesis of these extraordinary events is apparent from the history of the wife's correspondence with the National Criminal Intelligence Service (NCIS) to which I shall refer later.

The family background

[2] The husband and wife were married in April 1979. He is now 50 years old, and she is 52 years old. In January 2002, the wife filed her divorce petition. This court has not been asked to make any findings as to the parties' assets, but it is suggested by the wife that they are substantial and may exceed £19 million. The wife made her application for financial relief, and a financial dispute resolution (FDR) appointment was listed for 18 July 2003 before a High Court judge.

[3] The accountants' forensic reports were first made available in October 2002. The husband's accountant's reply to the wife's additional questions was supplied on 2 May 2003. It was not until a conference was held with leading and junior counsel for the wife on 16 June that the wife's legal advisers became sufficiently concerned about the husband's financial position to consider that issues under Part 7 of the POCA might arise. In particular, her legal team was concerned about the possibility of committing an offence under s 328 of the Act. Based on the financial information they had seen and the advice of their forensic accountant, the wife and her legal team became suspicious that part of the matrimonial assets might be 'criminal property' within the meaning of the Act. The wife's solicitors and counsel were worried that, in acting for the wife in the litigation and/or settlement of a financial dispute, they might fall foul of the s 328 prohibition and might become concerned in an arrangement which might facilitate 'the acquisition, retention, use or control of criminal property' by the wife. Accordingly, they sought to protect themselves and their client by invoking the protection offered by s 328(2)(a) and on 18 June 2003 the wife's solicitors wrote to NCIS making disclosure of the following information:

(a) that the wife and the husband were involved in ancillary relief proceedings listed for trial in December 2003;
(b) certain identifying information about the husband's business interests;
(c) that the wife and her solicitors had suspicions that the assets might comprise criminal property;
(d) that the wife would be seeking a substantial sum from the husband in the ancillary relief proceedings; and
(e) that the disclosure was being made on behalf of the wife, her solicitors and counsel.

[4] The solicitors' letter stated that an answer would be expected within 7 days as to whether the solicitors 'should continue to take steps in the proceedings'. Further, the letter sought advice as to whether in light of the 'tipping off' rules, the letter could be disclosed to the husband's solicitors. NCIS did not respond in writing to that letter. A number of telephone calls were made by the wife's solicitors to the duty officer at NCIS, whose advice (which NCIS now accepts was misleading) was that the decision to continue to act was purely a 'business decision' for the solicitors. The officer advised that a report was only required if money were actually about to change hands. He also thought, however, that if the money were not to pass through the solicitors' hands, that a report might not be necessary at all. This advice was wrong. Crucially, the NCIS officer also advised that the wife's solicitors were not permitted to tell either the other side, or their own client, that the

disclosure report had been made, as it would contravene the tipping off provisions and/or the prohibition against prejudicing an investigation.

[5] Having been instructed not to disclose the fact of their report to either the husband or the wife, nor to the husband's solicitors, the wife's solicitors felt that they were left in an extremely difficult position. Further attempts to seek clarification from NCIS proved unsuccessful. Letters were sent on 25 June and 9 July, but by 15 July a response had not been received.

[6] On 15 July I first heard this application on an urgent ex parte basis. Mr Mostyn, on behalf of himself and the wife's solicitors, submitted that they had been placed in an untenable position. It was impossible, he said, to reconcile NCIS's instructions to them not to disclose the fact of the report, with their professional obligations to the court, his client, and the respondent. He could not see how they could proceed with the FDR hearing on 18 July whilst prevented from disclosing the full facts to either of the parties, the opposing solicitors or the court.

[7] Given the complexity of the issues and the proximity of the FDR appointment, I saw no alternative but to vacate the listed FDR date. I also adjourned the ex parte application until 17 July so as to afford NCIS, the Inland Revenue, the Law Society and the Bar Council the opportunity to be heard. In light of the extremely unusual nature of the case I ordered that neither the husband nor his legal representatives were to be given a copy of any order other than my order to vacate the date of the FDR.

[8] As it happened, on receipt of the order to vacate the FDR, the husband's representatives obtained from the mechanical recording department, as they were quite entitled to do in the absence of any specific order of the court, a copy of the transcript of the 15 July hearing and immediately made an urgent application before me on 16 July to attend the 17 July hearing. I gave them permission to do so, on the condition that they were not to tell their client. That order was of a type rarely made in this court, and whilst clearly necessary at the time in the extremely unusual circumstances of this case, I hope that it will seldom be necessary in the future. In the result, the order endured for not more than 24 hours and I am satisfied that the temporary interference with the husband's Art 6 rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 was necessary and proportionate in all the circumstances.

[9] The wife's solicitors finally received a letter from NCIS, dated 15 July and received on 16 July, clarifying their response to the request for consent to act. In the letter NCIS advised that:

> 'On this occasion NCIS consents to you proceeding with the transaction specified in [the] disclosure report [of 9 July].
>
> This is an "appropriate consent" within s 335 of the Proceeds of Crime Act 2002, with the result that if you do proceed with that transaction you will not be committing an offence under ss 327, 328 or 329 of that Act …'

[10] On 17 July I heard submissions from the wife, the husband, NCIS, the Inland Revenue, the Law Society and the Bar Council. I am particularly grateful to Mr Mitchell QC on behalf of NCIS, whose submissions have been most helpful in illuminating the workings of the Act. By agreement, I received

further written submissions from all the parties, other than the Inland Revenue who supported the final submissions of NCIS.

The Proceeds of Crime Act 2002

[11] The POCA came into force on 24 February 2003. Part 7 is headed 'Money Laundering'; Part 8 is headed 'Investigations'. Within Parts 7 and 8, there are three key aspects of relevance to the present case: (i) acting in relation to an arrangement; (ii) tipping off; and (iii) prejudicing an investigation.

(i) Section 328 – an arrangement

[12] Section 328 makes it an offence to enter into or become concerned in a relevant arrangement. Section 328 reads as follows:

> '328 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.'

[13] 'Criminal property' is defined in s 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.'

[14] 'Criminal conduct' is defined in s 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.'

[15] Consequently, a person is protected from potential liability under s 328(1) if before acting he makes an 'authorised disclosure' and obtains the

'appropriate consent', as defined in ss 338 and 335 respectively. Section 335 reads, inter alia, as follows:

> '335 Appropriate consent
> (1) The appropriate consent is—
>
> (a) the consent of a nominated officer to do a prohibited act if an authorised disclosure is made to the nominated officer;
> (b) the consent of a constable to do a prohibited act if an authorised disclosure is made to a constable;
> (c) the consent of a customs officer to do a prohibited act if an authorised disclosure is made to a customs officer.
>
> (2) A person must be treated as having the appropriate consent if—
>
> (a) he makes an authorised disclosure to a constable or a customs officer, and
> (b) the condition in subsection (3) or the condition in subsection (4) is satisfied.
>
> (3) The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that consent to the doing of the act is refused.
> (4) The condition is that—
>
> (a) before the end of the notice period he receives notice from a constable or customs officer that consent to the doing of the act is refused, and
> (b) the moratorium period has expired.
>
> (5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure.
> (6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused.
> …
> (9) A nominated officer is a person nominated to receive disclosures under section 338.'

[16] Section 338 provides for 'authorised disclosures' which may be made to a constable, a customs officer or a nominated officer (authorised by the Director General of NCIS) and made in the form and manner prescribed in s 339. The disclosure is authorised only upon the satisfaction of one or other or the two conditions set out in s 338:

> '(2) The first condition is that the disclosure is made before the alleged offender does the prohibited act.
> (3) The second condition is that—
>
> (a) the disclosure is made after the alleged offender does the prohibited act,
> (b) there is good reason for his failure to make the disclosure before he did the act, and

(c) the disclosure is made on his own initiative and as soon as it is practicable for him to make it.'

[17] Failure to comply with the requirements of Part 7 is a criminal offence and the penalties are set out in s 334. As I understand, the Secretary of State for the Home Office has not yet provided regulations under the provisions of s 339.

(ii) Section 333 – tipping off

[18] Under s 333 of the Act:

'(1) A person commits an offence if—

(a) he knows or suspects that a disclosure falling within section 337 or 338 has been made, and

(b) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in paragraph (a).'

[19] An important exception, however, is contained in subss (2) and (3) which state:

'(2) But a person does not commit an offence under subsection (1) if—

(a) he did not know or suspect that the disclosure was likely to be prejudicial as mentioned in subsection (1);

(b) the disclosure is made 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;

(c) he is a professional legal adviser and the disclosure falls within subsection (3).

(3) A disclosure falls within this subsection if it is a disclosure—

(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or

(b) to any person in connection with legal proceedings or contemplated legal proceedings.

(4) But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose.'

[20] The act of informing the client or any other person that a disclosure has been made to NCIS would itself appear to be a 'disclosure' within the meaning of s 333(1).

(iii) Section 342 – prejudicing an investigation

[21] In addition to the 'tipping off' offences, s 342 of the Act makes it an offence to prejudice an investigation. It states:

'342 Offences of prejudicing investigation

(1) This 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 investigation or a money laundering investigation which is being or is about to be conducted.

(2) The person commits an offence if—

(a) he makes a disclosure which is likely to prejudice the investigation, or

(b) he 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.'

[22] As in s 333, s 342 contains the legal professional exemption:

'(3) A person does not commit an offence under subsection (2)(a) if—

(a) he does not know or suspect that the disclosure is likely to prejudice the investigation,

(b) the disclosure is made in the exercise of a function under this Act or any other enactment relating to criminal conduct or benefit from criminal conduct or in compliance with a requirement imposed under or by virtue of this Act, or

(c) he is a professional legal adviser and the disclosure falls within subsection (4).

(4) A disclosure falls within this subsection if it is a disclosure—

(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or

(b) to any person in connection with legal proceedings or contemplated legal proceedings.

(5) But a disclosure does not fall within subsection (4) if it is made with the intention of furthering a criminal purpose.'

[23] The act of informing the client or any other person that a disclosure is about to be made to NCIS would appear to be a 'disclosure' within the meaning of s 342(2).

The issues

[24] From the above provisions two main issues arise in the context of family proceedings and the application by the wife in the present proceedings:

(a) whether and in what circumstances it is permitted to act in relation to an arrangement; and

(b) whether and in what circumstances a legal adviser, having made an authorised disclosure, is permitted to tell others of the fact that s/he has done so.

[25] It is not appropriate for this judgment to range more widely since the issues which may arise in the future would be more appropriately considered within the factual matrix giving rise to those problems.

The submissions

The National Criminal Intelligence Service

[26] Mr Mitchell, on behalf of NCIS, recognised that the advice given by the desk officer to the wife's solicitors was wrong and misleading. This arose from a misunderstanding of the questions asked. The solicitors were correct to bring the matter to the attention of NCIS when they did. At that stage NCIS should have advised the solicitor whether consent was appropriate and was wrong to have advised the solicitor that it was not an appropriate case to seek consent. NCIS did later give advice as to consent by a letter of 15 July and consent was given so that the legal adviser would be able to conclude a financial settlement with disclosure made. It was not necessary, in order for there to be a disclosure, that funds actually passed through solicitors' client's account. The test for the legal adviser would be whether s/he had become concerned in an arrangement.

[27] In a later written submission in response to the submissions of the husband and the wife, Mr Mitchell pointed out that the requirement under s 328 was to disclose 'suspicion' not 'belief'. The purpose of the legislation was to stop the movement of criminal property and the obligation on a legal adviser was to make sure that s/he did not become involved at any stage with such an arrangement and to make the appropriate disclosure. There was no legal professional privilege protection in s 328. In written submissions he said:

> 'It is and remains the view of NCIS that any common law obligation to make full and frank disclosure during the statutory waiting period of 7 days and then the subsequently triggered 31 days is overridden by the statute. There is plainly room for an exception to this where the lawyer seeks the permission of NCIS or makes application to the court in the absence of agreement. No obligation to be full and frank about the affairs and circumstances of a person in private law proceedings can override the statutory waiting period which permits for inquiries and then investigation. There can be no matrimonial exception to this position.'

[28] He pointed out that when the Money Laundering Regulations come into force, probably in January 2004, then the legal advisers would be regulated and obligations under s 330 would arise, albeit with the legal professional privilege exception.

[29] In relation to tipping off, he said that no offence was committed by a legal adviser who informed his client or the other side of a future intention to disclose a suspicion. But he questioned whether there would ever be any legitimate purpose for a solicitor to make such a disclosure. To inform the client or the other side of the actual intention to disclose his suspicions would have the effect of warning the client and would be tantamount to becoming concerned in an arrangement, since if such a suspicion was well founded the client was bound to try and avoid detection. To inform the client before or

after making a disclosure might also come within the provisions of s 342 by prejudicing an investigation.

[30] Mr Mitchell submitted that the intention of 'furthering a criminal purpose' in ss 333(4) and 342(5) need not belong to the discloser. He referred me to the decision of *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346, in which the House of Lords was considering s 27 of the Drug Trafficking Offences Act 1986. The police had obtained an ex parte order for the production of files from a firm of solicitors relating to financial transactions of one of their clients. The police believed that the client had been provided with money to purchase property by an alleged drug trafficker. The solicitors relied on the exemption in s 27(4)(ii) that the material to which the order related included 'items subject to legal privilege'. The definition of 'items subject to legal privilege' was to be found in s 10(1) of the Police and Criminal Evidence Act 1984 which states:

> '10 Meaning of "items subject to legal privilege"
> (1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—
>
> (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
> (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
> (c) items enclosed with or referred to in such communications and made—
>
> (i) in connection with the giving of legal advice; or
> (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
>
> when they are in the possession of a person who is entitled to possession of them.'

[31] It will be seen that this definition was subject to s 10(2) which stated:

> 'Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.'

[32] The House of Lords took the view that on a purposive construction of s 10(2), the relevant 'intention' did not have to belong to the particular person holding the items; rather, if the intention of furthering a criminal purpose were held by anyone, the items would lose their privilege. A drug trafficker with criminal intent could not protect himself by placing his documents in the hands of a solicitor. Privilege belonged to the client, not the solicitor, and a criminal intent disentitled the client to privilege. This was simply the statutory form of the established principle in common law since *R v Cox and Railton*

14 QBD 153, that legal privilege did not attach where the advice sought was being obtained for the purpose of committing a crime. The alternative construction of s 10(2) could only lead to, in the words of Lord Goff of Chieveley (at 391), 'absurd consequences'.

[33] Mr Mitchell submitted that, by analogy, *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346 would apply to the passing of information by a legal adviser, who might therefore not be protected under the legal professional exemption. He submitted that the statute overrode the private law right of full and frank disclosure. The purpose of the POCA was to place an obligation on anyone who became suspicious about money laundering, to report their concerns if received in pursuit of a regulated business and/or, whoever was concerned, not to enter into an arrangement in relation to criminal property.

The wife

[34] Mr Mostyn believed that it was clearly necessary for the wife's legal advisers to make the disclosure under s 328 since they had a strong suspicion that part of the husband's assets might have been derived from untaxed income. They had been placed in a very difficult position by the advice given by NCIS and the requirements of NCIS after the disclosure had been made. NCIS had never withdrawn its requirement that they should not tell the other side about the disclosure. They therefore felt it necessary to seek directions from the court.

[35] In a later written submission Mr Mostyn expressed his concern about the 'clash' between the requirements under ss 333 and 342 not to 'tip off' nor to 'prejudice an investigation' and the clear obligation in ancillary relief applications to make full and frank disclosure. The protection afforded by s 333(2)(c) and (3)(a) or s 342(3)(c) and (4)(a) would be ineffective in the light of Mr Mitchell's submission that to disclose to the client or to the other party would bring counsel and/or solicitors within s 333(4) or s 342(5), that is to say a disclosure made with the intention of furthering a criminal purpose.

The husband

[36] Miss Baron QC, on behalf of the husband, made it clear that the husband's legal team was, of course, equally bound by the provisions of the POCA. They did not, however, consider that there was anything to report to NCIS. They could well understand why the wife's legal team felt it necessary to make disclosure but had themselves carefully considered the facts available to them and were satisfied that disclosure under the POCA was not necessary.

[37] Miss Baron pointed out that, since NCIS had not responded to the letter of 18 June from the wife's solicitors, there was no necessity to write a further letter on 25 June, the 7-day period having elapsed. The further disclosure of 9 July was unnecessary since no new issue had arisen and time did not run again. She also submitted that s 333 stood alone and was not tied to or part of the time periods imposed by the POCA.

[38] In a later written submission on behalf of the husband, it was argued that, contrary to the submission of Mr Mitchell, the POCA made considerable changes to the pre-existing legislation although it borrowed heavily from parts of it. In particular there was now, in general, no distinction between drug trafficking offences and other offences. There were two significant changes made by the POCA which affected the role and duties of professionals.

First the definition of 'criminal conduct' was far wider than before and secondly there was now a positive duty to report criminal conduct in cases involving no attempt to conceal or launder the proceeds of crime.

The Law Society and the Bar Council

[39] The provisions of Part 7 and s 342 of the POCA have become of increasing concern to the legal profession practising civil litigation and, more particularly, in the field of family law. The Bar and solicitors dealing with financial relief disputes of clients with substantial assets or making ancillary relief claims in such cases have been unsure as to their obligations under the POCA and the extent to which the provisions of the POCA might be a barrier to the resolution of financial disputes. When the present application was made, the Law Society and the Bar Council made it clear that each wished to be heard on the wider aspects of the impact of the POCA on the legal profession.

[40] The Law Society and the Bar Council, in written submissions, welcomed the opportunity to intervene and pointed out that the present case was not exceptional. The issues raised by the application reflected wider problems faced by barristers and solicitors, particularly those handling matrimonial matters.

The Law Society

[41] The main concern of the Law Society related to the effect of s 328 which was drafted widely and appeared to cover non-transactional matters. One crucial problem in ancillary relief applications arising from divorce was the requirement of full disclosure of the assets of the spouses under the Family Proceedings Rules 1991, as amended. Tax evasion by one of the parties might well be disclosed or revealed in the family proceedings, often in cases in which the assets were not substantial. This information might become available at any stage of the proceedings and would come within s 328. The Law Society was most concerned that there should be no uncertainty as to the exact extent of a solicitor's duties in relation to potential money-laundering offences. It submitted that the ambit of s 328 was potentially wider than NCIS had suggested and therefore the appropriate consent would be required in a greater number of cases than had been envisaged. The application of s 328 to disclosures made before the 'prohibited act' was causing practical difficulties but s 328 did apply to less specific activity and, in the view of the Law Society, it was necessary to make a request for consent in such cases to 'becoming concerned in an arrangement'.

[42] In a further written submission the Law Society referred to the ethical difficulties experienced by solicitors arising from s 333, 'tipping off' and s 342, 'prejudicing investigations', in acting for and communicating openly with clients. The Law Society suggested that it should be an acceptable form of compliance with s 328 if, in the case of a wife applicant, there was one joint authorised disclosure by the barrister, solicitor and client. The proposals put forward by NCIS in its position statement represented a sensible and practical way forward in cases similar to the present application. In other more complicated cases, particularly those in which the solicitor may have to make an authorised disclosure to NCIS about his own client, the position of the solicitor was more uncertain and placed solicitors in the impossible position of withholding material matters from their clients. There was urgent

need for guidance about circumstances where a solicitor could tell a client or third party about an authorised disclosure of which the client's activities were the subject.

[43] Mr Elliott QC, on behalf of the Law Society, stressed the concerns of individual solicitors around the country and the volume of inquiries made to the Law Society by solicitors seeking guidance in quite small cases. It was an everyday problem.

The Bar Council

[44] Mr Moor QC, on behalf of the Bar Council, expressed similar concerns to those of the Law Society. The Bar Council had issued guidance to the barristers in respect of money laundering. In a written submission it pointed out that the inclusion of suspicion in s 342(1) broadened the scope of the offence and might include those representing clients. The suggestion in NCIS's written submission that 'the solicitor should not tell the other side that a report has been made unless not to do so would breach an obligation to make disclosure in the context of the particular financial settlement proceedings' was not realistic in the context of family law. All ancillary relief cases required full and frank disclosure. If there was anything relevant in the report to NCIS it might well affect the value of the assets. It followed therefore that, when a report was made, the other side and the clients on both sides would have to be informed. One particular problem might arise on disclosures made at the door of the court.

The Inland Revenue

[45] In matrimonial financial proceedings the Inland Revenue is the most likely agency to be involved. In its submissions the Inland Revenue accepted that the wife's solicitors needed to make an authorised disclosure pursuant to s 338 and that the interpretation of the law as expressed by NCIS to the wife's solicitors was not correct. The statute did not state that it is only when funds pass through the hands of solicitors that consent is required. The wording of ss 327, 328, 329 and 330 was much broader. Repeated consent was not required for the same facts. Where an authorised disclosure has been made and the facts have not materially changed there is no need for further consent even if a further letter is written and no need for a further time delay for consent or refusal of consent.

[46] The Inland Revenue was not, however, able to give the appropriate consent under s 335 which had to be given by NCIS. Equally the Inland Revenue was not in a position to sanction the disclosure by the wife's solicitors to the husband that an authorised disclosure had been made to NCIS. The Inland Revenue had no objection to consent being given to the wife's solicitors.

Conclusions

[47] The Law Society, the Bar Council and family law practitioners in particular are understandably concerned about the implications for the legal profession of Part 7 and s 342 of the POCA. Although Mr Mitchell pointed out that similar legislation has been in force for over 10 years, without entering into a careful comparison of the earlier legislation and the POCA, I agree with Miss Baron that the POCA appears to be broader in its ambit with

the result that there is a greater potential effect on members of the legal profession engaged in particular in family financial applications.

(a) Whether and in what circumstances it is permitted to act in relation to an arrangement

[48] There is a range of ways in which a legal professional might become 'concerned in' an arrangement. It was not submitted to me, nor do I believe it could be the case, that the offence under s 328 can only be committed at the point of execution of the arrangement. None of the parties before me disagreed with the submission of Mr Mitchell that the act of negotiating an arrangement would equally amount to being 'concerned in' the arrangement.

[49] In my view, the duties under s 328 of a barrister or solicitor engaged in family litigation are straightforward. There is nothing in that section to prevent a solicitor or barrister from taking instructions from a client. However, if having taken instructions the solicitor or barrister knows or suspects s/he or his/her client will become involved in an arrangement that might involve the acquisition, retention, use or control of criminal property, then an authorised disclosure should be made and the appropriate consent sought under s 335. Therefore, if it seems to the solicitor or barrister that there are grounds for suspicion that any arrangement being sought from the court or negotiated between the parties is contrary to the requirements of s 328(1), then authorisation should be sought. Whilst the provisions under ss 327 and 329 were not raised before me in this case, it would seem that the position as set out above would apply equally to both of those sections.

[50] Issues of legal professional privilege do not seem to me to arise under ss 327, 328 or 329 and there is no professional privilege exemption in these sections.

[51] The effect of s 335 is that a person may make a disclosure, generally but not necessarily, to NCIS seeking consent to continue taking steps in relation to an arrangement. The person must not take any further steps in relation to the arrangement, until the person either:

(i) receives from NCIS notice of consent within 7 working days from the next working day after the disclosure is made ('the notice period' – s 335(5)), in which case the person may resume acting in relation to the arrangement (by virtue of s 335(3)); or

(ii) hears nothing from NCIS within the notice period, in which case the person is treated as having deemed consent to resume acting in relation to the arrangement (by virtue of s 335(3)); or

(iii) receives from NCIS notice of refusal of consent within the notice period, in which case the person must not act in relation to the arrangement for the duration of the moratorium period of 31 days starting with the day on which the person receives the refusal notice (by virtue of s 335(4)). Once the moratorium period has expired the person may resume acting in relation to the arrangement.

[52] In practice then, the longest possible time for which a person could be prevented from taking steps in relation to an arrangement, after sending a notice to NCIS, will be 31 days plus 7 working days.

[53] The statutory purpose behind s 335(4) is clearly to allow the relevant investigating authority time to take any action it deems necessary in relation to the disclosure where it has decided that consent should be refused.

[54] In most cases in the family courts, the criminal property will have been acquired by some form of tax evasion or possibly social security fraud and I would be surprised if there were to be refusal of consent within the notice period in the majority of cases.

[55] The consent procedures in ss 335 and 338 apply to those persons who make the authorised disclosure. So, for example, if a solicitor makes an authorised joint disclosure on behalf of himself, counsel and his client, then all three will be protected from prosecution. Indeed where the solicitor acts for the innocent party, it would be sensible as a matter of practice for solicitors to do so. If a solicitor is disclosing suspicions about his own client, it may, of course, be a different matter.

[56] It is important for the legal profession to take into account, as Mr Mitchell reminded us, that the POCA makes no distinction between degrees of criminal property. An illegally obtained sum of £10 is no less susceptible to the definition of 'criminal property' than a sum of £1 million. Parliament clearly intended this to be the case. Whatever may be the resource implications, the legal profession would appear to be bound by the provisions of the Act in all cases, however big or small. If this approach is scrupulously followed by the legal advisers, the result is likely to have a considerable and potentially adverse impact upon NCIS and would create serious consequential delays in listing and hearing family cases, including child cases.

(b) Whether and in what circumstances a legal adviser, having made an authorised disclosure, is permitted to tell others of the fact that s/he has done so

[57] Of much greater concern to the legal profession are the implications of ss 333 and 342, which prevent a person from 'tipping off', or prejudicing an investigation. Section 93D of the Criminal Justice Act 1988 (now repealed) contained a prohibition against tipping off in relation to criminal investigations of money laundering. In *Governor and Company of the Bank of Scotland v A Ltd and Others* [2001] EWCA Civ 52, [2001] 1 WLR 751, the Court of Appeal considered the meaning of the legal professional exemption contained in s 93D(4) of the Criminal Justice Act 1988, a provision dealing with 'tipping off' in almost identical terms to s 333. In that case the bank suspected that the monies held in a client's account had been obtained by fraud. Lord Woolf CJ at para [7] of the judgment of the court said:

> 'During argument there was discussion as to the extent of the defence provided by s 93D(4). Mr Crow helpfully drew our attention to the similarity between the language of s 93D(4) and the scope of legal professional privilege. Based on this assistance, we conclude that the subsection broadly protects a legal adviser when that adviser is engaged in activities which attract legal professional privilege.'

[58] That passage would appear to support the protection given to members of the legal profession in carrying out their duties to their clients, and that was the joint view of Mr Talbot and Mr Tidbury, for the Inland Revenue, who submitted in their skeleton argument that the natural meaning of s 333 was

such as to permit a solicitor or barrister to carry out his duties to the court and to his client without fear of committing the tipping off offence.

[59] There were no submissions made to me about the nature of the duties of a legal professional, whether solicitor or barrister, to the court, his client and his opponent, but the relevant principles are widely known and accepted. In general terms, of course, all legal professionals are bound by professional ethics which require openness and disclosure of relevant information to both the client and the opponent (see generally, *Halsbury's Laws of England* (Butterworths, Vol 44(1), 4th edn), paras 148–149).

[60] In addition, there is an enhanced duty of full and frank disclosure upon legal professionals acting in family proceedings, and particularly in ancillary relief proceedings (see *Jenkins v Livesey (Formerly Jenkins)* [1985] AC 424, sub nom *Livesey (Formerly Jenkins) v Jenkins* [1985] FLR 813; *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, [2002] 1 FLR 565). In accordance with this duty of full and frank disclosure in financial disputes between spouses, details of the size and description of family assets and actual or potential debts are crucial to the attempts of the legal advisers to settle these cases and to the FDR process, see Family Proceedings Rules 1991 (as amended) r 2.61A–E. If financial irregularities are discovered and investigated, it may diminish the value of the assets, the subject of the ancillary relief proceedings. The purpose of the FDR would be frustrated if the judge or district judge did not have the true facts and the parties were unable to negotiate a genuine settlement in the absence of the requisite knowledge as to the true value of the assets. In general terms the professional duties in family proceedings do, in my view, appear to attract the protection of ss 333(3) and 342(4) in order to permit a legal adviser to inform, for instance, the other side that a disclosure either will be, or has been, made to NCIS.

[61] I see the force of the contrary submission of Mr Mitchell that the full effect of the legislation may be impeded by the passing of information of those who may seek to take advantage of it. I am not, however, convinced that the words of the statute support the interpretation which Mr Mitchell suggested. In *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346 the court was concerned with the attachment, and loss, of legal professional privilege to items held on a client's behalf. The decision of the House of Lords in that case reflected the historical position and genesis of s 10(2) of the Police and Criminal Evidence Act 1984 by confirming that clients with a criminal purpose cannot hide behind privilege. However, the present case does not appear to me to be analogous. This case raises the issue of the right of a solicitor to make a disclosure to a client, or another, such as an opponent. The question of privilege does not arise.

[62] Sections 333 and 342 specifically recognise a legal adviser's duty in ordinary circumstances to make the relevant disclosures, even where the result would be to tip off their client, where to do so would fall within the ambit of being in connection with the giving of legal advice or with legal proceedings actual or contemplated. A central element of advising and representing a client must be, in my view, the duty to keep one's client informed and not to withhold information from him/her (see *Halsbury's Law of England*, above). Since the function of the Act is to regulate the proceeds of criminal behaviour, it is clear that in every circumstance where a solicitor believes an authorised disclosure to NCIS is necessary there will be at least a suspicion of criminal purpose. If, as NCIS suggests, ss 333(4) and 342(5) bite every time a party

who is suspected of holding a criminal purpose is given notice that a disclosure has been or will be made to NCIS (ie, is 'tipped off'), then the legal professional exemptions in ss 333(3) and 342(4) would be rendered meaningless. Sections 333(4) and 342(5) must have some purpose and the interpretation suggested by NCIS cannot, in my view, be correct. The exemption is lost if a disclosure to a client is made 'with the intention of furthering a criminal purpose'. The natural meaning of those words would seem to be clear. The approach which the House of Lords took to the construction of the word 'held' in *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346 should not be transposed into this context in relation to the word 'made', nor would it be necessary or proper to attempt to do so. Whereas the purpose of holding documents can be tainted by the intention of any number of people (including client and third parties), the intention of a legal adviser in choosing to make a disclosure would seem to belong to the adviser alone. The context and purpose of this particular section of the POCA is distinguishable from that in *R v Central Criminal Court ex parte Francis & Francis*, not least because the POCA has specifically underlined the duty of disclosure by legal advisers.

[63] The speech of Lord Griffiths in *R v Central Criminal Court ex parte Francis & Francis* indeed recognises the distinction between loss of privilege on the one hand, and the right to discuss matters with a client on the other hand. In dealing with a submission that the solicitors could not consult their client about the appeal for fear of breaching the equivalent tipping off provisions, Lord Griffiths said (at 386):

> 'I have no doubt that … if an order to give access to documentation is made under s 27, the solicitor–client relationship provides a reasonable excuse within the meaning of the section for the solicitor to take his client's instructions as to whether the order should be contested.'

[64] In other words, even though the client's criminal intent disqualified him from claiming privilege, it did not disqualify him from his entitlement to be consulted by his lawyer without falling foul of the tipping off rules.

[65] Of course there may well be instances where a solicitor's disclosure to a client is in breach of s 333(4) or s 342(5), because the solicitor makes the disclosure with an improper purpose. In such a case the legal professional exemption would, of course, be lost. I cannot, as I understood Mr Mostyn to suggest, give a blanket guarantee to all family practitioners that they will never lose the protection of the exemption. But unless the requisite improper intention is there, the solicitor should be free to communicate such information to his/her client or opponent as is necessary and appropriate in connection with the giving of legal advice or acting in connection with actual or contemplated legal proceedings.

[66] I recognise that the conclusion I have reached may cause some difficulty to the investigating authorities. The time lines set out in ss 328, 335 and 338 are independent from the provisions of ss 333 and 342. Having complied with the obligations under s 328, there is nothing in the statute to require a solicitor to delay in informing his client. Either he is entitled to do so forthwith by virtue of the s 333(3) exemption, or if s 333(4) or s 342(5) bites, he is not entitled to do so at all. There is no middle ground.

Good practice

[67] I am however concerned that the purpose of the Proceeds of Crime Act 2002 be respected, and that as a matter of good practice (as opposed to statutory obligation) the investigation authorities should be permitted time to do their job without frustration. In most cases I cannot see why a delay of, at most, 7 working days before informing a client would generally cause particular difficulty to the solicitor's obligations to his client or his opponent. Where appropriate consent is refused and a 31-day moratorium is imposed, best practice would suggest that the legal adviser and NCIS (or other relevant investigating body) try to agree on the degree of information which can be disclosed during the moratorium period without harming the investigation. In the absence of agreement, or in other urgent circumstances where even a short delay in disclosure would be unacceptable (such as where a hearing or FDR is imminent, or orders for discovery require immediate compliance), the guidance of the court may be sought.

[68] The Court of Appeal in *C v S and Others (Money Laundering: Discovery of Documents) (Practice Note)* [1999] 1 WLR 1551 set out a procedure to be followed where compliance with an order for disclosure of information in civil proceedings might reveal money laundering and cause the financial institution to be in breach of tipping off provisions under s 93D of the Criminal Justice Act 1988 (as amended). In *Governor and Company of the Bank of Scotland v A Ltd and Others* [2001] EWCA Civ 52, [2001] 1 WLR 751 the Court of Appeal suggested a similar procedure whereby the bank in that case could have made an application to the court naming the Serious Fraud Office as respondent. The application could be held in private and there would be no question of serving the customer since he would not be a party. The procedures suggested by the Court of Appeal in those two cases might usefully be adapted to the family financial proceedings where a disclosure has been made. Since the purpose of such an application is to protect the legal advisers and, in some cases, the client, I cannot see how one can impose an obligation on NCIS to be the applicant (although NCIS would, however, also be entitled to approach the court if it wished to do so). In my view, it would be appropriate for the legal advisers to make the application without notice to the other side, making NCIS the respondent to the application. It would be an application, however, within the ambit of the existing court proceedings and I do not see any difficulty at the moment in the court making any appropriate order, including, if in the High Court, declarations. In the present case I granted declarations since the situation was entirely new and I did so to clarify the situation. It would not seem to me to be necessary for the court generally to grant declarations, but rather to deal with the practical consequences of the authorised disclosure to NCIS. The application would of course be heard in private and the court should direct that any mechanical recording of the proceedings should not be disclosed or transcribed without the leave of the judge.

[69] I should like to remind legal advisers that it would not seem to be necessary to make repeated disclosures on the same facts, unless it is proposed to enter into a new arrangement or a variation of the same arrangement. Each time a further disclosure is made, time will start running again for 7 days or possibly 7 plus 31 days.

NCIS position statement

[70] Mr Mitchell has provided to the court a position statement setting out the approach of NCIS to the POCA, which has now have posted on NCIS's website (www.ncis.co.uk/legaldisclosures.asp). I have appended a copy of it to this judgment.

[71] Subject to my expanded conclusions above, paras (2)–(8) of the position statement are not substantially altered by my judgment in this case.

[72] Paragraphs (9) and (10) purport to be expressed in different terms from each other, but the only possible reading of them is that the legal professional exemption under ss 333(3) and 342(4) is lost, by virtue of ss 333(4) and 342(5), whenever any person possesses a criminal purpose regardless of whether the disclosure to the client/opponent is made before or after the making of the authorised disclosure. For the reasons set out above, I do not accept NCIS's interpretation and would recommend that in light of my judgment, paras (9) and (10) of the guidance be amended.

[73] Paragraphs (11) and (12) accord entirely with my views set out herein, and do not require amendment. Paragraphs (13) and (14) do not require my comments. I do however note that the view taken by NCIS in the last sentence of para (14) simply underlines the importance of a legal adviser making use of his professional exemption and disclosing the relevant information to his/her client so that the client is jointly protected from potential liability under the Act.

The present case

[74] In the circumstances of this case, the wife's legal advisers were clearly right to make an authorised disclosure to NCIS. It was also entirely proper for the wife's legal team to approach the court for guidance. The coming into force of the POCA in February has caused immense confusion and disruption in family proceedings, and no criticism should be made of the wife's representatives for seeking clarification of their statutory obligations, particularly in the light of the approach of NCIS to the disclosure made by them. In fact, since there was no reply by the end of the 7-day period, the wife's legal advisers were free to continue to deal freely with the other side and to inform the other side that a disclosure had been made to NCIS. They would not have been exposed to the risk of prosecution for tipping off or prejudicing an investigation, as I have found, contrary to the submissions on behalf of NCIS. But they could not have reasonably know this at the time. This position was reinforced by the consent given in NCIS's letter of 15 July. The wife's solicitors were not, however, certain from NCIS's letter that they had that right. Mr Mitchell and Mr Tidbury told me that neither NCIS nor the Inland Revenue had any objection to the husband being informed of the fact that the disclosure report had been made. Accordingly, I ordered that my previous order of 16 July preventing the husband's legal team from making the disclosure to their client should be set aside. I also granted the declarations sought by the wife's representatives, that:

(1) the wife's representatives can disclose to the husband and his representatives a copy of their report to NCIS;
(2) the wife's representatives can disclose to the wife a copy of their report to NCIS;

(3) the consent given by NCIS to the wife's solicitors extends to counsel and the wife herself; and
(4) the consent given by NCIS extends to implementation of any arrangement agreed.

[75] I indicated that I would hear the parties' submissions on costs after I handed down this judgment, should they wish me to do so.

APPENDIX

Proceeds of Crime Act 2002, Part 7

Position of the National Criminal Intelligence Service in relation to disclosures by the legal profession:

(1) In the view of the NCIS the following constitutes good practice on the part of a legal advisor who is advising a client in relation to a matter that might involve a suspicious financial arrangement.
(2) There is no need to seek the consent of the NCIS to act – that is to take instructions and learn what a case is about. The NCIS will not accept such requests for consent.
(3) Should a concern arise in relation to a prospective financial arrangement then the legal advisor should learn sufficient about the client and the source (or final destination) of any funds involved in the arrangement, including as necessary seeking information from the legal advisors, if any, on the other side.
(4) Should the legal advisor then have a suspicion at the stage that there is a step to be taken in the case that would involve the legal advisor or their client becoming involved 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 or there is the possibility of offences under s 327 or s 329 of the Proceeds of Crime Act 2002, a written report setting out all relevant details including the grounds for any suspicion should be submitted to the NCIS.
(5) Where consent is to be sought to enter into an arrangement this should be explicitly stated and highlighted in the written report faxed to the NCIS Duty Desk.
(6) For there to be a disclosure there is no necessity at all for any funds to be contemplated as having to pass through the legal advisors client account or actually to pass through such an account. The test for the legal advisor would simply be whether he had become concerned in an arrangement.
(7) At that stage the NCIS will follow the procedure in accordance with s 335 either giving or withholding consent as the case may be. That is that they will give or refuse consent within 7 days; if after 7 days there has been no response from the NCIS consent to proceed on the basis of the information disclosed will be deemed to have occurred. If the NCIS refuse to give consent then there would follow a 31-day period from the date of the refusal during which the legal advisor could not proceed with the arrangement, without risking the commission of a money laundering offence.

(8) Once a disclosure has been made to the NCIS then the solicitor is free to continue with the arrangement (as reported to NCIS) if consent is given, or at the end of the moratorium period if consent is withheld.

(9) If a legal advisor takes the view that he should inform his client (or any other person) before making such a disclosure to the NCIS, then he must have regard to s 342. If the legal advisor at least suspects that an investigator, a customs officer, a police officer or in some cases the director of the assets recovery agency is acting or proposing to act in connection with a confiscation, money laundering or civil recovery investigation which is being or is about to be conducted the offence of prejudicing an investigation is made out, whether or not there has been a disclosure to the NCIS. The legal advisor needs to be alert to the defence contained in s 342(3) which permits disclosures to a client or to any person in connection with legal proceedings. This defence is not available where the disclosure is made with the intention of furthering a criminal purpose. The NCIS take the view that the legal advisor does not have to share or be a party to this intention (which may be held solely by the client) for the defence in s 342(3) not to be available (see *R v Central Criminal Court ex parte Francis & Francis* [1989] AC 346).

(10) The NCIS would wish the legal profession to note that subject to s 333(4), under s 333(3) of the POCA there is no restriction on the legal advisor informing any person of the fact that they have made a report to the NCIS if such a disclosure is to a client or his representative in connection with the giving of legal advice to the client or the disclosure is made in connection with legal proceedings or contemplated legal proceedings.

(11) Where the legal advisor has made a disclosure to the NCIS, the NCIS would prefer as a matter of practise the legal advisor not to make any reference to that fact during the 7 days following the disclosure or during the period of 31 days following a refusal to consent to an arrangement, unless not to do so would be in breach of a disclosure obligation imposed by the particular proceedings.

(12) In the event that the legal advisor considers that a requirement of the legal proceedings is to require disclosure of the fact of the disclosure to the NCIS, but there has been no consent from NCIS within 7 days or the period is still running then the legal advisor should firstly inform the NCIS and try to seek agreement on the way ahead. In the absence of such agreement the legal advisor should consider making a without notice application to the court for directions giving the NCIS an opportunity to make representations (see *C v S and Others (Money Laundering: Discovery of Documents) (Practice Note)* [1999] 1 WLR 1551 and *Governor and Company of the Bank of Scotland v A Ltd and Others* [2001] EWCA Civ 52, [2001] 1 WLR 751).

(13) Legal advisors must not assume that 'the other side' in proceedings has reported a suspicion to the NCIS and such inquiries should not be made of the NCIS.

(14) Where the client of the legal advisor has joined in the disclosure that has been made the client would, from the point in time when a disclosure is made to the NCIS, not be regarded as having committed an offence under ss 327–329. Where a legal advisor makes a disclosure without the knowledge of their client then plainly and necessarily such protection for the client would not apply.

(NCIS website August 2003)

Order accordingly.

Solicitors: *Manches* for the applicant
Mishcon de Reya for the respondent
Winckworth Sherwood for the National Criminal Intelligence Service
Inland Revenue Solicitor
Law Society Solicitor

PHILIPPA JOHNSON
Law Reporter