

CIVIL MEDIATION COUNCIL GUIDANCE NOTE No 2

The obligations of mediators under the Proceeds of Crime Act ["POCA"] 2002

It was recently drawn to the Board's attention that one mediation provider was still including in its Standard Mediation Agreement a clause to the effect that

"...the mediator has an absolute obligation under the Proceeds of Crime Act 2002 to report to the NCIS any knowledge or suspicion relating to the involvement of the proceeds of crime (including tax evasion) and is precluded by law from informing the Parties of his intention to do so."

This was certainly believed to be the effect of Part 7 of the 2002 Act when it was first enacted. Indeed, the CMC convened a Forum in December 2004 to ventilate mediators' worries about the supposed effect of the Act in this respect. In March 2005, however, the Court of Appeal gave authoritative guidance on the meaning of this part of the Act, and although its judgment was not expressly concerned with the position of mediators, it led to the Chartered Institute of Arbitrators publishing authoritative guidance ("the Guidance") on the effect of the Act for mediators, arbitrators and adjudicators. The Guidance forms Guideline 12 of the Guidelines and Protocols which are published on the Chartered Institute's website at <http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/>.

Although the precise meaning of the Act must be a matter for the courts, the Board of the CMC believes that the Guidance has been universally followed, without any mishap, over the last five years. But it wishes to draw attention to the fact that the Guidance recognises that mediators may *in certain circumstances* incur the obligations created by the Act. **It therefore encourages all training providers, mediation providers and individual mediators to study the Guidance carefully, so as to ensure that mediators never run the risk of incurring criminal liability under the Act in any circumstances.**

In particular the Guidance warns mediators that although many of their earlier worries were not substantiated by the judgment of the Court of Appeal, they should exercise care in two situations:

(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".

In the latter case the Guidance suggests that it will almost certainly be ethical for the mediator to withdraw from the mediation once suspicions of this kind are aroused. Before withdrawing, however, it is suggested that he should give the parties the opportunity to rebut any suspicion he may hold that the mediation was being used as a pretext for agreeing on the acquisition, retention, use or control of criminal property.

The Guidance discusses the effect of the judgment in *Bowman v Fels* at some length. Its conclusions, so far as the position of mediators is concerned, are in these terms:

“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 “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 SOCA¹.

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.

¹ The Serious Organised Crime Agency, which has since April 2006 taken over the responsibilities of the former National Criminal Intelligence Service”.

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. “

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