

# The Proceeds of Crime Act 2002

## How to stay out of jail: A Practical Guide for Family lawyers

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Mike Horton  
17 May 2004

## 1 Background

- 1.1 Role of matrimonial lawyers has included maximizing the assets available to the parties (eg structure of settlements to allow benefit claims etc)
- 1.2 Conflict with increasing professional obligations re money laundering
- 1.3 What if tax evasion and its proceeds comes to light?
- 1.4 *S v S (Inland Revenue: Tax Evasion)* [1997] 2 FLR 774: Wilson J: discretion for judge whether or not to report tax evasion coming to light in ancillary relief proceedings
- 1.5 cf *A v A; B v B* [2000] 1 FLR 701: Charles J: duty on judge to report tax evasion and other illegal conduct coming to light in AR proceedings

## 2 Essential material

- 2.1 Part 7 of the Proceeds of Crime Act 2002
- 2.2 *P v P (Ancillary Relief: Proceeds of Crime)* [2004] Fam 1, [2004] 1 FLR 193
- 2.3 The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003 (SI 2003 No 3074)
- 2.4 The Money Laundering Regulations 2003 (SI 2003 No 3075)
- 2.5 NCIS revised guidance
- 2.6 NCIS website: <http://www.ncis.gov.uk>

- 3 The new law: The Proceeds of Crime Act 2002
  - 3.1 New law consolidating existing drug confiscation and other legislation
  - 3.2 Also extending range of offences covered and obligations on lawyers
  - 3.3 Part 7 into force 24 February 2003
  - 3.4 New money laundering regulations in force 1 March 2004, along with extension of the regulated sector to all family lawyers (nb s 330)
  
- 4 Basic definitions
  - 4.1 **Criminal conduct: s 340(2), (4)**
    - 4.1.1 conduct which constitutes an offence in any part of the UK, or
    - 4.1.2 conduct which would constitute an offence in any part of the UK if it occurred there.
    - 4.1.3 Does not matter who carried out the conduct
    - 4.1.4 Does not matter who benefited from it
    - 4.1.5 Does not matter when it took place (ie before or after Part 7 into force)
    - 4.1.6 Will include offences under Part 7!
  
  - 4.2 **Criminal property: s 340(3)**
    - 4.2.1 Property includes money, all forms of property, real or personal, and things in action and other intangible property: s 340(9)

- 4.2.2 Property includes any beneficial interest in property or right to possession:  
s 340(10)
- 4.2.3 Criminal property is property which constitutes a person's *benefit* from criminal conduct or it represents such a *benefit* (**in whole or in part and whether directly or indirectly**), and
- 4.2.4 which the alleged offender knows or suspects that it constitutes or represents such a benefit: s 340(3)
- 4.2.5 **Benefit:** a person benefits from conduct if he obtains property as a result of or in connection with the conduct: s 340(5)
- 4.2.6 What if no direct benefit to the alleged offender? Deemed obtaining of property: s 340(6): if a person obtains a **pecuniary advantage** as a result of or in connection with conduct, he is to be **taken** to obtain a sum of **money** equal to the value of the pecuniary advantage. NB **benefit fraud**
- 4.2.7 Irrelevant whether the criminal conduct is the only conduct which gives rise to the criminal property or it arises from a combination of criminal conduct and legitimate conduct: s 340(7).
- 4.2.8 Does not matter how large or small the value is: see *P v P* [2003] EWHC Fam 2260, Butler-Sloss P, para 56.

## 5 Money laundering

- 5.1 This term is defined in s 340(11) as any act which constitutes one of the offences under ss 327, 328, or 329 (see below), or any act which aids/ abets etc such conduct or is an attempt, conspiracy or incitement to commit such an offence.

- 5.2 Very wide: covers any criminal conduct and the benefits of such conduct
- 5.3 Often referred to as 'primary offences': nb no 'defence of legal professional privilege'.
- 5.4 Defence of 'authorised disclosure' under s 338, plus appropriate consent under s 335
  
- 6 Concealment: s 327
  - 6.1 An offence to conceal, disguise, convert, transfer or remove from UK any criminal property.
  - 6.2 Conceal or disguise include concealing or disguising the nature, source, location, disposition, movement etc of any criminal property
  - 6.3 Defence of making authorised disclosure or intention to do so but had a reasonable excuse for not doing so.
  
- 7 Facilitating retention or transfer: s 328
  - 7.1 The key provision for lawyers in ancillary relief or ToLATA cases
  - 7.2 "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."
    - 7.2.1 'enters into an arrangement': clearly this covers the client signing a consent order
    - 7.2.2 'becomes concerned in an arrangement': this covers the lawyer drafting the consent order. NB not just final orders but orders for maintenance pending suit,

discharge of s 37 or Mareva injunctions. Almost certainly covers the lawyer drafting a Calderbank letter or making open proposals. An arrangement clearly amounts to more than taking instructions from the client as to their financial affairs for the purpose of ancillary relief proceedings: *P v P*, para 49. An arrangement also implies something more than filling out a form E (although query setting out open case in last few boxes on the form), giving financial disclosure etc. It suggests some form of agreement or accommodation with the other party and/or their lawyers.

7.2.3 Asking for adjudication: some judges say no this does not amount to becoming concerned in an arrangement, others say yes it does. Play safe. NB if the parties said to a friend: you decide how much we should each have of our criminal property, the act of asking the friend would, in my view, amount to becoming concerned in an arrangement. Judges are not always friendly, but arguably what else is different from that situation and asking for adjudication.

7.2.4 Suggestion that any step, beyond merely taking instructions, which progresses the conduct of the case, amounts to an arrangement within s 328.

7.2.5 **Play safe:** the earlier you report/ take steps, the less likely you will have 'become concerned in an arrangement'

7.2.6 'knows or suspects': this knowledge or suspicion relates to the effect of the arrangement: ie do you know or suspect that the arrangement will facilitate the retention or transfer of property, and as to the nature of the property: ie do you know or suspect that the property is criminal property;

- 7.2.7 'facilitates (by whatever means)': the consent order, exchange of correspondence, schedule of contents etc. Very wide.
- 7.2.8 'acquisition, retention, use or control of': the wife getting a lump sum out of the savings which should have been used to pay tax; the husband keeping all or part of those savings; the wife being allowed to continue to stay in the timeshare purchased with the proceeds of crime etc
- 7.2.9 'criminal property': see above
- 7.2.10 'by or on behalf of another person': ie not just your own client's criminal property, but the other party's, or any person's criminal property which has ended up in the possession of the parties, or even criminal property 'deposited' with a third party which might have been the subject of a claim in the proceedings
- 7.3 Again, defence of disclosure or intention to make disclosure but reasonable excuse for failing to do so.
- 8 Acquiring property: s 329
- 8.1 Offence to acquire, use or have possession of criminal property.
- 8.2 Usual defence of making disclosure/ intended to make disclosure but reasonable excuse for not doing so
- 8.3 Additional defence of acquiring etc for 'adequate consideration': s 329(2)(c), s 329(3). The provision of goods or services which you know or suspect may help another to carry out criminal conduct is not consideration, eg advising client to keep quiet about knowledge or suspicion re tax evasion etc.

9 Failure to disclose: s 330

9.1 This is not a money laundering offence as such. Instead, it puts a positive obligation on persons in business in the regulated sector to report suspected money laundering.

9.2 Family lawyers (including barristers) are undoubtedly within the regulated sector from 1 March 2004, and s 330 will therefore apply to us: see The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003 (SI 2003 No 3074), which inserts a new Sched 9 to the 2002 Act with effect from 1 March 2004.

9.3 Three conditions to establish the offence:

9.3.1 you know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering: s 330(2).

9.3.2 the information giving rise to the knowledge or suspicion or reasonable grounds etc came to you in the course of a business in the regulated sector: s 330(3).

9.3.3 you do not make the required disclosure as soon as is practicable after information comes to you: s 330(4).

9.4 Required disclosure is to a nominated officer under s 331 or to NCIS.

9.5 'Defences': reasonable excuse; 'ignorance' and lack of training (s 330(7)), and the legal advice defence:

9.5.1 No offence committed you are a professional legal adviser and the information comes to you in privileged circumstances: s 330(6)(b)

- 9.5.2 Privileged circumstances further defined in s 330(10): information comes to you in such circumstances if given to you (a) by client in connection with your giving advice to the client; (b) by a person seeking legal advice from you; (c) by a person in connection with (existing or contemplated) legal proceedings.
- 9.5.3 **But** s 330(11) disappplies this defence where information given with the intention of furthering a criminal purpose. The criminal purpose can of course include a desire or attempt to commit money laundering. If you think you are being told this information with a view to the client being able to hide monies etc, ss (10) will not apply and you are obliged to make the report. NB client's criminal purpose, or yours. NB client's purpose to retain criminal property would disapply the defence, as possessing etc criminal property itself an offence; this is the case even if client ignorant of provisions of Part 7 of PoCA 2002.

## 10 Defences: making an authorised disclosure

- 10.1 Without more, s 328 would seem to prevent you acting for anybody where they or their spouse had criminal property.
- 10.2 You avoid going to prison by making an authorised disclosure (see below).
- 10.3 All of the money laundering offences, as well as the s 330 failure to report offence, have a defence of reasonable excuse. The money laundering offences require you to intend to make such a disclosure but have a reasonable excuse for not doing so.

- 10.4 **Do you feel lucky?** The ambit of what a reasonable excuse is not clear. You may feel lucky, or you may not want to be the defendant whose lawyer is arguing about its precise ambit. Assume your excuse will be unreasonable.
- 10.5 **Authorised disclosure.** The defence to the money laundering offences requires you to make an authorised disclosure under s 338 and, if the disclosure is made before you do the act which constitutes the offence ('the prohibited act'), you to have the 'appropriate consent'.
- 10.5.1 For you to get the protection afforded by s 338, ie for you to be making an *authorised* disclosure, you must:
- 10.5.2 make the disclosure to NCIS or to a nominated officer. [A nominated officer is a person in the same firm who forwards disclosures to NCIS. They are bound to pass on the disclosure to NCIS, and whilst they can give the 'appropriate consent', they may not do so without notification/ consent from NCIS: s 336.]
- 10.5.3 make the disclosure in the prescribed form and manner. There are no regulations yet governing this, and the guidance from *P v P* suggests that the report should be in writing and contain all relevant details, including the grounds for any suspicion that there is criminal property. The letter should include (i) identification of the parties and the fact that there are ancillary relief proceedings pending; (ii) enough information to identify the assets in question which might comprise criminal property; (iii) the fact and the basis of suspicion that the property might comprise criminal property; (iv) if appropriate, client seeking payment from or transfer of

property which might be criminal property; (v) disclosure being made under s 338 on behalf of client, solicitor and counsel. See below for example disclosure letter.

- 10.5.4 **either** make the disclosure before doing the prohibited act;
- 10.5.5 **or** do it afterwards, on your own initiative and as soon as practicable after doing the prohibited act, with a good reason for your failure to make the disclosure before doing the prohibited act.
- 10.6 If you are making the disclosure before doing the prohibited act, you need the appropriate consent: s 335:
  - 10.6.1 if you made the disclosure to an internal nominated officer, the consent must be from the nominated officer (see s 336 for restrictions on the nominated officer giving consent).
  - 10.6.2 if you made the disclosure to NCIS, you need its consent.
  - 10.6.3 The procedure works as follows. Once you make a disclosure, you cannot take any further steps in relation to the arrangement, until either:
    - 10.6.4 you receive from NCIS notice of consent within 7 **working** days from the next working day after the disclosure is made ('the notice period') in which case you can resume acting in relation to the arrangement; or
    - 10.6.5 you hear nothing from NCIS within the notice period, in which case you are treated as having deemed consent to resume acting in relation to the arrangement; or
    - 10.6.6 you receive from NCIS notice of refusal of consent within the notice period, in which case you must not act in relation to the arrangement for

the duration of the moratorium period of 31 days starting with the day on which you receive the refusal notice. Once the moratorium has expired you may resume acting in relation to the arrangement.

10.6.7 It is unlikely that you will have to wait the 31 days: Butler-Sloss *P in P v P* thought it would be surprising if you were to receive refusal of consent within the notice period in the majority of cases (para 54).

## 11 Tipping off

11.1 Two offences seek to prevent money launderers or criminals from being made aware that they have been reported and to prevent them disposing of the proceeds of their criminal conduct.

11.2 The first relates to disclosing that an authorised disclosure has been made, called tipping off under s 333.

11.3 The second is more general: making a disclosure likely to prejudice an investigation which you know or suspect is being made or about to be made.

11.4 Tipping off under s 333 is committed if you know or suspect that an authorised disclosure **has been made**, and you make a disclosure likely to prejudice any investigation which might be conducted following the disclosure being made.

11.5 **This offence does not prevent you telling your client, the other side or the court that you are about to make a s 338 authorised disclosure.**

11.6 There are two defences available to this offence: one that you did not know or suspect that the disclosure was likely to be prejudicial. The second protects a professional legal adviser who tell his client in connection with your giving him

advice, or who tells any person in connection with (existing or contemplated) legal proceedings.

11.7 This privilege defence is contained in s 333(3) for tipping off, and in s 342(4) for the more general offence of prejudicing an investigation. In both cases, it is qualified by the following subsections (s 333(4) and s 342(5)), which provide that a disclosure does not fall within this defence if it is made with the intention of furthering a criminal purpose.

11.8 In *P v P*, NCIS argued:

11.8.1 any common law obligation to make full and frank disclosure during the notice period of 7 days (and 31 day moratorium period) was over-ridden by the statute;

11.8.2 whilst no offence of tipping off was committed where a client or the other side was informed of a future intention to make a s 338 authorised disclosure, there would rarely 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 your 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. Indeed, such a disclosure might also come within the s 342 offence;

11.8.3 the intention of 'furthering a criminal purpose' need not belong to the discloser.

- 11.9 Butler-Sloss P rejected these arguments. Unless the solicitor himself or herself had an improper or criminal purpose in telling his client or the other side, he would not be making the disclosure 'with the intention of furthering a criminal purpose' (paras 62-66).
- 11.10 As a matter of law, the defence as interpreted in *P v P* allows you to tell the client, the other side and the court of the fact that you have made a s 338 authorised disclosure as soon as you have done so (or indeed that you are about to make such a disclosure).
- 11.11 However, NCIS considered that it would be good practice not to inform any person of a s 338 authorised disclosure being made until they had given consent or the seven day notice period had expired. The guidance from the judgment of Butler-Sloss in *P v P* is:
- 11.11.1 ordinarily, a delay of seven working days before informing a client of your having made an authorised disclosure should not generally cause any particular difficulty;
  - 11.11.2 if NCIS refuse consent, such that the 31 day moratorium period kicks in, you should try and agree with NCIS on what you can tell and to whom;
  - 11.11.3 in the absence of agreement, or in urgent circumstances where even a short delay in telling the client or the court or the other side would be unacceptable (eg FDR imminent or orders for discovery require immediate compliance), the guidance of the court may be sought;
  - 11.11.4 if necessary, you can apply ex parte to the court hearing the ancillary relief proceedings, giving notice to NCIS but not the other side. The court

would be able to make declarations as to what might be disclosed etc, but is more likely to deal with the practical consequences of disclosure, ie vacating a hearing, varying a direction for filing evidence etc. The hearing would be in private and the court should direct that any mechanical recording of the proceedings should not be disclosed or transcribed without the permission of the court.

## 12 Practical steps

12.1 Standard form advice: suggested that solicitors have letters setting out the terms of their retainer, and should make some mention of PoCA:

12.1.1 the obligation to give full and frank disclosure in the proceedings;

12.1.2 the general rules about confidentiality and legal professional privilege;

12.1.3 the duty on the lawyer to report the presence of the proceeds of crime before becoming concerned in negotiations;

12.1.4 that this duty overrides the normal rules on confidentiality and privilege;

12.1.5 that breach of this duty carries criminal sanctions (maximum penalty of 14 years);

12.1.6 the client has a similar duty;

12.1.7 there may be times when the lawyer cannot tell the client as to a likely report or that a report has been made to NCIS

## 12.2 When should I report?

- 12.2.1 The earlier the better: you have more time earlier in the court timetable, and the shorter the time between becoming aware of a PoCA issue and making a disclosure the better.
- 12.2.2 NB reporting is not the first port of call for your own client. The advice should be to regularise his affairs by the client himself coming clean to the tax man etc. If arrears of tax and any penalties etc are paid, there is no longer any criminal property. Just be careful not to become concerned with any arrangement etc in the meantime whilst the position is being regularised!
- 12.2.3 If information comes to light at court (say at an FDR), then stop negotiating at once and inform NCIS asap in writing, at the latest by the end of the next working day. You can inform the client, the other side and the court of the position: you cannot have an effective FDR.
- 12.2.4 If you are at a first appointment, and the court wishes to proceed to an FDR, you cannot. You can tell the other parties of the difficulty, provided your client consents.
- 12.2.5 NB the good practice suggested in *P v P* above.

## 12.3 Law Society Guidance to solicitors likely to include:

- 12.3.1 verify identity of each new client (passport/ driving licence and utility bill)
- 12.3.2 ensure that any funds disclosed have an obvious source

12.3.3 do not hold any significant sum on behalf of a client without an associated transaction in which you are acting

12.3.4 be wary of clients who are reluctant to provide this sort of information

#### 12.4 Form of disclosure

12.4.1 Regulations may yet be made governing the form and manner of disclosure: they do not at the moment, and the only form on the NCIS website is really for financial institutions.

12.4.2 Solicitors should make a disclosure on behalf of their firm, the client (where appropriate), and **named counsel**

12.4.3 Good practice to mention any disclosure to NCIS in the text of brief to counsel, and to include in any instructions to new counsel copies of any correspondence with NCIS including the s 338 disclosure letter, as well as the attendance note with the client which gave rise to the suspicion. Despite the NCIS guidance, counsel will have to make his or her own s 338 disclosure. The NCIS guidance states that if a solicitor makes a disclosure before instructing counsel there would be no requirement for counsel to make a further disclosure if the facts upon which the disclosure was made have not changed. Counsel very unlikely to want to rely on this guidance, which appears to suggest that NCIS has the power to deem conduct which would otherwise be an offence under s 328 to be lawful. After all, how did *P v P* com about!?

- 12.4.4 Unless the facts change, only need to make one disclosure, unless there is a different arrangement being entered into (eg maintenance pending suit hearing followed by final consent order).
- 12.4.5 NCIS can be contacted at Economic Crime Branch, National Criminal Intelligence Service, PO Box 8000, London SE11 5EN. Fax: 020 7238 8286. Duty desk 020 7238 8282/8607

### 13 Examples

13.1 In these examples, we are going to assume:

- 13.1.1 W is an innocent party who has not engaged in criminal conduct
- 13.1.2 H is a self-employed business man
- 13.1.3 W happens to find a piece of paper relating to the business spanning a number of years, with figures for the real profit, and figures for the profit as disclosed to the tax man

13.2 Acting for W:

- 13.2.1 explain to W the effect of PoCA
- 13.2.2 the need for W, solicitors and counsel to make disclosure to NCIS
- 13.2.3 make disclosure in respect of s 328, s 330
- 13.2.4 do it as early as possible to avoid potential adjournments
- 13.2.5 nb if you make written disclosure on Weds 3 March 2004, the notice period begins on Thurs 4 March 2004. It ends on Fri 12 March 2004, and

so if no notice from NCIS received by close of business on Fri 12, you can proceed (s 335(5)).

13.2.6 tell the other side: nb the piece of paper is a very relevant document and will need to be disclosed in any event

13.2.7 what if W refuses to allow you to make disclosure or tell the court or H's lawyers? explain no settlement or offers can be made without committing an offence or making the disclosure. Why does W want not to make disclosure? warn W of possible disclosure under s 330 in any event

13.2.8 What if letter comes to light for the first time on day of FDR? You cannot conduct an FDR. You should seek to obtain instructions to disclose the document to the court and H's lawyers. If no consent to disclose, you must cease to act, and warn client of s 330 disclosure.

13.2.9 NB s 328 requires knowledge or suspicion of the existence of criminal property; you must act on instructions, subject to those instructions being a defensible interpretation of any documents. NB s 330 is brought into play on merely having reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

### 13.3 Acting for H

13.3.1 Is the document genuine? If yes, advise: come clean to the taxman, and seek adjournment of AR proceedings until new tax liability has been assessed. Make disclosure to NCIS on behalf of client, solicitor and

counsel: warn client of possible self-incrimination. NB also specialist accountants advise on 'Hansard' procedure.

13.3.2 NB if H does not come clean, and W makes disclosure, DJ bound to adjourn proceedings to see whether any action will be taken by the Revenue

13.3.3 If H unwilling to make disclosure, he may either be willing to allow solicitor and counsel to do so: problem will be that H himself would commit s 328 offence on any settlement. If he is not so willing, you cannot make a s 328 disclosure and cannot be involved in any negotiations etc.

13.3.4 In this scenario, you will have to warn client that even if you cease to act for him, as appears likely, you will have to make a disclosure under s 330.

13.3.5 Information comes to light at FDR: same as above: cannot conduct an FDR. It seems the most you could do at FDR is ask the DJ for an indication and then adjourn the FDR, but even a nod and a wink (ie if you offered us this we would accept it) will amount to a s 328 arrangement.

13.4 NB NCIS will now respond within 24 hours if you send a fax asking them to give you consent within 24 hours. Always a good idea to chase them by telephone.

Michael Horton  
17 May 2004

## Example of text of letter to NCIS making disclosure

Dear sir

We are writing in order to make a disclosure under s 338 of the Proceeds of Crime Act 2002, and seeking the appropriate consent within s 335 of the 2002 Act from NCIS so as to be able to continue to act.

We act in divorce and financial provision proceedings on behalf of Clark Kent, of 1 Krypton Drive, Smallville, SU3 1PE. His date of birth is 11 September 1969. His wife and the other party to the proceedings is Lois Lane, of 25 Acacia Avenue, Smallville, SU2 4PER.

The proceedings relate in part to the parties' former matrimonial home at 1 Krypton Drive above. This property was funded in part by way of mortgage which Ms Lane has paid throughout the marriage. Our client is seeking a transfer of the property or an order for sale of the property within the proceedings.

We have formed the suspicion that this property may represent in part the benefit of criminal conduct by Ms Lane and thus may be criminal property. We have formed this suspicion on the basis of information given to us by Mr Kent, to the effect that throughout the time of their marriage, Ms Lane was in receipt of funds as a self-employed worker at the Daily Planet but failed to declare such income in any tax return to the authorities.

There is a hearing on 2 June 2004 at which it is hoped that the parties can resolve the financial dispute.

We are therefore making a disclosure of this matter under s 338 of the Act on behalf of ourselves, our client Mr Kent, and our counsel Mr Lex Luther. We ask for your consent under s 335 of the Act so that we may continue to represent Mr Kent in these proceedings and advance his case between now and the hearing.

Yours etc