

Bowman v Fels (Bar Council and others Intervening)

[2005] 1 WLR 3083

08/03/2005

Barristers

James Copley

Court

Court of Appeal

Facts

The claimant and the defendant were engaged in civil litigation. The claimant's solicitors had sight of documents disclosed by the defendant and came to suspect that he had wrongly included certain costs as business expenses in his accounts. Those solicitors considered it their duty under section 328 of the Proceeds of Crime Act 2002 (made pursuant to Council Directive 91/308/EEC, as amended, the purpose of which was to prevent the use of the financial system for the purpose of money laundering) to notify the National Criminal Intelligence Service ("NCIS"), and they did so, additionally making an ex parte application to a judge for an order to vacate a listing after being told by an officer of NCIS that it was unlikely that the requisite consent would be granted before the due date of trial. The judge granted the application to vacate and directed that any further application be made to him. The defendant's solicitors came to hear of the order, but not the basis of it, and they issued an application for the order to be set aside and for details of the claimant's solicitors' application. The judge who subsequently heard the application made an order discharging the order which vacated the trial date, and he found that there was no reason why the claimant's solicitors could not have disclosed both to the court and to the defendant's solicitors the reason for seeking an adjournment, or why they could not have continued to prepare the trial bundles and to take the other preparatory steps necessary for bringing the action to trial. The claimant appealed. By the time of the appeal hearing the parties had settled the underlying litigation and the issue arose whether the Court of Appeal in such circumstances had jurisdiction to entertain the appeal.

On the claimant's appeal, and on the questions whether the Court of Appeal had jurisdiction and whether legal professionals negotiating or implementing a consensual resolution of issues in a litigious context were thereby "carrying out [a] transaction" within the meaning of article 7 of Council Directive 91/308/EEC –

Held

Held, (1) that in light of the great public importance of the issues in the appeal the Court of Appeal had jurisdiction to entertain the appeal even though the parties involved in the underlying private law litigation had settled the litigation by the time of the hearing (post, paras 11–18).

Dicta of Lord Slynn of Hadley in *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450, 456, HL(E) applied.

(2) Dismissing the appeal, that section 328 of the Proceeds of Crime Act 2002 was not intended to cover or affect the ordinary conduct of litigation by legal professionals, which included any step taken by them in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment; that Parliament could not have intended that proceedings or steps taken by lawyers in order to determine or secure legal rights and remedies for their clients should involve them in “becoming concerned in an arrangement” which “facilitates ... the acquisition, retention, use or control of criminal property”, even if they suspected that the outcome of such proceedings might have such an effect; and that, in the circumstances, there was no good reason why the grounds on which the claimant had sought and obtained an adjournment of the trial date should not have been communicated to the defendant and no proper basis for any such adjournment (post, paras 83 -84 ,95 -97 , 106 ,109 -110).

Dicta of Dame Elizabeth Butler-Sloss P in *P v P (Ancillary Relief: Proceeds of Crime)* [2004] Fam 1, paras 48-51, 67 disapproved.

(3) That the consensual resolution by parties of the whole or any aspect of legal proceedings was an integral part of the conduct of ordinary civil litigation, and legal professionals negotiating or implementing a consensual resolution of issues in a litigious context were not thereby “carrying out [a] transaction” within the meaning of article 7 of Council Directive 91/308/EEC; that similar considerations applied with regard to section 328 of the 2002 Act despite the different terminology, so that it could not have been contemplated that taking such a step in the context of civil litigation would amount to “becoming concerned in an arrangement” which “facilitates ... the acquisition, retention, use or control of criminal property” within the meaning of section 328; that, rather, such activity was another ordinary feature of the conduct of civil litigation, facilitating the resolution of a legal dispute and of the parties’ legal rights and duties according to law in a manner which was a valuable alternative to the court-imposed solution of litigation to judgment (post, paras 99 -100 ,102).

Per curiam. (i) Even if section 328 is to be interpreted as including legal proceedings within its purview, it cannot be interpreted as meaning either that legal professional privilege is to be overridden or that a lawyer is to breach his duty to the court by disclosing to a third party external to the litigation documents revealed to him through the disclosure processes (post, paras 90).

(ii) The distinction between consensual steps, including a settlement, taken in an ordinary litigious context and consensual arrangements independent of litigation was inherent in both Council Directive 2001/97/EC and the 2002 Act; and the 2002 Act makes it clear that the distinction is between situations where there are existing or contemplated legal proceedings and other situations (post, para 101).

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