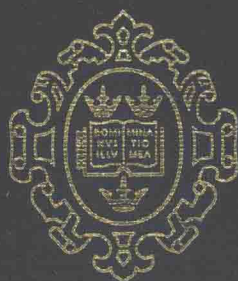

THE PROCEEDS OF CRIME

LAW AND PRACTICE OF
RESTRAINT, CONFISCATION,
AND FORFEITURE

TREVOR MILLINGTON
MARK SUTHERLAND WILLIAMS



OXFORD

THE PROCEEDS OF CRIME

The Law and Practice of Restraint,
Confiscation, and Forfeiture

by

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THE PROCEEDS OF CRIME

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FOREWORD

by the Honourable Mr Justice Kay

Crime can be extremely profitable. Examples abound of fraudsters, drug dealers, racketeers and other professional criminals living lives of luxury on the proceeds of crime. In recent years the need to convict and sentence the guilty has been supplemented by the need to separate the criminal from his ill-gotten gains. The Proceeds of Crime Act 2002 is a statute of great size and importance. It is difficult. It is complex. It is a legal minefield. Moreover, it will impose burdens on judges in Crown Courts who will be required to fit countless urgent and complicated applications of a novel kind into their crowded lists. In addition, High Court Judges will have to grapple with the new civil recovery provisions in cases where the Assets Recovery Agency seek to recover property which it alleges to be the proceeds of crime where no one has been convicted—and even where the defendant has been acquitted. All this calls for the most detailed examination by practitioners and judges. It requires the striking of a balance between the need to ensure that criminals do not prosper and the guarantee of fair treatment for defendants and third parties.

All those involved with this rapidly developing area of legal practice will benefit from this authoritative book. Trevor Millington and Mark Sutherland Williams are two acknowledged experts with great experience in the field. I welcome and pay tribute to the fruits of their labours.

The Honourable Sir Maurice Kay
The Royal Courts of Justice

July 2003

For Angela and Roberto

For Jayne

PREFACE

When the idea for a book on the proceeds of crime was first discussed over a long lunch and a couple of bottles of wine in the late summer of 2002, it seemed to be a good one. Our intention then was to put together not only a comprehensive manual on the existing Acts, which we had both lived with for several years, but also to review and include the new Proceeds of Crime Act 2002.

It was, as they say, a good idea at the time. The Proceeds of Crime Act 2002 runs to 462 sections, with 12 accompanying schedules: a total of 323 pages, a book in itself. In addition a booklet of some 130 pages entitled 'Explanatory Notes' was published with it to assist in the understanding of the new Act. And in addition to all of that, over the last few months we have seen a variety of statutory instruments published, over 25 in total, to supplement the new Act. These govern everything from the Rules of the Crown Court in relation to confiscation hearings and restraint orders, to no less than five commencement and savings orders, to statutory instruments dealing with pension provisions, the Police and Criminal Evidence Act, Crown Servants, and various codes of practice. The difficulty we were left with was what to leave out rather than what to put in. We regret, as a result, that we have only been able to focus on the law in England and Wales, leaving out, at least for this edition, confiscation law in Scotland and Northern Ireland.

Whilst no one can doubt this present Government's sincerity and determination to deal firmly with offenders who benefit financially from their crimes, the result of all of this new legislation is that the practitioner is left with something of a confused picture, and we were left with something of a mountain to climb, not least because, whilst the Proceeds of Crime Act attempts to consolidate previous legislation, it will, for the foreseeable future, run side by side with the existing Drug Trafficking Act and Criminal Justice Act. Many cases will remain therefore, as before, in the High Court, other cases will now be dealt with by the Crown Court.

The notion that Crown Court judges, prior to their normal sitting day, will be prepared to consider restraint and receivership applications is one that many judges themselves still find difficult to digest. This area of the law is extensively within the civil jurisdiction and it is therefore potentially foreign to those judges who will now deal with the majority of applications. Complaints have already been raised by certain members of the judiciary about the lack of training they have received prior to the implementation of the new Act. For many, it has consisted of no more than half a day or a days course. Many anticipate that the work

of the Crown Court judge will only have begun as a result of a restraint order made *ex parte* on a Monday morning. The risk is that by the following Thursday the case will be back in court *inter partes* to be argued. This will potentially disrupt and have further ramifications for the Crown Court list. We suspect also that the new Act will be truly tested in the courts, particularly in the light of the Human Rights Act 1998. The upshot is that with the volume of new legislation that has been created by the new Act, which replaces two fairly self-contained sections in the Drug Trafficking Act and the Criminal Justice Act, far from having simplified the law, the new Act has gone some way to complicating it. We do not intend in any way to be the prophets of doom. Far from it, we suspect and hope that the new Act will work, and will work well. One can recall that not too long ago many in the legal profession were airing similar reservations about the Human Rights Act: and as we now know that Act fitted fairly easily into modern day practice and is now accepted and accommodated by members of the Judiciary and most in criminal practice.

We trust we have fulfilled our initial objectives and that this book will serve as a useful touchstone for reference not only in relation to the new Act, which at the time of writing is yet truly to have effect, but also as a reference work for case law under the DTA and the CJA, both of which are likely to be around for some time to come. It will of course be noted that the views expressed herein are our own and are not representative of any government department or other organisation.

Trevor Millington would like to thank Mark Sutherland Williams, my most delightful and knowledgeable co-author who unhesitatingly agreed to take on the task of writing this work at a very busy time both personally and professionally, and all of Mark's colleagues at 3 Paper Buildings for their help and encouragement throughout. My particular thanks must go to members of the senior management team at HM Customs and Excise for their unfailing support, including, in particular, David Pickup, the Solicitor for Customs and Excise, David North, and Brett Welch. I must also thank Farah Sheikh for her invaluable research assistance. Above all, however, my thanks go to my dearest friends, John and Marion O'Loughlin, without whose support through the most difficult times none of this would ever have been possible, and to Angela and Roberto for their extraordinary kindness which has been a constant source of inspiration over the last year and to whom this book is dedicated with my affection, admiration, and gratitude.

Mark Sutherland Williams would like to thank: his co-author, Trevor Millington, for not only suggesting the project but also for having the confidence in him to complete the task. Trevor Millington is undoubtedly one of the country's leading authorities on asset forfeiture law, and responsible for shaping and developing many aspects of it. It has been my pleasure to work with him on this project. Further I would like to thank my Head of Chambers, Michael Parroy QC for the ride;

Preface

Michael Brompton QC, for the highs and the lows; Oliver Sells QC, for recent successes; and Christina Gorna for starting things off. I must also thank Purvi Patel of the Assets Recovery Agency for her contribution to the chapter on Civil Recovery and interim receiving orders; and all of my Clerks at 3 Paper Buildings, now too many to mention, but particularly our Chief Clerk, Charles Charlick for his guidance over the years. I would also like to thank all of my friends at the Solicitor's Office of HM Customs & Excise and the Assets Recovery Agency, including Colin Jones, Emma Wotton, Carolyne Lamptey, Justine Holmes, Piers Doggart, Charles Birikorang, Sue Pritchard, and Vinod Kalia, for their continued support, and to Terry Scarborough and Katie Hawe for many great times, they both having now taken to pastures new. Both my and Trevor's thanks go to Annabel and Meg at the Oxford University Press, for being so terrific about all of our missed deadlines. Lastly, I owe an enormous debt of gratitude to Barrie McKay, the Assistant Treasury Solicitor, for his encouragement, a very big case, and for everything that followed. Above all I would like to thank my wife for her support throughout this project which meant we lost a Christmas and many weekends together.

We both respectfully thank The Honourable Sir Maurice Kay for agreeing to pen a Foreword to this work.

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May 2003

BIOGRAPHIES

Trevor Millington

Trevor Millington is a Barrister and Senior Lawyer in the office of the Solicitor for Customs and Excise. He was responsible for setting up the Customs and Excise Asset Forfeiture Unit in 1989 and since that time has specialised exclusively in the law relating to the restraint and confiscation of the proceeds of crime. He has been involved in many of the reported cases on this increasingly complex area of law, including *Re T* (Disclosure Orders), *Hare v Commissioners of Customs and Excise* (piercing the corporate veil of companies), and *Commissioners of Customs and Excise v Hughes and another* (liability to pay costs of management receivers). In 1994 he was seconded to Gibraltar where he was responsible for drafting legislation to implement the EC Money Laundering Directive and to provide for the restraint and confiscation of the proceeds of crime. His first book, *Restraint and Confiscation Orders* was published by FT Law and Tax in 1996. He has lectured widely on the subject to audiences as diverse as Interpol, Europol, the National Criminal Intelligence Service, police and Customs officers, lawyers, and receivers. His interests include a passionate love of opera and classical music.

Mark Sutherland Williams

In 1996 Mark Sutherland Williams was instructed as junior counsel in Customs' longest running drugs investigation, Operation Stealer. Since then he has gone on to appear in some of the country's most high profile drugs prosecutions and subsequent confiscation hearings. He has been at the forefront of the law in relation to cash forfeiture cases under the Drug Trafficking Act and has recently been advising on the implementation of the cash forfeiture provisions under POCA. He regularly appears in the High Court and the Court of Appeal in specialist forfeiture, receivership, restraint and confiscation order matters. Recent cases of note include Operation Extend, Operation Eye-ful, and the enforcement proceedings of Customs' largest ever CJA confiscation case *Re T*. In 1999 he was instructed by the Treasury Solicitor's Department to draft the witness statements of Baroness Thatcher and John Major for the BSE public inquiry. In 2001 he was appointed to part time judicial office. Latterly he became the first counsel to be instructed by the Director of the ARA on an interim receiving order matter. He has also been a sometime Tutor in Public Law at the University of Exeter.

LIST OF ABBREVIATIONS

The following abbreviations are used throughout this work:

ARA	Assets Recovery Agency
CCR	County Court Rules
CCRC	Criminal Cases Review Commission
CJA 1988	Criminal Justice Act 1988
CJA 1993	Criminal Justice Act 1993
CPR	Civil Procedure Rules
CPS	Crown Prosecution Service
DTA	Drug Trafficking Act 1994
DTOA	Drug Trafficking Offences Act 1986
ECHR	European Convention on Human Rights
LSC	Legal Service Commission
MCA 1973	Matrimonial Causes Act 1973
NCIS	National Criminal Intelligence Service
PCC(S)A	Powers of Criminal Courts (Sentencing) Act 2000
POCA 1995	Proceeds of Crime Act 1995
POCA	Proceeds of Crime Act 2002
RSC	Rules of the Supreme Court

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