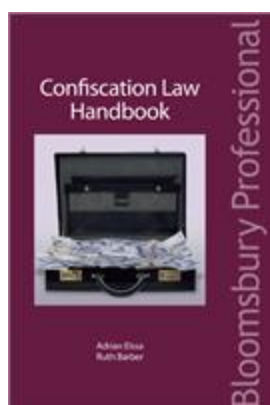


# *Confiscation law handbook*

**Adrian Eissa and Ruth Barber**

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**Book review by Sally Ramage, Editor, *The Criminal Lawyer***

## **The authors**

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## **Clarity of writing**

*Confiscation Law Handbook* reminds the reviewer of the saying: '*It does exactly what it says on the tin.*'<sup>1</sup> This first edition is destined to be updated and republished as the Proceeds of Crime Act evolves. It fills a gap in the marketplace and is sorely needed. It introduces this complex topic to solicitors, barristers and to university law schools.

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<sup>1</sup> Eric Partridge, Tom Dalzell, Terry Victor (2007) *The concise new Partridge dictionary of slang and unconventional English*, London: Routledge. See page 653.

## **Confiscation law**

Confiscation law is necessary to prohibit criminal drug trafficking, arms trafficking, organised crime, efforts by terrorists to accumulate funds for their purposes, funds from the illegal importation and exportation of endangered animal species, trading in prohibited weapons, pornography, defrauding the government of Value Added Tax (VAT) and excise duties on alcohol and tobacco. In this way, it can be said that the state has an interest in suppressing the conditions likely to favour the commission of crime by the removal of the financial instruments and capital used to commit unlawful activities. Confiscation, or asset forfeiture, therefore acts as a deterrent to crime.

### **The word ‘forfeiture’**

The word forfeiture is derived from the word felony, which in turn is derived from two ancient words- Saxon ‘fee’<sup>2</sup> (Gothic ‘faihu’; Scottish ‘feu’) and ‘ion’<sup>3</sup> and can be traced back to Saxon times. The ancient roots of confiscation laws forms the continuity to the present day criminal justice system because it is part of the sentencing process.

### **The word ‘confiscation’**

Confiscation in international law is where a State seizes property belonging to another State, or to its subjects, and appropriates it. Confiscation is also known the punishment for carrying contraband of war. Confiscation is also known as the punishment for carrying supplies to a besieged or blockaded place. In English law, the word confiscation has been used with regard to property as punishment if the property was used or intended to be used for purposes of crime, as in the Prevention of Crimes Act 1871; the Police (Property) Act 1897; the Criminal Justice Act 1972 to today’s Proceeds of Crimes Act 2002.

### **Proceedings are *in rem***

However, the English law of confiscation, the civil procedure, is totally unrelated to any criminal offences; as civil forfeiture or confiscation does not in itself create a criminal offence, nor is it concerned with the search, arrest, detention, charging prosecution or conviction of anyone. It is concerned *only* with the disgorgement of any proprietary gains. The proceedings are *in rem*, important particularly in admiralty law, where proceedings were brought against the ship, and the ship’s worth was forfeited.

The civil procedure so formulated is very smart, in that the confiscation and restraint of the proceeds of crime does not need to be proved ‘beyond all reasonable doubt’, as it must in criminal procedure. Civil actions are divided into actions *in rem* and actions *in personam*. A judgment *in rem* is a judgment pronounced on the status of some particular subject matter. In respect of proceeds of crime, proceedings *in rem* are

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<sup>2</sup> Landholding. The word ‘fee’ was applied to property to denote that it had the quality of descending to the heirs of the owner for the time being, if he did not dispose of it during his life or by his will, had he the power to do so. A ‘fee’, being of the two classes, ‘fee simple’ and ‘fee tail’, was originally a feudal benefit granted to a man and his heirs in return for services to be rendered to the grantor.

<sup>3</sup> Price.

brought for the assertion of a right of property against someone who denied or infringed that right. Thus the term *jura in rem* have come to mean rights available against the world at large as opposed to *jura in personam*<sup>4</sup> and so a judgment or decree is said to be *in rem* when it binds third parties.

Legal practice in this area remains a speciality. Note that under the Limitation Act 1980, amended by s.288 POCA, an action for civil recovery may not be commenced after the expiry of 12 years from the date on which the cause of action accrued (see pages 122-126 of *Confiscation Law Handbook*). POCA, s.288 states:

- ‘(1) After section 27 of the Limitation Act 1980 (c. 58) there is inserted:*  
*“27A Actions for recovery of property obtained through unlawful conduct etc. (1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (civil recovery of proceeds of unlawful conduct).*  
*(2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be brought after the expiration of the period of twelve years from the date on which the Director’s cause of action accrued. .*  
*(3) Proceedings under that Chapter are brought when (a) a claim form is issued, or (b) an application is made for an interim receiving order, whichever is the earlier.*  
*(4) The Director’s cause of action accrues in respect of any recoverable property: (a) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained. (b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained through unlawful conduct, which it represents, is so obtained.*  
*(5) If: (a) a person would (but for the preceding provisions of this Act) have a cause of action in respect of the conversion of a chattel, and (b) proceedings are started under that Chapter for a recovery order in respect of the chattel, section 3(2) of this Act does not prevent his asserting on an application under section 281 of that Act that the property belongs to him, or the court making a declaration in his favour under that section.*  
*(6) If the court makes such a declaration, his title to the chattel is to be treated as not having been extinguished by section 3(2) of this Act.*  
*(7) Expressions used in this section and Part 5 of that Act have the same meaning in this section as in that Part.*  
*Ⓝ(2) After section 19A of the Prescription and Limitation (Scotland) Act 1973 (c. 52) there is inserted “19B Actions for recovery of property obtained through unlawful conduct etc. (1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (civil recovery of proceeds of unlawful conduct).*  
*(2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be commenced after the expiration of the period of twelve years from the date on which the Scottish Ministers’ right of action accrued;*  
*(3) Proceedings under that Chapter are commenced when (a) the proceedings are served, or (b) an application is made for an interim administration order, whichever is the earlier; (4) The Scottish Ministers’ right of action accrues in respect of any recoverable property: (a) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained; (b) in the case of proceedings for a recovery order in respect of any other recoverable*

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<sup>4</sup> *Jura in personam* means ‘rights against a specific person’.

*property, when the property obtained through unlawful conduct which it represents is so obtained; (5) Expressions used in this section and Part 5 of that Act have the same meaning in this section as in that Part.”*

*(3) After Article 72 of the Limitation (Northern Ireland) Order 1989 (SI 1989/1339 (N.I. 11)) there is inserted: “72A Actions for recovery of property obtained through unlawful conduct etc. (1) None of the time limits fixed by Parts II and III applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (civil recovery of proceeds of unlawful conduct); (2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be brought after the expiration of the period of twelve years from the date on which the Director’s cause of action accrued; (3) Proceedings under that Chapter are brought when (a) a claim form is issued, or (b) an application is made for an interim receiving order, whichever is the earlier.”*

*(4) The Director’s cause of action accrues in respect of any recoverable property: (a) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained; (b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained through unlawful conduct which it represents is so obtained. .*

*(5) If: (a) a person would (but for a time limit fixed by this Order) have a cause of action in respect of the conversion of a chattel, and, (b) proceedings are started under that Chapter for a recovery order in respect of the chattel, Article 17(2) does not prevent his asserting on an application under section 281 of that Act that the property belongs to him, or the court making a declaration in his favour under that section.*

*(6) If the court makes such a declaration, his title to the chattel is to be treated as not having been extinguished by Article 17(2). .*

*(7) Expressions used in this Article and Part 5 of that Act have the same meaning in this Article as in that Part.’*

## **Revenue and Customs Prosecutions Office**

In 2005, there was created a Revenue and Customs Prosecutions Office in the UK This included the Enforcement Task Force, a multi-disciplinary unit comprising Customs and Crown Prosecution Service lawyers, and police and customs officers, all of whom share the responsibility of enforcing confiscation orders. To illustrate how and why the Proceeds of Crime Act operates as regards confiscation, the reviewer will relate<sup>5</sup> the following case prosecuted by the Serious Fraud Office (SFO) in the year 2001, as announced on the SFO website in September 2001.<sup>6</sup>

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### **Case study: ‘Legal Aid’ fraud**

Chapter 7 of *Confiscation Law Handbook* is devoted to caselaw; it includes a wealth of cases which illustrate the aims of confiscation; the meaning of the word ‘obtains’; benefits; value of goods and drugs; pecuniary advantage; apportionment; money laundering; companies; lifting the corporate veil. This chapter alone is sound reason

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<sup>5</sup> Date of birth: 9 April 1969. Tracie Margurite Andrews was convicted of stabbing to death, her boyfriend Lee Harvey and blaming it on a fictitious road rage incident.

<sup>6</sup> The UK’s SFO (as opposed to the New Zealand SFO at <http://www.sfo.govt.nz/>) has its offices at Elm House, 10-16 Elm Street, London, and WC1X0BJ. See the UK’s SFO website at <http://www.sfo.gov.uk>.

for the placement of this book in every lawyer's library. Every university law school library must have this book – there is no other introductory, detailed, practical book on confiscation in English law.

### **Fraud trial at Bristol Crown Court**

The reviewer introduces the reader to the case of *R v Tim Robinson and Others* [2001]<sup>7</sup> to illustrate several facets of confiscation. Tim Robinson was the first defendant in a case in which twenty six others were on trial for 'green form fraud' at Bristol Crown Court. The trial lasted for almost 12 months, and involved complex issues of disclosure, legal privilege and confidentiality. The senior partner of the solicitor's firm *Robinsons' Solicitors* was convicted. He was the solicitor best known for representing convicted murderer Tracie Andrews. Some time after the *Tracy Andrews* was tried for the murder of her boyfriend, Tim Robinson (then in his 60s) was charged, tried and convicted of criminally masterminding a multi-million pound fraud against Legal Services Commission, by fraudulently misusing the Green Form system, the investigation of which began since 1993, years before Tracie Andrews had committed murder. Tim Robinson was convicted of fraud along with 21 of his employees – they had been guilty of the submission of fraudulent Legal Aid forms. It is estimated that, in total, this law firm had claimed for millions of pounds of work that was never done. Tim Robinson was imprisoned in 2004. At Tim Robinson's trial, Bristol Crown Court heard how the long-term fraud centred on the 'Green Forms' used by solicitors' firms to claim for certain types of Legal Aid work.<sup>8</sup> In the early 1990s, *Robinsons Solicitors*, which had offices in Cheltenham, Gloucester, Bristol and Swindon (but which no longer exists) boasted that it was one of the largest specialist criminal law practices in Britain.<sup>9</sup> On investigation, police discovered that in a number of the firm's other cases, some solicitors and clerks exaggerated their bills or simply created fictitious non-existent clients, the prosecution told the court during Tim Robinson's court trial.

### **Police tipped**

A whistleblower's report triggered the investigation into this Legal Aid fraud. The exact sum of money defrauded from the Legal Aid Board by this law firm was estimated to be as much as £17 million over the years that the police investigation concentrated on. At the criminal trial, one of Tim Robinsons' former employees said that up to 90% of the 'Legal Aid Green Forms' submitted by Robinsons' Solicitors Cheltenham office were fraudulent. The prosecution counsel was Ian Glen; Queen's Counsel (QC) who told the court that one of Tim Robinson's employees had said that Tim Robinson was '*a mini-Maxwell, obsessed with power and money*', and it was noted by prosecuting counsel that Tim Robinson had been careful '*not to dirty his own hands*'. *Mr Glen said: 'Mr Robinson himself was very careful not to dirty his*

<sup>7</sup> Tim Robinson was released from prison in 2004, having served half of his seven-year prison sentence.

<sup>8</sup> The government provides funding for legal aid to help people protect their basic rights and get a fair hearing; access the court process to sort out disputes; and solve problems that contribute to social exclusion. The Legal Services Commission (LSC) administers the legal aid scheme in England and Wales. Note that the UK Ministry of Justice oversees the LSC and the Treasury sets the LSC's annual legal budget.

<sup>9</sup> The law firm worked on the defence of Tracie Andrews who had murdered her fiancé in 1997, claiming that he had been the victim of a road rage attack. He kept up a continuous pretence of this lie, even down to the detailed description of the man she said had killed her boyfriend and her solicitors broadcast a 'photo-fit' on television and pleaded for anyone who recognised this man, to come forward. Because of her fabrication, the Alvechurch police stopped and interviewed hundreds of drivers over a period of several days in the hope that another driver would remember the alleged killer and his fictitious car.

*own hands. He got others to commit the frauds with those Green Forms. It was his fee-earning clerks who did the dirty work.*<sup>10</sup>

### **Legal costs of trial over £40 million**

Police officers had seized 21 tonnes of documents in this fraud case. Tim Robinson himself was convicted along with 21 of his employees and five employees were acquitted with charges against two other employees ordered by the judge to lie on file. The investigation of this fraud began in April 1993 and with 120 police officers consumed in this fraud investigation, it cost the government many millions of pounds, not including £40 million in legal costs.

### **Tracing the assets for confiscation purposes**

Having established the fraud, the assets had to be traced and the Serious Fraud Office (SFO) traced assets belonging to Tim Robinson or his wife to a total of £1.6 million. The SFO found that Tim Robinson had drawn a sum of £3 million from his firm between the years 1991 to 1999.

### **Confiscation Orders**

The judge imposed a confiscation order on Tim Robinson of £532,275 to be paid as compensation to the Legal Aid agency (now called the Legal Services Commission). The trial judge also imposed an order for Tim Robinson to pay the sum of £500,000 towards prosecution legal costs. See also *R v Szrajber* [1994] Crim LR 543 (on page 94 of *Confiscation Law Handbook*; note that the inadequacy of the available amount is explained on page 104). Robinson was ordered to pay towards prosecution costs because it was known that the amount of monies available could sustain both orders. Note also that Pension Policies can form part of the available monies confiscated if such policies can be realised.

### **Unsuccessful appeal against conviction**

Robinson appealed against his conviction and then his sentence in October 2002, but lost both appeals. Tim Robinson's defence counsel was David Etherington QC.<sup>11</sup> Having been convicted of serious fraud, solicitor Tim Robinson completely ruined his own career, fortunes and reputation and status by abusing his position of trust, committing serious fraud in so doing.

### **A partnership firm**

Any person is legally capable of forming a partnership with any other person. Companies as well as individuals can, provided their objects clause gives them the power to do so, enter a partnership with other companies or with individuals.

### **Cessation of partnership**

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<sup>10</sup> Editor, 'Legal Aid scam boss convicted', *BBC News UK*, 29 October 2004. See <http://news.bbc.co.uk/1/hi/england/gloucestershire/3964525.stm>.

<sup>11</sup> Now at 18 Red Lion Court, London.

Most partnerships are partnerships at will. This means that no particular period is agreed upon as being the Time during which the partnership is to last. A ‘*partnership at will*’ can be dissolved by notice unless there is an agreement to the contrary. In the case of *Robinsons Solicitors*, those partners convicted of fraud could no longer hold practising certificates from the Law Society of England and Wales, and therefore the partnership *Robinsons Solicitors*<sup>12</sup> ceased to exist and cessation accounts as at that date would have been drawn up. Partners who are starting a business or who wish to use a business name should consult the regulations. If they find that their name includes a word covered by the regulations they should first write to the government department or other body which is to be consulted in relation to that word asking it whether it objects. They should then apply to the Secretary of State for approval stating that they have made such a request and enclosing a copy of any reply that they have received from the government department or other body that they have consulted. Any partnership which uses a business name other than one permitted under section 1 Business Names Act 1985, is required to state the name of each partner (together with an address for service in Great Britain) on every business letter, order for goods or services, invoice, receipt and written demand for payment of a debt (Section 4(1)(a) Business Names Act 1985). The same information must also be given by a notice in a prominent position at each place of business of the partnership (section 4(1)(b) Business Names Act 1985). The same information must be given in writing to anyone with whom the partnership has had dealings or negotiations and who asks for the information (section 4(2) Business Names Act 1985). This disclosure requirement does not apply to a partnership with more than 20 members provided that none of the partners’ names appear (other than as signatories) and provided the letter includes a statement of the address of the principal place of business and a statement that the name and addresses of the partners can be inspected there.<sup>13</sup>

### **The partnership deed or agreement**

Partners enter into the agreement on the terms that they themselves have negotiated. So they are contractually bound by those terms, as long as those terms do not expressly conflict with the provisions in the Partnership Act 1890. These terms may be enforced by the law in the same way as other contractual terms. Usually the terms are set out in the form of Articles of Partnership and any gaps in the Articles will be filled by reference to the Partnership Act 1890. These terms will be terms about the nature of the business to be transacted; the name of the firm; the capital contributions to be made by individual partners; the drawing up of the business accounts; the method of determining and sharing profits.

<sup>12</sup> It is to be noted that a partnership is entitled to choose any name it wishes. The Act permits the free use of certain names and requires approval of others. If the business of a partnership is carried on under a name, which consists of the surnames of all the partners no restrictions, apply. (Section 1 Business Names Act 1985). This is true also if the names consists of surnames together with permitted additions and nothing else. The permitted additions are the forenames or the initials of the partners, the addition of an S to a surname to signify that there is more than one partner with that same name and/or a statement that the business is being carried on in succession to the business of a former owner.

<sup>13</sup> Minor amendments due to the Companies Act 2006 affect partnerships. The Partnership Act 1890 s4 permits a partnership to have a firm name. The Companies Act 2006 Part 41 Chapter 1 applies to any person carrying on business in the UK and prohibits sensitive words and misleading names. By Chapter 2, s1202, where the firm name is other than those of the partners, the partners’ names must be on the partnership’s business letters etc, but, s1203, if there are more than twenty partners, it is sufficient to state the principal place of business and that a list of the partners may be inspected there. There is no requirement to display details on websites. These provisions replace the Business Names Act 1985

The law imposes duties on partners: these are the fiduciary duties of partners. A written agreement is not required for the formation of a partnership. This contrasts with the position of a company where the articles, which have contractual effect under section 18 Companies Act 2006 (section 14 Companies Act 1985). In practice many partnerships decide that the agreement between the partners, as to how the business is regulated, should be in the form of a written agreement. Such an agreement is often called a partnership agreement, a partnership deed or articles of partnership. When writing a partnership deed, it must be borne in mind that many of the provisions in the Partnership Act 1890 are there to regulate the relationship of the partners except to the extent that there is a contrary agreement. The nature of a partnership agreement must depend upon the circumstances.

Points to note when examining a partnership deed are (i) the parties (section 24(7) Partnership Act 1890); (ii) the nature of business (section 24 (8) Partnership Act 1890); (iii) name; and (iv) capital. Provision should be made specifying which property is to be regarded as partnership property and which is to remain the property of individual partners. The Deed should include terms dealing with the dissolution of the partnership and clauses to provide for what is to happen in case of death or retirement of partners. The deed may have terms, which deal with the partners' obligations to the firm (eg confidentiality, loyalty). Also, terms such as that the partners are to give their whole time to the business of the firm or a clause to state that partners must only take up other businesses with the approval of their partners, a clause to prevent each partner from doing business in competition with the firm during the continuance of the partnership, even if the partners are not full-time. Another good clause to have in the deed is a restrictive covenant preventing competition with the firm by a partner after he has left the firm, as long as this clause does not make unreasonable demands. Some of the duties of partners are set out in the Partnership Act 1890 (PA). Section 10 PA states that the liability of partners in regard to torts is joint and several if the wrong sued on is committed in the ordinary course of the partnership business. Section 25 PA states that no majority of partners can expel another partner, unless such power is contained in the partnership agreement. Section 28 PA states that partners must provide true accounts and give full information to the other partners in relation to all things affecting the partnership (see *Law v Law* [1905] All ER 526, CA). Section 29 PA provides that partners must account to the firm for any benefit obtained, without consent, from any transaction relating to the partnership.

### **Appeal against confiscation**

Confiscation can be appealed against under the general rules of appeal to the court of appeal. The appellant can apply for an extension of time. According to Part 2, Order 2003, POCA, the applicant must give notice of appeal and state the grounds for the application. Chapter 6, pages 60 to 74, deals with enforcement, reconsideration of orders and appeals, etc.

### **Disclosure**

Disclosure of confidential banking data based on suspicion of fraud may have had a detrimental effect on the finance industry, although no one has yet studied this issue. In the case of *Macdoel Investments Ltd and Others v Federal Republic of Brazil and*



*Others*<sup>14</sup> the Court of Appeal<sup>15</sup> lowered the standard of proof to be met before a court will make a pre-action order for disclosure against a third party. ‘Third party interests’ is such an important topic that it has had a whole chapter devoted to it in *Confiscation Law Handbook*.<sup>16</sup>

There has always been scope for the courts to infringe on a bank's duty of confidentiality to its client: the power to order pre-action disclosure against a third party necessarily means that a bank can be required to produce confidential information relating to the affairs of a client engaged in litigation at the order of the court.

In *Macdoel Investments Ltd & Others v Federal Republic of Brazil & Others*<sup>17</sup> however, the Jersey Court of Appeal appears to have dramatically lowered the standard of proof to be met before a court will make a pre-action order for disclosure against a third party. Mere suspicion that the proceeds of fraud are held in a Jersey bank account, rather than a higher standard such as a prima facie case, is now sufficient for the bank to be required to disclose confidential data. Without any obvious consideration for the effect on the finance industry, the Court of Appeal appears to have broken down the banker's door and demanded the key to the vault.

### **Third Party Pre-Action Disclosure**

The leading English case on the court's power to order pre-action disclosure against a third party is *Norwich Pharmacal Co v Customs and Excise Comrs*<sup>18</sup> where Lord Reid held that:

*‘If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.’*

The court has a discretion about whether or not it is right that an order should be made in all the circumstances of the case. To grant *Norwich Pharmacal* relief it had to be shown that: a wrong has been carried out, or at least arguably carried out, by a wrongdoer; the plaintiff intends to assert his legal rights against the wrongdoer; there is the need for an order to enable action to be brought against the wrongdoer; and the defendant or respondent is a person who was mixed up in, or facilitated in, the wrongdoing or has some relationship with the wrongdoer, and is able to provide the information necessary to enable the wrongdoer to be sued.

One of the most commonly encountered applications of the *Norwich Pharmacal* jurisdiction are what are generally called *Bankers Trust* orders, named after the Court

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<sup>14</sup> [2007] JCA069.

<sup>15</sup> Note that *MacDoel* was a case in the jurisdiction of Jersey. It can be argued that by this caselaw, the definition of ‘reasonable suspicion’ has been defined, and has disregarded the rights and interests of third party banks. In the international banking environment, clients value confidentiality, as they still do domestically, and there are many jurisdictions which will still give confidentiality to their clients. This case demonstrates a gross incursion into the privacy offered by Jersey banks and must have greatly concerned Jersey’s banking community.

<sup>16</sup> Chapter 9, ‘Third Party Interests’ (pages 123 to 127).

<sup>17</sup> *Ibid* 10.

<sup>18</sup> [1973] 2 All ER 943, [1973] 3 WLR 164.

of Appeal decision in *Bankers Trust Co v Shapira*.<sup>19</sup> On September 20, 1979, two men presented to the plaintiff bank in New York two cheques, each for half a million dollars purportedly drawn on a bank in Saudi Arabia and made payable to one of the men. The bank paid over the million dollars and on instructions from the two men credited \$600,000 and later \$108,203 to accounts of the two men at the London branch of the D bank, the third defendants. The plaintiff bank reimbursed the bank in Saudi Arabia in the sum of, one million dollars, and on May 20, 1980, issued a writ in one with statement of claim in an action to trace and recover the moneys. The appeal court granted the order sought against the bank, but said that

*‘Though the court would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the early interlocutory stages of an action where plaintiffs sought to trace funds which in equity belonged to them’.*

### **Existing Authorities on ‘third party interests’**

*Bankers Trust and Arab Monetary Fund v Hashim (No 5)* [1992] All ER 911 is a case which directly addresses the question. In *Bankers Trust*, Lord Denning considered to what standard the plaintiff must show that the monies in the accounts were the fruits of wrongdoing and in *Arab Monetary Fund* Mr Justice Hoffmann, following *Bankers Trust*, addressed the standard to which the plaintiff must demonstrate that the disclosure sought would lead to the location or preservation of the assets. In the *Bankers Trust* context the involvement of the third party, the bank, in the wrongdoing arises from the fact that monies which were the product of the wrongdoing entered the accounts. Unless the funds which entered the accounts actually came from the wrongdoing, then the third party bank against which disclosure is sought will not have had any involvement in the wrongdoing at all. Accordingly, asking whether the funds in the third party accounts or evidenced in the third party documents were from the wrongdoing is equivalent to asking whether the third party was involved in the wrongdoing.

In *Arab Monetary Fund* the court described *Bankers Trust* as an application of the *Norwich Pharmacal* principle in aid of tracing claims. Hoffmann J held that to obtain the information sought “the plaintiff must demonstrate a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim”. On the facts of that case, he found that there was no serious possibility that disclosure of the information would enable the assets to be found and preserved.

### **Civil Contempt for breach of restraint order**

The Court of Appeal ruled that a breach of restraint order (Part 2POCA) made under the ruling in *OB v SFO*<sup>20</sup> is arguably at issue if say, a defendant breaches the restraint order by spending the money in question, having been acquitted in the criminal court of a proceeds of crime charge. Assuming that the assets in question had been

<sup>19</sup> 1980] 3 All ER 353, [1980] 1 WLR 1274.

<sup>20</sup> [2012] EWCA Crim 67 (at para.43).

restrained at the Time of the criminal charge against him, and that he proceeded to spend the money after he had been acquitted in the criminal court. Apart from offences by third parties (such as banks) who allowed him to spend his money, he himself would be in civil contempt of the court.

### Issues and thoughts on the subject of ‘confiscation’

The United Kingdom (UK) has followed Ireland and has in force the Proceeds of Crimes Act 2002 which confiscates assets from someone the government suspects has obtained such assets through criminal activity. In the UK, punishment for fraud offences consists of imprisonment and also confiscation of the proceeds of fraud wherever possible.<sup>21</sup>

In England where trusts are often used to protect assets from confiscation, a discretionary trust may be made to pay the creditors when the beneficiaries become bankrupt. As the Proceeds of Crime Bill was being debated in Parliament in 2011, the accountancy industry’s views on the Bill was summed up thus:

*‘The “Proceeds of Crime Bill” proposes to make it a criminal offence for accountants not to report any suspicions or dubious transactions to the National Criminal Intelligence Service (NCIS)<sup>22</sup> as well as the Inland Revenue.<sup>23</sup> In response, the ICAEW<sup>24</sup> claims that the “government plans to crack down on money laundering could be very damaging economically and pose a serious threat to the role of the accountant”.<sup>25</sup>*

POCA is as much about restorative justice as it is about punishment, some argue. For example in a 2003 case, Lee Rosser was handed consecutive prison terms in two trials concerning conspiracies to defraud investors in a ‘malt whisky scheme’ and a ‘millennium champagne scheme’. The Serious Fraud Office traced his assets and won a confiscation judgment. The court was told that through Rosser’s fraud, the benefit from the fraud was £5 million, but because he made a large number of cash transactions and because of his expensive lifestyle, his realisable assets were few. The court nevertheless ordered him to pay £519,000. Contrary to this obvious benefit from the fraud perpetrated, was the case of *R v Olibutan*<sup>26</sup>. The facts of *Olibutan* bore no

<sup>21</sup> For example in a 2003 case, Lee Rosser was handed consecutive prison terms in two trials concerning conspiracies to defraud investors in a ‘malt whisky scheme’ and a ‘millennium champagne scheme’. The UK’s Serious Fraud Office traced his assets and won a confiscation judgement. The court was told that through Rosser’s fraud, the benefit from the fraud of £5 million, but that because he made a large number of cash transactions and his expensive lifestyle, his realisable assets were few. The court nevertheless ordered him to pay £519,000. Contrary to this obvious benefit from the fraud perpetrated, is the case of *R v Olibutan*, *The Times*, 7 November 2003, the facts of this particular case bore no evidence that the conspirator received any pecuniary advantage from the conspiracy and therefore the confiscation order was quashed.

<sup>22</sup> Since disbanded.

<sup>23</sup> Now HMRC (Her Majesty’s Revenue and Customs).

<sup>24</sup> Institute of Chartered Accountants for England and Wales.

<sup>25</sup> A quote from <http://www.accountingweb.co.uk>, accessed on 6 June 2001. Note, however, that evidence relating to the involvement of accountancy firms in money laundering is not difficult to find. In a High Court case, Lord Justice Millett pointed the finger at accountants and accountancy firms and said that ‘*Mr. Jackson and Mr. Griffin knew... of no connection or dealings between the Plaintiffs and Kinz or of any commercial reason for the Plaintiffs to make substantial payments to Kinz. They must have realised that the only function which the payee companies or Euro-Arabian performed was to act as “cut-outs” in order to conceal the true destination of the money from the Plaintiffs...to make it impossible for investigators to make any connection between the Plaintiffs and Kinz without having recourse to Lloyds Bank’s records; and their object in frequently replacing the payee company by another must have been to reduce the risk of discovery by the Plaintiffs. Mr. Jackson and Mr. Griffin are professional men. They obviously knew they were laundering money...It must have been obvious to them that their clients could not afford their activities to see the light of the day. Secrecy is the badge of fraud. They must have realised at least that their clients might be involved in a fraud on the plaintiffs.*’

<sup>26</sup> *R v Olibutan* [2003], *The Times*, Nov 7, Court of Appeal, Criminal Division.

evidence that the conspirator received any pecuniary advantage from the conspiracy. Therefore the confiscation order was quashed.

Under the Proceeds of Crime Act 2002 (POCA) a person who has committed a criminal offence benefits from his offending if he obtains property '*as a result of or in connection with*' the commission of the offence (s. 76(4))<sup>27</sup> (See caselaw *R v Waya*<sup>28</sup>, on page 80, *Confiscation Law Handbook*). In a mortgage fraud, for example, the person's benefit is the market value of the property obtained (s.76 (7)<sup>29</sup> and s.79 (2).<sup>30</sup>) POCA caters for the situation<sup>31</sup> whereby a person invests all the property he has unlawfully obtained. This topic is dealt with in pages 25 to 32 of *Confiscation Law Handbook*.) In such a situation the court calculating the benefit must compare two valuations (s. 80(2))<sup>32</sup>. The first valuation is the market value of the property at the time it was obtained (adjusted for inflation). The second valuation is the market value of '*any property which directly or indirectly represents*' the property obtained (s.80 (3)); in other words the Court must look at the market value of any investment which '*represents*' the property obtained. The defendant's benefit for the purposes of confiscation is the greater of these two valuations. This process operates so that if the value of the investment has increased, the benefit is the value of the investment at the time of the confiscation hearing. But if the value of the investment has decreased, the benefit is the value of the property when originally obtained (adjusted for inflation). This accords with common sense. A person who has invested stolen property and made a profit ought not to be allowed to reap the rewards of such an investment. Equally, a person who has obtained property ought not to escape confiscation merely because he made a bad investment.

### **'But for' valuation of property**

It is interesting to note another approach which has been rejected by the Court of Appeal, namely the 'but for' approach. Benefit is the value of property obtained '*as a result of or in connection with the commission of the offence*'. One approach to valuing benefit might be to equate the term '*as a result of*' with '*but for*'. Applying this approach suggests that the defendant obtained the property because of the mortgage funds, '*but for*' which, he could not have bought it. He therefore obtained the property '*as a result of or in connection with*' the fraud and his benefit is the value of the property. This approach suffers from three difficulties: (i) the 'but for' approach broadens the scope of '*benefit*' and ignores the narrow ambit of the original offence. In a mortgage fraud, the essence of the defendant's conduct is obtaining mortgage funds dishonestly. The property obtained '*as a result of*' the fraud is limited to the mortgage funds. In the case of *R v Mamy*<sup>33</sup> the court said:

<sup>27</sup> S.76 (4) states that: '*A person benefits from conduct if he obtains property as a result of or in connection with the conduct.*'

<sup>28</sup> [2011] 1 Crim App R (S) 4.

<sup>29</sup> POCA, s.76 (7) states that: '*If a person benefits from conduct his benefit is the value of the property obtained.*'

<sup>30</sup> POCA, s. 79(2) states (about any property held by a person), that: '*Its value is the market value of the property at that time.*'

<sup>31</sup> This is a situation present in a typical mortgage fraud.

<sup>32</sup> POCA, s.80 (2) states that: '*The value of the property at the material time is the greater of the following (a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money; (b) the value (at the material time) of the property found under subsection (3).*' Subsection 3 states that: '*the property found under this subsection is as follows. (a) If the person holds the property obtained, the property found under this subsection is that property (b) if he holds no part of the property obtained, the property found under this subsection is any property which directly or indirectly represents it in his hands; (c) if he holds part of the property obtained, the property found under this subsection is that part and any property which directly or indirectly represents the other part in his hands.*'

<sup>33</sup> [2008] AC 1028. at para. 28.

*'If (say) a defendant applies £10,000 of tainted money as a down-payment on a £250,000 house, legitimately borrowing the remainder, it cannot plausibly be said that he has obtained the house as a result of or in connection with the commission of his offence.'*

Secondly, applying the logic of 'but for' reasoning would suggest that the property obtained by the buyer was both the mortgage funds and the house: both were obtained 'as a result of' the offence. In the current example, this would mean that the defendant's benefit was not only the value of the mortgage funds (£600,000) but also the value of the house (£800,000), even though the mortgage funds were used to buy the house.

Another issue is that the 'but for' approach permits benefit to accrue indefinitely. For example, if the defendant subsequently legitimately reportages the house, each legitimately obtained mortgage should be added to the value of the criminal property, because 'but for' the original fraudulent mortgage and the purchase of the house, he would not have been in a position to remortgage. Such double counting would offend common sense and in *R v Pattison*,<sup>34</sup>, Toulson L.J. said:

*'Every school child knows that you cannot have the penny and the sweet. If your mother gives you a penny and you buy a sweet with it, your benefit is a penny's worth and not two penny's worth.'*

The third issue with the 'but for' approach is that it is contrary to the valuation provisions in POCA. Under the 'but for' approach, where criminal property has been invested, the investment is property obtained 'as a result of' the commission of the offence. The value of the benefit would simply be the value of the investment, and there would be no need for the detailed valuation provisions contained in POCA, s.80.<sup>35</sup>

## References

Crown Prosecution Service, (2010) 'Confiscation and Ancillary Orders pre-POCA: Proceeds of Crime Guidance', London: Home Office.

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Rudi Fortson, (2011) *Misuse of Drugs and Drug Trafficking Offences: Offences, Confiscation and Money Laundering*, London: Sweet & Maxwell.

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<sup>34</sup> [2007] EWCA Crim 1536 (at para. 21).

<sup>35</sup> POCA, s.80 states:

*'(1) This section applies for the purpose of deciding the value of property obtained by a person as a result of or in connection with his criminal conduct; and the material time is the time the court makes its decision.*

*(2) The value of the property at the material time is the greater of the following: - (a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money; (b) the value (at the material time) of the property found under subsection (3).*

*(3) The property found under this subsection is as follows: (a) if the person holds the property obtained, the property found under this subsection is that property; (b) if he holds no part of the property obtained, the property found under this subsection is any property, which directly or indirectly represents it in his hands. (c) if he holds part of the property obtained, the property found under this subsection is that part and any property which directly or indirectly represents the other part in his hands.*

*(4) The references in subsection (2)(a) and (b) to the value are to the value found in accordance with section 79.*