

Tool up to fight the fraudsters

One of the sharpest tools in the fraud risk management toolbox is the ability for businesses to bring private prosecutions, as **Ian Brown** and **Kate McMahon** explain



Few organisations outside the financial services sector expect to be the target of fraud, yet, at some time or another, many will be. Just as a prudent organisation develops procedures to deal with fire or other catastrophic events, so it also considers its fraud risks and lays plans to deal with any fraud that should occur. The ability to bring a private prosecution is one of the tools in the fraud risk management toolbox.

Private prosecutions look set to rise in the UK. Its courts have become an international dispute resolution centre and its legislature has extended the reach of the Crown. The Bribery Act 2010 also shows a greater acceptance of the global reach of its courts.

The court of appeal accepted in the case of *R v Sheppard & Whittle* ([2010] EWCA Crim 65) that crime has ceased to be local in origin and effect: 'Crime is now established on an international scale and the criminal law must face this new reality. Their lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.'

The court ruled that it had jurisdiction to try a defendant in a case as long as 'a substantial measure of the activities constituting the crime took place in England'.

Plain sailing

It is often a straightforward matter to undertake a private prosecution when fraud or theft occurs within an organisation since most of the evidence will be retained. For example, an employer or manager can often provide statements about suspect payments, theft, irregular arrangements or failures to comply with the organisation's accounting systems. With some simple direction from a prosecution lawyer or expert investigator, private prosecution investigations can be quick, efficient and cost-effective.

Once the evidence has been reviewed by a prosecutor, and charges decided on, a prosecution is commenced by

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'laying an information' at a magistrates' court. The 'information' provides details of the offence alleged and the relevant legislation which creates the offence.

The magistrates' court will then issue a summons, which will be served on the accused, along with the date on which they must attend court for their first appearance to face the charges. Once a defendant is within the court system, they must comply with bail and court orders or risk arrest.

Cost-neutral

Perhaps most attractively, a private prosecution will almost always be a cost-neutral process. If a private prosecution is successful, the prosecutor can ask to be awarded costs against a defendant following their conviction. If the defendant is not in a position to pay those costs or if the prosecution is not successful, the court can and should order the costs of the investigation and legal expenses to be paid out of central government funds, under section 17 of the Prosecution of Offences Act 1985.

Overall, private criminal prosecutions have been overlooked for far too long as an effective deterrent to crime.

Draw up a plan

The key considerations for an organisation when preparing a plan to deal with a fraud include:

- * early identification of a fraud taking place and the steps to take to prevent any further loss
- * understanding the sanctions available and identifying the appropriate action
- * identifying the immediate actions necessary to preserve evidence
- * undertaking investigations that comply with the relevant legislation.

A well-considered fraud response plan should sit alongside an organisation's overall fraud or crime

prevention strategy. It is important that all levels of management commit to managing and executing a zero-tolerance policy to criminal behaviour. As part of that strategy, organisations should have procedures in place to keep open all available sanctions, including the following:

- * criminal prosecution – private and public
- * civil recovery
- * disciplinary measures
- * regulatory sanctions, where appropriate.

Irrespective of whether an organisation is a large multinational conglomerate or a small family-run concern some level of planning is necessary. A plan should be prepared that will enable an organisation to undertake a criminal prosecution if required. This plan should be at the forefront of fraud response planning. The plan needs to have been thought through and should not rely simply on calling the police for assistance and giving up if the police cannot assist.

It is an unavoidable fact that police resources are increasingly stretched and fraud investigations and subsequent prosecutions are becoming rarer and less prioritised. Yet fraud is on the increase: in March 2012 the National Fraud Authority estimated

* BACKGROUNDER

The current buzz surrounding private prosecutions is curious considering the history of criminal prosecutions in the UK – in the 18th century, the prosecution of almost all criminal offences was undertaken privately. Recently, the misconception that only the Crown or government agencies can use the criminal system to prosecute people or companies has fallen away. The right to bring a private prosecution in the UK is contained in section 6(1) of the Prosecution of Offences Act 1985.

In the case of *Gouriet v Union of Post Office Workers* (1978) 3 All ER 70 [1977], Lord Wilberforce stressed the importance of the right to bring private prosecutions: 'The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right, which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences... remains a valuable constitutional safeguard against inertia or partiality on the part of authority.'

While Lord Wilberforce considered inertia or partiality likely reasons for failure to prosecute by the state, the investigation of complex fraud and its subsequent prosecution is increasingly restricted due to lack of government funding to fight fraud on the current scale, particularly as it is a crime which is often difficult and time consuming to investigate and prosecute.

Results published in July 2012 of a review carried out by the University of Portsmouth's Centre for Counter Fraud Studies revealed that an estimated 98.5% of fraud cases go unreported to the police and that only 0.4% actually result in a criminal sanction.

In times of austerity, businesses and the public often look for alternatives to traditional methods of redress which are either unavailable to them or would be prohibitively slow and costly if they undertook civil proceedings.

In many jurisdictions outside the UK, private prosecutions are being used more and more frequently to address criminality. In the US, for example, private prosecutions are often run in tandem with civil proceedings. In Brazil (where trademark offences are often prosecuted privately) and Canada, private prosecutions are frequently used, particularly for crimes which have a financial aspect.

that the annual loss to the UK economy in 2011, due to fraud, was £73bn. Even if the police do become involved it is rare that intervention is instantaneous or that fraud is discovered immediately, and as time elapses important evidence may be lost, unavailable or even destroyed.

Every organisation should have an anti-fraud policy that clearly states its commitment to investigate all allegations of fraud and to take action against those who commit fraud. Without the fear of detection and prosecution there is little to deter both organised and opportunistic fraudsters.

For smaller organisations the fraud response plan may consider the engagement of external professionals at an early stage; for other businesses some form of internal investigation may be appropriate.

However, it is also important to remember that badly conducted investigations can damage vital evidence and jeopardise the chances of any subsequent action.

Running the investigation

An organisation must be able to commence an investigation immediately a fraud is suspected or discovered. Effective and immediate action will help to stem losses and

preserve evidence.

During the first 24 hours, often referred to as the 'golden hour', it is essential that those undertaking the investigation are clear about their objectives and exactly what needs to be done to achieve them.

Important evidence can easily be compromised if unqualified or inexperienced staff attempt to conduct investigations. This is particularly important if criminal prosecution is an option that you want to consider.

The initial actions to consider include the following:

- * the preservation of digital evidence from computers, personal digital assistants, mobile phones, etc
- * the examination of other evidence such as landline phone records
- * the preservation of documentary evidence
- * early identification of witnesses and suspects
- * open source research and background data gathering.

It is also important to plan exactly who will undertake the investigation and who will supervise it. Both of these key roles should be unconnected with the business area in which the fraud took place. Both roles will also require a good knowledge of investigative best

practice, the relevant legislation and, where necessary, relevant technical expertise.

The recovery of digital evidence is a specialist area that should not be attempted without expert support. Similarly, interviewing witnesses and suspects should be undertaken only by professionally trained investigators.

Although some frauds are incredibly complicated, the vast majority are not difficult to investigate and prosecute provided the right steps are taken by the right people at the right time. Ensuring that this is the case will help to make private prosecutions and investigations a quick, efficient and cost-effective process.

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*PIRACY, CRUELTY, MURDER: DRIVERS FOR ACTION

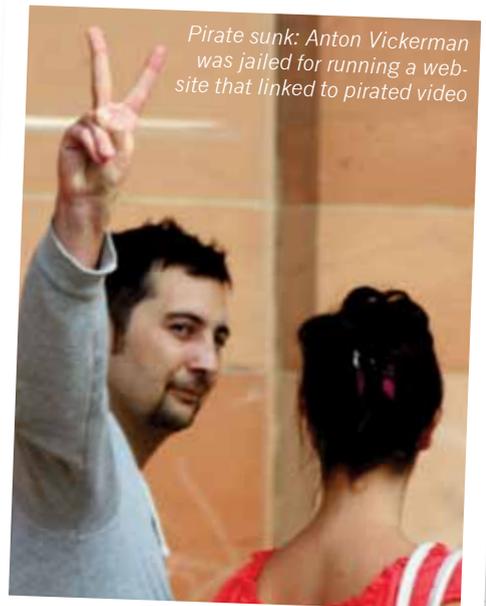
In the UK the Federation against Copyright Theft (FACT) frequently brings private prosecutions, such as the one against Anton Vickerman, who was jailed for four years for fraud in August. FACT had begun its lawsuit following the decision of the Crown Prosecution Service not to proceed.

Vickerman ran the Surfthechannel website, which linked to pirated US TV and film content, some of which he himself had uploaded to sites outside the UK. Vickerman received payments for adverts on Surfthechannel through bank accounts in Latvia. While the judge described as 'speculative' the film industry's estimates of its losses

from his activities as between £52m and £198m, he accepted that the losses ran into millions.

And in July 2011, three men were jailed for a total of 15 years following a private prosecution by Virgin Media. The three sold over 400,000 set-top boxes across the UK that gave unlawful free access to Virgin Media's cable TV channels and cost the company an estimated £144m a year.

Animal charity the RSPCA often brings private prosecutions as does the BPI (the British trade body for recorded music). But perhaps the highest-profile private prosecution ever



Pirate sunk: Anton Vickerman was jailed for running a website that linked to pirated video

brought in the UK was by Stephen Lawrence's family in 1994 against those suspected of murdering him.