

# Fraud Intelligence

For the prevention, detection and control of fraud in all its guises

## Prosecutions to the people

*Private criminal prosecution of offenders is an often overlooked instrument within a company's counter-fraud enforcement strategy, says **Kate McMahon** of Edmonds Marshall McMahon.*

Individuals and companies who fall victim to fraud often believe that their only litigation options are public prosecution by the Crown or a government agency, or else the civil route. Yet, in England and Wales, there is also a legislative right to bring a private criminal prosecution that is found in section 6 of the *Prosecution of Offences Act 1985*.

This means that a private individual or body, such as a company or charity, can bring a prosecution against an individual or company – although for some offences, such as those under the *Bribery Act 2010*, *Prevention of Corruption Act 1906*, *Customs and Excise Management Act 1979* or section 1 of the *Biological Weapons Act 1974*, permission would need to be sought from the Attorney General, Director of Public Prosecutions, Director of Revenue and Customs or the Director of the Serious Fraud Office. The legislation and standards of criminality involved in private prosecution are the same as those in a public prosecution.

The largest commercial fraud to have been prosecuted in the UK was a case brought privately by Virgin Media. Three men were jailed for a three-and-a-half year scam in which they manufactured, imported and supplied over 400,000 set-top boxes for free cable television access – at a cost to the company of around £504 million, which they recovered through the litigation.

### Why bring a private prosecution?

Fraud criminal proceedings are usually brought as a result of a successful police investigation and are prosecuted by the Crown Prosecution Service (CPS) or the Serious Fraud Office. If, however, the prosecuting authorities are unwilling to bring proceedings owing to insufficient budget or because some types of crime are not a police priority, then private prosecution can allow

a corporate or individual victim to retain control of criminal proceedings and actively pursue a conviction against the accused. Therefore, private prosecutions are often used to tackle economic or large-scale crime that may not be understood or prioritised elsewhere.

Lord Wilberforce described in *Gouriet v Union of Post Office Workers*, [1977] 3 All ER 70, how private prosecutions offer a remedy and constitutional safeguard for individuals against inertia or partiality on the part of public bodies. In addition, research carried out by the University of Portsmouth's Centre for Counter Fraud Studies suggested that an estimated 98.5% of fraud cases go unreported to the police, and of the 1.5% that are reported, only 0.4% result in a criminal sanction. These figures indicate that fraud is either misunderstood or not prioritised by law enforcement agencies, so this is where private prosecutions may come in.

Fraud prosecutions can be used in many situations – essentially, any intended false representation made by an individual or company, in order to gain an advantage, is prosecutable. A successful private prosecution can result in a criminal conviction and custodial sentence for the offender, and compensation awarded to the victim.

A private prosecution can be brought:

- where there has been any type of fraud or false misrepresentation in a business, employment or financial situation which has resulted in a loss to, or negative impact upon, a company;
- any kind of external fraud, which has, or may cause, financial loss to a business;
- loan, insurance and mortgage fraud;
- fraud when underwritten debts have been agreed based on false information;
- internal fraud committed by employees;
- any type of dishonesty, fraud or criminal behaviour committed by employees.

Advantages for the company are that prosecutions tend to be cheaper and quicker than civil litigation – in that criminal lawyers usually charge lower fees and a

criminal action generally lasts between half to three-quarters as long as civil proceedings.

They also send a strong message that the company will not tolerate wrongdoing. Prosecutions have great deterrence effect due to the powers of the criminal court – that include confiscation, the threat of a custodial sentence and a criminal history. A conviction can affect an individual's ability to be a company director and to win contracts in the EU with government agencies. In addition, the outcome of a prosecution is easy to understand and publicise. There is also no time limit, whereas a civil action must usually be brought within six years.

Criminal proceedings are effective at targeting both individuals and companies, as the outcome does not depend on a person's assets. In counterfeit investigations, this means all parts of the supply chain can be attacked without the greater monetary concerns present in civil cases. If a victim has suffered financially through the crime, a prosecution may enable compensation for this loss. Where a defendant has been convicted of a criminal offence and benefited financially from their crime, the court can be asked to make a compensation order as well as a confiscation order.

Another strategy is for a company to use both criminal and civil litigation together; the two proceedings need not even be taken against the same people. The two sets of litigation are not in conflict. For example, in criminal proceedings, there is now an obligation to reveal fully any and all defences at an early stage. In civil cases where full disclosure is required it is now considered unlikely that a defendant would be excused from defending a civil claim simply because to do so might reveal or injure his probable defence in a criminal trial.

There are efficiencies that result from this tandem approach. For example, investigation of a fraud can be used for both criminal and civil litigation. Further, it is possible, depending on how information has been obtained, to use information gained with powers in one area of investigation in another area to excellent effect and a criminal conviction can be evidence in a civil case.

## How to bring a private prosecution

### Step 1: investigate the fraud and gather evidence

Investigation may be conducted either by the police or privately. Generally, fraud victims like to get the police involved, however for crimes such as internal fraud they are not needed – as all of the evidence is usually on-site and accessible. Police do not expect to be paid, although there were criticisms of “private policing” concerning a contract Virgin Media made with the police to pay their overtime bill for its fraud inquiry.

If the material relevant to the prosecution is held by the police, it may be possible, once the case is in

court, to obtain a witness summons to secure the production of relevant material from the police.

### Step 2: assess the evidence and draft charges

The private prosecutor should consider whether the case meets the full code test in the Code for Crown Prosecutors, and draft the charges (where appropriate). In order to meet the test, there must be sufficient evidence to provide a realistic prospect of conviction and it must be in the public interest to pursue the prosecution. If the test is not met, it is likely that the CPS will take over the prosecution and discontinue it.

### Step 3: charges are laid before the court

When charges have been drafted, an ‘information’ will be laid before a magistrates’ court. The information provides details of the alleged offence and the relevant legislation that creates it.

The magistrates’ court will then decide whether to issue a summons or a warrant.

A summons, served on the accused, will detail the offence(s) to be answered, as well as the date, time and address of the court that the defendant is required to attend.

### Step 4: case is heard in court

Depending on the seriousness and type of the charge(s), the case may be tried before the magistrates’ court or sent (or committed) to the crown court for trial or sentence. The prosecutor will need to instruct an advocate with rights to represent the cause at the trial.

## Notifying the CPS

A private prosecutor is not required to notify the CPS that a private prosecution is being brought, but the CPS may be notified at any stage by the defence, a third party, the victim or the court and it may decide to intervene, either to continue or discontinue the proceedings themselves. Alternatively, once the trial has started the Attorney General may put a stop to it by issuing a *nolle prosequi* (‘do not prosecute’).

## Costs

The individual or body bringing the private prosecution must be prepared to fund the investigation and prosecution. A private prosecution is subject to the same obligations as public prosecuting authorities in that there is a duty to pursue reasonable lines of enquiry as well as obtain, retain and disclose relevant material. Legal aid is not available. Costs to management time and staff resource should also be carefully considered.

In a private prosecution, an order may be made for payment out of government funds to compensate the prosecutor, but no such order will be made if the

prosecution is instigated or continued without good cause. Criminal solicitors cannot engage in 'no win, no fee' cases. The costs are immediately repayable to the client – who can claim investigative and legal costs – and should not be unreasonable. Costs awards of some percentage or another happen in most cases that are properly brought.

### Compensation and confiscation

If a defendant is convicted, the court may be asked to make a compensation order as part of the sentence (see sections 130-134 of the *Powers of Criminal Courts (Sentencing) Act 2000*). Evidence is required to show what the loss is, which must fairly be said to result from the offence. This may include a sum by way of interest.

There is no limit to the amount of compensation that the crown court may order, though it must have regard to the offender's means. In the magistrates' court, the maximum compensation sum that may be ordered for any offence is £5,000. Costs come out of government funds and the compensation is met by the perpetrator – unless the perpetrator can pay it all.

The crown court may also make a confiscation order against a convicted defendant, to deprive them of the financial benefit they have obtained from criminal conduct. To do this, the court has to decide whether the defendant has a criminal lifestyle, or failing that, has obtained a benefit from particular criminal conduct.

It is possible to ask the crown court to make both a confiscation and compensation order. In these cases, the victim would be compensated out of the confiscation receipts. The compensation amount would be enforced as if it were a confiscation order. For example, if a criminal does not pay a confiscation order made by the court, he or she would have to serve a default term if they did not pay the amount ordered within a certain time. Even if the criminal serves time

for non-payment, the sum is still owed. Furthermore, interest accrues on this sum.

### The risks

Potential risks associated with private prosecutions include:

- The financial costs associated with bringing a private prosecution;
- The CPS may take over a private prosecution and either continue or discontinue it. Factors that are considered during the decision-making process are outlined in guidance available on the CPS website;
- As with public prosecutions, there can be a considerable time delay between the commission of the offence and the trial;
- If the prosecution fails, the individual or body bringing a private prosecution may be at risk of being sued by the defendant for malicious prosecution. However, this is very difficult to prove;
- If the prosecution fails because it is vexatious or improper, an adverse order for costs (that is, being ordered to pay the defendant's court costs) may be made against the private prosecutor.

As with public prosecutions, a private prosecution may fail for a number of reasons including the defendant being found not guilty, the court ruling that there is no case to answer (or insufficient evidence), or it may be stayed as an 'abuse of process'. According to the CPS guidance, an abuse of process is not simply if someone is found not guilty but it would be, "something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed."

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