



PRIVATE PROSECUTIONS FIGHTING BACK AGAINST CRIME

Tamlyn Edmonds and Ashley Fairbrother of Edmonds Marshall McMahon explain how private criminal prosecutions offer businesses a valuable route to obtain redress when they have been the victim of economic or financial crime.

The concept of “private prosecution” is often unfamiliar to many companies, which may be more familiar with civil litigation when choosing to protect their commercial rights. Despite its importance in ensuring justice, private prosecution is a right that is often overlooked. It is, however, becoming an increasingly popular remedy, especially for companies that have fallen victim to economic crime. It is a powerful tool in the fight against fraud, corruption and intellectual property (IP) infringement and should be a consideration for any company that has fallen victim to any form of economic crime.

This article:

- Examines the main types of economic and financial crime for which private prosecutions are most often brought.
- Discusses the evidence that is required to bring a prosecution.

- Sets out the key steps involved in bringing the prosecution
- Explains the main benefits and risks of bringing a private prosecution.

WHAT IS A PRIVATE PROSECUTION?

Put simply, a private prosecution is a criminal prosecution pursued by a private person or body and not by a statutory prosecuting authority. The right is expressly preserved by section 6(1) of the Prosecution of Offences Act 1985 (1985 Act) (section 6(1)) and is often described as being of constitutional importance. While the right to pursue a private prosecution is a remnant of legal history, it remains an important one in England and Wales, especially when set against the background of budgetary constraints on traditional law enforcement agencies that no longer have the resources, manpower or often expertise to tackle the

growing increase in certain types of crime, particularly economic crime.

Although the need for companies to pursue private prosecutions has greatly diminished since the creation of the Crown Prosecution Service (CPS) in 1985, private prosecutions have an increasingly important role to play in ensuring access to justice. The Lord Chief Justice commented in *R v Zinga* that “there is an increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions” ([2014] EWCA Crim 52).

WHAT CAN BE PROTECTED?

A private prosecution is principally about delivering justice by convicting and punishing the guilty. When a company has been the victim of a fraud or other crime, it faces

difficult decisions on what to do next. However strong people's feelings are within the company to obtain justice and retribution, these rather nebulous concepts are often sidelined to more commercial considerations. A private prosecution, however, can help organisations both to achieve justice and punish the offender, while also promoting corporate objectives, such as protecting its brand reputation and recovering stolen funds.

Most private prosecutions are brought for offences involving economic or financial crime, being primarily fraud, cyber crime and IP offences. These prosecutions are not confined simply to high-loss cases. They range from low-value frauds of a few hundred pounds up to multi-million-pound conspiracies.

Private prosecutions are often used in the types of cases discussed below.

IP crime

A brand's reputation and its brand confidence are a company's cornerstone (see *feature article "Protecting valuable brands: infringers take note"*, www.practicallaw.com/9-500-4673). Counterfeit goods take unfair advantage of the company's reputation and can be ruinous to brands. Private prosecutions brought by, or on behalf of, IP rights (IPR) owners are increasingly common. Each and every prosecution disrupts the organised sale of counterfeit items bearing the trade marks of the relevant brands. These prosecutions are usually brought following a private investigation carried out by the IPR owner or private investigators acting on behalf of the IPR owners (see *box "Apple's action to protect its trade marks"*).

There are essentially four categories of IP offences, relating to:

- Trade marks.
- Copyright.
- Patents.
- Design infringement.

Brand owners recognise that while a civil judgment may provide a remedy in a specific case, often it does very little to stem the flow of counterfeit goods or the infringement of their IPR. A private prosecution enables public justice to be carried out, and sends a strong deterrent message to those engaged

Apple's action to protect its trade marks

TM Eye Ltd is a firm of private investigators that acts, and holds power of attorney, for a number of the world's leading brands and specialises in carrying out proactive investigations into the sale and distribution of counterfeit goods.

On behalf of Apple Inc, TM Eye carried out three test purchases from Edge Distributions Limited's website of Apple electronic products. These purchases were evidenced using screen shots and, on one occasion, video recorded. A senior investigator at Apple, trained to examine products, examined the goods and confirmed that Edge Distributions was not authorised to use any Apple trade marks and was not an Apple authorised seller, and that the goods were counterfeit.

TM Eye commenced a private prosecution against Edge Distributions and a director on charges of six counts of selling goods with a sign, or the packaging of which bore a sign, identical to or likely to be mistaken for a registered trade mark contrary to section 92(1)(b) of the Trade Marks Act 1994 (*TM Eye v Edge Distributions Ltd, Osei (2018)*). Both Edge Distributions and the director were convicted of the offences and sentenced to fines, 50 hours of unpaid work in the case of the director and ordered to pay a contribution towards the prosecution costs.

in the sale of illicit goods that this particular brand will not tolerate it and will take action.

The court has the power to:

- Pass custodial sentences of up to ten years for some IP offences.
- Make confiscation or compensation orders, or both, under the Proceeds of Crime Act 2002 (POCA) (see "*Compensation and restitution*" below).
- Make other ancillary orders, such as, disqualifying directors, destroying goods and taking away vehicles.

A prosecution helps to proactively protect the company brand while the ancillary orders assist in disrupting, and eventually dismantling, the supply chains of criminal gangs, and removing counterfeit goods from the market.

Corporate fraud

Companies may sometimes be the victim of a fraud from employees, who are frequently senior and long-standing. In many cases, those employees will have been colleagues, friends or even family members of legitimate hard-working members of the company. In situations such as these, emotions run high. Those dishonest employees may have hidden or spent large amounts of company funds. A private prosecution enables the company, the shareholders and the directors to deliver justice for the company and, more

importantly, its staff, thereby maintaining trust, confidence and morale.

More significantly, the company's financial position may have been severely affected by the fraud, so the recovery of stolen funds will usually ultimately be the company's main objective. This is a legitimate consideration for any entity that has been the victim of a fraud and for which a private prosecution may ultimately assist. In those cases, where the suspected fraudsters do not have any identifiable funds available to satisfy any judgment or any costs order, there is little point in pursuing civil proceedings unless the company wishes to establish a point of principle for future cases. A civil judgment would, in essence, provide a hollow outcome.

In contrast, a private prosecution, in these circumstances, does not; it enables the victim company to obtain criminal public justice which gives confidence to its staff, shareholders and clients, punishes the offender, and may assist in any dealings with a regulator by demonstrating that action is being taken. The ability of a private prosecutor to recover its reasonable legal costs from central, state funds at the conclusion of the case also means that the organisation is not throwing good money after bad (see "*Costs*" below).

The desire of a private prosecutor to achieve justice cannot be underestimated and can be discerned in the costs ruling in *Fuseon Limited v Senior Courts Costs Office* where

the court held that the victim company's director had done everything that could reasonably be expected of a person in his position to engage the state to prosecute but his endeavours had failed, which ultimately led to the private prosecution ([2019] EWHC 126 (Admin)).

Cyber crime

Cyber crime takes a variety of different forms, from cyber fraud and cyber stalking, to online harassment and creating fake profiles to inflict harm on individuals and companies (see feature article "Cyber security: top ten tips for businesses", www.practicallaw.com/3-621-9152). This is a particularly heinous and pernicious type of crime conducted by very determined individuals. In the case of cyber crime, often very little help will be obtained from the state. Where the individual can be identified, a private prosecution can provide a sufficiently robust way of dealing with the offender, while also going some way to rectifying the damage done by spreading malicious information about the victim company, since a criminal verdict provides an outcome that the public can understand; that is, a verdict of guilty or not guilty.

Charity fraud

One type of fraud that charities endure is fundraiser fraud, where fundraisers fail to pay charitable donations to a legitimate charity that they were purportedly raising the money for (see box "Macmillan's action to recover stolen funds"). Another type of fraud is legacy fraud, in which executors of a will fail to pay to the charity the funds that have been left in a will.

In the case of fundraiser fraud, this can result in a lasting backlash because those responsible have manipulated the emotions and generosity of donors in order to elicit a donation, leading to anger and disillusionment if it is revealed that the charity and philanthropic promises were invalid. Disillusionment and suspicion caused by fraudulent charitable solicitation or misappropriation of funds has the additional effect of tainting the fundraising appeals of legitimate fundraisers, which suffer by association with those who defraud donors. While the sums of money involved are not usually huge, this is a serious offence, since the offenders breach the considerable trust placed in them by both the charity and those who donated; both expect those monies to be paid to help the good charitable causes that the charity provides.

Macmillan's action to recover stolen funds

A group of individuals who frequented their local pub held a charitable event raising £1,500 for Macmillan Cancer Support. Those donations were given to the pub manager, T, who was entrusted with the safekeeping and banking of those funds. She informed others that she had banked the money. However, no money was ever received by Macmillan. A concerned member of the public raised suspicions about T's conduct with Macmillan, which then investigated.

T failed to respond to the Macmillan fraud investigator's enquiries. After proceedings were commenced, her defence was that someone had stolen the money from her. She was convicted by a jury following trial (*Macmillan Cancer Support v Toogood*). She was sentenced to 18 months' imprisonment for the theft and four months for the fraud, to run concurrently, suspended for two years. She was also ordered to carry out 100 hours' unpaid work and to pay £1,500 in compensation.

The Crown Court said that the message has to go out to people who are involved in safeguarding charity money that these offences are serious and that the consequences are serious. T had breached the trust placed in her by those who had given their time and money to raise money for good causes and entrusted the money to her.

The objective of these prosecutions was summarised after the case by Macmillan's chief financial officer, Steve Clayton, who said that it is vital that the public have confidence that their donations are going to help people living with cancer. He added that, while Macmillan has robust systems in place to prevent wrongdoing and fraud is thankfully rare, it takes any abuse of its supporters' trust extremely seriously and will continue to take action where necessary.

Private prosecutions enable charities to achieve justice, recover money in individual cases that can be used towards legitimate charitable goals, while also protecting the charities' wider fundraising objectives by giving confidence to those who wish to donate that they can do so knowing that the charity will not tolerate abuse of its brand by fraudsters. Those who later discover that charitable donations may not have been paid to the charity develop strong sentiment to see justice delivered. If a charity does not take action, it may see that strong sentiment directed against it, resulting in a backlash from the community.

EVIDENCE

The evidence that is required to bring a prosecution will depend on the offence that is being prosecuted. However, general principles apply across all criminal cases, including private prosecutions, which need to be borne in mind.

In any criminal prosecution, the burden of proof rests with the prosecutor, which must prove the constituent elements of any alleged offence using admissible evidence. This evidence can be formed of direct evidence

of criminal activity or circumstantial evidence from which proper inferences might be drawn.

While the right to bring a private prosecution is preserved by section 6(1), the Director of Public Prosecutions (DPP) has the power under section 6(2) of the 1985 Act to take over any prosecution (see "DPP takeover" below). Any defendant in a private prosecution can request that the DPP take over the prosecution by making a request to the CPS. If the CPS takes over a private prosecution it can continue with the prosecution itself, however, it also has the power to stop it for several reasons, including for lack of sufficient evidence.

To limit the risk of the CPS stopping a prosecution, when advising on the decision to prosecute, it is important that the private prosecutor takes into account the guidelines in the Code for Crown Prosecutors which sets out the circumstances in which public prosecutions should be brought (www.cps.gov.uk/publication/code-crown-prosecutors). The CPS considers that a prosecution should only be brought where:

- There is sufficient evidence to provide a realistic prospect of conviction.

- It is in the public interest to do so.

These two stages make up what is called the Full Code Test. Before commencing a private prosecution, while not a formal legal requirement, it is useful to ensure that both stages of the Full Code Test are satisfied. The CPS's position is that it will take over and stop any private prosecution where it reviews the case and finds that either stage of the Full Code Test is not met (see "DPP takeover" below).

Fraud by false representation

In the case of a fraud by false representation or a fraud by abuse of position, essentially the prosecution must prove that the suspect made false representations dishonestly, or abused their position dishonestly, with the intention of making a gain for themselves or causing a loss to another (*Fraud Act 2006*).

Usually, evidence to prove the fraud will arise from oral accounts of witnesses who observed events. In a straightforward charity fundraising case, the only evidence necessary to bring a private prosecution may be a witness statement from those who attended the charitable fundraising event, and a statement from the charity in question stating that it did not receive the money. Depending on the facts, this may be sufficient evidence on which a magistrates' court or jury could properly convict the defendant. In other fraud cases, evidence may be necessary from:

- Private detectives, who have carried out surveillance to try to identify assets that may have been stolen or acquired with ill-gotten gains.
- Forensic accountants, who have carried out examinations of company accounts and accounting software and to review bank statements.
- Experts, who have forensically examined handheld devices, email servers or laptops, to unravel the fraud and identify important evidence linking the offender to the crime.

BRINGING THE PROSECUTION

Private prosecutions operate in exactly the same way as a public prosecution. The same duties and obligations rest on the prosecutor as they do in a public prosecution. While there is no obligation on private prosecutors to comply with the Regulation of Investigatory

Powers Act 2000, which regulates the powers of public bodies to carry out surveillance and investigation and covers the interception of communications, a private prosecution can later be stopped if a prosecutor has conducted an investigation that has unnecessarily or disproportionately interfered with individuals' rights.

A fraud case will have to go through several distinct phases to get to a private prosecution.

Obtaining evidence

Often a private prosecutor will already possess the evidence required in order to start a private prosecution, for example, material held on company servers or mobile devices, and it will just be a case of putting that evidence into an admissible form. However, in some cases, parts of the evidence may still be required before proceedings can commence. A private prosecutor does not have the powers of the police available to them, therefore they must think creatively, within the confines of the law, in order to obtain the admissible evidence necessary to institute criminal proceedings.

As much evidence as possible should be obtained before commencing proceedings, as the risk of not doing so could lead to the DPP taking over the prosecution and discontinuing it at an early stage. In the case of a corporate victim, it may have already conducted an internal or external investigation that has uncovered the extent of the offending, or it may have received intelligence in relation to offending that requires further investigation either by the company or external investigators (see feature article "Corporate investigations: key issues for boards and in-house lawyers", www.practicallaw.com/0-619-0485).

At that early stage in the investigation, solicitors are often engaged to assist and consider either referring the case to the police early on and supporting them or commencing a private prosecution. While organisations would habitually refer cases to the police, examples such as the action that Hunter Premium Worldwide Sourcing Limited took against its former financial controller demonstrate why they now prosecute themselves (see box "Prosecution of a dishonest employee").

The investigation may require further evidence to be gathered. This may involve interviewing employees or third parties. Witness statements will usually need to

be drafted. In some cases, this can be one statement from the investigator or more statements may be required from first-hand witnesses. Social media is a very effective investigative tool and will often provide important evidence. In other cases, it may be necessary to carry out surveillance and send letters to organisations asking that they share information relevant to the criminal investigation under the Data Protection Act 2018. In some cases, it may be necessary to obtain disclosure orders from the court to compel the production of that evidence or obtain evidence from other jurisdictions.

Assessing the evidence

The file of available evidence is then submitted to a lawyer specialising in private prosecutions, who will advise whether there is sufficient evidence already or whether further evidence needs to be obtained.

That lawyer will then apply the Full Code Test to assess whether there is sufficient evidence to provide a realistic prospect of conviction and it is in the public interest to prosecute (see "Evidence" above).

Once all evidence has been obtained, the lawyer will then prepare the case by writing a full advice on evidence and a case summary, which will be submitted to court.

Commencing the prosecution

The commencement of a private prosecution starts with the laying of an information at the magistrates' court (*Rule 7.2, Criminal Procedure Rules 2020*). An information is essentially an allegation of an offence that describes the offence and includes the relevant legislation and particulars of the offending in order to make it clear what the prosecutor is alleging against the defendant (*Rule 7.3, Criminal Procedure Rules 2020*).

Summons

Once an information is laid at the magistrates' court, the court will consider whether to issue a summons or arrest warrant. Typically a summons is applied for, although an arrest warrant can be issued where the defendant's address is not known or they may be a bail risk.

Magistrates will apply the test for obtaining a summons; that is, whether:

- The offence is known to law.
- The essential ingredients of the offence are present.

- The offence alleged is not time barred.
- The court has jurisdiction.
- The informant has the necessary authority to prosecute (*R v West London Justices, ex parte Klahn* [1979] 2 All ER 227).

The court will also consider whether the allegation is vexatious.

A duty of candour applies when applying for a summons, more commonly referred to as a duty of full and frank disclosure. Essentially, the prosecutor must: not mislead the court in any way; and draw the court's attention to any material that may be adverse to the private prosecutor and to any other proceedings relating to the same matter or that may be relevant to the court's decision, such as parallel civil proceedings. The summons is then served on the defendant.

The trial

Typically, the first hearing date is within a few weeks of the application. The case then proceeds in exactly the same way as a state prosecution. If convicted, the defendant is sentenced in the same way as if it were a public prosecution. If a victim has suffered loss, they may ask the court to make a compensation order to compensate them for their loss (see "Compensation and restitution" below).

KEY BENEFITS

Companies may experience a number of benefits associated with taking the private prosecution route.

Desire for justice

Many companies have a genuine desire to see justice achieved when they have fallen victim to crime. This is particularly so where the police or other law enforcement agencies have been unwilling or unable to investigate a complaint but there is sufficient evidence which can and should be properly placed before a criminal court to see that those guilty of criminal offences are punished.

Deterrence

Private prosecutions brought by companies can be important in deterring others from committing criminal offences against that particular company. The threat of criminal sanctions, such as imprisonment and financial penalties, coupled with the effect

of a criminal conviction on individuals cannot be underestimated.

Many companies often use private prosecutions to protect their IPR from those selling counterfeit goods, such as in *Zinga* in which Virgin Media brought a prosecution against an individual who sold set-top boxes that allowed users to access a pay TV service for free.

Private prosecutions are also regularly brought by insurers, including Direct Line, Allianz and Axa, against individuals who have made false insurance claims, in order to deter others from doing so (see box "An insurer's firm stand against fraud"). Other examples include *R (Direct Line) v Malik* (2021), *R (Allianz Insurance) v Stephenson* (2020) and *R (Axa) v Havert* (2015).

In addition, certain charities, such as Macmillan Cancer Support, regularly bring private prosecutions against those who commit fraud against it (see box "Macmillan's action to recover stolen funds").

Publicity

A private prosecution can be an important way of drawing attention to an issue. The media will often report prosecution results and the public will easily understand what the results mean. This can draw attention to issues and work hand-in-hand with deterrence to prevent certain types of persistent criminality. It can be helpful for companies to consider a PR strategy when deciding to prosecute privately as there may well be sensitivities around publicising the particular criminal conduct involved.

Compensation and restitution

Where a company has suffered financial loss as a result of the criminality, and where a defendant has been convicted for the offence, the criminal courts have the power to make a compensation order to compensate the victim for the loss suffered, dependent on the means of the defendant (sections 130-133, *Powers of Criminal Courts (Sentencing) Act 2000*). It should be noted, however, that the court is unlikely to embark on any detailed analysis of causation for damages.

Zinga confirmed that a private prosecutor is also entitled to pursue confiscation proceedings against a convicted defendant under POCA. This makes confiscation an essential tool in the private prosecutor's toolkit to deprive the defendant of the proceeds of their criminal conduct.

The powers available under POCA are extremely valuable in the fight against economic crime. Once criminal proceedings have commenced and where there is a risk of dissipation of assets, a private prosecutor can apply for a restraint order, which has the effect of freezing property anywhere in the world that may be liable to confiscation following conviction and the making of a confiscation order. A restraint order can apply not only against a defendant, but also against any other person who may be holding realisable assets; for example, any assets held jointly with the defendant or the recipient of a tainted gift (section 77, POCA).

Where a defendant has been convicted and has financially benefitted from the crime, a private prosecutor can ask the court to proceed to confiscation. This process allows the court to undertake a detailed analysis of how a defendant has benefitted from crime and whether they have what POCA terms a "criminal lifestyle" (section 75, POCA).

In certain circumstances, the court can make assumptions that money or property held by a defendant has come from criminal conduct, unless the contrary is proved. These draconian measures allow the court to confiscate the proceeds of crime, which will not necessarily be limited to the proceeds of the particular offence for which the defendant has been convicted.

The court can also order compensation to be paid to the victim from the confiscated proceeds of crime. A failure to pay an amount due under a confiscation order will lead to a sentence of imprisonment being imposed in default. The court must set a default sentence to be served in the event that the defendant does not pay the confiscation order within the time allowed for payment. The mandatory default sentences are set out in section 52(2A) of POCA. For example, any benefit over £1 million will attract a default sentence of up to 14 years' imprisonment for failure to pay. These measures also work hand-in-hand with deterrence as would-be criminals fear losing their assets or having to serve lengthy prison sentences in default.

Civil remedies inadequate

Private prosecutions can often be quicker and more cost effective than civil proceedings. In certain circumstances, it is possible to bring both criminal and civil proceedings in tandem.

In certain cases, the suspect may have spent the proceeds of their crime and so there are no assets to satisfy any potential damages awarded in the civil courts. In these instances, where the behaviour can be deemed to be both criminal in conduct and form the basis of a civil claim, it may be more effective for companies to bring criminal proceedings by way of a private prosecution rather than incur the costs of a civil action with no chance of recompense at the conclusion.

Costs

One of the most important aspects to private prosecutions concerns costs. In any proceedings regarding an indictable offence, the court may order the payment out of central funds, from the Ministry of Justice budget, of the amount that the court considers reasonably sufficient to compensate a private prosecutor for any expenses properly incurred in the proceedings (*section 17, 1985 Act*). This includes both legal and investigative costs and any expert fees that were necessary for the prosecution. The policy rationale for this provision is that the private prosecutor is fulfilling what essentially should be a state function, therefore it should be recompensed for the costs incurred in bringing the proceedings and should not be out of pocket for pursuing justice.

Where a court makes an order for costs but is of the opinion that there are circumstances that make it inappropriate for the prosecution to recover the full amount, such as the conduct of the private prosecutor, the court will assess what amount would be just and reasonable.

An order for costs should be made unless there is good reason for not doing so; for example, where proceedings have been instituted or continued without good cause, or there has been misconduct on behalf of the prosecutor.

It is important to note that the court can make an order for costs out of central funds irrespective of the result, so it does not matter if the defendant is convicted or acquitted; the private prosecutor can still be compensated for the costs of bringing the private prosecution providing that the prosecution was properly brought and properly conducted.

An order for costs can also be made against a convicted defendant although an order is not likely to be made where they do not have the means to pay (*section 18, 1985 Act*).

Prosecution of a dishonest employee

Between 2003 and 2013, Gerard Lawless, the financial controller of a group of companies based in Hertfordshire which included Hunter Premium Worldwide Sourcing Limited (Hunter), stole in excess of £1.5 million from the group to fund a lavish lifestyle for himself and his family, causing a substantial loss to the group.

Mr Lawless was initially hired in 1997 as an accountant which led to a 15-year business and personal relationship based on trust and friendship with the owner of Hunter.

Mr Lawless misappropriated monies from the group by transferring money to his and his wife's personal accounts, cashing company cheques to his personal account and using the company credit card for personal spending. Expenditure on the company credit card included purchasing golf trips abroad, expensive champagne and extravagant holidays for his family and friends. The extent of Mr Lawless's spending contributed to one of the companies entering into voluntary liquidation in 2013.

The fraud was initially discovered when Mr Lawless's company credit card statement was sent to the company's office in Harpenden which came to the attention of the directors. Following the discovery, Mr Lawless' employment was terminated.

In 2016, Hunter reported to the police that it had been defrauded by its financial controller and provided the evidence to support those allegations. After reviewing the material, the police advised Hunter that the issue was a civil one and not a criminal one and it should be pursued in the civil courts. Not satisfied with that response and wanting to ensure that justice was served, Hunter instead brought a private prosecution in the criminal courts against the individual (*see "Desire for justice" in the main text*) (*R (Hunter Premium Worldwide Sourcing Limited) v Gerard Lawless*).

The Crown Court described the scale of dishonesty displayed by Mr Lawless as "staggering in every aspect". Mr Lawless was unanimously found guilty of fraud by abuse of position contrary to sections 1 and 4 of the Fraud Act 2006 and theft contrary to section 1 of the Theft Act 1968. He received a concurrent sentence on both counts of seven and a half years' and five years' imprisonment and was disqualified as a director for ten years.

Confiscation proceedings followed, with Mr Lawless being subject to a confiscation order with a default sentence of two and a half years (*see "Compensation and restitution" in the main text*).

However, there is no obligation on the private prosecutor to apply for costs against the defendant as opposed to from central funds.

Greater control

When a matter is reported to the police and prosecuted by a public authority, victim companies can often feel removed from this process. Complaints levied at the CPS by victims often involve the failure to communicate and the way in which cases are handled, particularly in times of austerity. A private prosecution necessarily allows greater control over the process.

In addition, a private prosecutor will have greater resources to deploy in respect of the investigation; for example, resources to ensure

the prompt imaging and analysis of company servers, imaging of mobile phone data and the instruction of forensic accountants. This can mean that the case is better prepared from an early stage, which may result in an early guilty plea. Furthermore, a private prosecution can be quicker or more focused, or both, than a public prosecution.

KEY RISKS

Before starting down the route of a private prosecution, businesses must consider some key risks.

DPP takeover

The DPP has the right to take over any private prosecution and either continue the case or,

if it forms the view that the Code for Crown Prosecutors test is not met, discontinue the proceedings (sections 6(2), 23 and 23A, 1985 Act).

The DPP will take over and continue with the case if the papers clearly show that:

- Both parts of the Full Code Test are met.
- There is a particular need for the CPS to take over the prosecution. The list of reasons is not exhaustive but could include, for example, the fact that the offence is serious or the prosecution requires the disclosure of highly sensitive material.

If, after having reviewed the case papers, the CPS reaches the view that either the sufficient evidence stage or the public interest stage of the Full Code Test is not met, it will take over the private prosecution and stop it. The DPP may also take over the private prosecution and stop it where the prosecution is likely to damage the interests of justice; for example, where the prosecution interferes with the investigation or prosecution of another criminal case.

Where a private prosecution is taken over and discontinued by or on behalf of the DPP, the business can request that the decision be reviewed under the CPS Victim's Right to Review Scheme (the scheme) in the first instance (www.cps.gov.uk/legal-guidance/victims-right-review-scheme). Where any decision under the scheme can be shown to be irrational, among other potential grounds, it can be the subject of challenge by way of judicial review.

Disclosure

Private prosecutors must comply with the disclosure principles under the Criminal Procedure and Investigations Act 1996 (1996 Act). References to the prosecutor in the 1996 Act are to any person acting as a prosecutor, whether an individual or body (section 2(3)).

A private prosecutor therefore has a duty to retain and record all relevant material that does not form part of the prosecution evidence in the case. This may include material held on company servers, mobile phone downloads, minutes of meetings, emails and material held by third parties.

Once that material is recorded, two tests must then be applied; that is, whether any of the material either:

An insurer's firm stand against fraud

DAS, the victim company and private prosecutor, is a large insurance company. From 2000, the defendants A, K and J conspired together to defraud DAS. The fraud ran until its detection in 2014.

As part of its motor insurance business, DAS needed to obtain medical reports. The defendants set up a company, MRL, to facilitate the provision of these reports and procured DAS to contract with MRL to supply them. MRL was portrayed as an arms-length business in which the defendants had no personal interest.

A was the CEO of DAS for much of the offending period. K was a senior employee at DAS, rising to Head of Claims over the first two years of the fraud. Both A and K were directors of various DAS group companies over the indictment period. K resigned in December 2004 but continued to be involved in the fraud thereafter.

J married A in 2001. She worked at DAS until 1999 when she left to work at MRL which she did throughout the duration of the conspiracy. She was responsible for the day-to-day management of MRL. However, at the outset, DAS was told that she was only the office manager. Even this declared interest required DAS board approval and was permitted only after A made representations that she was simply an employee of the company. Some years after she divorced A in 2005, her ostensible status at MRL changed.

The defendants used the benefit of their knowledge and power as senior DAS employees to ensure that MRL received favourable treatment in all contract negotiations and business dealings with DAS, to their own personal advantage and to DAS's significant detriment. A used his position to conceal what was afoot and to thwart investigations into the same. Each defendant's interest in MRL changed over the conspiracy but their ownership and control of, and benefit from, MRL was concealed throughout.

The court found that over the 14-year course of their offending, the defendants received many millions of pounds in fraudulently obtained funds and that DAS suffered even greater losses (*R (DAS UK Holdings Limited) v Asplin, Kearns, Jones*). Following the conviction of the defendants, resulting in combined sentences of 14 years' imprisonment in relation to the criminal offences, DAS conducted confiscation proceedings and successfully obtained compensation and confiscation orders of more than £7 million.

- Undermines the prosecution case.
- Assists the defence case.

If the material satisfies either of these tests, it must be given to the defence. These provisions seek to ensure fairness in the proceedings.

It is extremely important that disclosure obligations and the gathering of unused material are considered at an early stage. If disclosure obligations are not properly complied with, the risk of the prosecution failing is high, as the proceedings are likely to be deemed an abuse of the court process.

Malicious prosecution

If a private prosecution is brought where it is later alleged by the defendant that it should not have been, for example, if the

evidence was fabricated or the prosecution was brought with malice, then the defendant may institute a civil claim against the private prosecutor for malicious prosecution. While claims for malicious prosecution are possible, in reality they are notoriously difficult to prove. The claimant would need to prove that the prosecution was unreasonable, with no reasonable cause to commence the prosecution and that the private prosecutor had acted with malice; that is, from a motive other than a legitimate desire to bring the person to justice (*Moulton v Chief Constable of West Midlands [2010] EWCA Civ 524*).

Motive

Defendants in private prosecution cases will often argue that the case should be stayed as an abuse of process on the basis that the private prosecutor has an oblique or ulterior

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motive in bringing the prosecution. The courts have, however, considered whether the motives of a private prosecutor can taint or otherwise affect their ability to pursue a private prosecution. It has been acknowledged that it is inevitable that many private prosecutions will be brought with mixed motives (*Dacre v City of Westminster Magistrates Court* [2008] EWHC 1667). However, this does not mean that a prosecution has been improperly brought. In 1993, a private prosecution was brought arising from the collision between a dredger and a pleasure boat, the Marchioness, on the River Thames in which 51 people died (*R v Bow Street Stipendiary Magistrates, ex*

parte South Coast Shipping Co Ltd [1993] QB 645). Mr Glogg, the husband of one of the victims, sought a public inquiry and when this failed, he commenced a private prosecution for manslaughter against the owners of the dredger. It was alleged that Mr Glogg's motives were improper and so the proceedings were an abuse of the process.

The court found that the fact that a public inquiry had been ruled out did not mean that Mr Glogg's motive in instituting the prosecution should be regarded as improper. It said that if there is evidence that a defendant has been guilty of an offence,

then a desire to see him prosecuted and, if found guilty, punished is not an improper motive, especially where the prosecutor is one of the bereaved. In the court's view, even if motives are mixed, the courts should be slow to halt a prosecution unless the conduct of the prosecution is truly oppressive.

The issue of the motives of a private prosecutor were also considered by the Court of Appeal in a recent private prosecution brought by a company against its former chief executive and others for fraud, where the court emphasised that mixed motives do not of themselves necessarily vitiate the prosecution (*D Limited v A and others* [2017] EWCA Crim 1172).

Where there is evidence that demonstrates that an individual or entity is guilty of a criminal offence, the courts are unlikely to interfere with a private prosecution.

Costs order

In any prosecution, where the court considers that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court can make an order as to the payment of those costs (*section 19(1), 1985 Act*).

The deployment of this power is, however, used sparingly as it is a punitive section and not designed to compensate a winning party to criminal proceedings. There are alternative provisions for the recovery of the acquitted defendant's costs.

An unnecessary or improper act or omission can be considered as an act or omission that would not have occurred if the party concerned had conducted their case properly or that could otherwise have been properly avoided. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution if, in all the circumstances, no reasonable prosecutor could have come to that decision.

Tamlyn Edmonds is a partner, and Ashley Fairbrother is a senior associate, at Edmonds Marshall McMahon.
