

Private Prosecutions: A Potential Anticorruption Tool in English Law

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This paper is the fourth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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I. What is a private prosecution?

The concept of “private prosecution” is unfamiliar to many. It is, put simply, a criminal prosecution pursued by a private person or body and not by a statutory prosecuting authority. The right to pursue a private prosecution is a remnant of legal history, but it remains an important one in England & Wales, the jurisdiction discussed here.

In the majority of jurisdictions around the world, the criminal justice system is seen to be a function of the state, which investigates and prosecutes alleged offenders on behalf of the public and for the benefit of the public. Historically speaking, this is a relatively recent development in England & Wales and in all jurisdictions based upon the English legal system (such as the United States of America).

From the 16th century up to the 19th century crime was seen as a private matter between the victim and/or their family and the accused who, if they wanted to secure justice, would commence a private prosecution. A system of unpaid constables existed whose role it was to keep the peace and to bring anyone accused of a felony before the courts, but they had no duty to investigate crimes or to prosecute them. A system of “thief takers” developed, who obtained public rewards for capturing those who committed certain offences, such as Highwaymen. This private system was rife with false allegations for reward and denied many victims access to justice through a lack of means.

Prior to 1829 there was no organised state police force in England to investigate those responsible for committing crime. Only in instances where the crime was committed against the state would it be involved in the prosecution (such as treason). Things began to change in the 19th Century, with the introduction of an organised paid police force in 1829, which began to bear the burden of prosecuting individuals on behalf of the public, albeit in the capacity as private citizens. In 1879 the office of the Director of Public Prosecutions (“DPP”) was created, establishing a public prosecutor whose role it was to prosecute in the most serious of cases with the remainder of cases being prosecuted by the police or private citizens. This remained the system until the creation of the Crown Prosecution Service (“CPS”) in 1985, headed by the DPP, whose role it was to bring public prosecutions on behalf of the police. There also now exist a number of other special government departments whose role it is to investigate specific types of offences and to prosecute them on behalf of the public, for example, the Environment Agency and the Serious Fraud Office.

From 1985 to the present day the role of the police has been to receive allegations and complaints, which they investigate and thereafter refer to the CPS who will review the case and decide whether or not to prosecute. In deciding whether a public prosecution should be brought the CPS must follow the Code for Crown Prosecutors¹. The principle test applied, known as the ‘Full Code Test’, is whether the evidence discloses a reasonable prospect of conviction and, if so, whether the prosecution is in the public interest. Only if both these tests are met should a case be prosecuted. It should be noted that the reasonable prospect of conviction test is not the same as beyond reasonable doubt, it is a much lower evidential threshold. Whilst lawyers are loath to use percentage terms for such tests, it has been referred to as the “51% chance test” or the “greater than even chance test”².

¹ https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf

² *R (on the application of Gujra) (FC) (Appellant) v Crown Prosecution Service (Respondent)* [2012] UKSC52, para 1 per Lord Wilson.

Whilst there are many different investigation agencies, some with their own in-house lawyers who will determine whether an individual should be charged with an offence, the Full Code Test will always be applied in public prosecutions. The Full Code Test does not strictly apply to private prosecutions. However, there are good reasons why it is sensible to ensure that this test is capable of being met, as otherwise the case may be taken over and discontinued. This is dealt with further below.

Despite the creation of public prosecutors, the right of an individual to pursue a private prosecution has remained. It is a right that is expressly preserved by s.6(1) of the Prosecution of Offences Act 1985 and which has been recognised as being of constitutional importance. In the 1975 case of *Gouriet v Union of Post Office Workers*³ Lord Wilberforce described the right to bring a private prosecution in the following terms: “*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... remains a valuable constitutional safeguard against inertia or partiality on the part of authority*”. In the same case, Lord Diplock said that private prosecutions are “*a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.*”

An example of such bias and corruption where a private prosecution was brought occurred in 1864, in what became known as the “*Saffron Hill Murder*”. On the afternoon of the 26th December 1864, a stabbing occurred in the Golden Anchor Public House in Clerkenwell, London, an area occupied mainly by Italian migrants. Mr Pellizoni, one of the patrons present in the pub, was immediately seized and placed over the bloodied body by persons present. The police arrived and arrested him, ignoring any evidence from those present as to who had in fact carried out the murder. During the subsequent trial, the police suppressed evidence that the murder weapon was found some distance away from the incident, where Mr Pellizoni could not possibly have been. Mr Pellizoni was convicted and sentenced to death. A group of local Italians, knowing that the crime had been committed by another, Mr Mogni, who had confessed to wielding the knife, commenced a private prosecution against him. Mr Mogni was convicted leading to a unique situation in which two different persons were convicted of the same crime, but not jointly. Mr Pellizoni was eventually granted a reprieve and was released. Mr Pellizoni’s counsel, Mr Ballatine, later commented that: “*in this case the police did not like publishing the fact that they had committed a flagrant blunder, and so an innocent man was very nearly being executed.*”⁴ But for the right to bring a private prosecution against such corruption and partiality, a grave miscarriage of justice would have occurred.

Despite dissenting voices in this and other jurisdictions (such as in some US states) which consider that the responsibility for criminal law should rest solely with the state as an impartial actor, the right to bring a private prosecution in England & Wales has endured as it has in Canada and some other common law jurisdictions.

II. Why the need for private prosecutions?

Whilst the need for many people to pursue a private prosecution in England & Wales has greatly diminished since the creation of public prosecutors, they still have an important role to play in ensuring access to justice. Whilst some argue that private prosecutions can lead to malicious complaints and false allegations being pursued by

³ (1975) AC 435

vexatious litigants, there are protections in place that prevent the abuse of the criminal justice system in this way. In particular, the DPP has the power to intervene and to take over any private prosecution⁵, for the purposes of continuing with it themselves or to stop it. “*But the existence of a private prosecutor still acts as an external check against the risk of a rare lapse or oversight on the part of the Director [of Public Prosecutions].*”⁶

In the current climate of austerity, budgetary constraints and crimes of increasing complexity the use of private prosecutions is undoubtedly on the increase. The police and other traditional law enforcement agencies have suffered massive cutbacks and they no longer have the resources to dedicate to certain types of crime. In 2012 the Lord Chief Justice of England & Wales commented 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*”⁷. Those crimes which do not pose an immediate safety risk to the public are undoubtedly seen as a lesser priority, in particular economic crime.

The budgetary constraints on enforcement agencies have also necessarily led to a deficit of expertise to investigate and/or prosecute complex cases. This was recently exemplified in the *Trafigura* case, which involved the illegal dumping of toxic waste off the Ivory Coast in 2006, affecting the health of large numbers of the local community. A dossier of evidence was submitted to the Environment Agency by Amnesty International relating to the alleged involvement of individuals based in the UK. It was widely reported that the Environment Agency stated that, if true, a serious offence had been committed but that they lacked the resources, capacity and expertise to investigate such a large company who were likely to deploy legal arguments⁸. Suffice to say that this provides little in the way of deterrence and adherence to the rule of law.

Aside from budgetary constraints there have been a number of cases where traditional enforcement agencies have been reluctant or unwilling to investigate. This is particularly so where the allegations involve politically sensitive issues, large corporate entities, or allegations against the police. Sometimes such matters can be dismissed as being ‘civil’ law issues.

Private Prosecutions, or the well-publicised threat of such action, has on occasion been sufficient to place pressure to bear for public prosecutions to be brought. For example, following the *Sea Empress* oil spill off the Pembrokeshire Coast in 1996, Friends of the Earth made clear that if the Environment Agency would not prosecute, they would. This pressure is widely recognised as having brought to bear a decision on the part of the Agency to commence a public prosecution.

III. Who can bring a Private Prosecution?

The simple answer to this question is that anyone can. There is no requirement that a private prosecutor be the victim of the crime, or connected to the crime that they

⁵ In accordance with s.6(2) of the Prosecution of Offences Act 1985

⁶ Irish case of *Kelly & Anor v. District Court Judge Ryan* [2013] IEHC 321 in which a private prosecution was brought against two bankers for fraud.

⁷ *Regina (Virgin Media Ltd) –v- Zinga* [2014] EWCA Crim 52 - <http://www.bailii.org/ew/cases/EWCA/Crim/2014/52.html>

⁸ <http://www.theguardian.com/world/2015/jul/23/uk-authorities-lack-resources-to-investigate-trafigura-over-toxic-waste>

wish to prosecute. Any person or entity having ‘legal personality’, including companies and charities, has the ability to pursue a private prosecution.

There are several bodies and organisations who regularly bring private prosecutions before the courts, including The Royal Society for the Prevention of Cruelty to Animals (“RSPCA”); the Federation Against Copyright Theft; broadcaster SKY plc; the Premier League and so on. Invariably these private prosecutions will be for specific types of offences that the organization, or its members, are particularly concerned with, such as intellectual property rights or in the case of the RSPCA, cruelty to animals.

IV. Who can be prosecuted?

If there is evidence that a person has committed a criminal offence then they can be prosecuted, unless they benefit from immunity.

A ‘person’ encompasses any ‘legal personality’ and therefore also includes corporate entities as well as individuals. Where a corporate entity is involved the actions and the ‘mind’ of the company are ascribed to an individual or individuals who hold senior positions in the company and who can be described as its ‘directing mind and will’. This will generally be those who are near, or at, board level and is unlikely to apply to those who are employees or agents. If there is sufficient evidence to demonstrate that a corporate entity has committed a criminal offence through its ‘directing mind and will’ both the company and the individual can be prosecuted, as they have separate and distinct legal personalities.

Where corporate crimes are alleged, it will often be challenging to prove the involvement of its ‘directing mind’, particularly in large multinationals, where they are likely to be relatively removed from the criminal act complained of. In these circumstances, the individual persons responsible can be prosecuted, but the corporate entity itself may escape sanction.

V. What can they be prosecuted for?

There are a large number of criminal offences in England & Wales created by the common law, primary legislation and secondary legislation. There are estimated to be some 10,000 criminal offences in England & Wales, not including by-laws⁹. These offences cover a wide range of prohibited activities, including regulatory offences. Whilst the number of offences often leads to criticisms that the criminal law is unwieldy and complex, there is likely to be a specific offence that will capture the criminality that is alleged in most instances. A private prosecutor is generally able to use any offence, although some offences require consent to be obtained first (see below). Prosecutions can be brought covering areas such as:

- Environmental Crime
- War Crimes (consent required)
- Fraud
- Bribery and Corruption (consent required)
- Violent and sexual crimes
- Perverting the course of justice
- Slavery
- Money Laundering
- Intellectual Property

⁹ Smith and Hogan’s Criminal Law (2015), p.3

VI. Time Limits

Some offences are subject to time limits, which will need to be observed. Serious offences that can be tried in the Crown Court (known as offences triable on indictment), such as perverting the course of justice and money laundering are not subject to a time limit and whilst there may be legal argument based on any prejudice caused by delay, proceedings may be brought at any time. Offences which are less serious and which can be tried only in the magistrates' court (known as summary only offences) are generally subject to a time limit of six months from the date on which the offending occurred. When considering a private prosecution it is essential to move swiftly to ensure that consideration can be given to all possible offences that might be pursued.

VII. Consent to Prosecute

A private prosecutor has the ability to bring a private prosecution for any offence. However, proceedings for some offences require consent to be obtained from either the DPP (as the head of the CPS), the Attorney General (the Government's principal legal advisor) or in some circumstances a relevant minister with responsibility for a particular regulatory agency¹⁰. Where consent is being sought to prosecute an offence, it will generally involve presenting the evidence to support the allegation in order to satisfy the 'Full Code Test' (reasonable prospect of conviction and public interest).

Whilst consent should generally be sought before proceedings for the offence are instituted (the timing depends on the charge being used) the requirement "*shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence*"¹¹. Accordingly, even where consent is required a private prosecutor could apply to the court for a warrant for the arrest of an individual. This provision has however recently been limited in respect of war crimes (and similar offences)¹², and consent is now required from the DPP before a warrant can be applied for in relation to such offences¹³. The obtaining of arrest warrants in private prosecutions is dealt with in more detail below.

Generally speaking, the consent of the Attorney General is required "*where issues of public policy, national security or relations with other countries may affect the decision whether to prosecute*"¹⁴. This includes offences under the Official Secrets Act 1911; War Crimes; certain terrorism offences and so on. The Attorney General also retains a power to enter a *nolle prosequi* (unwilling to pursue) bringing any private prosecution already commenced to an end.

Those offences which require consent from the DPP are, broadly speaking, ones where the discretionary factors to be taken into account in deciding whether or not to prosecute are likely to be particularly sensitive and/or where there is a need to

¹⁰ A full list of the offences requiring consent can be found at

¹¹ S.25(2)(a) Prosecution of Offences Act 1985

¹² Pursuant to the International Criminal Court Act 2001

¹³ S.153 Police Reform and Social Responsibility Act 2011. This was the result of private prosecutors obtaining warrants for the arrest of several high profile individuals for war crimes including, Bo Xilai; Henry Kissinger; Tzipi Livni, Ehud Barak and so on.

¹⁴ Blackstone's Criminal Practice (2015)

ensure consistency and to prevent abuse. These include offences such as Bribery, conspiracy to commit an offence abroad, offences under the Terrorism Act 2000, assisted suicide and so on.

Where consent to prosecute is sought from the DPP, CPS policy states that: “*If consent is given, that guidance states that 'if the proposed prosecution passes [sic.] the Full Code Test, the CPS will then take over the prosecution. If the proposed prosecution fails the Test, consent to prosecute will not be given.'*”¹⁵ The rationale behind this policy would appear to be that any offences which require consent to be sought should be in the hands of a public prosecutor.

Where the CPS take over such a private prosecution and further investigation is required, assistance will be sought from the police. In cases where the police were originally unable or unwilling to provide assistance, seeking consent can accordingly be a worthwhile exercise.

Where consent is granted, it does not mean that the private prosecution will necessarily be taken over, even where the allegations are sensitive or political in nature. For example, In 1976 Mary Whitehouse, an activist campaigner opposed to social liberalism, obtained consent from the Attorney General to prosecute Gay News and others for the crime of blasphemous libel (abolished only in 2008) following the publication of a poem by James Kirkup (“*The Love that Dares to Speak its Name*”) which involved a portrayal of a Roman Centurion having sex with Jesus following his crucifixion. This prosecution was permitted to proceed and was ultimately successful.

VIII. Jurisdiction

Jurisdiction is an important factor when considering whether the offending behaviour complained of is capable of being prosecuted in the courts of England & Wales, particularly in relation to cross-border offending.

Generally speaking, the courts of England & Wales will only have jurisdiction over crimes committed (or substantially committed) within this jurisdiction, unless there is a specific statutory provision that provides for extra-territorial jurisdiction.

Each case will necessarily be fact-specific; however, there are several types of offences that do have an extra-territorial reach, including:

- Specified crimes (such as, fraud, dishonesty offences, blackmail, computer misuse¹⁶) which can be prosecuted if a ‘relevant event’ (one of the constituent elements of the offence) occurred in England & Wales.
- Crimes of ‘universal jurisdiction’ (including war crimes¹⁷ and torture committed by public officials¹⁸) that can be prosecuted in the courts of England & Wales, irrespective of the nationality of the accused and irrespective of the jurisdiction where any such criminal acts are alleged to have taken place.
- Murder and manslaughter, which can be prosecuted in England & Wales, irrespective of where it occurred, as long as the accused is a British national¹⁹.

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¹⁶ See the Criminal Justice Act 1993

¹⁷ pursuant to the Geneva Conventions Act 1957 and the International Criminal Courts Act 2001

¹⁸ pursuant to the criminal Justice Act 1988

¹⁹ S.9 Offences Against the Person Act 1861.

IX. Why bring a private prosecution?

An individual or entity might have a number of different motives for wanting to pursue a private prosecution including:

- A desire to see justice achieved
- Deterrence
- Compensation/restitution
- Highlighting an issue or publicity
- Greater control

It is important to note that there is no requirement that crimes must be reported to state investigation agencies before commencing a private prosecution. Furthermore, even where a complaint has been made to the police, this does not act as a bar to a private prosecution.

The courts have considered whether the motives of a private prosecutor can taint or should otherwise affect their ability to pursue a prosecution. It has been acknowledged that “*it is inevitable that many private prosecutions will be brought with mixed motives*”²⁰. However, this does not mean that a prosecution has been improperly brought. In 1993 the English courts dealt with a private prosecution arising from the collision between a dredger and a pleasure boat (the *Marchioness*) on the River Thames in which some 51 people died (the *South Coast Shipping case*²¹). 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 as such the proceedings were an abuse of the process.

Lord Justice Lloyd commented that “*The fact that a public inquiry has been ruled out does not mean that his motive in instituting the prosecution should now be regarded as improper. 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. Even if Mr. Glogg’s motives were mixed, the courts should be slow to halt a prosecution unless the conduct of the prosecution is truly oppressive...*” 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.

A desire to see justice achieved

This will be the most common motive, particularly where a victim is the private prosecutor. This is particularly so where the police have been unwilling or unable to investigate a complaint, but there is evidence which can be properly placed before the court to see that those who are guilty of criminal offences are punished. For example, in 1995 two sex workers reported to the police that they had been raped. Their credibility was challenged by the police, who declined to investigate and no prosecution was ever brought. With the assistance of the NGOs Women Against Rape and the English Collective of Prostitutes, a private prosecution was brought, which resulted in conviction and a prison sentence of 14 years imprisonment.

The desire to see justice achieved has resulted in a number of high profile private prosecutions that, although unsuccessful, related to areas where victims and/or their families have strived to obtain justice, for example, the private prosecutions relating

²⁰ *Dacre v City of Westminster Magistrates Court* [2008] EWHC 1667, per LJ Latham

²¹ *R v Bow Street Stipendiary Magistrates, ex P. South Coast Shipping co. Ltd* (1993) Cr. App. Rep. 405

to the murdered teenager Stephen Lawrence in 1994 and the prosecution of two police officers in 2000 for offences relating to the Hillsborough disaster. Both these cases were part of broader campaigns for justice that eventually led to independent public enquiries into the actions of the police.

Deterrence

A private prosecution can be important in deterring others from committing criminal offences and/or to cause persons or entities to desist from on-going criminal conduct. The threat of criminal sanctions such as imprisonment and the effect of a criminal conviction on individuals cannot be underestimated.

Many private companies often use private prosecutions to protect their intellectual property rights by traders selling counterfeit goods, such as in the case of *Zinga* (2014) (*ante.*) in which Virgin Media brought a prosecution against an individual who sold set-top boxes which allowed users to access a pay TV service for free. Private prosecutions have also recently been brought by the insurers AXA against individuals who have made false insurance claims, in order to deter others from doing so²².

Where state enforcement agencies have failed to take action against those who consistently flout the law, a private prosecution can send a clear signal that such activity will not be tolerated by civil society. This has been particularly seen in relation to environmental crime where there have been a number of successful private prosecutions. For example, in 1991 Greenpeace pursued a successful private prosecution against the chemical company Albright & Wilson under the Water Act 1989 for discharging excessive amounts of heavy metal into the Irish Sea in circumstances where the National River Authority was aware of the offence but was not willing to take any action.

Compensation/Restitution

Where loss has been suffered, compensation may be a primary motive of a private prosecutor. Given the cost and delays likely to be suffered in pursuing civil proceedings, a private prosecution can be a much more attractive solution. Following conviction, the criminal courts have the power to make a compensation order²³, dependant on the means of the offender. However, the court is unlikely to embark on any detailed analysis of causation for damages.

A private prosecutor is also entitled to pursue confiscation proceedings against a convicted defendant under the Proceeds of Crime Act 2002²⁴. This allows the court to undertake a detailed analysis of how a defendant has benefitted from a crime and whether they have a 'criminal lifestyle'. In certain circumstances, the court can make assumptions that money/property held by a defendant has been obtained 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 courts can order compensation be paid to a 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.

²² *R (Axa) v Gatley* (2014) and *R (Axa) –v- Paul Havert* (2015)

²³ S.130-133 Powers of Criminal Courts (Sentencing) Act 2000

²⁴ The ability of a private prosecutor to make use of such proceedings was confirmed in the case of *R (Virgin Media Ltd) –v- Zinga* [2014] EWCA Crim

Highlighting an issue or publicity

A private prosecution can be an important way of drawing attention to an issue and whilst it is unlikely to be the sole motivation, it can be nonetheless an important consideration. The media will often report prosecution results and the public will readily understand what the result means. This can draw attention to issues and can work hand in hand with deterrence to prevent certain types of persistent criminal behaviour.

Greater control

When a matter is reported to the police and prosecuted by public authorities, victims can often feel removed from the process. Complaints levied at the CPS by victims often involve failures 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.

Often, a private prosecutor will have greater resources to deploy in respect of the investigation and prosecution of an offence. This can mean that a case is better prepared from an early stage, which might result in an early guilty plea. Furthermore, a private prosecution can be quicker and/or more focussed than a public one, once the evidence is available.

IX. Limitations on bringing a private prosecution

The DPP has a right to take over the conduct of any private prosecution²⁵ and either continue the proceedings or if she forms the view that the Code for Crown Prosecutors test is not met, she may discontinue the proceedings²⁶.

Until 2009, the DPP's policy in relation to the taking over and discontinuing of private prosecutions was based on a different evidential test from that in the Code for Crown Prosecutors: the DPP would take over and discontinue where there was clearly no case to answer (a reasonable jury presented with the evidence and properly directed could not properly convict) or that the prosecution was clearly likely to damage the interests of justice.

In 2009 the DPP changed the policy in relation to the taking over of private prosecutions. The new policy states:

“The CPS should take over and continue with the prosecution if the papers clearly show that:

- *the evidential sufficiency stage of the Full Code Test is met; and*
- *the public interest stage of the Full Code Test is met; and*
- *there is a particular need for the CPS to take over the prosecution.*

*All three elements outlined above must be satisfied before the CPS takes over and continues with the prosecution”.*²⁷

²⁵ S.6(2) Prosecution of Offences Act 1985

²⁶ S.23 and 23A Prosecution of Offences Act 1985

²⁷ http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/

In relation to whether there is a particular need for the CPS to take over the prosecution, this will involve cases that warrant the prosecution being conducted by a public prosecuting authority rather than by a private individual or entity, for example serious offences, or the disclosure of highly sensitive material.

The position now therefore, is that if the CPS reach the view that the evidential sufficiency stage of the code test is not met (there being insufficient grounds to provide a reasonable prospect of conviction), they will take over the conduct of the private prosecution and discontinue the proceedings. It is clear that this policy change leaves less capacity for the continuation of private prosecutions than the “clearly no case to answer” test that existed previously.

The lawfulness of this change in policy was challenged in the case of *R (Gujra) v CPS [2012]* after a private prosecution commenced by Mr Gujra against three defendants for common assault and using threatening words, was discontinued by the DPP²⁸. The Supreme Court held that the CPS' approach to taking over a private prosecution with the intention to discontinue it, unless the evidential stage of the Full Code Test was met, was lawful and did not frustrate or emasculate the objects underpinning the right to maintain a private prosecution in section 6 of the Prosecution of Offences Act 1985. However, importantly the dissenting judgments of Lady Hale and Lord Mance expressed concern that the reasonable prospect test would emasculate the right to bring a private prosecution. Lady Hale had doubts over the reasonable prospect of success test, on the basis that there could be two reasonable but different views on whether a reasonable court would convict. She went on to say that the possibility of judicially reviewing the DPP's decision to discontinue was not a sufficient safeguard and the test could raise issues under the European Convention of Human Rights.

It is important to note that the DPP may also take over and discontinue proceedings even where the Code Test is met if she forms the view that the prosecution is likely to damage the interests of justice. This would be in cases, where for example the prosecution interferes with the investigation of another criminal offence; where the prosecution is malicious or vexatious; or where the CPS or police have promised the defendant they won't be prosecuted.

Where a private prosecution is taken over and discontinued by or on behalf of the DPP, a request can be made for the decision to be reviewed under the CPS Victim's Right to Review Scheme in the first instance²⁹. Where any decision under the Victim's Right to Review Scheme can be shown to be irrational (amongst other potential grounds) they can be the subject of challenge by way of judicial review.

²⁸ *R (Gujra) v CPS [2012] 1 WLR 254*

²⁹ http://www.cps.gov.uk/publications/docs/vrr_guidance_2014.pdf

XI. How do you bring a private prosecution?

Magistrates' Court Process

Under English law, the commencement of all criminal proceedings, including the commencement of a private prosecution, starts with the laying of an information³⁰ at the magistrates' court. 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.³¹ If the offence is subject to a time limit (see above) the information will need to be laid within it.

Once an information has been laid at the magistrates' court, the court will consider whether to issue a summons or arrest warrant³². In order to determine whether a summons or arrest warrant should be issued, the court will at the very least consider whether the essential ingredients of the offence are present; that the offence is not 'out of time'; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute³³. The court will also consider whether the allegation is vexatious. An arrest warrant will only be issued where the offence is an indictable offence, or punishable with imprisonment, or where the defendant's address is not known to enable a summons to be served on him/her³⁴.

If a summons is obtained, the court will return this to the prosecutor in order for it to be served on the defendant. The summons will contain information of when and where the defendant is required to attend court and will also specify the offences. In circumstances where an arrest warrant is obtained, assistance can be sought from the police to see that it is executed.

Burden and standard of proof

The burden of proof is always placed on the prosecutor, who must prove that the defendant has committed each element of the offence in question. These elements must be proved to a jury, or to a judge (depending on the court hearing the matter), so that they are sure beyond a reasonable doubt that the defendant committed the offence in question. There is no burden of proof on a defendant, nor are they required to give evidence. The prosecution must prove its case through the evidence of witnesses and/or documentary exhibits that are placed before the court.

Conducting an investigation

Often a private prosecutor will already be in possession of the evidence required in order to start a private prosecution and it will just be a case of putting that evidence into an admissible form. However, in some cases there may be parts of the evidence that are still required before proceedings can commence. A private prosecutor does not have the powers of the police available to them, therefore they must think creatively (and within the confines of the law) in order to obtain the evidence necessary to institute criminal proceedings. As much evidence as possible should be obtained prior to laying an information as the risk of not doing so could lead to the

³⁰ Rule 7.2 Criminal Procedure Rules 2014

³¹ Rules 7.3 Criminal Procedure Rules 2014

³² Section 1 Magistrates Courts Act 1980

³³ *R v West London Justices, ex parte Klahn* [1979] 2 All ER 221

³⁴ Section 1(4) Magistrates Courts Act 1980

DPP taking over the prosecution and discontinuing it at an early stage. There are various ways a private prosecutor can go about gathering evidence, including:

a) Material obtained from witnesses/statements:

It is important for those acting for the private prosecutor, to obtain witness statements from all of the relevant witnesses in the case who will provide evidence that goes towards proving the elements of the particular offence(s) alleged. Those witnesses may also need to produce (as exhibits) documents or even objects that will form part of the evidence. In order for a witness statement to be used in criminal proceedings, it must contain evidence relevant to the issues in the proceedings and it must be signed by the person who makes it, to confirm that the contents of the document are true. All witness statements forming part of the prosecution case will need to be served on the defendant once proceedings have been commenced³⁵.

b) Private investigators – legally obtained material

It may be necessary to instruct private investigators to obtain evidence prior to commencing proceedings. This may involve meeting with and taking statements from potential witnesses, obtaining publically available documents (for example Land Registry or Companies House documents) or to carry out surveillance. Private investigators are also often needed where evidence is held outside the jurisdiction and key witnesses may also be scattered across different international locations. If instructing private investigators, it is important for the private prosecutor to instruct reputable investigators that are well aware of their legal obligations in relation to the obtaining of evidence. If evidence is obtained illegally, this could have serious consequences for the success of the private prosecution as such evidence is likely to be ruled inadmissible.

c) Data Protection Act 1998

It is possible for a private prosecutor to rely on the exemptions under the Data Protection Act 1998 (“DPA”) when gathering evidence. Often information is required from third parties, for example banks, the police and other organisations, who may hold important evidence that is essential for the prosecution. It may be that such organisations are reluctant to share the information because it constitutes “*personal data*” under the DPA.

However, there are important exemptions under the DPA that the private prosecutor can rely on in this regard. Where personal data is required for the purposes of the prevention of crime, or the prosecution of offenders (as it would be in a private prosecution) it would not be unlawful for the data controller of the organisation to provide the required data³⁶.

A further exemption is where disclosure is necessary for the purpose of legal proceedings or for the obtaining of legal advice or for establishing, exercising or defending legal rights³⁷.

It should be noted that the exemption in itself does not constitute a justification for handing over personal data. The data controller should also ensure that either the witness or potential defendant has given their consent to the information being

³⁵ Section 9 Criminal Justice Act 1967

³⁶ S.29 Data Protection Act 1998

³⁷ S.25(2) Data Protection Act 1998

disclosed, or that the disclosure of the personal data is necessary for the purposes of legitimate interests pursued by a third party (for example a private prosecution).³⁸

d) Norwich Pharmacal Order

Where evidence is required before the commencement of proceedings, and a third party is unwilling to provide the information under the DPA exemptions, a private prosecutor may wish to consider a Norwich Pharmacal Order³⁹, derived from the name of the case that established the principle. A Norwich Pharmacal Order is applied for in the High Court and is an order which requires that a third party who is innocently 'mixed up' in the wrongdoing disclose certain documents or information. Similar orders may also be considered in foreign jurisdictions where evidence is held outside the UK.

e) Witness summons

Where criminal proceedings have commenced, it is possible to obtain a witness summons requiring a potential witness to produce a document or thing or to give evidence about information held in confidence if it is likely to be material evidence in the prosecution case⁴⁰. This provision can be used, for example, to compel financial institutions to provide information in relation to a defendant's assets and bank accounts where that evidence is material to the prosecution case, such as in money laundering cases.

f) Experts

Consideration should be given to instructing experts where necessary, as often expert evidence is required in prosecution cases. Examples include instructing forensic accountants to provide expert evidence in complex fraud or money laundering cases, expert scientific evidence in environmental cases, or medical evidence in cases involving harm to victims.

Pitfalls in bringing a private prosecution

Disclosure

Private prosecutors must comply with the disclosure principles under the Criminal Procedure and Investigations Act 1996 (CPIA). References in the Act to the prosecutor "*are to any person acting as a prosecutor, whether an individual or body*"⁴¹.

A private prosecutor therefore has a duty to retain and record all relevant material which does not form part of the prosecution evidence in the case. It is deemed to be relevant if it is capable of having a bearing on the case.

Once that material is recorded, two tests must then be applied: (1) Does any of the material undermine the prosecution case, or (2) does it assist the defence case? If the material satisfies either of these questions, it must be given to the defence. These provisions seek to ensure fairness in the proceedings.

If disclosure is not properly complied with, then the risk of the prosecution failing is high, as the proceedings are likely to be deemed an abuse of the court process.

³⁸ Schedule 2 Data Protection Act 1998

³⁹ Norwich Pharmacal v Commissioners of Customs and Excise [1974] AC 133.

⁴⁰ Rule 28.5 Criminal Procedure Rules 2014

⁴¹ Section (2) Criminal Procedure and Investigations Act 1996 (as amended)

Malicious prosecution

If a private prosecution is brought where it is later alleged by the defendant that it should not have been, for example 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. Whilst 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 (from a motive other than a legitimate desire to bring the person to justice)⁴².

Costs

One of the most important aspects to private prosecutions concerns costs. A court may in any proceedings in respect of an indictable offence order the payment out of central funds (from the Ministry of Justice budget) of such amount as the court considers reasonably sufficient to compensate a private prosecutor for any expenses properly incurred by them in the proceedings⁴³. This includes both legal and investigative costs and any expert fees that were necessary for the prosecution.

Where a court makes an order for costs but is of the opinion that there are circumstances which make it inappropriate for the prosecution to recover the full amount, the court shall assess what amount would be 'just and reasonable'.

An order for costs should be made by the court save where 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 award 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 prosecution providing the prosecution was properly brought.

In the event that the CPS take over the private prosecution and continue with it, the private prosecutor can still apply for their costs up to the point in the proceedings where the CPS took over.

An order for costs will be applied for at the conclusion of the proceedings, therefore it is important that the private prosecutor is able to cover the cost of the investigation, preparation of the case and the subsequent proceedings with a view to recouping these expenses at the end of the case. The costs will necessarily depend on the scope and complexity of the allegations and, where lawyers are instructed, any agreement that it is in place. The source of such funds could be raised through crowd funding, or in certain cases litigation funders may be willing to assist to meet the costs that will be incurred.

⁴² *Molton v Chief Constable of West Midlands* [2010] All ER (D)

⁴³ S.17 Prosecution of Offences Act 1985

Conclusion

The right of an individual or entity to pursue a private prosecution continues to be of fundamental importance in ensuring access to justice and to see that those responsible for committing criminal acts are punished. This is particularly so in times of austerity and where “conventional” authorities are unable or unwilling to take action. This right is a powerful tool in the arsenal of litigation, which can often be quicker and more effective than other civil legal remedies that are available to victims, or those who seek to take action on their behalf.

There are safeguards, which prevent improper use of private prosecutions and which allow public prosecutors to reserve the most serious types of allegations to themselves or to have oversight over allegations that involve certain sensitive issues. However, if there is evidence to prove an allegation there is no reason why a private prosecution should not succeed.

To be trite, with great power comes great responsibility and a private prosecutor is, rightly, not afforded any more leeway than a public prosecutor in bringing a prosecution. Where the liberty of a subject is at stake it remains of fundamental importance that the fairness of the proceedings is maintained and that the private prosecutor proves any allegation beyond reasonable doubt. As a result a private prosecutor will need to be sure that sufficient evidence to prove an offence has been gathered, or can be gathered using the court powers available to them. A failure to meet this obligation is likely to lead to a case being taken over and stopped by the DPP.

The financial burden placed upon a private prosecutor in investigating and prosecuting an offence, which is ultimately for the benefit of the whole of society, is recognised in their ability to recover costs from central funds in cases which have been properly brought, irrespective of whether they succeeded.

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