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Choosing between private prosecution or civil litigation

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A note explaining the differences between using private prosecution or civil litigation as a method of dispute resolution.

Scope of this note

The ability to bring a private prosecution is a long-standing right, expressly preserved by section 6(1) of the Prosecution of Offences Act 1985 (POA 1985).

Private prosecutions have increased over recent years, particularly in complex fraud cases, where public authorities lack resources (or inclination) to commence public prosecution (as observed in *D v A [2017] EWCA Crim 1172, at paragraph 40*).

In many instances, a private prosecution may be considered alongside the proposition of bringing a claim in the civil courts. Examples of situations when a private prosecution and/or a civil claim might be brought include:

- Prosecutions under the Fraud Act 2006 or a civil claim for fraudulent misrepresentation where a party has been the victim of dishonest acts by others.
- Prosecutions for theft and/or a civil claim for conversion where a party has had goods or monies stolen from it.
- Prosecutions under the Copyright, Designs and Patents Act 1988 or Trade Marks Act 1994, or a civil claim for trade mark, design right or patent infringement for the copying of instruments or goods which may infringe the intellectual property of a party's business.
- Prosecutions under the Computer Misuse Act 1990 or a civil claim under the Data Protection Act 2018 and/or the General Data Protection Regulation where individuals have gained unauthorised access to a party's computer systems and processed data unlawfully.

This practice note considers the advantages and disadvantages of bringing a private prosecution in contrast to commencing civil proceedings, along with the potential pitfalls of bringing concurrent civil and private prosecution actions. The note also highlights matters to consider when determining whether a case is more suited to civil or criminal disposal.

Pros and cons of private prosecutions

There are many reasons for preferring a private prosecution over civil proceedings.

A successful prosecution provides a significant deterrent effect because of the sanctions and penalties available through criminal proceedings. These include confiscation, custodial sentences, disqualification from holding corporate office and a criminal conviction.

In some cases, private prosecutions can be less costly than civil proceedings. However, a number of large and complex private prosecutions in recent years have matched or exceeded costs that would have been incurred in civil cases.

Investigating and/or commencing a private prosecution can encourage the Crown Prosecution Service (CPS) to act itself and take over the matter under section 6(2) of the POA 1985.

A private prosecutor can apply to the court for an order that its costs be paid from central funds (*section 17, POA 1985*). This may be attractive where a prospective defendant is impecunious. This application can be made by a private prosecutor either on conviction or acquittal.

Where a private prosecutor (or another party) has suffered financial loss, a private prosecutor can apply for:

- A compensation order under sections 130 to 133 of the Powers of Criminal Courts (Sentencing) Act 2000 to recover that loss.
- A confiscation order under section 6 of the Proceeds of Crime Act 2002.

A criminal conviction can be persuasive evidence in a civil case and thus may encourage early settlement of any subsequent civil action.

There is no time limit for bringing a prosecution, meaning an habitual or historic defendant can continue to be punished. However, a civil action must usually

be brought within six years of the date of loss, or from when a claimant has discovered a fraud, concealment or mistake, or could with reasonable diligence have discovered it.

Successful prosecutions can generate both positive publicity for the prosecutor for having taken robust action against criminal conduct and serious reputational damage for the defendant.

Potential risks or disadvantages of private prosecutions compared to civil claims

Private prosecutions remain expensive and lengthy undertakings, and the overall rate of cost recovery does not compare well with civil litigation. While recovery in civil proceedings can be more or less accurately tracked at between 65-80% of total costs for the successful party, there is only limited information publicly available about recovery of costs for private prosecutors.

The CPS may decide to take over a private prosecution and discontinue it at any time. A claimant remains in control of its claim at all times.

An investigation has to be carried out by the private investigator who will be under the same duties as a public prosecutor but will not have the same compulsory, investigative powers. It can therefore be difficult to gather documents held by third parties or comply with disclosure obligations in a cost-effective way.

Although similar risks exist in civil litigation, if the prosecution fails, a private prosecutor may be at risk of being sued by the defendant for malicious prosecution. This, however, is very difficult to prove. If the prosecution fails because it is improper, an adverse order for costs may be made against the private prosecutor (see *Asif v Ditta [2021] EWCA Crim 1091*).

What protections for defendant in criminal proceedings?

- Any evidence obtained for civil proceedings may be deemed to be inadmissible in criminal proceedings, as it may not be compliant with the Police and Criminal Evidence Act 1984 (PACE).
- There are tighter restrictions on the prosecution's right to rely on hearsay and bad character evidence in criminal proceedings. For more information, see Practice notes, Hearsay evidence and Bad character evidence.
- Criminal proceedings have a higher standard of proof (beyond reasonable doubt) than their civil counterparts (balance of probability).
- There are far more onerous disclosure duties in criminal than civil proceedings. Disclosure obligations in criminal matters will trump a client's right to assert privilege in certain circumstances. For more information, see Practice note, Disclosure in the Crown Court
- Civil litigation is more flexible than criminal litigation. Generally, the claimant:
  - has complete control over its claim;
  - has a wider range of remedies at its disposal; and
  - may bring actions against third parties to recover its losses or assets.
- A failed prosecution, especially if halted for abuse of process, may bring negative publicity to the private prosecutor.
- Private prosecutions are brought in the wider public interest. Accordingly, even if a party wishes to withdraw a private prosecution, the Director of Public Prosecutions (DPP) can continue with it if it is in the public interest to do so. This means that settlement may not be an option since the private prosecutor cannot give an undertaking that the defendant will not be the subject of a prosecution by the DPP.

Overarching goals of the client

Unlike a civil action, criminal proceedings, if successful, will leave the defendant with a criminal record and carry the threat of more punitive remedies such as custodial sentences or disqualification from holding corporate office. It is a significant deterrent especially in the business context given that in many professions individuals risk being debarred from practicing as a result of any criminal conviction.

Conversely, if financial recovery is the key aim for the client, civil litigation may be more appropriate. Civil claims do not have to be targeted solely against the ultimate wrongdoers and can be initiated against third parties who either hold misappropriated assets or have facilitated the wrongdoing.

Although both civil and criminal litigation are public processes, should a client be sensitive to possible media interest in their affairs, civil litigation may create less public interest than its criminal counterpart. There are also various forms of alternative dispute resolution that retain confidentiality over a civil dispute or allow a commercial relationship to be maintained.

Chances of success

In both criminal and civil proceedings, the burden of proof for each procedure lies on the party bringing the action. Both the claimant (in civil proceedings) and the

prosecutor (in criminal proceedings) must prove their case to succeed at trial.

However, a key difference between the two proceedings is the standard of proof:

- In civil proceedings, for a claimant to succeed, it must prove its case on the balance of probabilities (that is, the facts and elements of the cause of action it advances are more likely than not to be made out).
- In criminal proceedings, for the prosecution to succeed, the case must be proved beyond reasonable doubt (that is, a jury must be sure that the defendant committed the alleged offence).

However, it is unwise to place too much weight on the standard of proof as a means of determining whether a private prosecution or a civil claim is more likely to be successful. In some circumstances, it may be easier to prove that individuals were guilty of criminal conduct than, for example, that a company should be held liable for a civil wrong.

Duration of proceedings

The duration of proceedings will vary on a case-by-case basis.

Historically, criminal proceedings were considered swifter than civil proceedings. The Court of Appeal in *R (on the application of Virgin Media Ltd) v Zinga [2014] EWCA Crim 1823* commented that one of the reasons that private prosecutions have become more popular is the "speedier process of the criminal courts".

However, a 2022 report found that current levels of unacceptable delays to justice for victims, witness and defendants is unlikely to be addressed by the Ministry of Justice's "meagre ambition to reduce the Crown Court backlog by less than 8,000 cases by March 2025". These backlogs, caused by overcrowding in the criminal court lists, mean that significant delays are currently being experienced by private prosecutors.

Ministry of Justice statistics indicate an average criminal case takes around 24 weeks from first listing in the magistrates' court to completion in the Crown Court. This compares favourably to the civil jurisdiction, with on average 36.9 weeks taken for a small claim to go to trial from issue (and 58.5 weeks taken for a multi or fast-track matter). A concluded settlement agreement (in civil proceedings) or a guilty plea (criminal) can of course conclude matters more speedily.

However, these statistics do not reflect the current backlogs in the criminal justice system. In any private prosecution, time will also be required before the laying of information at the magistrates' court to investigate the matter and gather the necessary evidence. The time required to prepare a prosecution will increase depending on the complexity of the matter and resources available.

Similarly, the length of civil proceedings can vary significantly depending on the case. If the claimant has a very strong case and can show that the defendant has no real prospect of successfully defending the claim, or there is no other compelling reason why the case or issue should be disposed of at a trial, a judgment can be obtained very quickly. A summary judgment application can be filed once the defendant has either filed its acknowledgment of service or defence, and thus judgment can be obtained within weeks of issue of the claim. For more information, see Practice note, Summary judgment: overview.

Limitation

Limitation is an absolute defence to civil proceedings, with limitation periods varying in length depending on the cause of action. Generally, there is a limitation period of six years for actions in tort or on discovery of a fraud. For more information on the differing lengths of limitation periods in civil proceedings, see Practice note, Limitation periods: overview and Checklist, Length of limitation periods.

In criminal prosecutions, the only time restrictions are that a summary-only offence must be laid within six months of the date of the offence. The Court of Appeal has held that only in exceptional circumstances will the courts grant a stay of proceedings on the ground of unjustifiable delay., and it will be rare for a case to be stayed where there is no fault on the part of the prosecution.

Remedies available

Civil proceedings

Civil proceedings focus on victim redress. As such there are a wide range of remedies available to a claimant.

Civil recovery allows for proceedings to be brought against third parties rather than just the original perpetrator of the wrong or damage against the claimant, to maximise the opportunities for restitution. Remedies include:

- Damages claim against the perpetrator, for example return of monies paid as a result of misrepresentation or unjust enrichment.
- Claim against a third party who is in possession, using or controlling the claimant's misappropriated assets should the perpetrator have attempted to cover their wrongdoing by transferring assets to a third party.

- Claim against a party with a duty of care should the third party have facilitated the wrongdoing. For example, where professional advisors have handled the proceeds of fraudulent activity, claims against them may be brought for breaches of their professional or statutory duties.
- In corporate insolvencies, monies can be recovered through placing a company into liquidation. In urgent cases a provisional liquidator can be appointed under section 135 of the Insolvency Act 1986 to take immediate control of the company in order to preserve assets or evidence ahead of the company being placed into liquidation. An investigation can then be conducted to establish the extent of any wrongdoing and the assets available to satisfy any claim. For more information, see Practice note, Provisional liquidation: overview.
- Application for a freezing order under rule 25.1 of the Civil Procedure Rules (CPRs) to prevent the dissipation of funds which appear to be under the control of the perpetrators until a judgment can be enforced. A freezing order is a form of injunction and the court will make a freezing order if it is just and convenient to do so. The applicant must be able to show it has a good arguable case against the respondent and there is a real risk of the respondent's assets being dissipated. Freezing orders are not limited to assets within the jurisdiction and may not need identifiable respondents. In *CMOC v Persons Unknown [2017] EWHC 3599 (Comm)*, the court was willing to grant a worldwide freezing order against persons unknown against the backdrop of a fraud claim. For more information, see Practice note, Freezing orders: overview.
- Injunctions to prevent anticipated harm being done by the claimant to the respondent. Injunctions may be granted as an interim or final remedy and may either require the respondent party to do or refrain from a specified act. Other than freezing orders, other common types of injunctions are search orders or orders for delivery up. For more information, see Practice note, Injunctions: overview.

These actions are not mutually exclusive, and it may be necessary to consider more than one of these tools in any civil action. A number of the above measures (such as freezing orders and other injunctions) can be obtained on an urgent basis should a party need to act quickly in order to prevent a dissipation of assets or further harm being suffered.

Private prosecutions

Powers of the courts in criminal proceedings focus on punishing the offenders and bringing them to justice. Accordingly, courts have powers to impose fines, community orders and prison sentences on convicted defendants. However, it is also possible for a private prosecutor to ask the court to make an order to restrain assets at the commencement of an action or to seek a compensation or confiscation order as part of the sentence. See Practice note, Private prosecutions: interlocutory applications.

A key advantage of confiscation and compensation orders over their civil equivalents is that they are enforced by the threat of imprisonment. Should a defendant not pay or hand over the relevant assets when required by a compensation order by the deadline, the defendant will serve a prison sentence until payment.

The maximum terms of imprisonment in default of payment of compensation orders are specified in Schedule 4 to the Magistrates' Courts Act 1980 (MCA 1980), and for confiscation orders set by the Crown Court in section 139(4) of the Powers of Criminal Courts (Sentencing) Act 2000 and section 35(2A) of the Proceeds of Crime Act 2002. These range from seven days for compensation orders under £200 to 12 months for an amount exceeding £10,000. This rises to up to 14 years for unpaid confiscation orders exceeding £1 million. Offering part payment reduces the defendant's sentence proportionately.

Duties of a private prosecutor and civil claimant

Private prosecutors are subject to stricter duties in the conduct of their case than their civil counterparts. Civil litigants are required to adhere to the civil court's overriding objective by assisting the court in dealing with cases justly at a proportionate cost. In limited circumstances they may also have professional conduct duties when dealing with litigants in person.

Private prosecutors have a duty to act as ministers of justice in the same way as any prosecutor appointed by the state. Private prosecutors should adhere to the Code for Crown Prosecutors (CPS Code) (even though it does not strictly apply to them), to ensure their conduct is beyond reproach and to discourage any abuse of process arguments (see CPS: Code for Crown Prosecutors).

CPS Code requirements

The CPS Code requires the prosecutor to:

- Follow the Full Code test (see Full Code test, below).
- Make all reasonable enquiries and disclose the outcome of such enquiries in accordance with disclosure rules, whether they point to the guilt or the innocence of the defendant.
- Present the facts fairly and draw all relevant authorities to the court's attention, whether they are in favour of the prosecution or defence.

- Disclose information or material that is favourable to the defendant or that undermines the prosecution case.
- Assist the court in the administration of justice and not deliberately, knowingly or recklessly mislead the court.
- Ensure that the criminal justice process operates as swiftly as possible and is consistent with the interests of justice.
- Bring to the attention of the court any matters of law relevant to the sentence.

A private prosecutor is thus subject to the same obligations as a minister for justice as the public prosecuting authorities, including the duty to ensure that all relevant material is made available both for the court and the defence (the duty of candour).

Duty of candour

The duty of candour has been described as one of "full and frank disclosure". That duty is replicated in the CPS Code and requires the prosecutor:

- Not to mislead the court in any material way.
- To disclose to the court any material which:
  - is potentially adverse to the prosecution;
  - might support the defendant's case; or
  - could be relevant to the judge's decision. This includes any matters which suggest that the issue may be inappropriate.

When quashing a summons for the non-compliance by the private prosecutor with the duty of candour, "compliance with the duty of candour is the foundation stone upon which such decisions are taken. In my view, its importance cannot be overstated" (*R (Kay) v Leeds Magistrates' Court [2018] EWHC 1233 (Admin), Sweeny J at paragraph 38*)

Code for Private Prosecutors

The Private Prosecutors' Association (PPA) has also published a Code for Private Prosecutors, which details best practices for conducting private prosecutions (PPA: Code for Private Prosecutors).

The Code deals with matters not covered by the CPS Code and expressly states that both should be read in conjunction.

Adherence to the Code for Private Prosecutors is voluntary, but members of the PPA have confirmed that they will abide by it.

For more information, see Legal update, Code for Private Prosecutors.

Disclosure issues

The disclosure regime set out in the Criminal Procedure and Investigations Act 1996 (CPIA 1996) applies to all prosecutors. In addition to the CPIA 1996, the principal sources of, and guidance on, a prosecutor's disclosure obligations are:

- Attorney General's Guidelines on Disclosure.
- Judicial Protocol on the Disclosure of Unused Material in Criminal Cases.
- Criminal Procedure Rule 15 and Criminal Practice Direction.
- CPS Disclosure Manual.

Collectively, the disclosure obligations and duties require:

- The production and maintenance of a written disclosure management document, consistent with the size and complexity of the disclosure task. The document should clearly set out:
  - issues of the case;
  - what material exists; and
  - how that material is to be acquired, retained and reviewed.

  The disclosure management document must be reviewed and updated to capture significant developments that might affect the disclosure process.
- The pursuit of all reasonable lines of enquiry, and the acquisition and retention of any material that might satisfy the test for disclosure.
- Clear and accurate scheduling of any material that might satisfy the test for disclosure. It should include a separate schedule of any sensitive material which cannot be disclosed in its original format.
- The proper application of the disclosure test. Any material that might reasonably be considered capable of undermining the case for the prosecution or of assisting the defendant's case should be disclosed.

Accurate scheduling of relevant material is essential to demonstrating a thorough and robust approach to the disclosure process. The private prosecutor has a continuing duty to disclose evidence, which must be kept under constant review throughout its investigation (*section 7A, CPIA 1996*). A failure of these processes can result in a stay for abuse of process.

The investigation of the facts and pursuit of all reasonable lines of enquiry can be an expensive and difficult process for private prosecutors and often involves employing third parties such as private investigators. There are no disclosure obligations on

the defendant, and given that private prosecutors have fewer powers than a public prosecutor, it is often difficult to access documents held by third parties. For example, private prosecutors or their investigators will not be able to apply for search warrants, as the applicant for a search warrant has to be a police officer (*section 8, PACE 1984*).

Even obtaining information from the police can be difficult given that the police are only required to retain seized property as long as "is necessary in all the circumstances" (*section 22, PACE 1984*). The fact that a private prosecution has been commenced will not necessarily confer a right to access evidence in the hands of the police to the private prosecutor, even if the request is a legitimate one and it is essential to the success of the prosecution. However, should the matter be sent for Crown Court trial, any prosecution is deemed to be on behalf of the Crown, and so disclosure may then be ordered.

Where a request for third-party material is met with a refusal, a witness summons may be obtained requiring the production of that material to the court, which would then provide it to the prosecutor (Attorney General's Guidelines on Disclosure 2013*, paragraph 57*). However, a witness summons only applies to "material evidence" in the proceedings. It will not capture information that:

- Reveals an additional potential line of enquiry.
- Could be used to support a cross-examination conducted by the defendant.

Such material may be important unused evidence that should ultimately be disclosed if obtained.

In *R v Alibhai and others [2004] EWCA Crim 681*, the Court of Appeal considered the difficulties the Crown faced in obtaining potentially disclosable unused material from third parties such as Microsoft Corporation and the FBI. The court held that the prosecutor must take all reasonable steps to identify and obtain the sources of the material. Failure to obtain the material will not necessarily result in the proceedings being stayed. Whether a stay is granted will depend on the nature and importance of the material involved, especially in the light of any other obtained or disclosed material. However, the court concluded that mechanisms do not exist for a prosecutor to compel a third party to disclose material that will not form part of the evidence.

The issues in the case rather than the prosecutor's resources will determine what lines of enquiry are "reasonable" for a prosecutor to follow. That an obvious and important line of investigation will be time-consuming or expensive to undertake will not provide a valid excuse for not doing so.

The proper discharge of a prosecutor's disclosure obligations will be costly. A potential private prosecutor must:

- Give full and accurate instructions about the existence and whereabouts of potentially relevant material.
- Provide their solicitors with access to that material.
- Consider how they intend to obtain relevant material of which they are aware but that is held by third parties.
- Consider how the material will be reviewed, scheduled and assessed for its disclosability. Considerations should include:
  - how much material there will be;
  - complexity of the issues;
  - existence of any relevant digital or electronic material;
  - who will conduct the disclosure exercise;
  - who will "sign off" on the disclosure process and (if necessary) be cross-examined on it.

Privilege and contamination

Other than issues of abuse of process in the disclosure process, a private prosecutor must also understand that disclosure obligations (and hence the right to a fair trial) overrides a prosecutor's right to assert privilege.

The test to be applied in any individual case is whether the material in question might reasonably be considered capable of undermining the case for the prosecution or of assisting the defence, despite the fact that the material may be privileged. Therefore, instructions that either undermine the reliability of other prosecution evidence or support the case advanced by the defendant, or any admissions by a private prosecutor to their solicitor, are likely to meet the test for disclosure.

If the client is also the victim, thought needs to be given as to how to prevent the contamination of their evidence before trial. The client should not be shown documents or given information about the evidence of other witnesses (including the defendant) until they have given their own evidence at trial, given the prejudicial effect this may have on the giving of their own evidence. Practically, this can mean that the client has limited involvement in the matter, as they will not be able to view documents that refer to the evidence of other witnesses or attend any interim hearings. Such a setup can be very frustrating for the client, and their expectations must be managed throughout.

For further information, see Practice note, Legal professional privilege in internal investigations.

Pre-issue, similar constraints will be placed on civil litigants who will have to investigate matters for themselves to assess whether evidence exists or may be obtained to support their claim. However, if a civil litigant is confident that the defendant holds the relevant documents, it can rely on the fact that under standard disclosure rules all parties must disclose documents that:

- They rely on.
- Adversely affect their own case or another party's case.
- Support another party's case.
- Are required under a relevant practice direction.

The defendant itself is under a duty to make a reasonable search for such documents. For more information, see Practice note, Disclosure: an overview.

Application for pre-action disclosure can also be made before proceedings have been commenced in relation to anticipated proceedings where it is desirable to do so. Applications can be commenced against:

- The anticipated defendant (under CPR 31.16).
- A third party to anticipated proceedings (under CPR 31.17).

In cases where wrongdoing has been committed by persons unknown, an application under the Norwich Pharmacal or Bankers Trust jurisdictions can be issued against an innocent party to disclose documents to reveal the identity of the wrongdoers. The use of such applications may also be an important tool for a private prosecutor in gathering its evidence. For more information, see Practice notes, Norwich Pharmacal orders: a practical guide and Private prosecutions: interlocutory applications.

Control of proceedings

Civil proceedings are private actions that parties commence to enforce their legal rights. Unlike criminal proceedings, there is little interaction with public bodies. Although the court has a wide range of case management powers, generally the claimant will retain complete control over their case and can make key decisions concerning how to pursue it, including whether and how to continue the proceedings.

The decision to initiate a claim is purely one for the claimant to make in civil proceedings. There is no legal test that the claimant has to satisfy to bring a claim. The only hurdle to overcome is payment of the relevant court fee. Thus, a claimant is free to commence a claim that it may not (at the time) believe has a good chance of succeeding, hoping perhaps to uncover supporting evidence to its claims through disclosure, or pressure a defendant into settling.

The claimant needs to be mindful of being pursued for costs by the defendant should their claim be discontinued or ultimately defeated (see CPR 38). If the claim is of a spurious nature, it could be easily and quickly defeated by a successful summary judgment or strike out application.

There are a number of procedural constraints which could result in a private prosecution being discontinued. To protect against abuse of process arguments, a private prosecution should only be commenced if both limbs of the Full Code test are satisfied (as set out in the CPS Code).

Full Code test

The Full Code test is as follows:

- Is there sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge?
- Is a prosecution required in the public interest?

Discontinuing proceedings

A private prosecution may be discontinued in any of the following ways:

- The Director of Public Prosecutions (DPP) may take over the conduct of proceedings at any time and discontinue them under section 6(2) of the POA 1985.
- The magistrate may refuse to issue a summons on the laying of information.
- The proceedings may be challenged as an abuse of process either by way of judicial review or by an application to the magistrates' court to set aside the summons (see Challenging the private prosecution).
- The Attorney General (AG) may declare the prosecutor a vexatious litigant or terminate proceedings by entering a termination of proceedings (*nolle prosequi*) stating that the AG no longer wishes to bring a prosecution against the defendant. Entering a *nolle prosequi* is rare and is usually only used where the defendant is not fit to stand trial.

The DPP has the power to discontinue a private prosecution at any time and may learn of the prosecution in a number of ways, for example press reporting or on application by the private prosecutor or defendant (*section 6(2), POA 1985*). The CPS is not required to take over the action but it must, if asked, decide whether or not to do so.

The CPS will first consider whether the Full Code test is met. If it is not met, the CPS should take over the

prosecution and discontinue it. If the Full Code test is met, the CPS will consider other abuse of process arguments or reasons for discontinuing the private prosecution, for example because:

- It interferes with the investigation of another criminal offence.
- It interferes with the prosecution of another criminal charge.
- It is vexatious or malicious.
- The offence was already disposed of.

If there is no other reason to discontinue the private prosecution, the DPP will consider whether the prosecution should continue as a private prosecution or whether the DPP should take it over. This decision is dependent on a number of factors, including:

- The seriousness of the offence.
- The complexity of any disclosure.
- Any issues of witness anonymity.

In *R (Gujra) v Crown Prosecution Service [2012] UKSC 52*, the Supreme Court held that the DPP should apply to private prosecutions the same test (evidential sufficiency and public interest) to cases brought by the CPS.

Any decision to discontinue a private prosecution may only be challenged by judicial review on the basis of an irrational (and therefore unlawful) application of the provisions of the Full Code test.

Vexatious prosecution

When considering whether to issue a summons on the laying of information, a magistrate's consideration of abuse arguments will involve ensuring that the prosecution is bona fide or has not been instituted oppressively, unfairly or in a vexatious manner.

The allegation of a vexatious private prosecution was raised in *R (Johnson) v Westminster Magistrates' Court [2019] EWHC 1709 (Admin)*. The applicant brought a crowd-funded private prosecution against the proposed defendant, Boris Johnson, who was at the time a sitting Member of Parliament, former Mayor of London and former Secretary of State for Foreign and Commonwealth Affairs. It was alleged that while in political office, Mr Johnson had repeatedly lied and misled the British public as to the cost of UK's membership of the EU and so committed three offences of misconduct in a public office.

In response to the laying of the information, Mr Johnson claimed that the prosecution was a political stunt, where the applicant's main goal was to undermine the Brexit referendum result of 2016, and to limit or prevent the consequences of Brexit itself.

The magistrate considered that the claim was not vexatious but did not give any reasons for its decision. The lack of reasons in deciding that the prosecution was not vexatious was a reason why the High Court quashed the summons on judicial review by Mr Johnson, although the High Court declined to examine whether such a decision itself was Wednesbury unreasonable.

Malicious prosecution

If the prosecution fails (particularly for abuse of process), a private prosecutor may be at risk of being sued by the defendant for malicious prosecution.

A claim for malicious prosecution under tort requires the claimant to prove all of the following:

- The prosecution terminated in the claimant's favour.
- The prosecution had been brought without reasonable and probable cause.
- Proceedings were initiated or continued maliciously.
- The claimant suffered damage.

"Reasonable and probable cause" was considered in *Moulton v Chief Constable of West Midlands [2010] EWCA Civ 524*. The court said that:

- The prosecutor must have a genuine belief that the defendant was guilty ("[there must be a] finding as to the subjective state of mind of the police officer responsible").
- It must be reasonable, on the available evidence, to believe in the defendant's guilt ("an objective consideration of the adequacy of the evidence")

In relation to whether the proceedings were brought maliciously, the court said that the claimant would need to evidence the prosecutor's ulterior motive, which was something more than "a legitimate desire to bring the appellant to justice". In practice, the requirement to evidence the prosecutor's subjective state of mind means it is a very high bar for a malicious prosecution claim to be brought.

In *Willers v Joyce [2016] UKSC 43*, the Supreme Court confirmed that an action in the tort of malicious prosecution may be brought in respect of civil as well as criminal proceedings. When the case was resubmitted to the High Court, it was clear that the courts were relying on previous precedent relating to criminal malicious prosecution claims. Thus, such risks may apply equally to civil actions as private prosecutions.

Costs

Recovery of costs in civil proceedings follows the general rule that the loser pays the winner's costs.

Costs are generally assessed on the standard basis that the costs incurred by the winning party are proportionate, and both reasonably incurred and reasonable in amount with any doubt going in favour of the paying party. In situations where the courts have cause to depart from the standard assessment, costs are awarded on an indemnity basis, whereby costs will be awarded that are simply reasonably incurred and reasonable in amount.

The general cost situation is, however, complicated by the Part 36 costs regime, which lays down specific costs consequences that the courts must follow, unless it is unjust to do so when an offer compliant with the requirements of Part 36 of the CPR has been made by one party. The making of a Part 36 offer is therefore one of the most important tactical steps a party can make in civil litigation. There is no such similar concept in the criminal system.

Unlike civil proceedings, the costs of a private prosecution are not dependent on a successful conviction: it is possible for a private prosecutor to recover costs even where a defendant is acquitted. In a private prosecution, costs can be awarded not just from the defendant (on conviction) but also from central funds, whether or not the defendant has been convicted. The amount paid is whatever is reasonably sufficient to compensate the prosecutor for any expenses properly incurred by them in conducting the proceedings.

For more information on when costs can or cannot be recovered in a private prosecution, see Practice note, Claiming costs for a private prosecution.

Concurrent proceedings

Where both commencing civil and criminal proceedings are viable options for a client, a valid option would be to commence both claims concurrently.

A client may be additionally motivated to bring concurrent claims in order to:

- Secure a criminal conviction or adverse factual finding on which related civil proceedings can rely. As criminal convictions are based on a stricter standard of proof than civil proceedings under section 11(1) of the Civil Evidence Act 1968, the fact that a person has been convicted of an offence in a UK court is admissible in evidence to prove that they committed the offence.
- Obtain earlier disclosure of relevant documents.
- Pressure an opponent to settle ongoing civil litigation.
- Cause reputational damage.

Where both civil and criminal proceedings cannot be commenced

A private prosecution may be a victim's only option where a limitation defence applies to a civil claim.

Conversely, civil proceedings may be a client's only option if a matter has already been dealt with by law enforcement but not in a manner that was satisfactory to the client. For example, if the proposed defendant received a minor fine or was found not guilty of the offence under the criminal standard of proof.

The House of Lords has held that a private prosecution could not follow a caution where the defendant had an express assurance that he would not be prosecuted (*Jones v Whalley [2006] UKHL 41*). However, two of the Lords expressed in *obiter* comments that it would be preferable to give a caution in "modified terms, stating that the caution may not preclude a private prosecution and will not preclude a civil action" (*Lord Brown, at paragraph 36*)".

Ministry of Justice guidance on the administering of cautions now reflects this judgment. If administered correctly, the person receiving a caution should now be made aware that a private prosecution may follow. (MoJ: Simple cautions: guidance for police and prosecutors (2013).)

Where the CPS is already pursuing what it considers to be the appropriate charges, a magistrate should, in the absence of any special circumstances, be hesitant of issuing a summons for a more serious charge brought by way of a private prosecution. Such a course could be oppressive, and there is a likelihood that the DPP may take over and discontinue the private prosecution.

Challenging the private prosecution

The fact that the prosecutor is motivated by a desire to punish the defendant or by self-interest is not in itself abusive.

In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p South Coast Shipping [1993] QB 645*, the court held that an indirect or improper motive in launching a prosecution did not necessarily invalidate it, and the court should be slow to stop such a prosecution in the case of mixed motives unless the conduct was truly oppressive.

However, if a defendant can show that the private prosecution is being used (or was threatened) as leverage in related civil proceedings and/or settlement negotiations, the likelihood of having the case dismissed goes up. Judges are becoming more aware that private prosecution actions are being used to exert pressure on defendants in related civil proceedings and increasingly will dismiss such prosecutions as a result.

This was demonstrated in *R(G) v S and S [2017] EWCA Crim 2119,* where criminal and civil proceedings were commenced in parallel. Amongst the several reasons why the Crown Court judge stayed the prosecution as an abuse of process was because the criminal proceedings

were being used "to put pressure on the respondents in relation to the civil proceedings which covered, essentially, the same subject matter". However, this was reversed by the Court of Appeal, which held that "mixed motives are to be distinguished from an oblique motive which is so ... unrelated to the proceedings that it renders them an abuse of process" (*Treacy LJ at paragraph 27*).

The court in *R (Virgin Media Ltd) v Zinga [2014] EWCA Crim 52* indicated that, in some cases, a private prosecution may not be a suitable alternative to civil action. In the cost decision in the same case, in order to dissuade the bringing of improper or unsuitable private prosecutions, the court limited the costs recoverable by the private prosecutor from state funds. In addition, the Court of Appeal stressed the professional duties of the legal advisors bringing such actions, including the overriding duty to "ensure that the proceeding is fair and in the overall public interest" (*at paragraph 61*).

The Court of Appeal has held that a prosecutor should never consider as a ground for instigating criminal proceedings that it would benefit from a confiscation order. Following *R v Knightland Foundation [2018] EWCA Crim 1860*, the court held that the prosecutor must be scrupulous in avoiding any perception of bias, and should only be concerned with whether the prosecution could meet the evidential and public interest test contained in the CPS Code when determining whether to prosecute. Accordingly, given that a compensation order would benefit a private prosecutor, if this was the sole reason for bringing the private prosecution, it would amount to an abuse of process.

For example, in *Asif v Ditta [2021] EWCA Crim 1091,* the court found that the private prosecutor had an obvious motivation, which was "to obtain financial recompense in his own private interests", and that it was "improbable that such a prosecution could be thought to be in the public interest" (*at paragraph 59*). The Court of Appeal concluded that the prosecution was being used for "private tactical and oppressive reasons and the judge made no arguable error in staying the proceedings as an abuse" (*at paragraph 94*).

If the criminal proceedings are dismissed or stayed as an abuse of process, there will be consequent cost implications for the prosecutor. Private prosecutors may not get a second chance to prosecute. It has been considered doubtful that second applications for a summons on exactly the same material can be considered by other justices of the same bench. In *Asif*, the Court of Appeal also awarded costs against the private prosecutor, on the grounds that there had been serious misconduct in the case, namely that there was a "primary improper purpose" and attempts had been made to "pull the wool over the Court's eyes" (*at paragraph 140*).

Without prejudice privilege

A party may be tempted to threaten a private prosecution to increase the pressure on the other side to settle an ongoing civil action, particularly where any threat would be protected by without prejudice protections. However, parties must ensure that such threats do not backfire and lead to the relevant communication losing its without prejudice protection and/or demonstrating evidence of blackmail, a serious crime in its own right.

In *Ferster v Ferster [2016] EWCA Civ 717*, in the course of a dispute between shareholders in a family-owned business, a without prejudice offer was made by one party to another which stated, "we have become aware of further wrongdoings by Jonathan [Ferster]". The email went on to suggest that "it is clearly in everyone's (and particularly Jonathan's) interest to wrap this up speedily and quietly" and that "a settlement will obviate the need of further steps such as committal proceedings being issued". It suggested that Jonathan Ferster would likely be imprisoned as he could face charges of contempt of court, perjury and perverting the course of justice.

The Court of Appeal held that the threats in the email amounted to an unambiguous impropriety, an established exception to without prejudice privilege. The court stated that the "impropriety arises from the fact that [the offer] is tied, and tied only, to the threats affecting Jonathan's liberty, family and reputation" (*at paragraph 21*). The threats in the letter were an attempted abuse of the without prejudice nature of the settlement negotiations. Accordingly, the other party was entitled to refer to the correspondence in open court.

In *Ferster*, the court stressed that threats did not have to meet the formal definition of blackmail in order to show unambiguous impropriety. However, there remains a real risk whenever a party threatens to commence criminal proceedings in any discussions aimed at settling related civil disputes.

Blackmail is the making of "any unwarranted demand with menaces" (*section 21, Theft Act 1968*). It is irrelevant that the threat may be to do something that the blackmailer is entitled to do (for example, commence a private prosecution). The offence will be made out if there is an accompanying demand for a financial reward, without reasonable grounds to do so. For more information, see Practice note, Blackmail.

Ability to settle civil proceedings

Where concurrent proceedings have been commenced, it may not be open for a party to agree to discontinue its criminal proceedings as part of any settlement agreement to the civil proceedings.

A private prosecution can only be discontinued where it is proper to do so in relation to the Full Code test. Therefore, there can be a conflict of interest between a client's instructions to cease the criminal proceedings to agree to a settlement and the prosecutor's duty to apply the Full Code test.

The DPP may choose to take over the case to prevent it from being discontinued, thus undermining the undertakings given in any settlement agreed in the civil proceedings.

Choosing between civil and criminal proceedings

In a situation where both proceedings are open to a party, commencing civil or criminal proceedings will be a decision to be taken on a case-by-case basis. There are many factors to consider, and the following questions may assist in determining which option is the best to pursue:

- What is the best way to prevent further loss?
- Will the police investigate and prosecute the matter?
- What are the victim's primary concerns? Costs? Deterrence? Reputation?
- Is it likely that the threat of civil proceedings will cause the other side to make a settlement offer?
- What is the likelihood of a successful recovery through the criminal courts?
- What are the risks of a private prosecution or civil action?
- Do assets need to be preserved urgently, and what is the most effective way to do this?
- Are there assets available to satisfy a civil claim or criminal confiscation/compensation order? Who holds these assets?
- Will it be easier to obtain and maintain a restraint order or a freezing order?
- How will the matter be investigated and evidence gathered?
- Will search powers be required? Will evidence need to be gathered forensically?
- Should interviews be conducted under caution?
- Does the victim have the ability to put these measures independently in place?
- Is it an appropriate case for parallel criminal and civil proceedings to be commenced?