

# A guide to private prosecutions

Anthony Metzger QC and Adam Gersch

# Definition

*“A private prosecution is a criminal prosecution started by a private individual or body, who is not acting on behalf of the police or any other prosecuting authority or body that conducts prosecutions”*

Fraud Advisory Panel, April 2013

# Fundamental right

*“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.”*

Lord Wilberforce, *Gouriet v Attorney General* [1978] AC 435

# Background

- ▶ Historically, all prosecutions were private but brought in name of Crown
- ▶ 19<sup>th</sup> century – brought by victims or relatives of deceased
- ▶ Attorney General only instituted most serious or notorious cases
- ▶ Metropolitan Police Act 1829: police forces established and brought prosecutions
- ▶ Prosecution of Offences Act 1879: role of DPP for important/difficult cases
- ▶ Prosecution of Offences Act 1985: established CPS under leadership of DPP

# Statutory force

Preserving the constitutional right, **Section 6 of the 1985 Act** provides:

(1) Subject to subsection (2) below, **nothing** in this Part **shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings** to which the Director's duty to take over the conduct of proceedings does not apply

(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, **he may nevertheless do so at any stage**

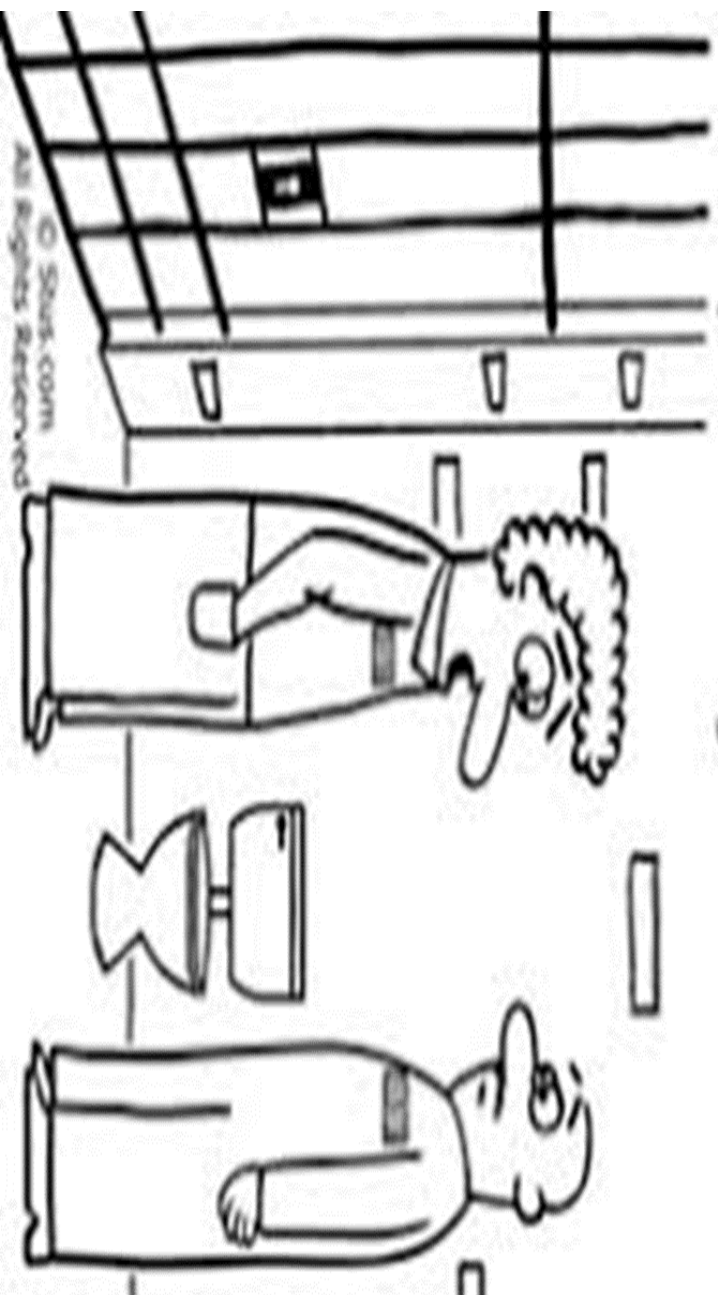
# Increase in private prosecutions

- ▶ Local and national police priorities can mean many cases are not pursued
- ▶ Effect of trial backlog during Covid-19 pandemic
- ▶ Many organisations now routinely use private prosecutions eg Federation Against Copyright Theft (FACT), Virgin Media, British Phonographic Industry (BPI)
- ▶ Many advantages to bringing a private prosecution, and can be quicker, cheaper and more effective than a civil claim

# Core principles

- ▶ Criminal law – purpose is punishment
- ▶ Burden and standard of proof
- ▶ Evidence typically given live
- ▶ Appearance of accused is required
- ▶ Outcomes
  - ▶ Restraint
  - ▶ Conviction with custodial sentence, fine, confiscation or compensation order
- ▶ Costs – good prospect of recovery from central funds **win, lose or draw**
- ▶ No substantial risk of adverse costs
- ▶ Enforcement – orders enforced by court / state

It turns out "fiduciary"  
means you have to give it back.





# Advantages

- ▶ Prosecutor may have specialist knowledge
- ▶ Greater control over speed and shape of proceedings
- ▶ Speedier and cheaper process than civil proceedings
- ▶ More effective as a deterrent
- ▶ Good chance of recovery of costs under s17 of Prosecution of Offences Act 1985
- ▶ Possibility of a restraint and compensation order in addition to confiscation



Prosecution of white-collar crime has fallen by 30% since 2014

*The Times*, 9/12/19 "Police cuts blamed as fraud cases fall"

Fraud accounts for 1/3 of crime but just 2% of cases are prosecuted by fewer than 1% of police

BBC News, 25/1/20 "Fraud victims failed as criminals operate with impunity – report"

Refreshes  
the parts  
that others  
can't  
reach

# Disadvantages

- ▶ CPS may take over private prosecution and discontinue: ss6(2) and 23 of POA 1985
- ▶ Investigators unable to apply for search warrants (s8 PACE refers to a police officer)
- ▶ Prosecutor must be prepared to fund investigation and prosecution, and potential risk if no costs order made under s17 POA 1985

# Getting grilled



# Investigation

- ▶ Consider a PACE-compliant interview letter or invite to voluntary interview
- ▶ Consider a Norwich Pharmacal order for 3<sup>rd</sup> party disclosure of information of pre-action disclosure order against a potential defendant: *FCFM v Hargreaves & Ors* [2018] WWHC 3075
- ▶ Witness summons to secure production of documents
- ▶ Can seek assistance of police for international enquiries and sharing of any financial reward: s93 Police Act 1996
- ▶ Counsel's advice should be sought as soon as reasonable suspicion of an offence to ensure independent review and compliance with Criminal Procedure Rules on structure and format of evidence and disclosure

# Disclosure

- ▶ Criminal standard applies – more extensive than civil cases
- ▶ Duty of candour
- ▶ Requires great care to safeguard integrity of the process.

See *Leominster Justices ex p. Aston Manor Brewery Co* [1995] Crim LR 224

- ▶ May trespass on matters of privilege

# Threshold test

- ▶ Consider whether case meets **full code test** for Crown Court Prosecutors:
  - ▶ Sufficient evidence for **realistic prospect** of conviction?
  - ▶ Is it in the **public interest** to pursue the prosecution?
- ▶ If not satisfied, risk of defence inviting CPS to take over / discontinue
- ▶ If frivolous or vexatious, risk of an adverse costs order
- ▶ Seek an independent review

# Restraint, confiscation and compensation

- ▶ Ex parte **restraint order** under s41 POCA 2002 if
  - ▶ “**Proceedings for an offence have been started**” and there is ‘**reasonable cause to believe that the defendant has benefited**’ from his criminal conduct”
  - ▶ Proceedings start when a summons is issued
  - ▶ Grant of restraint order is discretionary and need to show “**real risk of dissipation**”
- ▶ **Confiscation order** on conviction: *R (on appn. Of Virgin Media Ltd v Zinga* [2014] EWCA Crim 1823 confirmed available in private prosecutions under s6 POCA 2002 to deprive D of benefit from criminal conduct. See *Ketan Somaia v Regina* [2017] EWCA Crim 741.
- ▶ **Compensation**: ss 130-134 Power of Criminal Courts (Sentencing) Act 2000 – no limit



# Costs

- ▶ Private prosecutor can recover costs from **central funds**: section 17 of the Prosecution of Offences Act 1985, irrespective of outcome
- ▶ Court may order: "the payment out of central funds of such amount as the court considers **reasonably sufficient to compensate** the prosecutor for **any expenses properly incurred** by him in the proceedings"
- ▶ Para 2.6.1 of the Practice Direction (Costs in Criminal Proceedings) - presumption in favour of an order which '**should be made save where there is good reasons for not doing so.**'
- ▶ Degree of caution remains advisable – court will potentially consider terms of engagement with solicitors and advocates, and steps taken to involve State prosecuting authorities

# Contact Details

- ▶ Any Questions?
- ▶ Thank you for taking part – materials will follow

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