

Making best use of private prosecutions – what, when and how?



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What is a private prosecution?

A private prosecution is one that is not brought by the Crown or other statutory prosecuting authority but instead is brought by a private individual, charity, organisation or company that may have been the victim of crime. A corporate body is able to bring a private prosecution, as it is seen by the law as a legal individual¹.

The right to bring a private prosecution is preserved by section 6 of the *Prosecution of Offences Act 1985*. There is a wide range of offences available to someone who wants to initiate a private prosecution, but some offences (for example bribery) require the permission of the Attorney General or the Director of Public Prosecutions (DPP) before proceedings can commence.

Private prosecutions are not a new concept. Many companies regularly bring private prosecutions. One of the most notable was the recent Virgin Media case, where three

men took part in a large-scale fraud selling set-top boxes which allowed people unlawful free access to Virgin Media's cable television channels, resulting in convictions for all three men. Private prosecutions have also been described as "a valuable constitutional safeguard against inertia or partiality on the part of authority"².

When and why?

The current economic climate means that traditional law enforcement agencies are faced repeatedly with the need to make enormous cutbacks. This in turn means that not all crime can be investigated. Certain crimes, especially fraud and other financial crime, don't appear to be the priority of the police and, as a result, are often not investigated. While reports may be submitted to Action Fraud, from a police perspective (given that many of the specialist economic crime teams within the police are closing down), the specialist knowledge

required for dealing with fraud cases is decreasing rapidly. This will have a further adverse impact on the number of cases being investigated. Private prosecutions, therefore, can be a useful tool to tackle economic crime that may not be understood or prioritised elsewhere.

Research carried out by the University of Portsmouth's Centre for Counter Fraud Studies showed that an estimated 98.5% of fraud cases go unreported to the police and, of the 1.5% that is reported, only 0.4% results in a criminal sanction³. Private prosecutions can, therefore, be extremely effective in situations where the police do not investigate. Commencing a private prosecution allows a victim to retain control of the proceedings and actively to pursue a conviction against the accused. A successful private prosecution also sends out a powerful deterrent message to those considering engaging in criminal activity against companies: that they will be held accountable for their crimes.

How?

The DPP has the power to take over a private prosecution under section 6(2) *Prosecution of Offences Act 1985* and either continue with it, or

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¹ *R (Gladstone plc) v Manchester City Magistrates' Court* [2004] EWHC 2806 (Admin)

² Lord Wilberforce in *Gouriet v Union of Post Office Workers* (1978) 3 All ER 70 [1977]

³ *Fraud and punishment – enhancing deterrence through more effective sanctions*



discontinue it. While there is no legal requirement for a private prosecutor to apply the “Full Code Test” of the Code for Crown Prosecutors when deciding whether to prosecute, it is strongly suggested they do so in order to mitigate the risk of discontinuance by the DPP.

The “Full Code Test” consists of two stages: the evidential stage and the public interest stage. The private prosecutor therefore should be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, and that it is in the public interest to prosecute. If so, they can then commence proceedings in the Magistrates’ Court. An Information⁴ should be laid at the Magistrates’ Court, which is a formal document that gives details of the accused, and the alleged offences. The Magistrate will then decide whether to issue a

summons or warrant⁵. They will consider whether the alleged offence is known to the law, whether on first sight the particular ingredients of the offence are met, that the offence isn’t out of time and whether the allegation is vexatious and proceedings not instituted simply to cause embarrassment or annoyance to the defendant⁶.

Once the summons is issued, and served on the defendant, the prosecution can proceed in the normal way, as it would with a public prosecution.

Costs

The most important aspect of private prosecutions relates to costs. A private prosecutor can apply for costs back out of central funds at the conclusion of the case. This covers both investigative and legal costs, as well as any expense

incurred as a result of compensating any witness for the expenses, travel and loss of time caused by their attendance. This means that any company or individual bringing a private prosecution can apply for reimbursement of the costs incurred in investigating the matter and the legal fees involved with bringing the matter to Court. The means of the defendant are irrelevant for this purpose. Section 17 of the *Prosecution of Offences Act* provides that a court may in any proceedings in respect of an indictable offence, order the payment out of central funds of an amount that the court considers reasonably sufficient to compensate the private prosecutor for any expenses properly incurred in the proceedings. •

⁴ Part 7 of the *Criminal Procedure Rules*

⁵ Section 1 *Magistrates’ Courts Act 1980*

⁶ *R v West London Metropolitan Stipendiary Magistrates* [1979] 2 All ER 221