

Outer Temple
Chambers

**An essential guide to private prosecutions
for defence lawyers**

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INTRODUCTION

- What is the power to bring a private prosecution?
- Private prosecution v public prosecution v civil action
- Policy
- Process
- Trial
- Verdict
- Commercial concerns

THE POWER TO BRING A PRIVATE PROSECUTION

- **The power to bring a private prosecution is an ancient one explicitly preserved by s6 POA 85.**
- **Gouriet v Union of Post Office Workers [1978] AC 435, 477.**
Lord Wilberforce held:
“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, though rarely exercised in relation to indictable offences... remains a valuable constitutional safeguard against inertia or partiality on the part of authority”.
- **Recently affirmed by the Lord Chief Justice in R (Virgin Media Limited) v Munaf Ahmed Zinga [2014] EWCA Crim 52 (paragraph 55).**
“...the retrenchment of the state is evident in many areas, including the funding of the Crown Prosecution Service ... it seems inevitable that the number of private prosecutions will increase, particularly in areas relating to the criminal misuse of intellectual property. In the overwhelming majority of such cases, a prosecution will serve the public interest in addressing such criminal conduct.”

- However, not an unfettered right. The DPP retains a power to take over a private prosecution and stop it (s6 (2) POA 85).
- Some offences can only be prosecuted with the consent of the DPP (eg insider dealing).
- Consent can be difficult to obtain and may result in DPP taking the prosecution over.
- Impossible to obtain evidence from abroad via LoR without authorisation of AG.

PRIVATE PROSECUTION V PUBLIC PROSECUTION V CIVIL REMEDY

- **Advantages:**

- 1) Client in control not a government agency.
- 2) Private prosecution better resourced than the CPS/SFO.
- 3) Criminal court trial process generally quicker than the High Court.
- 4) Criminal conviction carries stigma whilst criminal courts can punish.
- 5) Criminal courts have wide powers to award costs and compensation.
- 6) Confiscation can follow which is a draconian sanction for a convicted defendant.

- **Disadvantages:**

- 1) Possible conflict of interest between the client's purpose and the public interest = abuse of process.
- 2) No possibility of summary judgement.
- 3) Settlement by way of monetary payment not possible.
- 4) Criminal trials are public and attract media interest.
- 5) Standard of proof and criminal rules of evidence are onerous.
- 6) No public investigators (Police, Customs) to call on meaning limits to investigative powers.

POLICY

- Any prosecution will be supervised by the Crown Court/Court of Appeal. Risk of unfairness if private prosecution brought by a person claiming to be the “victim” of offence (i.e. loser if fraud) because they are not objective, but the rules governing a fair criminal trial cannot be abrogated.
- Doctrine of abuse of process, disclosure rules, exclusionary rules of evidence under s76/78 PACE all apply to ensure a criminal trial is fair in all circumstances.
- Criminal courts will not let the jurisdiction be used to settle private disputes.

- **Accordingly, any private prosecution should firstly consider the CPS Code for Prosecutors**
 - 1) Is there a realistic prospect of conviction?
 - 2) Is the prosecution in the public interest (i.e. will deter crime)?
- **If prosecution does seem tactically sound and passes the Prosecutor's Code, then before laying information consider the following:**
 - 1) Has the suspect been given an opportunity to respond to the investigation (i.e. interview)?
Not a requirement of PACE 84 but a central feature of criminal investigations to ensure fairness/identify weaknesses in the prosecution case.
 - 2) Has a disclosure officer been identified and has material gathered been put on correct schedules (see s3, 5 CPIA 96 and AG's Disclosure Guidelines)? Disclosure in fraud can be huge and will need to be signed off by an investigator/lawyer as well as being under constant review.
 - 3) Have weaknesses in the prosecution case been properly identified and dealt with? Time is limited after laying the information. Evidence gathering post - charge far more difficult.

- 4) Is the client relying upon co-operation with Police/other agencies? Are the Police being compensated for their time? Can this be disclosed? Not objectionable in principle but needs to be carefully managed and disclosed. MOJ/HO have promised to issue public guidance.
- 5) Has the evidence been the subject of any kind of independent review by counsel/independent person, to stress test the case? There is a risk of a loss of objectivity when complainant is prosecutor.
- 6) Has the client considered whether pleas of guilty to lesser offences/basis of plea are acceptable? These need to be considered early.
- 7) Is confiscation likely? If so, consider issues like corporate veil and how criminal benefit will be calculated at early stage.

PROCEDURE

- The private prosecution is commenced by laying an ‘information’ at a magistrates court (followed by the issue of a summons) Rule 7.2 of the Criminal Procedure Rules (Crim.PR).
- The information may be laid before a magistrate or a magistrate’s clerk. This must be done in writing. R.7.2 (2) Crim.PR.
- The written information must contain statement of the offence that:
 - a) Describes the offence in ordinary language. R.7.3 (1) (a) (i) Crim.PR.
 - b) Identifies any legislation that creates it. R.7.3 (1) (a) (ii) Crim.PR.
 - c) Contains such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.

- More than one incident of the commission of the offence may be included in the allegation if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission. R.7.3(2) Crim.PR (eg continuous course of conduct in fraud).
- In respect of anyone appearing before the magistrate's court on an indictable only defence, the magistrate's court must immediately transfer the case to the Crown Court. S.51 (1) CDA1998.
- The private prosecutor is under no duty to inform the CPS that a private Prosecution has commenced.

- **Once the proceedings have started, a private prosecutor will need to consider the following aspects of procedure:**
 - 1) Disclosure. Needs to be under constant review. Who is the disclosure officer? Have the CPIA and AG Guidelines been complied with? S 3 CPIA and Code requires an investigator/lawyer to sign off disclosure.
 - 2) Rebuttal. Has a defence statement been served? What additional evidence is need? Who will get the additional material? Is an expert required? Does defence evidence undermine prosecution to extent a conviction is unlikely?
 - 3) Case management. Indictments, Friskies Schedules (or alike), case summaries, applications to admit bad character evidence/hearsay and agreed facts all need to be drafted. The prosecution preparation is front - loaded. Is the client ready for the costs implications of this?
 - 4) Be ready to deal with inevitable allegations of bias and incompetence because the prosecution is not being brought by an independent body.

TRIAL

- **During a trial, the prosecution has a duty to manage the case. This can be onerous and includes the following practical issues:**
 - 1) Have jury bundles been prepared and served ahead of trial?
 - 2) Are photocopying facilities available at court?
 - 3) Does the private prosecutor have private space at the Crown Court to store exhibits and meet witnesses?
 - 4) Who will contact witnesses to ensure their arrival on time, manage their expenses and keep them amused whilst waiting?
 - 5) How well resourced will the prosecution team be at court (i.e. advocates but also paralegals and support lawyers)?
 - 6) How are instructions going to be taken once the trial commences? In the High Court the parties are both present. Who will represent the prosecution as the case unfolds and tactical/legal/evidentiary decision have to be made quickly.

VERDICT

- **Upon conviction, the client can expect the following:**
 - 1) Punishment of the defendant but within the Sentencing Council Guidelines for the relevant offence. Client expectations to be managed.
 - 2) Confiscation of proceeds of crime. This can have severe consequences for the defendant but is in itself a separate and time consuming process.
 - 3) Reasonable costs including investigation costs (s16 POA 85) subject to defendant's means. Be ready with schedules.
 - 4) Media interest.

- **Upon acquittal, the client must be prepared for the following:**
 - 1) Argument from the defence that the case should never have been brought and it is entitled to costs s19 POA.
 - 2) Media criticism from defendant that the whole prosecution was malicious and ill - judged.
 - 3) Limited right of prosecutors appeal i.e. only after a terminating ruling.

COMMERCIAL CONCERNS

- **Client needs to understand the following:**
 - 1) A private prosecution is a realistic option in many cases but courts will resist it being used maliciously.
 - 2) Successful prosecution demand early preparation. Costs implications.
 - 3) Investigative resources vital as well as lawyers.
 - 4) Various factors create uncertainty in the criminal process (burden/standard of proof, exclusionary rules of evidence, credibility of experts, accuracy of eye witness accounts, juries, summing up) meaning risk inherent.
 - 5) Costs process not subject to same careful analysis as in High Court. “Broad brush”
 - 6) Successful conviction is most powerful weapon to deter wrong doing.

Tim Green's experience as a private prosecutor includes:

- 2014 - Authorised to exercise statutory powers of the Attorney General of the Isle of Man in significant multi-jurisdictional tax fraud.
- 2012 – Appointed to Attorney General's A Panel of advocates for HSE. EA, ORR private prosecutions.
- 2012-14 Instructed in several private prosecutions brought Severn Trent Water Limited.