

Private prosecutions for fraud offences

It is a common misconception that only the Crown, government agencies and other public bodies can bring prosecutions. In England and Wales a private prosecution can be brought by any private individual or body – including the victims of fraud.

What is a private prosecution?

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.

Any individual or body contemplating a private prosecution should seek professional legal advice from a specialist solicitor or barrister (see 'further information').

Who can bring a private prosecution?

A private prosecution can be brought by any private individual or body – for example a company, a charity (such as the RSPCA), or a department store.

The common law right to bring a private prosecution is preserved in section 6 of the Prosecution of Offences Act 1985. However, some offences require the permission of the Attorney General, the Director of Public Prosecutions, or the Director of the Serious Fraud Office before proceedings can commence.

Private prosecutions are not a new concept and have been used by a broad range of organisations in cases alleging financial crime, including Virgin Media, the Federation Against Copyright Theft (FACT), and the BPI (which represents the UK's recorded music industry).

Why bring a private prosecution?

Where a person or a company is accused of fraud, criminal proceedings are usually brought as a result of a successful police investigation, and they are prosecuted by the Crown Prosecution Service (CPS) or the Serious Fraud Office (SFO).

However, by commencing a private prosecution a corporate or individual victim can retain control of criminal proceedings and actively pursue a conviction against the accused, especially in cases where the prosecuting authorities are unwilling to bring proceedings. Private prosecutions can be used to tackle economic crime such as

counterfeiting or fraud (internal or external) or to protect commercial rights.

A successful private prosecution can result in a criminal conviction and custodial sentence for the offender, and compensation being awarded to the victim. It can also send a powerful deterrent message to those considering engaging in criminal activity against the victim.

The risks

There are a number of potential risks associated with private prosecutions and these need to be considered at the outset. They include (but are not limited to):

- The potential financial costs associated with bringing a private prosecution.
- The CPS may take over a private prosecution and either continue or discontinue it.¹ The factors that are taken into consideration during the decision-making process are outlined in legal guidance available on the CPS website.
- As with public prosecutions, there can be a considerable time delay between the commission of the offence and the trial. This can be distressing for victims.
- If the prosecution fails, the individual or body bringing a private prosecution may be at risk of being sued by the defendant for malicious prosecution.
- If the prosecution fails, an adverse order for costs (that is, being ordered to pay the defendant's court costs) may be made against the private prosecutor.

As with public prosecutions, a prosecution may fail for a number of reasons including the defendant being found not guilty, the court ruling that there is no case to answer (or insufficient evidence), or it may be stayed as an abuse of process².

¹ See ss6(2) and 23, Prosecution of Offences Act 1985.

² The CPS legal guidance on abuse of process states that a case may be stopped if there is 'something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed'. See www.cps.gov.uk/legal/a_to_c/abuse_of_process/.

Costs

The individual or body bringing the private prosecution must be prepared to fund the investigation and prosecution. A private prosecution is subject to the same obligations as public prosecuting authorities. In that regard, a private prosecutor has a duty to pursue reasonable lines of enquiry and obtain, retain and disclose relevant material.

The costs associated with any form of civil litigation (including private prosecutions) are not purely financial. The costs to management time and staff resource should also be carefully considered. Legal aid is not available.

In a private prosecution, an order may be made for a payment out of central (government) funds to compensate the prosecutor, but no such order will be made if the prosecution is instigated or continued without good cause.

How to bring a private prosecution

Step 1: investigate the fraud and gather evidence

If the material relevant to the prosecution is held by the police, it may be possible, once the case is in court, to obtain a witness summons to secure the production of relevant material from the police.

Step 2: assess the evidence and draft charges

The private prosecutor should consider whether the case meets the full code test in the Code for Crown Prosecutors, and draft the charges (where appropriate). In order to meet the test, there must be sufficient evidence to provide a realistic prospect of conviction and be in the public interest to pursue the prosecution. If the test is not met, the likelihood is that the CPS will take over the prosecution and discontinue it.³

³ *R (on the application of Gujra) v Crown Prosecution Service* [2013] 1 All ER 612.

Step 3: charges are laid before the court

When draft charges have been decided upon, an 'information' will be laid before a magistrates' court. The information provides details of the offence alleged and the relevant legislation that creates it. The magistrates' court will then decide whether to issue a summons or a warrant. The summons, which is served on the accused, will detail the offence or offences to be answered, and the date, time and address of the court that the defendant is required to attend.⁴

Step 4: case is heard in court

Depending on the nature of the charge or charges laid, the case may be tried before the magistrates' court or committed or sent for trial at the crown court. The prosecutor will need to instruct an advocate with rights to represent the prosecutor at the trial.

Notifying the CPS

There is no requirement on a private prosecutor to notify the CPS that a private prosecution is being brought, but the CPS may be notified at any stage in the process by a third party and may decide to intervene and either continue or discontinue the proceedings themselves. Alternatively, once the trial has started the Attorney General may put a stop to the proceedings by issuing a *nolle prosequi*.

Confiscation and compensation

If a defendant is convicted, it is possible to ask the court to make a compensation order as part of the sentence. The power of the court to make a compensation order is governed by the ss130–134 of the Powers of Criminal Courts (Sentencing) Act 2000. There is no limit to the amount of compensation that the crown court may order, though it must have regard to the offender's means. In the magistrates' court, the maximum sum which may be ordered by way of compensation for any offence is £5,000.

⁴ s1, Magistrates' Court Act 1980. Also see Part 7 Criminal Procedure Rules.

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Provident Personal Credit Ltd v Denise Hanshaw

The defendant was a self-employed agent working for Provident Personal Credit Ltd. Her job was to sign new customers who wished to take out loans, and to collect the weekly repayments on existing loans. Agents were not permitted to take out loans for their own benefit in other people's names. The defendant persuaded several of her existing customers to take out loans in their own names and to give her the loan monies. She did not inform Provident. Eventually the defendant was unable to keep up the repayments on the loans and the fraud came to light. The total loss was in the region of £20,000.

The case was initially prosecuted by the Crown Prosecution Service but discontinued. On the basis of independent legal advice, proceedings were re-instituted by Provident Personal Credit Ltd on the grounds that a further review of the evidence had reached a different conclusion. Two fraud charges were laid.

The defendant pleaded guilty in the magistrates' court and was committed to the crown court for sentencing.

Source: *Provident Personal Credit Ltd v Denise Hanshaw* (Croydon Magistrates Court, 8 January 2013).

An individual or organisation can therefore be compensated for any personal injury, loss or damage suffered as a result of the crime. 'Loss' may include a sum by way of interest. An award may be made whenever it can fairly be said that a particular loss results from the offence. Evidence is required to show what the loss is.

Another useful tool available to the crown court once a defendant is convicted is the making of a confiscation order. The purpose of this order is to deprive the defendant of the financial benefit that he has obtained from criminal conduct. To do this, the court has to decide whether the defendant has a criminal lifestyle, or failing that, has obtained a benefit from particular criminal conduct.

Confiscation orders act as a very powerful deterrent to criminals as, more often than not, they are more concerned about holding on to their assets than serving a custodial sentence. It is possible to ask the crown court to make both a confiscation and compensation order. In these cases, the victim would be compensated out of the confiscation receipts.

Further information

Bar Directory (to find a barrister)
www.legalhub.co.uk

Crown Prosecution Service
www.cps.gov.uk

Fraud Advisory Panel
www.fraudadvisorypanel.org

Law Society of England and Wales
(to find a solicitor)
www.lawsociety.org.uk

Legislation
www.legislation.gov.uk

Serious Fraud Office
www.sfo.gov.uk

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