

Parallel proceedings

AN INTRODUCTION TO UK LEGISLATION | JULY 2020 | SECOND EDITION



Organisations that fall victim to fraud can choose to pursue two or more potential sanctions at the same time. This can increase the chances of a successful outcome in fraud cases.

WHAT ARE PARALLEL PROCEEDINGS?

'Parallel proceedings' is a process whereby two or more potential sanctions are pursued at the same time (in parallel) to try to maximise the chances of a successful outcome.

A sanction is a penalty or enforcement action that can be taken against a person who is found to have committed fraud or, in some cases, failed to prevent it. Sanctions include the following.

- Disciplinary: human resource issues and internal disciplinary measures.
- Regulatory: regulatory enforcement against individuals and possibly the organisation itself.
- Civil: civil recovery, freezing and restraint orders and damages.
- Criminal: prosecution (including private prosecution) and associated orders such as disqualification, restraint, receivership and confiscation through the criminal courts.

Careful planning is needed at the outset of an investigation to ensure that all options are available and do not conflict with one another. Failure to plan carefully may increase the risk of closing off one or more options.

WHO CAN BRING PARALLEL PROCEEDINGS?

Parallel proceedings can be brought by private and public bodies, as well as by private individuals. This may mean that no one person or organisation has oversight or control over the various proceedings that are ongoing at any given time.

The type of proceedings that can be brought, and who can bring them, will depend on various factors including:

- the behaviour giving rise to the proceedings;
- the relationship between the parties; and

- whether the person or business is in a regulated industry.

Anyone contemplating parallel proceedings should seek professional legal advice.

WHY BRING PARALLEL PROCEEDINGS?

Organisations may wish to bring parallel proceedings in particular to ensure that the full range of fraudulent conduct is exposed and any wrongdoers are properly sanctioned. This might carry the complementary aim of 'example setting' to ensure that such conduct is not repeated. They may also wish to ensure that any money lost can be recovered.

In circumstances where State resources are limited and trials can take a number of years, the use of civil proceedings or private prosecution can be attractive.

Organisations may also be required to report certain kinds of wrongdoing to a regulator, or may make a voluntarily self-report as an organisation, in the hope or expectation that leniency will be shown and any consequent penalty will be lower.

KEY CONSIDERATIONS

There are a number of potential risks associated with pursuing parallel proceedings that need to be considered at the outset. These include the following.

Does the organisation have the required budget?

Bringing (or defending) civil or criminal proceedings can be costly.

Does the organisation have other necessary resources?

Involvement in multiple proceedings may require the provision of the same information to various parties in different formats or at different times.

Can the organisation maintain control?

The organisation will have no control over an action in the hands of State prosecutorial or regulatory authorities. This may discourage a defendant in civil proceedings from entering negotiations as the organisation will be unable to stop other proceedings from continuing.

Is there a risk that someone will be punished twice?

Both public and private bodies must be careful to avoid 'double accounting' in the imposition of penalties such as criminal confiscation and civil recovery.

Could the proceedings be impugned as leverage?

Organisations must be careful to avoid the perception that, for example, a private prosecution is being pursued to put pressure on a defendant in civil proceedings.

How will any information be used?

Defendants in criminal trials have privilege against self-incrimination, but many regulators have the power to require the provision of certain information. The timing of the filing of any defence to civil proceedings may be an important consideration for parallel criminal proceedings. Equally, the issue of legal professional privilege over the findings of any internal investigation should also be considered.

Is there a risk of inconsistent decisions?

It is possible for an internal disciplinary process and/or a regulatory investigation to exonerate an individual while they remain subject to criminal investigation and prosecution by a different body or must defend a civil case (or vice versa).

Is there a risk of prejudice?

Parallel proceedings will frequently end at different times. Should a defendant be found liable in a civil action or

following a regulatory investigation, this might be thought to prejudice their chances of exoneration following a criminal trial on the same issue.

Is there a risk of delay?

Where there is a serious risk of prejudice, civil proceedings may be adjourned, or the announcement of a regulatory decision delayed, until the outcome of any criminal trial is known. This might mean that any victims must wait to receive compensation for a wrong done to them, or an innocent defendant cannot recover their good name.

Ultimately, organisations should consider what they want to achieve (and what realistically can be achieved) before commencing any proceedings. Certain proceedings will be out of the hands of the organisation, but the organisation's response to those proceedings must also be considered in light of the factors listed above.

CIVIL VERSUS CRIMINAL

Important differences exist between civil and criminal sanctions that have implications for fraud investigations, including:

- evidential and interview requirements; and
- burdens of proof that must be met in court.

Prosecution and recovery in the criminal courts

Cases are usually reported to the police, Serious Fraud Office or other Government body for investigation and possible criminal prosecution and compensation. An individual or organisation can also initiate criminal proceedings in certain circumstances (called 'private prosecutions').

Issues to consider include the following.

- Whether the police will have an appetite to investigate and prosecute and at what stage to involve them (this should be immediately in most cases).
- Does the organisation have the willingness and resources to undertake a private prosecution?

- Is a forensic approach being taken to the gathering and retention of evidence? This is particularly important when recovering, restoring or recreating digital records.
- Are statements being taken from all relevant witnesses and should those suspected of criminal conduct be cautioned before interview?
- What is the likelihood of a successful criminal court recovery?
- Does the organisation have a clear policy about when to pursue criminal sanctions for acts of dishonesty?

Civil recovery, freezing orders and damages

Civil recovery measures can be used by victims of fraud to recover their losses. The emphasis is on the victim obtaining compensation (a payment of money or transfer of assets) from the fraudster or someone else who participated in the fraud.

Issues to consider include the following.

- Is urgent action required to prevent further loss?
- Will the threat of immediate civil proceedings facilitate an offer of settlement? Civil proceedings may provide a speedier outcome than criminal prosecution.
- Should civil proceedings run in parallel with criminal prosecution? A civil freezing order in the High Court may survive a dismissal or acquittal in the criminal courts as the burden of proof is lower.

REGULATORY ACTION

Both civil and criminal action can run in parallel with regulatory sanctions. Government bodies may have gateways for the sharing of evidence, and an organisation may consider waiving privilege over the findings of any internal investigation. However, care should be taken to ensure that evidence gathered for regulatory purposes can be used in either civil or criminal proceedings if appropriate.

Organisations should consider consultation with the appropriate regulatory body at an early stage, particularly in light of the possibility of Deferred Prosecution Agreements for corporate offenders.

DISCIPLINARY PROCEDURES

Internal disciplinary action can run in parallel with regulatory, civil or criminal sanctions. If criminal proceedings are contemplated or underway, it is important to consult with prosecuting authorities before taking disciplinary action.

Even if an employee is found not guilty of criminal charges, it may still be possible to instigate internal disciplinary procedures, subject to the organisation's policies.

FURTHER INFORMATION

The Bar Council to [find a barrister](#).

The Law Society to [find a solicitor](#).

Private Prosecutors' Association for the voluntary [code for private prosecutors](#).

Also see the [resources](#) section of our website.

This helpsheet was kindly reviewed and updated by Kerri McGuigan at Peters & Peters Solicitors LLP.

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