THE PRIVATE PROSECUTOR AS GUARDIAN OF THE PUBLIC INTEREST

Without careful consideration of the public interest test at the outset, some proposed private prosecutions may be susceptible to discontinuance

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The right to commence and continue a private prosecution is not unfettered. By virtue of s.6 of the Prosecution of Offences Act 1985, that right is subject to the power of the Director of Public Prosecutions to take over those proceedings at any stage, and, in the event that he considers that either the evidential or the public interest test contained within the Full Code Test is not met, to discontinue them.

In determining whether a prosecution is required in the public interest, the Code provides that a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.

The public interest test is one which, by its nature, can generate different, yet reasonably held, assessments because the weight to be ascribed to any particular relevant factor is, quintessentially, a matter for the decision maker. The Court will not interfere with a decision provided all material considerations were taken into account and there is no irrationality.

As the number of private prosecutions increases, and as they become a more frequent feature of related civil litigation, the broader issue of the public interest (beyond the question of motivation, which is primarily considered within the abuse jurisdiction) will come increasingly to the fore.

R (on the application of Deripaska) v DPP

On 16 October 2020, Mrs Justice Tipples DBE refused the claimant's application to renew his application for judicial review of the CPS's decision to take over and discontinue his private prosecution of Vladimir Chernukhin. Mr Deripaska's prosecution of Mr Chernukhin, for perverting the course of public justice, was brought against the backdrop of extensive civil litigation between the two relating to the disputed ownership of a company, Navio Holdings Ltd. Mr Deripaska contended that Mr Chernukhin and his former adviser, Mr Kargin, sought to gain an unfair and illegal advantage in that litigation by producing a trust document which had been falsified by alteration to bolster his case as to ownership of the company, and by providing false testimony in respect of that document, both in witness statements and orally, before an arbitral tribunal and then the High Court. The falsity of the document was uncovered during the course of the High Court proceedings. Despite that, Mr Justice Teare found in Mr Chernukhin's favour on the issue of whether he was the beneficial owner of the company.

Following a referral of the private prosecution to the DPP from the Crown Court, the DPP, applying the Full Code Test, concluded that whilst the evidential test was made out, the public interest test was not. The private prosecutor contended that the decision was irrational and/or not in accordance with the Guidance on Public Justice Offences incorporating the Charging Standard. Mrs Justice Tipples held that there was no basis in this case for the contention that the decision-maker acted irrationally or not in accordance with settled policy.

Private prosecutions and the public interest

It is not uncommon for a private prosecution to be brought against a backdrop of antecedent or contemporaneous civil or arbitration litigation. The sophisticated private prosecutor seeks to remove the victim from the evidential chain, ever aware of the motive issue, and to prosecute for public justice offences arising from the defendant's alleged conduct in those linked proceedings. The argument in such cases is that where the defendant has allegedly lied in, or sought to pervert those, linked proceedings, the victim is the justice system as a whole, such that there is a demonstrable public interest in prosecution, particularly where the CPS Charging Standard decrees that prosecutions for public justice offences should "usually" go ahead.

There is, in such cases, a broader public interest issue as to how the private prosecution jurisdiction should interface with civil (including arbitration) litigation. That issue, among other things, involves a consideration of the precise context in which the proposed private prosecution is brought, and conditions and resource availability in the criminal justice system (which bears a financial and resource cost even if the parties are privately funded).

Ultimately, cases such as this one raise this question: who is the guardian of the 'public interest'? Is it the CPS? If so, should it be the CPS? If, as the authorities make clear, more than one reasonable lawyer may legitimately hold differing views as to what is, or is not, in the public interest, why should the reasonable opinion of the CPS lawyer prevail over that of the private prosecution lawyer if their opinions differ?

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