



Parallel criminal and civil proceedings

By Sean Larkin, QEB Hollis Whiteman, 12 June 2008

The issue

There have been a long been difficulties created by simultaneous criminal and civil¹ proceedings which share the same, or at least a substantially overlapping, factual matrix. How to manage such 'parallel' proceedings has always troubled both civil and criminal practitioners and recent developments have given this issue ever-greater importance. This talk discusses the fundamental principles affecting parallel criminal and civil litigation, aiming to help both civil and criminal practitioners avoid the pitfalls it creates.

I am of the view that for three principal reasons the existence of parallel civil and criminal proceedings, and the problems that creates, has become increasingly prevalent.

Firstly, there has been an undoubted increase in regulation and an increasing criminalization of what hitherto would have been perceived as purely civil or regulatory. The examples are everywhere:

- (i) adoption of a substantial body of European directives;
- (ii) corporate manslaughter legislation;
- (iii) duties on directors²;
- (iv) intellectual property;
- (v) the Enterprise Act 2002, by which company employees may face up to five years in prison and/or an unlimited fine if they dishonestly agree to engage in prohibited cartel activities.

Further changes are likely to result from the recent report on regulatory sanctions by Professor Richard B. Macrory³. Professor Macrory was commissioned by the government to devise a more

1 I am using 'civil' in this context in its widest sense i.e. any non-criminal litigation. It includes regulatory interventions, inquests, industrial tribunal actions, professional, and even internal, disciplinary decisions.

2 For example, in nearly every major statute, where an offence is committed by a body corporate but was carried out with the 'consent or connivance' of any officer, then that officer, as well as the company itself, is liable. Although prosecutors are not yet fully aware of this and prosecutions on this basis remain rare, this will become an increasingly important consideration for company directors.

3 Professor Richard B. Macrory, 'Regulatory Justice: Making Sanctions Effective', 28 November 2006. The review was

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effective and consistent regulatory sanction regime. He concluded there were insufficiently broad and flexible powers available to regulators, with the result that cases were either under-prosecuted at the regulatory level or over-prosecuted in criminal proceedings. Professor Macrory suggested that regulators extend their own powers of sanctions and adopt as a model the Financial Services Authority, which has powers such as:

- (i) Administrative fines
- (ii) Publicity orders
- (iii) Restorative orders.

This might result in fewer 'over-prosecutions' – situations where criminal prosecutions are undertaken to reach where regulation cannot. However, it will also increase the amount of regulatory sanctions pursued, increasing the chances of parallel civil (qua regulatory) and criminal proceedings.

The first point is therefore that the criminal/civil line has become blurred. There is an increased criminalisation of activity. **The second** principal reason for increased in civil and criminal proceedings is the trend for claimants to actively seek redress in both the civil and criminal courts. In light of increased scrutiny by stakeholders and regulators, victims, particularly organisations, need to be seen to be pursuing all available sanctions. A successful prosecution and imprisonment serves as a useful deterrent of future behaviour while also sending out the right message to investors, customers and regulators.

There are a number of examples of regulatory bodies seeking increasingly varied sanctions against wrongdoers, no doubt reflecting the demands of claimants. The Financial Services Authority's (FSA) launched its first criminal prosecution for insider dealing on 23 January 2008. The chief executive of the FSA, Hector Sants, has said publicly that the FSA 'will use powers to prosecute matters as criminal offences and to restrain the proceeds of crime in appropriate cases'⁴.

The NHS has also stated publicly its parallel sanctions approach. If one considers the example of a death in an operating theatre, this may well result in:

- (i) an internal disciplinary hearing;
- (ii) a professional disciplinary action by the professionals' regulatory body;
- (iii) a criminal enquiry (if gross negligence is alleged);
- (iv) an inquest;
- (v) a civil action for negligence.

The defence is likely to be the same in each forum [e.g. my procedure fell within a reasonable range of options as identified by the Bolam test], but there may be completely different even competing considerations for each tribunal. For example, in criminal proceedings, the defence solicitors may wish a client to admit nothing and put the prosecution to proof. Meanwhile, the civil

commissioned by the government following the Hampton Review on regulatory inspections and enforcement.

4 Speech by Hector Sants, Chief Executive, FSA, FSA Retail Firms Conference, 27 February 2008, http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0227_hs.shtml.

action will most likely be fought by a local health trust [employing altogether different solicitors] who will be happy to settle, and who will make concessions and apologies to suit their tactical purposes.

The third stimulant to parallel civil and criminal proceedings is the increase in case-management in criminal procedure, and the emphasis on defence disclosure. Placing an obligation on defendants to disclose defences and documents prior to trial draws the sting from a central argument against parallel civil and criminal proceedings. It had long been argued that the unfairness of civil proceedings occurring parallel to, or before, a criminal trial was that the defendant would inevitably be required to disclose his defence to the criminal charges in the civil proceedings. This argument loses much of its force where criminal trials themselves require defence disclosure.

The obligation on defendants to disclose their defence began with the development of adverse inferences. Although the right to silence remains enshrined in the criminal law, if a defendant now chooses to exercise that right, either at interview or at trial, the judge or jury can, in certain situations, draw an adverse inference against him⁵. Parliament has now also extended defence disclosure, making it more akin to civil pleadings and procedure. The current position is that we have in force or have waiting to be brought into force:

- (i) defence statements⁶;
- (ii) procedure rules in which the over-riding objective encourages judges to be robust in their dealings with the defence;
- (iii) Court of Appeal rulings requiring defence advocates to identify flaws in the prosecution case and not sit back and take advantage;
- (iv) the disclosure of experts instructed not simply experts to be relied upon⁷;
- (v) the disclosure of names and addresses of witnesses to be called [although the Admin court has said that such information is protected by litigation privilege]⁸.

These are all concepts reasonably familiar to the civil world but, until recently, foreign to criminal practice (and, for that matter, the professional disciplinary world).

The case of *Mote v Secretary of State for Work and Pensions and Another*⁹ is a very good example of the effect of this third factor. Mr Mote was overpaid £67,000 of income support and housing benefit. He appealed the decision that he had been overpaid to the Social Security Appeal Tribunal but, before the appeal was heard, he was charged with offences of dishonesty. He then lost the appeal and a subsequent appeal to the Social Security Commissioners was dismissed. In the meantime, he was elected MEP and enjoyed privilege from prosecution which temporarily stayed the criminal matters. He was eventually convicted at trial and imprisoned.

Mr Mote appealed the decision of the Social Security Commissioners to the Court of Appeal arguing

⁵ Criminal Justice and Public Order Act 1994, s. 34-37.

⁶ Criminal Procedure and Investigations Act 1996, s. 5.

⁷ Ibid, section 6D.

⁸ Ibid, section 6C. *R v (Kelly) v Warley Magistrates' Court* [2007] 171 JP 585 [2007] EWHC 1836.

⁹ [2008] C.P. Rep. 13

that the Social Security Appeal Tribunal should have adjourned their proceedings pending the outcome of the criminal proceedings. The Court of Appeal reviewed the authorities on concurrent civil and criminal proceedings. They found that not only that a civil court does enjoy a 'real discretion' to decide whether or not to adjourn the civil proceedings but also that civil proceedings could frequently proceed while safeguarding the defendant's rights in the criminal trial. The court noted the power of the criminal courts to stay proceedings for abuse of process or to limit evidence admitted at trial, and stated that there is no prejudice caused to the defendant by the fact that he may disclose his defence to the criminal charges in the civil proceedings. The court pointed out, as I discussed above, that a defendant is now, anyway, required to disclose his defence to criminal charges at an early stage.

Advantages / Disadvantages

So, if parallel civil and criminal proceedings are becoming increasingly frequent, acceptable, what can practitioners on either side expect to be the benefits or drawbacks? When should one object to parallel proceedings as opposed to letting them run their course?

There are many advantages in letting the criminal proceedings take their course prior to embarking on civil proceedings:

- (i) the police and other state bodies have greater powers – arrest, search, interview under caution, restraint and confiscation. There are many bodies and witnesses who are likely to be more responsive to requests from the police than from private solicitors;
- (ii) the cost is borne by the state;
- (iii) a conviction pleaded at subsequent hearing saves considerable time;
- (iv) the issues will have been more clearly identified which will assist in the preparation of the hearing;
- (v) the defence evidence will have been pleaded or adduced;
- (vi) disclosure issues may largely have been resolved.

There are, on the other hand, certain disadvantages:

- (i) there is a lack of control of the nature and direction of the investigation;
- (ii) the state authorities may lack the requisite experience and expertise, particularly with regard to medical causation matters;
- (iii) it may take considerable time for the criminal matters to run their course (and the defendant may be suspended with pay (funded by the tax payer) for the entirety of those proceedings);
- (iv) the defence have had a test run;
- (v) witnesses may suffer from witness fatigue;
- (vi) disclosure issues may not have been resolved and there may be a conflict arising from the fact of parallel investigations or enquiries.

Relevant legal principles

Those are, very briefly, the advantages and disadvantages of parallel proceedings. Depending how these factors play out in your cases, you, as practitioners, are likely to be applying for proceedings to be stayed pending the outcome of parallel criminal or civil proceedings or resisting such an application. It is therefore useful to be up to date with the relevant legal principles.

Can there be parallel proceedings?

The answer to this, the fundamental question (one we have already touched upon in Mote), is undoubtedly – yes. The relevant test to be applied is that laid down in *Jefferson Ltd v Bhetcha*¹⁰. In *Jefferson Ltd*, the plaintiffs brought a claim to recover monies appropriated by a former employee who was also facing criminal prosecution in connection with the same matters. The Court of Appeal held that the court had a discretion to stay the civil proceedings or to adjourn an application for summary judgment having regard to the concurrent criminal proceedings. The Court of Appeal stated:

‘in my judgement, while each case must be judged on its own facts, the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff’s ordinary rights of having his claim processed and heard and decided should be interfered with....one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings....’¹¹.

The test has been refined by subsequent cases. A stay must now be refused unless there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings.

What factors might be taken into account in deciding ‘serious prejudice’?

It is therefore necessary to examine what factors the court will consider in deciding whether or not to grant a stay of civil proceedings due to a real risk of serious prejudice. The remainder of this speech discusses each of those factors in turn.

A The privilege against self-incrimination (1): The effect on civil proceedings

This most obvious potential unfairness caused by parallel proceedings derives from the privilege against self-incrimination. The privilege against self-incrimination means that a person cannot be compelled to say anything, or produce any documents or things, which might tend to bring him into the peril and possibility of being convicted as a criminal¹². This privilege applies in criminal cases only, and it follows that a defendant may only invoke the privilege where they face a criminal charge, there is a fear that they may be prosecuted for existing matters or that his answers may lead to a prosecution.

¹⁰ [1979] 1 W.L.R. 898

¹¹ Per Megaw LJ, at page 905.

¹² For a full-definition, see the often-cited Halsbury’s Laws of England (4th Ed) (1975) Volume 13, at paragraph 92.

Unfortunately, and this is where the problems start, what the privilege doesn't do is let you decline to participate at all in civil proceedings for fear that your answers will subsequently be used against you. Therefore, while you cannot be forced to advance a defence in a civil claim, your failure to provide a defence will inevitably lead to the loss of the claim. This can cause significant unfairness where criminal proceedings, in which one wishes to invoke the privilege, run parallel to civil proceedings.

That was the dilemma facing the defendant Clough in *V and C*, and the Court of Appeal showed little sympathy to him¹³. In deciding whether a stay of civil proceedings should have been granted because the privilege against self-incrimination constrained the defendant from putting forward a defence, the Court of Appeal stated:

- (i) there is no right to silence in the context of civil proceedings;
- (ii) even in criminal proceedings, if a defendant has a positive defence the criminal law now expects that defence to be adumbrated at an early stage if there is to be no danger of adverse inferences being drawn or adverse comment made;
- (iii) third, it is legitimate to start from the position that a positive defence is likely to exculpate rather than incriminate.

The Court of Appeal therefore refused Clough's appeal, holding there was no need for stay - one can enjoy the privilege, but if one exercises it one may suffer the consequences. It is, therefore, unlikely that, absent exceptional circumstances, a court or tribunal will grant stays of parallel civil proceedings to prevent defendants from implicating themselves in criminal matters.

There a number of options open to a defendant to address this problem:

- (i) it may be possible to avoid fear of self-incrimination. A court order may be subject to a condition that no statement or admissions made in compliance with the order shall be admissible against that person.
- (ii) one can invite the CPS to give undertakings to comply with orders. It is unusual for the CPS to agree, but they may agree. A common sense view may prevail.
- (iii) a defendant can argue for the exclusion of *prima facie* admissible evidence if admission would have an adverse effect on the fairness of the proceedings.

Finally, a defendant who feels obliged to give an account in civil proceedings or criminal proceedings should be careful as to representations made on his behalf – those representations might subsequently be used against him in parallel proceedings. There is clear authority that representations made by lawyers acting under authority can provide admissible evidence. *R v Turner*¹⁴ was a case that dealt with representations made at an earlier hearing by non-trial counsel. Another example is *R v Hayes*¹⁵ where a letter containing pre-trial negotiation about possible pleas was deemed admissible. Further, anything said by the defendant will be *prima facie* admissible.

¹³ [2001] EWCA Civ 1509

¹⁴ [1975] 61 Cr App R 67

¹⁵ [2004] EWCA 2844

B The privilege against self-incrimination (2): The use of documents obtained in civil proceedings in the criminal trial

There is further potential for the erosion of the privilege against self-incrimination in parallel proceedings caused by the compelled disclosure of documents. Where civil litigation exists parallel to criminal proceedings, there is a risk that documents the defendant is compelled to produce in civil proceedings are used against him in later criminal matters.

The Court of Appeal has shown equally scant concern for this problem. In *C PLC v P & Attorney-General (Intervenor)*¹⁶ the Court of Appeal decided that the privilege against self-incrimination cannot be relied upon to hold back incriminating material found in the course of a civil search order – in this case child pornography found on a hard drive. The court stated that the privilege against self-incrimination does not apply in respect of material that exists independently of any compulsory questioning. The Court of Appeal also made clear that it was possible for the incriminating material to then be used in criminal proceedings. The court stated that it has always been English law that evidence, however obtained, is admissible if it is relevant to any issue¹⁷. Indeed, English law goes further and says that, if it is relevant, it is immaterial that it has been illegally obtained, subject to the overriding discretion of a judge at a criminal trial (now set out in Police and Criminal Evidence Act 1984 s. 78) to exclude the evidence if in all the circumstances (including the circumstances in which the evidence was obtained) the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

A similar point arises in relation to production orders obtained in confiscation proceedings. Criminal Justice Act 1988 s. 93H allows officers to obtain a production order for material for the purposes of an investigation into whether any person has benefited from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct. The Division Court in *R. v Guildford Crown Court ex p. DPP; R. v Southwark Crown Court ex p. Bowles*¹⁸ confirmed that:

‘evidence produced by or consequent on a production order is in the ordinary way admissible at trial and not confined to its use to restraint or confiscation proceedings’¹⁹.

The potential for unfairness caused by such decisions is shown by the case of *Attorney-General's Reference (No 7 of 2000)*²⁰. A bankrupt was obliged under the Insolvency Act 1986 s. 296(1) to deliver to the official receiver possession of his estate, books, papers and other records relating to his affairs. Although the insolvency proceedings constitute civil proceedings, if the bankrupt failed to produce these records he would be in contempt of court and punishable with two years imprisonment. Pursuant to this obligation, the bankrupt was required to answer a preliminary questionnaire in which he said he had in the previous two years lost money in betting and

¹⁶ [2007] EWCA Civ 493

¹⁷ It does have to be said that in many statutes conferring powers to compel disclosure of evidence, the statute itself prevents that evidence being used in criminal proceedings. However, the material obtained can be used to make further enquiries.

If someone says that they had a bank account, the police can obtain evidence directly from the bank. If a defendant says there is a witness to the events, an account can be taken from them.

¹⁸ [1998] QB 242

¹⁹ Simon Brown LJ, at page 942.

²⁰ [2001] 1 WLR 1879

gambling. He later, as he was also required to, delivered up six boxes of documents, including documents relating to his gambling activities. Those documents then formed the basis of a criminal charge laid against him under Insolvency Act 1986, s. 362, which provides that a bankrupt is guilty of an offence if he had in the two years before petition contributed to or increased the extent of his insolvency by gambling.

C Adverse publicity

Theoretically, the fear that the publicity of civil proceedings would be of such a nature that the criminal trial would have to be postponed or stayed as an abuse might result in a court postponing the civil proceedings. However, in considering whether such publicity is likely to prejudice the criminal trial, it is now possible to apply a simple, and almost unwinnable, test. Was the publicity generated more prejudicial than Harold Shipman, Fred West and others? By the time Michael Stone, who hammered a mother and daughter to death in front of their sister, had his retrial, he had his psychopathic history splashed all over the papers, as well as the coverage of his earlier trial and conviction. Was this prejudicial? No. Has Barry George suffered undue prejudice as a result of the coverage of his trial for killing Jill Dando? No. The list is endless. The reality is that any risk of prejudice by adverse publicity is already met by publishers' fear of contempt proceedings, reporting restrictions and questions for the jury to exclude anyone who may have seen offending articles.

D Double jeopardy

Double jeopardy is the situation where criminal proceedings against a defendant are unfair because the defendant has previously been tried for essentially the same offence. The origin of this principle is in fact the origin of the abuse of process doctrine in *Connelly v DPP*²¹.

There have been various attempts to extend the principle to parallel criminal and civil proceedings, where the argument becomes whether a criminal trial constitutes trying the defendant for the same matters as in previous civil proceedings. In *R. v L*²², care proceedings in respect of a child and parallel criminal proceedings both considered the question of whether the child's father was responsible for her death. In the course of care proceedings, a judge in the Family Division found that although the child had died from non-accidental injuries, it was not possible to say whether the defendant or the child's mother was the more likely to have inflicted those injuries. At the defendant's trial for the murder, the judge rejected the appellant's submission that in the light of those findings the criminal proceedings should be stayed as an abuse of process. The appellant was convicted of manslaughter. The Court of Appeal upheld this decision, stating the purpose of the care proceedings had not been to consider whether the appellant had killed the child and so whether he could have been convicted or acquitted of a criminal offence. The court responsible for the care proceedings had no jurisdiction in relation to criminal proceedings and, accordingly, there had been no abuse of process. Interestingly, the court also stated that, although parallel criminal proceedings are not a reason to adjourn care proceedings, as delay is generally detrimental to children, it is desirable to have liaison between the relevant authorities and some linkage between directions hearings as the cases progress.

21 [1964] AC 1245

22 [2006] 1 W.L.R. 3092

E Rehearsal of Evidence

It is no ground to stay civil proceedings because they provide an opportunity for a rehearsal of the criminal trial. In the course of *Mote*, counsel for the defence argued that as the parties to the civil proceedings were the same as the parties to the criminal proceedings, they would have the opportunity to study the appellant's reaction and to assess what questions to ask in the criminal trial. He emphasised that this was a prejudice to the appellant which could not realistically be the subject of an abuse of process application in the criminal proceedings. There was no effective remedy for it apart from postponing the hearing of the appeals pending the conclusion of the criminal trial. The Court of Appeal rejected this argument entirely, concluding that the point had no merit.

F Burden of conducting parallel litigation

Unlike many of the other factors above, the burden of conducting parallel litigation has been found to be a factor that could lead to a stay but only in exceptional circumstances. In *R v Institute of Chartered Accountants in England ex p Brindle*²³, the Court of Appeal allowed an appeal from the Divisional Court who confirmed a decision of the committee of enquiry to proceed to disciplinary proceedings whilst litigation was unresolved. The accountants were involved in BCCI. Although the court identified a number of factors, the primary concern was the sheer scale of the task faced by the committee and the burden of fighting on separate fronts.

Brindle must be contrasted with *R v Chance*, in which the Divisional Court refused an application for judicial review of a decision by chartered accountants Joint Disciplinary Scheme refusing an application to stay pending civil actions. The applicants were accountants for Robert Maxwell. They faced a large number of enquiries ranging from DTI, SFO, Parliamentary committees, civil claims and disciplinary proceedings. The court distinguished *Brindle* and limited it to its own facts, stating:

'The extent of the overlap between the proceedings will mean that the proper preparation for defence on the one front will also serve as the defence on the other front. If difficulties arise as a result of different tribunals requiring different things of the named individuals at the same time, then this can be sorted out by the tribunals responsible for the conflicting demands'²⁴.

*R [Application of Ranson] v Institute of Actuaries*²⁵ perhaps strikes the balance between *Brindle* and *Chance*. The applicants challenged the decision to continue proceedings, notwithstanding outstanding civil litigation. Mr Justice Moses reviewed the authorities and allowed the application and directed the stay, largely on the basis that the applicants were litigants in person. He confirmed, however, that the power to stay should be exercised sparingly and great weight is applied to the view of the body making the decision but held that, in this case, the burden of the applicants would be too great.

²³ [1994] BCC 297

²⁴ Per Henry LJ

²⁵ [2004] EWHC 3087

Conclusion

It is clear that, in relation to many of the factors discussed below, the Court of Appeal is firmly of the view that they are unlikely to result in sufficient prejudice to merit a stay of civil proceedings. Nevertheless, arguments for a stay can, and do, succeed, and practitioners - civil or criminal, prosecution or defence - must be alive to the arguments for and against. Whichever side one argues, a case-specific approach, relying on a range of the factors discussed above will be the most effective approach.

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