5 SAH

FIVE ST ANDREW'S HILL

Private Prosecutions Seminar

— SEPTEMBER 2019

A practical guide on the procedures and challenges of pursuing a private prosecution.

— Edmund Burge QC
— Andrew Bird
— Sarah Wood
— Ben Keith
— Benjamin Burge
— Alexandra Davey
— John McNamara
— Jonathan Benton
DIRECTOR OF THE INTELLIGENT SANCTUARY

OVERVIEW

5SAH has been a market leader in private prosecution work for a number of years and our barristers have been instructed in some of the recent leading cases in this area. We offer an extensive team of expert barristers who undertake this work and have significant knowledge of all aspects of pursuing a private prosecution.

The seminar aims to be a practical guide on the procedures and challenges of pursuing a private prosecution. It will provide a comprehensive and useful guide to working in this evolving area by covering a number of key topics associated with undertaking this work, including:

- Obtaining information and evidence for use in private prosecutions
- Laying an information and issuing a summons
- The role of the investigator
- Disclosure
- Code for Private Prosecutors
- Costs
- Restraint and Confiscation in the context of a private prosecution
- Private Prosecutions in the international forum

S P E A K E R S

Our Seminar will be presented by the following experts:

EDMUND BURGE Q.C.

Ranked in Chambers & Partners as a leader in financial crime at the London Bar & in the Legal 500 for fraud. Currently instructed to advise on the merits of bringing a private prosecution against public officials for their suspected criminal acts committed in the course of legal proceedings.

ANDREW BIRD

Ranked in the leading directories in the fields of Financial Crime and POCA & Asset Forfeiture. Also ranked in Who's Who at the UK Bar in Asset Recovery. Andrew has been involved in a number of substantial private prosecutions for fraud in the last 3 years.

SARAH WOOD

Ranked in Chambers & Partners, Sarah is the Joint Head of the Business Crime Team. She specialises in criminal and family matters involving high-value assets and complex financial arrangements and has been regularly instructed in Private Prosecution work for the last 10 years.

BEN KEITH

Ben Keith specialises in Extradition, Immigration, Serious Fraud, Human Rights & Public law. He is ranked in Chambers & Partners & Legal 500. He acts in private prosecutions under Universal Jurisdiction for breaches of international law and advises in cross-border litigation.

BENJAMIN BURGE

Ben has extensive fraud experience, defending and prosecuting multi-million pound conspiracies, recent instructions include a transatlantic team role representing a London based foreign exchange trader charged with offences by the US Department of Justice.

ALEXANDRA DAVEY

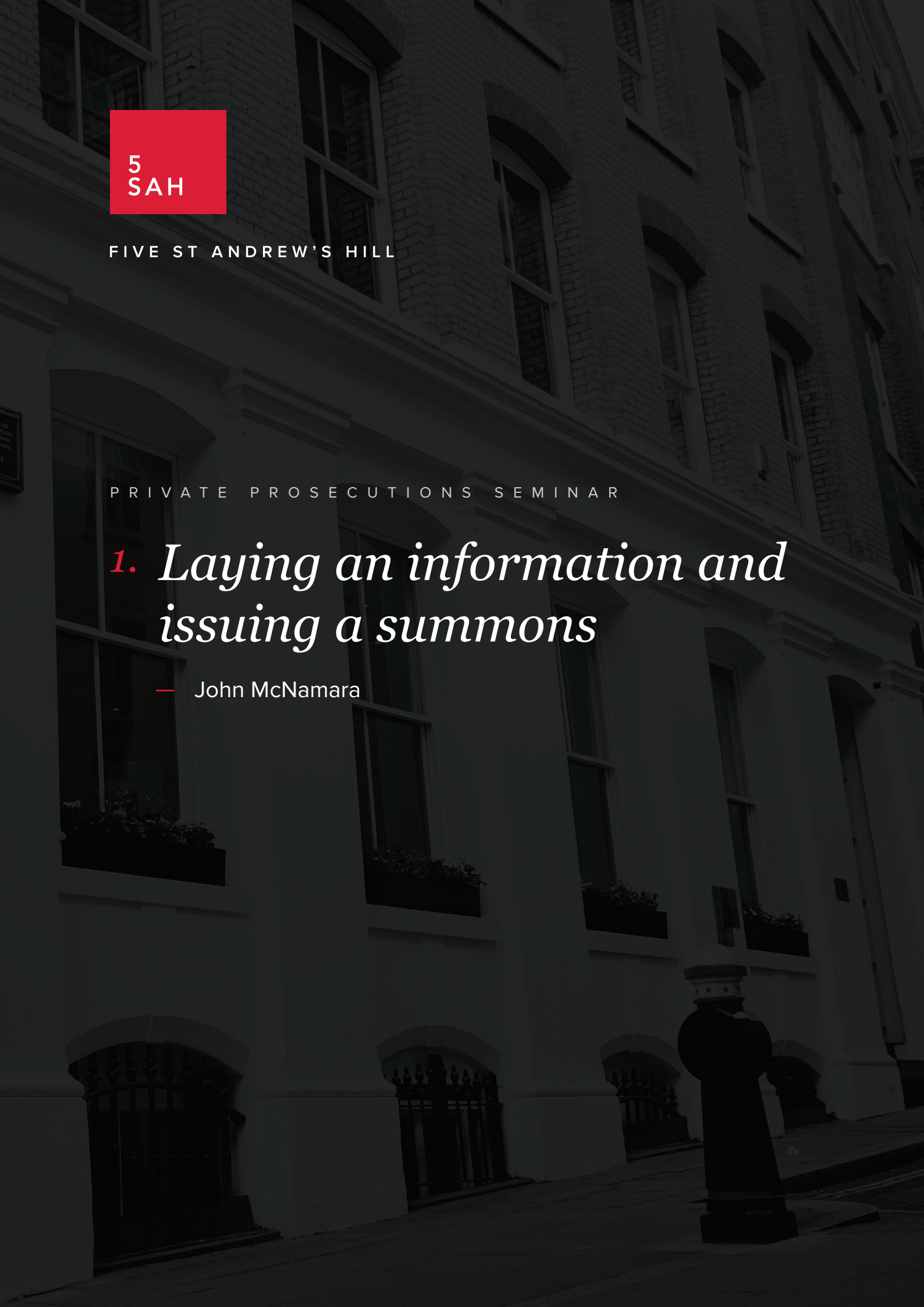
Alexandra is regularly instructed as Prosecution Counsel in private prosecutions brought by luxury brands in relation to trademark infringements & counterfeit goods. She also has experience as Disclosure Counsel & Disclosure Officer in private prosecutions brought by individuals.

JOHN MCNAMARA

John is a barrister practising in criminal law and all related areas. John is frequently instructed in the private prosecution of trademark and copyright offences. In his role on the CBA executive he provided a response to the consultation on the Code for Private Prosecutors.

JONATHAN BENTON DIRECTOR OF THE INTELLIGENT SANCTUARY

Director and part-owner of Intelligent Sanctuary. Fast-paced and fast-growing company. Leading the way in the use of the latest technology to help clients understand their problems, risks, and opportunities.



5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

1. *Laying an information and issuing a summons*

— John McNamara

5
SAH

FIVE ST ANDREW'S HILL

LAYING AN INFORMATION AND ISSUING A SUMMONS

JOHN McNAMARA, barrister 5 St Andrews Hill

Introduction

1. Beginning a private prosecution can be a complicated administrative and judicial process. Given the nature of private prosecutions it is likely that all areas of the process will be scrutinised by lawyers for any defendant. It is vitally important that those bringing prosecutions do so carefully.

2. Private prosecutions are commenced by an application for a summons. That process is started by the laying of an information (which can also properly be referred to as "applying for a summons"). The laying of an information is an administrative act performed by the prosecutor. An information is simply a statement by which the magistrate is informed of the offence. It is designed for the purpose of initiating criminal proceedings.

3. An information cannot be laid by an unincorporated association (*Rubin v DPP*, 89 Cr. App. R. 44, DC). It is preferable for an individual to lay an information (*R. v Ealing Justices Ex p. Dixon* [1990] 2 Q.B. 91, DC).

Time limits

4. An information to try a summary only offence must be laid within 6 months of the date of the offence. Failure to do so will mean the court cannot try the information pursuant to section 127 Magistrates' Court Act 1980.

5. The information is laid when it is received at the office of clerk to the justices in the relevant area (*R. v Manchester Stipendiary Magistrate Ex p. Hill*, 75 Cr. App. R. 346, HL).

6. When calculating "6 months" the day of offence is excluded from the calculation but the day on which the prosecution begins is included. A month is defined as a calendar month (Interpretation Act 1978 Schedule 1). For periods calculated in months, the period ends at midnight on the day in the subsequent month that bears the same number as the day of the earlier month or the preceding number is no such number appears in the subsequent month (*Dodds v Walker* [1981] 1 W.L.R. 1027, HL; *Chief Constable of Merseyside v Reynolds* [2004] EWHC 2862 (QB)).

7. If it is unclear whether an information has been laid within the time limit the defendant is entitled to the benefit of the doubt. For the court to have jurisdiction to try an information the prosecution will have to prove to the criminal standard the information was laid in time (*Atkinson v DPP* [2004] EWHC 1457 (Admin)).

8. If a magistrates' court mistakenly rule that time limits have expired there is no power for the case to be re-opened *Verderers of the New Forest v Young* [2004] EWHC 2954 (Admin).

Obtaining a summons

9. After an information has been laid the court can then conduct the judicial exercise of deciding whether or not to issue a summons. The issuing of a summons is governed by section 1 Magistrates' Court Act 1980.

10. The Criminal Procedure Rules 2015 (amended in 2018 and 2019) set out the relevant rules at Crim PR 7. Crim PR 7(6) summarises that an application for a summons should:

    (a) concisely outline the grounds for asserting that the defendant has committed the alleged offence or offences;

(b) disclose—

(i) details of any previous such application by the same applicant in respect of any allegation now made, and

(ii) details of any current or previous proceedings brought by another prosecutor in respect of any allegation now made; and

(c) include a statement that to the best of the applicant's knowledge, information and belief—

(i) the allegations contained in the application are substantially true,

(ii) the evidence on which the applicant relies will be available at the trial,

(iii) the details given by the applicant under paragraph (6)(b) are true, and

(iv) the application discloses all the information that is material to what the court must decide.

6. The case of *R (Kay and another) v Leeds Magistrates' Court* [2018] 2 Cr App R 27 sets out what the court should consider when considering issuing a summons. The position is summarised at paragraph 22 of the judgment as:

(1) The magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time-barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute.

(2) If so, generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so—most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper.

(3) Hence the magistrate should consider the whole of the relevant circumstances to enable him to satisfy himself that it is a proper case to issue the summons and, even if there is evidence of the offence, should consider whether the application is vexatious, an abuse of process, or otherwise improper.

(4) Whether the applicant has previously approached the police may be a relevant circumstance.

(5) There is no obligation on the magistrate to make inquiries, but he may do so if he thinks it necessary.

(6) A proposed defendant has no right to be heard, but the magistrate has a discretion to:

(a) Require the proposed defendant to be notified of the application.

(b) Hear the proposed defendant if he thinks it necessary for the purpose of making a decision.

11. The pro forma "sp001" application for applying for a summons or warrant provides prompts requesting the majority of the above criteria. The form can be found in Microsoft word format on the justice.gov.uk website.

What level of analysis should the court employ?

12. *Kay* followed on from *R (DPP) v Sunderland MC* [2014] EWHC 613 (Admin) in which the court had observed (at paragraph 22):

> "… [The magistrate] *was obliged to come to a judicial conclusion on whether or not to issue either or both summonses, and that required a review of whether there were prima facie evidence of the ingredients of the common law offence. We have set them out. Had he conducted a rigorous analysis of the legal framework, he could not reasonably have concluded that there was such.*"

13. In *R (Johnson) v City of Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) the Divisional Court stressed the need for this "review" and "rigorous analysis" in rejecting the submission that the threshold test for the issue of a summons was a low one. The Court also held that the Claimant Mr Johnson was entitled to know the District Judge's reasons for finding why the prosecution in his case was not vexatious as being politically motivated.

Vexatious or mixed motives?

14. Of course a prosecution (whether public or private) must not be improperly motivated, but the courts have recognised that in many private prosecutions a prosecutor will have a motive other than simply a desire that justice be done and that a criminal offence (if proven) should be punished. In *R v Bow Street MSM, ex p South Coast Shipping Co Ltd* [1993] QB 645 it was held that the mere presence of an indirect or improper motive in launching a prosecution did not necessarily vitiate it; and the court would be slow to halt such a prosecution in the case of mixed motives unless the conduct was truly oppressive. This was followed in *Dacre v City of Westminster Magistrates Court* [2009] 1 WLR 2241.

15. In *D Limited v A and Others* [2017] EWCA Crim 1172 the Court of Appeal considered a private prosecution for fraud brought, without police or CPS support, by a company against its former Chief Executive and his family and associates. The Judge had found that the proceedings were an abuse of process for various reasons. In reversing that decision the Court of Appeal stressed at paragraph 40 the general right to bring a private prosecution which *"is not readily to be undermined"*.

16. The Court of Appeal considered the question of motive at paragraph 59 (emphasis added):

> "*In any event, mixed motives may often be present in many prosecutions. In a public prosecution, the proceedings will be brought in the public interest: but the actual complainant may often be accused of (say) seeking revenge after a relationship has failed, and so on. This may sometimes indeed be the case but the true motive of the complainant may still be to seek justice. In a private prosecution, the complainant of course is frequently the prosecutor. But there too it is well established* ***that mixed motives do not of themselves necessarily***

> ***vitiate the prosecution****: see, for example R v Bow Street Metropolitan Stipendiary Magistrate ex p. South Coast Shipping Co. Ltd [1993] QB 645."*

17. In *D Ltd v A* there were parallel civil proceedings, but these had been stayed. By contrast *R(G) v S and S* [2017] EWCA Crim 2119 was a case where there were criminal and civil proceedings in parallel. The Crown Court Judge had stayed the prosecution as an abuse of process for various reasons, one of which was a finding that the criminal proceedings were being used *"to apply pressure on the respondents in relation to the civil proceedings which covered, essentially, the same subject matter."* The Court of Appeal reversed the ruling, holding that:

> *"...mixed motives are to be distinguished from an oblique motive which is so dominant and so unrelated to the proceedings that it renders them an abuse of process."*

18. The Court also accepted as correct a concession by the defendant that many private prosecutions are brought with mixed motives, and that the mere presence of mixed motives cannot be the test.

19. Prosecutors should also be wary when considering the pursuit of POCA as a reason to prosecute. The Court of Appeal has held that pursuit of a confiscation order that will financially benefit a prosecutor should not be ground for prosecuting. Reference should only be had to the test in the Code for Crown Prosecutors (*Wokingham Borough Council v Scott and others* [2019] EWCA Crim 20). Of course for a private prosecutor the proceeds of a confiscation order would pass to the State (unlike in *Wokingham BC v Scott* where a local authority benefit from 37.5% of any confiscation). While a compensation order would benefit a private prosecutor if that were the sole reason for the private prosecution it would likely amount to an abuse of process.

Approach to the police

20. There is no requirement that a private prosecutor applying for a summons or warrant must first have taken the matter to the police, although depending on the facts of the case it may be a relevant circumstance. A magistrate exercising their decision to refuse to issue process for that reason alone without considering the whole of the relevant circumstances and without informing himself of all relevant facts would be a flawed exercise of the discretion (*Barry v Birmingham Magistrates' Court* [2009] EWHC 2571 (Admin); [2010] 1 Cr. App. R. 13).

What if CPS is already prosecuting?

21. When the CPS is already pursuing what it considers to be the appropriate charges, a magistrate should be slow, in the absence of any special circumstances, to issue a summons for a more serious charge on the application of a private prosecutor. Such a course could well be oppressive and there is a distinct possibility of the DPP taking over the private prosecution (*R v Tower Bridge Metropolitan Stipendiary Magistrate Ex Parte Chaudhry* [1993] 99 Cr App R 170).

What if the proposed defendant has been cautioned?

22. This scenario has been explored in *R (on the application of Lowden) v Gateshead Magistrates Court & Chief Constable of Northumbria Police* (2016) EWHC 3536 [Admin].

23. That case was a judicial review of a decision by the Magistrates Court not to issue a summons because a simple caution had previously been administered. The District Judge made the decision not to issue the summons having assumed that there had been no express warning to the Defendant that he might face a subsequent private prosecution. The summarised position from that case was that:

i. Section 6(1) of the Prosecution of Offences Act 1985 retains the broad right to institute a private prosecution. This right ought not to be constrained by the courts without due course;

ii. The case of *Hayter v L* [1988] 1 WLR 854 is authority for the fact that it is not an abuse of process for a private prosecution to follow when a caution has been administered in circumstances where it has been made plain to the Defendant that such a prosecution may still follow. Davis LJ commented that this decision *'connotes that in principle a subsequent private prosecution is capable of co-existing with a previous and extant police caution'.* The case of *Omar v Chief Constable of Bedfordshire Police* [2002] EWHC 3060 was cited in support of this general proposition;

iii. The House of Lords in *Jones v Whalley* [2005] EWHC 931 held that it was an abuse for a private prosecution to follow a caution in circumstances were an explicit representation had been given to the Defendant that he would not be prosecuted. The decision in *Hayter* was not over-ruled by the House of Lords but was instead distinguished on its facts;

iv. The Ministry of Justice guidance on the administering of cautions that was issued in 2013 reflects the comments of the House of Lords in *Jones v Whalley* in that it sets out guidance designed to ensure that a person receiving a caution is made aware that a private prosecution may follow.

Protection for defendants

24. The protection for an individual against whom a summons is issued is the right to apply to the Justices to dismiss it or to stay it on the ground that it was an abuse of the process to have issued it at all (*R. v Bradford Justices Ex p. Sykes* [1999] Crim. L.R. 748).

25. In *Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 A.C. 42; [1993] 3 W.L.R. 90 the House of Lords considered when considering abuse of process arguments the magistrates' court is confined to matters directly affecting the fairness

of the trial of the particular accused they are dealing with (e.g. delay). The magistrates' court jurisdiction did not extend to the wider supervisory jurisdiction for upholding the rule of law; that the wider responsibility was vested in the High Court.

26. As such where an abuse of process argument falls under the second limb, and does not touch on the issue of the fairness to try the defendant, the issue should be dealt with in the High Court and not the magistrates' court.

Duty of candour

27. As outlined in paragraph 6 above the proposed defendant has no right to be heard on an application for summons. In fact the significant majority of applications will be decided without the need for material over and above that provided by the prosecutor.

28. As a result the prosecutor's obligations to the court are vitally important. The duty of candour has described as one of "full and frank disclosure." That duty includes not to mislead the court in any material way, the disclosure to the court of any material which potentially adverse to the applicant or might militate against the grant or which "may be relevant to the judge's decision, including any matters which indicate that the issue might be inappropriate" (*R (Kay and another) v Leeds Magistrates' Court*).

29. It follows that the duty therefore applies to both issues of fact and law. The prosecutor must put on their "defence hat" and, if appropriate, raise with the court issues such as:
    - Issues with the merit or procedure of the application;
    - Issues surrounding the motive of the prosecution (i.e. concurrent civil proceedings);
    - Potential abuse of process arguments which may be raised;
    - Whether "traditional" law enforcement has been approached and any reaction from such agencies.

Consequences

30. Private prosecutors may not get a second bite of the cherry. It has been considered doubtful if it is proper for justices to decide as a matter of discretion, to entertain a second application for a summons on exactly the same material as considered by other justices of the same bench (*R. v Worthing Justices Ex p. Norvell* [1981] 1 W.L.R. 413, D.C).

31. When it is considered bringing a prosecution has the potential to amount to an "improper act" for the purposes of recovering costs under the Prosecution of Offences Act it is vitally important that care is taken at all stages of the process.

5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

2. *The role of the investigator*

— Jonathan Benton

DIRECTOR OF THE INTELLIGENT SANCTUARY

intelligent sanctuary

1. The use of non-warranted investigators in a private prosecution, in reality a private investigation in anticipation of a private prosecution, makes eminent sense given the shared common standards, namely the Police and Criminal Evidence Act, 1984, Codes of Practice, and the codes governing private prosecution, 'the code' hereafter. However, we must first ensure we have the right investigator as the range in experience, standards and ability to understand and act within the parameters of the law may present a 'minefield' for the private prosecutor.

2. Private investigators can (if they choose to do so) adhere to a voluntary code of practice and standards but remain unregulated and have repeatedly been subject to criticism both in the press and parliament. Unscrupulous actions by investigators ranging from unfairly obtaining information for a tabloid newspaper through to the use of nefarious business activities intended to undermine the competition, which fuel bad press. Instructing suitably qualified and experienced investigators, possibly those who have been warranted investigators such as the police, HMRC or other recognised investigative authorities, may be one of the most important decisions of any private prosecution.

Engagement

3. Has a crime been committed? Lawyers can, of course, make that judgement, but first an assessment against the National Crime Recording Standards (NCRS),[1] which is Home Office policy may prove helpful, not least as part of your justification to proceed. Using an impartial, adequately trained and qualified investigator may help in that assessment against NCRS and may prove helpful if you choose to report to the authorities (albeit not as prerequisite for the private prosecutor). The investigator may also help by ensuring the allegation is properly recorded for any subsequent scrutiny, ensuring the right information is obtained helping to shape your investigation strategy.

[1]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116269/ncrs.pdf

4. The investigator will work with the private prosecutor to help with the assessment of any evidence that is required by advising on what evidence may be obtainable using a number of investigative actions. The investigator should ensure the principles of admissibility are followed, it is fair, balanced and any evidence obtained using private methods is not an abuse of the court's process.

Obtaining evidence

5. The investigator is not bound by the Regulation of Investigative Powers Act, 2000 (RIPA) or the Investigatory Powers Act, 2016 and should be mindful that some acts of surveillance under RIPA may be unlawful. However, instructing an appropriately trained investigator should protect the integrity of an investigation by ensuring that surveillance, if used, is conducted within the spirit of RIPA and only within the parameters of what is lawful by a private citizen. Moreover, the investigator should ensure that an adequate record is made. The record should provide a rationale for the action to be taken, setting out what resources, devices or equipment are to be used, when, who by, what the operatives training and experience are and importantly a detailed log of the events is made. All of this will ensure the spirit of RIPA is followed.

6. The investigation may require the seizing, recording and examination of evidence. Much of the equipment available to the police and others can now be purchased e.g., tamper-proof exhibit bags. Packaging, assessing and providing the appropriate continuity would mean that accepted standards of evidence for a prosecution are followed. Furthermore, much of the forensic work police may request on an exhibit are available for the private prosecution although cost may be a factor. That includes a growing market of professional cyber forensic experts that can examine data held on smart phones, tablets and other electronic media storage devices.

Interviewing witnesses

7. The interviewing of witnesses is a task many believe they can do but few have received any formal training. The use of a suitably qualified investigator can ensure, importantly, that the witness is correctly managed, looked after and the statement is admissible. The College of Policing issues guidance on the obtaining of a witness statement[2]. If followed it can be assumed the statement will follow the rules of criminal procedure, notes retained, log of when and where the interview took place and the standard template followed ensuring best evidence is obtained.

[2] . https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/

Open-source intelligence

8. Open-source intelligence enquiries ('OSINT') are now a critical part of any criminal prosecution, to not use them in a private prosecution may be remiss and mean critical opportunities for securing evidence are not identified or pursued. The private prosecutor may be at an advantage, budget permitting, over the police given the rapid pace at which information becomes more accessible and obtainable. This may be no more relevant than in a complex, international fraud case, the type of criminal allegation where it can prove increasingly difficult to secure the engagement of the police (or other law enforcement agency). With less than 30% of the world wide web in the English language and significantly less than that indexed and accessible through a conventional search engine the data so often is out there. The challenge with data is having the specialist skills to locate, retrieve and interpret it.

9. The investigator can also obtain, view, record material held on the 'darkweb', albeit they are ill-advised to solicit or coerce material that may be available, as their acts in doing so may be unlawful. Information and evidence from fake websites through to tracing cryptocurrency through an exchange are all available to the private prosecutor, although instructing suitably qualified and experienced investigators is advised and will ensure the rules of evidence are followed.

Financial investigation

10. There is no provision for accredited financial investigators in the private prosecution setting, yet there is possibly a no more important area of the investigation where the expert skills of a specialist investigator may prove critical to a private prosecution. From knowing when, where and how to obtain specific information; ranging from the beneficial owner of a company in an offshore territory through to information relating to bank accounts or charges against a property require specialist training. Without using a specialist, it may have a bearing upon what assets are identified, assessed for risk of dissipation, restrained and ultimately confiscated/forfeited by the courts.

11. The role of data and its use in a financial investigation is becoming increasingly critical to the tracing of assets in a global asset recovery effort. The suitably trained investigator will be able to identify, interpret and refer to public tax records of Russian expats through to trade export licences for the People's Republic of China. All of this financial intelligence may provide the 'needle in the haystack' that uncovers a hidden company behind which vast amounts of proceeds of crime sit. Of course, this process of obfuscation by the alleged criminal and unravelling by the investigator can also prove to be valuable in evidencing the crimes themselves.

12. There are a significant number, circa. 340m, copies of original, government records that can now be commercially obtained by a suitably trained person. Of course, the original document may be required for court, but sight of a copy may help reduce requests for legal assistance from a foreign jurisdiction. The process of identifying hidden companies and assets should mean the proceeds of crime are identified quicker, and the victim stands a much greater chance of recovering their money. The intelligence gathered in the course of the financial investigation may provide the grounds for the application of a Norwich Pharmacal order.

13. A Norwich Pharmacal order is a court order for the disclosure of documents or information that is available in the United Kingdom. It is granted against a third party which has been innocently mixed up in wrongdoing, forcing the disclosure of documents or information, this may include a financial institution. By identifying individuals, the documents and information sought are disclosed in order to assist the applicant for such an order in bringing legal proceedings against individuals who are believed to have wronged the applicant, by example a fraudster.

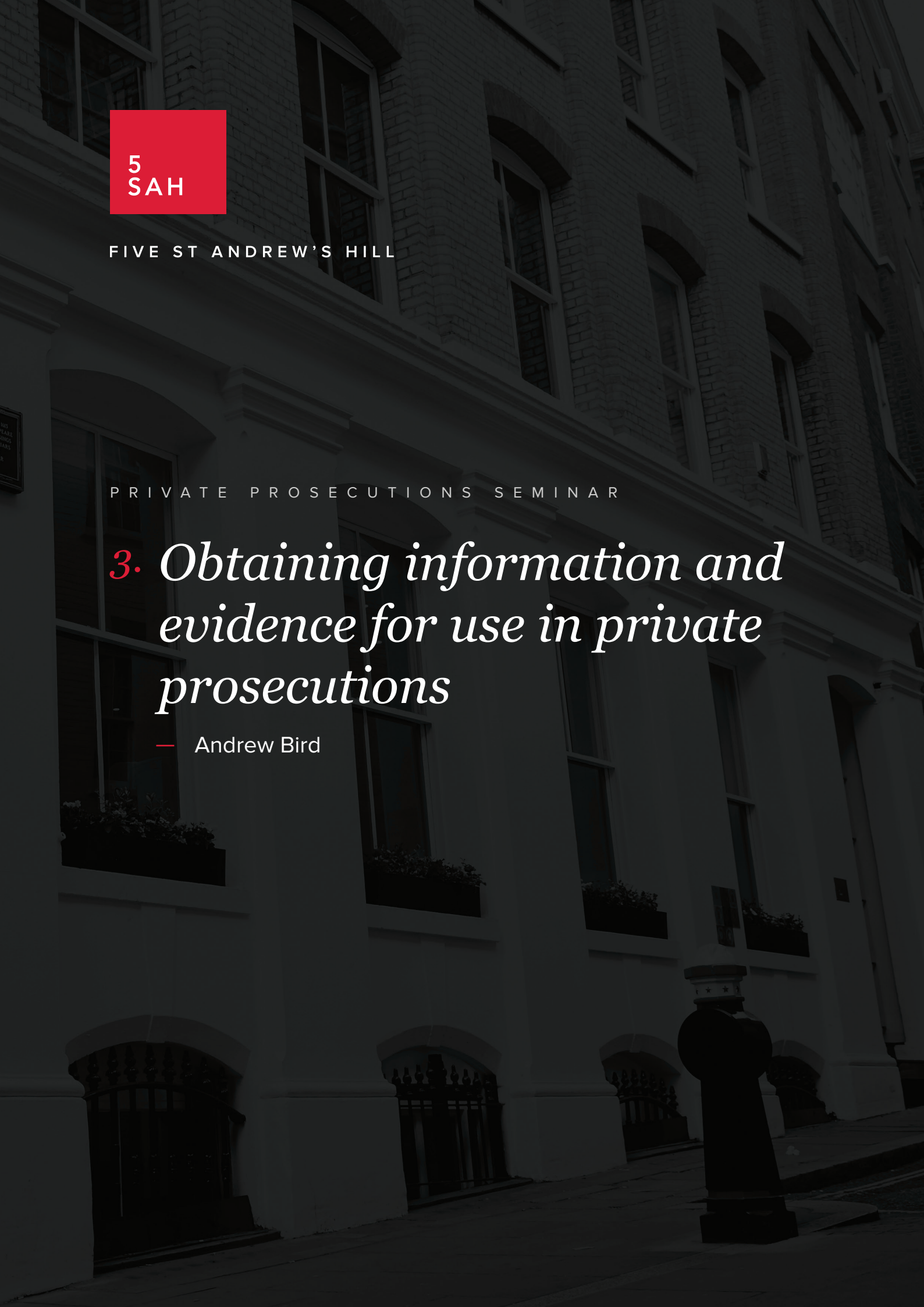
Disclosure and final comments

14. Not to be overlooked is disclosure. By instructing a suitably qualified and experienced investigator you should expect disclosure to remain a golden thread through their investigation. Detailed logs of material obtained, document management systems and ongoing assessment of material will ensure that the court can have confidence in the conduct of the investigator and their investigation.

15. The use of experienced former law enforcement investigators with suitable qualifications, will significantly enhance the ability to pursue a private prosecution. An investigator who is able to follow the guiding principles, codes of practice and spirit of the law applied in a criminal prosecution should ensure your private prosecution is safe. When you add the need to identify, restrain and ultimately ask the court to confiscate assets it is difficult to see how it can be achieved without an adequately trained investigator. Ultimately, if the expert is not employed the right material may not be obtained from a bank through to the hidden assets remaining unidentified, ultimately leading to loss for the victim. Whilst it is the norm for banks to only engage with accredited financial investigators and judges to hear their application for production of accounts, the transposition of that level of expertise required into private prosecutions may help apprehend more fraudsters and ensure victims are properly compensated.

Jonathan Benton

Director, Intelligent Sanctuary and formally Detective Superintendent, Metropolitan Police Service & National Crime Agency, Head of International Corruption Unit, Money Laundering and Criminal Finance Teams



5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

3. *Obtaining information and evidence for use in private prosecutions*

— Andrew Bird

5
SAH

FIVE ST ANDREW'S HILL

OBTAINING INFORMATION AND EVIDENCE FOR USE IN PRIVATE PROSECUTIONS

ANDREW BIRD, barrister 5 St Andrew's Hill

1. In a Police, SFO or regulatory investigation, powers of investigation may be conferred upon a particular type of investigator directly by statute, or the investigator may, by virtue of his office (such as constable or Accredited Financial Investigator[1]) have personal locus to apply to a court for orders under which suspects and third parties may be required to produce or provide access to information or material of relevance to an investigation or prosecution. Common examples of such powers are production orders (PACE or POCA), disclosure orders (POCA) account monitoring orders (POCA) etc.

2. Rather fewer powers are conferred upon public prosecutors (as opposed to investigators). The most obvious are the power under s.2 CJA 1987 conferred upon the Director of the SFO or the power to issue an Information Notice conferred on the DPP by s.62 SOCPA. The CPS (as opposed to a constable) is not an investigator and cannot apply for "investigative orders".

3. Private Prosecutors, and "civilian" (ie without statutory status) investigators do not have access to similar powers or opportunities. This paper examines the powers that may be available, and the other options by which an investigation or private prosecution may be progressed.

[1] See s.453 POCA and SI 2015/1853 for the descriptions of FIs who are authorised to make particular applications

5
SAH

FIVE ST ANDREW'S HILL

Material publicly-available

4. Where material is in the public domain it may often be accessed directly, or through an agency (for example a credit-reference agency) in the business of holding and disseminating (usually selling) information.

5. Certain government or statutory bodies (for example Registrar of Births, Marriages and Deaths, HM Land Registry, Companies House, local authority planning departments) will have material available to the public, albeit sometimes on payment of the appropriate fee.

6. Much material filed in court proceedings is available for public inspection and access. There may however be restrictions on use which will need to be addressed, and appropriate permission sought.

7. Where civil proceedings are in being or have been conducted then it may be possible to use material which has been disclosed in those proceedings for the purpose of a private prosecution. However this will be a "collateral use" and so may require the permission of the civil court (following an inter partes procedure) if the material concerned has not been referred to in open court.

8. CPR Rule 31.22 relates to documents provided on disclosure. CPR 32.12 provides similar protection in respect of filed witness statements.

9. CPR Rule 31.22(1) creates a prohibition on the use of a document for any purpose other than the purpose of the (civil) proceedings in which it was disclosed. It is not a prohibition upon disclosure as such, but a prohibition upon collateral use by the party

receiving the document. Thus in Tchenguiz v SFO [2014] EWHC 1315 (Comm) it was held that a party who received documents by way of disclosure in a civil case required the permission of the High Court to use them for the purpose of showing them to counsel for the purposes of seeking legal advice in relation to criminal proceedings:

> "Ultimately, the answer depends on the proper characterisation of the "purpose" for which the documents are "used". In my view, the proposed course of action which involves giving the documents to other counsel specifically to obtain criminal advice for the reasons set out in Mr Bailin's skeleton cannot properly be characterised as being *"...for the purpose of the proceedings in which [the documents are] disclosed ..."* In my view, the words of CPR 31.22 are clear. In particular, they put an important restriction on the use of documents received by a party by way of disclosure in the course of proceedings. Given the compulsive nature of the disclosure process, it seems to me that the Court should be astute to ensure that such process is not used for some collateral process or ulterior motive unless, of course, one or more of the exceptions (including the grant of permission) are satisfied; and that the rule should be construed and applied accordingly."

Per Eder J @ para [12]

10. In a later application, in the same proceedings, judgment cited as [2014] EWHC 2379 (Comm) the judge (Eder J) declined to rule on a further submission as to whether permission was required to provide the documents to a team of reviewers, but did grant permission under CPR 31.22. Essentially the Judge was allowing exceptions to Rule 31.22 on a stage-by-stage basis.

Enlisting the help of the State or Police authorities

11. The Police are prepared to seek and share information in certain circumstances. Common examples are material generated by police following road traffic accidents.

There is an MoU for the exchange of information between the police, insurance companies and loss adjusters. There is a Code of Practice (2005) and ACPO/NPIA Guidance (2010) on the Management of Police Information. These are centred on the need for a "policing purpose" both for the holding and sharing of Police information. There is no reason why these purposes should not include a private prosecution by a responsible complainant.

12. An information-sharing protocol (in effect a contract) may be concluded between the Police and an intended prosecutor. This would be likely (in the event of a prosecution, whether public or private) to be a discloseable document, and would enable both the Police and the prosecutor to point to a transparent and formalised arrangement, presumably approved at high level within the Police force concerned. A Protocol is specifically suggested as appropriate in clause 4.8.3 of the Code of Practice on the Management of Police Information.

13. A person has no right of access to material held by the Police or CPS for the purpose of considering whether to bring a private prosecution: *R v DPP ex p Hallas* (1988) 87 Cr App 340. The fact that a person may want to see material for a purpose which is entirely legitimate does not give him any legal right to see the documents. However once a case is committed for trial a witness summons may be issued against the CPS (or it would seem, the Police) requiring the production of such material: *R v Pawsey* (CCC) [1989] Crim LR 152.

14. In *Scopelight v CC of Northumbria Police* [2010] QB 438 the CA recognised that it may be necessary for the Police to retain items after a CPS decision not to prosecute so that they could be made available if some other public or private body wished to pursue a private prosecution. That case also recognised that there will be cases where the

Police assist private prosecutors (eg FACT or the RSPCA) with obtaining search warrants etc.

15. In *R v Zinga (appeal against conviction)* [2012] EWCA Crim 2357 a conviction was upheld in circumstances where the assistance of the Police had been enlisted by an intending private prosecutor (Virgin Media Limited) to apply for and execute search warrants. The Court held that the fact that a private prosecutor was involved should have been made known to the court when the warrants were sought, but made no other criticism of the arrangements. There appears to have been no suggestion that the material thus obtained was obtained unlawfully or unfairly.

16. Mr Zinga returned to the Court of Appeal after a confiscation order had been made against him: *R v Zinga* [2014] 1 WLR 2228. The Court considered in some detail the landscape for private prosecutions. *Pawsey* and *Scopelight* were considered by the CA @ para [35], but although finding "great force" in the contention that a private prosecutor was acting in the name of the Crown and should be treated as if it were a public authority, the court decided that it was unnecessary to make a finding to that effect.

17. In both *Scopelight* and *Zinga* the courts recognised that in an age of limited resources and with priority being given to terrorism, it is inevitable and appropriate that the CPS will have to be selective in the cases they prosecute, and that private prosecutions are likely to be more frequent. There was no suggestion that private prosecutions would necessarily be inconsistent with the public interest, which in terms of "police purposes" would be the bringing of offenders to justice.

18. So far as <u>restrictions</u> upon Police disclosure are concerned, the starting point remains *Marcel v MPC* [1992] Ch 225 in which it was held by the CA that where documents

had been obtained by Police under the powers in Part II of PACE 1984 they could not be voluntarily disclosed or used for any purpose other than the statutory purpose for which they were obtained – ie the investigation and prosecution of crime. The CA stressed that such documents did not belong to the Police, but to the person from whom they were seized, and there was an obligation of confidentiality to that person.

19. Generally, the courts have recognised that there may well be cases where the Police should provide material to third parties, in the public interest, so that those third parties may themselves take steps to protect their own lawful interests. Thus if the Police have material (even if obtained by intercept or other highly-sensitive means) that a person's life is in danger then because they have a positive duty (under Article 2 of the ECHR) to protect him, then that may involve giving him a warning so that he can be aware of the risk and take steps to protect himself: *Osman v UK* (2000) 29 EHRR 245.

20. The Data Protection Act 2018 and the GDPR impose restrictions upon data controllers, including the Police, when it comes to processing (which includes disclosing or sharing) personal data. However ss.29 to 81 of the 2018 Act provide for processing by "competent authorities" (eg Police) for "the law enforcement purposes" as defined in s.31. Those purposes include the investigation, detection and prosecution of criminal offences, with no obvious restriction to public prosecutions.

21. Regulatory Bodies (eg FCA, SRA) may have information which they are prepared to share for a proper purpose. Their disciplinary findings are generally available to the public.

22. The NCA have a special statutory scheme for receipt and disclosure of information – see the "gateways" in s.7 Crime and Courts Act 2013:

- A person may disclose information to the NCA if the disclosure is made for the purpose of the exercise of any NCA function (s.7(1));
- An NCA officer may disclose information obtained by the NCA in connection with the exercise of any NCA function if the disclosure is for any permitted purpose (s.7(4));
- "Permitted purpose" includes "the investigation or prosecution of offences, whether in the United Kingdom or elsewhere" (s.17(1)).

23. By s.3(5)(c) of the Criminal Justice Act 1987 information obtained by the SFO may be disclosed by the SFO to a number of UK public or regulatory bodies and in addition:

> *"for the purposes of any criminal investigation or criminal proceedings, whether in the United Kingdom or elsewhere,"*

thus carrying the implication that it may disclose to any person (not just a public or regulatory body) for those purposes.

24. HMRC is tougher, as there is a positive statutory obligation of taxpayer confidentiality in s.18(1) CRCA 2005. Section 18(2)(d) permits disclosure for the purposes of a criminal investigation or criminal proceedings (whether or not within the UK) but only relating to a matter in respect of which the Revenue and Customs have functions.

Enlisting the help of a Court

25. A distinction must be drawn between the position before criminal proceedings are instituted (by information/application and summons) and after, when a criminal court will have jurisdiction, control and case management powers, and the statutory provisions which can compel the production of evidence.

(a) Pre-commencement – NPOs for private prosecutions

26. Before proceedings are commenced, an application for pre-action disclosure can be made, against a suspect or a third party, under the *Norwich Pharmacal* procedure now contained in CPR 31.18. The rules were re-stated by Lightman J in *Mitsui v Nexen Petroleum UK* [2005] EWHC 625 (Ch):

(i) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer

(ii) There must be a need for an order to enable action to be brought against the wrongdoer

(iii) The person against whom the order is sought must:

(a) be mixed up in so as to have facilitated the wrongdoing and

(b) be able or be likely to provide the information necessary to enable the ultimate wrongdoer to be sued.

27. For an example of the issues involved when seeking an NPO for customer details against a bank see *Banker's Trust v Shapira* [1980] 1 WLR 1274.

28. An NPO can be sought in support of obtaining information for the purposes of lawful redress by means of a private prosecution, but the "Jurisprudence for striking the correct balance in *Norwich Pharmacal* proceedings in aid of criminal investigations by private persons or entities has not been developed." For some the issues relevant to an NPO in support of an anticipated private prosecution see *FCFM Group Ltd v Hargreaves Lansdown Asset Management Ltd* [2018] EWHC 3075 (QB). In that case there were (a) pending civil proceedings, (b) an ongoing Police investigation (c) the suspects were not put on notice and (d) one of the offences (Insider Trading) would have required DPP Consent for a prosecution. The application was refused at first instance. The following general points emerge from the judgment:

"10. …The fact that private persons do not have the investigative powers and resources conferred upon public authorities is not, in itself, a reason to use the procedures of the civil courts in order to give them access to materials they would not otherwise be entitled to see. The fact that public authorities do have those investigative powers and resources is, on the other hand, a reason to assume (in the absence of other evidence) that, in the first instance, the work of investigation and prosecution can be left to them. There has to be good reason to allow a private person to use the *Norwich Pharmacal* procedure in the pursuit of materials for a private prosecution. When the matter is currently in the hands of prosecuting authorities, as in this case, and, moreover, when the private person (a company in this case) is litigating the same questions in a civil suit, it is doubtful whether it can be said that there is "the need for an order to enable action to be brought against the ultimate wrongdoer,

…

36. A *Norwich Pharmacal* application for examination of documents which might or might not support a private prosecution against parties with whom the applicants are already in civil litigation is unusual. The only other case of which I have been made aware is the litigation reported in *D Ltd v A* [2017] EWCA Crim 1172 (see para 29 of that decision). That precedent does not, in my judgment, derogate from the clear indication by the House of Lords in *Ashworth* that the *Norwich Pharmacal* jurisdiction "is an exceptional one and one which is only exercised by the courts when they are satisfied that it should be exercised" (para 57, cited above). These orders are not granted as a matter of course.

37. Care must be taken not to encourage civil litigants to open up satellite litigation canvassing the possibility of criminal prosecution as a tactical move in their existing disputes. The breadth of any *Norwich Pharmacal* order will also require attention, especially since the third parties giving disclosure will not have the same interest in limiting disclosure to relevant

documents, and to excluding privileged documents, or other sensitive documents, as a party to civil litigation has. The public prosecution authorities are well placed to conduct investigations which respect the rights of the suspect as well as the interests of justice and the rights and interests of alleged victims. Jurisprudence for striking the correct balance in *Norwich Pharmacal* proceedings in aid of criminal investigations by private persons or entities has not been developed. Although the authorities I have referred to show that *Norwich Pharmacal* applications may be available to support private prosecutions in an appropriate case, they will by no means always be appropriate, and in my judgment this is not an appropriate case.

29. Rights under Article 6, Article 8 and Article 10 ECHR may be engaged, and the application will need to address these – in particular for the Article 6 right not to self-incriminate see now *Volaw Trust v HM A-G for Jersey* [2019] UKPC 29.

30. The traditional view is that an order to produce pre-existing documents will not infringe the privilege against self-incrimination – see *R (River East Supplies) v Nottingham Crown Court* [2017] EWHC 1942 Admin. But (a) the fact that a person may have to admit possession of certain material might incriminate them, and (b) *Volaw* suggests that the issue of Article 6 must be addressed and justified even in the case of pre-existing documents.

(b) Once proceedings are issued

31. The principal methods for obtaining material once proceedings have been issued are:

(i) Bankers Books Evidence Act 1879

(ii) Witness Summons under Criminal Procedure (Attendance of Witnesses) Act 1965, s.97 Magistrates' Courts Act 1980 or para 4, Schedule 3 to the Crime and Disorder Act 1998

(iii) Case Management Directions.

32. Overseas evidence is something of an anomaly: although a "person charged" can apply to a Judge for an ILOR under s.7 C(IC)A 2003, a "prosecutor" cannot. Section 7 refers to a "prosecuting authority". This is not defined, but is used in contrast to the word "prosecutor" elsewhere in the Act. It therefore seems unlikely that a private prosecutor who is not a "prosecuting authority" can apply under s.7.

(i) Bankers Books Evidence Act 1879

33. Application can only be made:

- By a party to a legal proceeding
- For entries in a "banker's book"
- In accordance with Part 17 Crim PR

34. An application cannot be made by way of fishing expedition: there must already be evidence for the prosecution of the commission of an offence and the application must be made for the purpose of adding to the evidence of that offence: *R v Nottingham JJ, ex p Lynn* (1984) 79 Cr App R 238, following *Williams v Summerfield* [1972] 2 QB 512.

(ii) Witness Summons

36. The choice of one of the three alternative routes under MCA 1980, CDA 1998 and CPAoWA 1965 will depend upon the stage reached in the proceedings.

37. In all cases Part 17 of Crim PR sets out the procedure to be followed.

38. In each case:

- The witness must be compellable (ie not the accused)
- The material must be "likely to be relevant evidence" (you can't get a witness summons for unused material)
- The issue of a summons, order or warrant must be in the interests of justice.

39. Article 8 and Article 6 (self-incrimination) may apply. The application must be focussed and narrow so as to achieve proportionality. A witness summons can override obligations of confidentiality owed by the respondent. However it cannot be used to obtain privileged material.

(iii) Case Management Directions and other statutes

40. Circumstances may exist where the Overriding Objective requires the production of material by a party (including by a defendant). Where (for example) a document is referred to in a Defence Statement, or by a Defence witness the Judge can direct its production by means of a witness summons, and in an appropriate case may be prepared to give case management directions to achieve the same result. There is however little sanction (apart perhaps from costs) that can be imposed for default, and so the more usual procedure where there is reluctance is to use the witness summons procedure.

41. Following a conviction and where the Court is proceedings to confiscation under s.6 POCA 2002 the Judge can make orders for the provision of "information" under s.18 of POCA. The sanction is an adverse inference.

5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

4. *Disclosure*

— Edmund Burge QC

PRIVATE PROSECUTIONS AND DISCLOSURE

EDMUND BURGE Q.C. 5 St Andrew's Hill

Introduction

1. The statutory disclosure regime under the Criminal Procedure & Investigations Act 1996 ('CPIA') applies to all prosecutors, whether state or private – see s.2(3): "*References to the Prosecutor are to any person acting as a prosecutor, whether an individual or a body*".

2. This is clearly apt to cover a private prosecutor – in accordance with the general principle that private prosecutors are subject to same obligations upon 'a minister of justice' as public prosecutors – see eg R. v. Belmarsh Magistrates' Court, ex parte Watts [1999] 2 Cr.App. R 188.

Sources of guidance/codes etc

3. In addition to the CPIA, the principal sources of a prosecutor's disclosure obligations, and of guidance thereon, are:
   (i) The Attorney General's Guidelines on Disclosure;
   (ii) The Judicial Protocol on the Disclosure of Unused Material in Criminal Cases;
   (iii) The Criminal Procedure Rules ('CrPR') r.15, and Criminal Practice Direction;
   (iv) The CPS Disclosure Manual.

4. Much of the existing guidance is aimed principally at public prosecutors and those working with them, such as the police. For example, the CPIA Code of Practice (2015) which provides guidance on the retention, recording and provision to the prosecutor of relevant material, applies only to those charged with a duty to investigate ie the police, HMRC, NCA etc (per paragraph 1.2). Similarly, the CPS

Disclosure Manual is obviously aimed at those undertaking a public prosecutorial function.

5. However, collectively the various sources listed above represent a useful body of guidance which can be adapted and applied as appropriate to a private prosecution, and anyone engaged in bringing a private prosecution must ensure that they are familiar with them.

6. In addition, Chapter 4 of the Code for Private Prosecutors ('CPP') provides a summary of the principal obligations/duties. There are also additional disclosure issues raised at paragraphs 7.5 (Abuse of Process), 8.4 & 8.5 (re: the effect of concurrent civil proceedings), and 9.3 (the on-going duty of disclosure).

The disclosure process

7. Collectively, the disclosure obligations and duties require:
   (i) The creation of and adherence to a Disclosure Management Document ('DMD'), consistent with the size and complexity of the disclosure task. It should set out clearly what the issues in the case are, what material exists, and how it is to be acquired, retained and reviewed. The DMD needs to be kept under review, and up-dated to reflect significant developments that might affect the disclosure process, eg the service of a Defence Statement that sets out a previously unmentioned defence. In all but the simplest of cases some form of written DMD is advisable;
   (ii) The pursuit of all reasonable lines of enquiry, and the acquisition/retention of any material that might satisfy the test for disclosure;
   (iii) Clear and accurate scheduling of that material, including where necessary a separate schedule of any 'sensitive' material which cannot be disclosed in its raw/original format;
   (iv) The proper application of the disclosure test, ie the disclosure of any material which 'might reasonably be considered capable of undermining the case for the prosecution ... or of assisting the case for the accused.'

8. The clear and accurate scheduling of relevant material is essential to demonstrating a thorough and robust approach to the disclosure process. Failures of that process in public prosecutions have resulted in stays for abuse of process, and the same principles will apply equally to those cases brought privately. Therefore, the proper application of the disclosure regime can have a significant effect on the resources that will be required to fund a private prosecution, and thus a private prosecutor's ability to bring it at all.

9. A particular problem can be the acquisition of relevant material held by third-parties. The Attorney General's Guidelines (at paragraphs 53-58) set out a prosecutor's obligations to identify and obtain such material, saying "*prosecutors should take reasonable steps to identify, secure and consider material held by any third party where it appears to the investigator, disclosure officer or prosecutor that (a) such material exists and (b) that it may be relevant to an issue in the case*" – paragraph 56.

10. However, there is a potential difficulty for private prosecutors, namely where that third-party refuses or fails to provide it. While that can equally be a problem for state prosecutors, third-parties may be more inclined to co-operate with a prosecuting arm of the state than with an individual/private body. This may be particularly so where the third party is itself a public agency (eg a local authority, social services department or a hospital), or where there are concerns about the confidentiality of that material.

11. The AG's Guidelines (at paragraph 57) goes on to deal with the situation where a request for third-party material is met with refusal. It says that where the requirements of the Criminal Procedure (Attendance of Witnesses) Act 1965 (or s.97 of the Magistrates' Courts Act 1980) are met, a witness summons may be obtained requiring the production of that material to the Court. The Court would then provide that material to the prosecutor.

12. However, the conditions for obtaining a witness summons are met only where the requested 'material' is considered likely to be "material evidence" in the proceedings – a witness summons cannot compel the provision of pure information, nor will it apply to documentary material that merely reveals a further potential line of enquiry or will be used for cross-examination as to credit. Both such categories may be important unused material which would ultimately fall to be disclosed if obtained from the third party.

13. The AG's Guidelines provide no helpful answers about how to get around the problem. At paragraph 55 (dealing with material held by other public bodies) it says merely "*Where, after reasonable steps have been taken to secure access to such material, access is denied, the investigator, disclosure officer or prosecutor should consider what, if any, further steps might be taken to obtain the material or inform the defence. The final decision on any further steps will be for the prosecutor.*" It makes no suggestions as to what those steps might be.

14. In R. v. Alibhai & others [2004] EWCA Crim 681, the Court of Appeal considered the problems that had been faced by the Crown in obtaining potentially disclosable unused material from the Microsoft Corporation, the FBI and others for use in a trial for conspiracy to deal in counterfeit goods. The judgment of Longmore LJ contains a helpful summary of the obligations on prosecutors to obtain such material, and their ability to do so (see paragraphs 32 to 36).

15. The Court found no power over and above a witness summons to compel the provision of material held by a third-party, but instead identified a very high bar that any defendant would have to cross before the prosecution became an abuse for want of obtaining and disclosing such material. The Court said: "…*even if there is the suspicion that triggers these provisions, the prosecutor is not under an absolute obligation to secure the disclosure of the material or information. He enjoys what might be described as a "margin of consideration" as to what steps he regards as appropriate in the particular case. If criticism is to be made of a failure to secure*

third party disclosure, it would have to be shown that the prosecutor did not act within the permissible limits afforded by the Guidelines" - paragraph 63.

16. In other words, the prosecutor must take all reasonable steps to identify the sources of such material and to obtain it, but failure to succeed will not of itself result in the proceedings being stayed. Much will depend on the nature of the material involved, and the extent to which it might bear on the issues in the case, especially in the light of any other material that has already been obtained or disclosed. Ultimately though, the mechanisms do not exist for a prosecutor to compel a third party to disclose material that will not form part of the evidence. Therefore the more that the requested material can be shown potentially to form part of the evidence the greater the prospect of obtaining it from a third party under a witness summons.
17. What lines of enquiry are 'reasonable' for a prosecutor to follow will be determined by the issues in the case rather than the prosecutor's resources. The fact that an obvious and important line of investigation will be time-consuming or expensive to undertake will not in itself provide a justification for not doing so.

18. Finally, disclosure of specific documents in the hands of the prosecutor can be made without reference to them – if a document satisfies the test it must be disclosed by those responsible for the process, and no permission from the client is required. However, in practice a private prosecutor may prefer to be given a choice: Disclose, or discontinue the proceedings.

Funding/Cost

19. Given the cost implications of properly discharging a prosecutor's disclosure obligations, a potential private prosecutor will need clear advice at the outset on:
    (i) Their obligation to give full and accurate instructions about the existence and whereabouts of potentially relevant material, and giving their solicitors access to that material;
    (ii) How they intend to obtain material of which they are aware but that is not already in their possession;

(iii)How the material will be reviewed, scheduled and assessed for its disclosability, eg:

- Is the prosecutor competent to do it themselves (ie do they understand the relevant test, and can they be trusted to apply it properly to individual documents)?
- If not, who will do it for them (Solicitor/Counsel/Paralegal)?
- How much material will there be, and how complex are the issues likely to be?
- Is there digital/electronic material likely to be of relevance that needs to be reviewed? If so, how much, where and how will that be done?
- Who will 'sign off' on the disclosure process, and be cross-examined on it if necessary?

20. It will often be that the entire disclosure function will be handled by those instructed to represent the prosecutor, with all the costs that involves. It should also be borne in mind that resistance by third parties to the provision of relevant material can result in unforeseen litigation, and yet further legal costs. Therefore, a private prosecutor may be left facing the reality that if they cannot afford to fund the disclosure process properly, they cannot bring the prosecution at all.

Particular issues

(a) Motive/abuse of process

21. The inherently partisan way in which many private prosecutions are brought means the prosecutor's motives are capable, where they are clearly vexatious or oppressive, of founding a stay for abuse of process, see eg R. (Dacre) v. Westminster Magistrates' Court [2009] 1. Cr.App.R 6, R (ex parte CC of Northumbria) v. Newcastle upon Tyne Magistrates' Court [2010) EWHC 935 and Johnson v. Westminster Magistrates' Court [2019] EWHC 1709.

22. The AG's Guidelines make it clear that the duty of disclosure encompasses material that may support legal arguments such as an application to stay the proceedings as an abuse. Therefore those acting for private prosecutors will need to be alive to the potential for such arguments, and conduct any disclosure process with their client's motives clearly in mind.

(b) Legal Professional Privilege

23. A private prosecutor cannot rely on Legal Professional Privilege ('LPP') to avoid their disclosure responsibilities - the obligation to ensure a fair trial 'trumps' their right to assert privilege.

24. Therefore, admissions against interest that are revealed by the client to their solicitors, or instructions that either undermine the reliability of other prosecution evidence or support the case advanced by the defendant, are likely to meet the test for disclosure, nothwithstanding the protections normally enjoyed by privileged communications between solicitor and client. The test to be applied in any individual case is whether the material in question might reasonably be considered capable of undermining the case for the prosecution, or of assisting that for the accused.
25. Pure legal advice on the merits of the prosecutor's case, being no more than the opinion of a legal adviser, would not ordinarily fall to be disclosed, any more than would the opinion of a state investigator or lawyer in similar circumstances. In such a case, LLP over that communication between lawyer and client would continue to apply. However, an advice on the merits which also refers to facts or assertions that satisfy the disclosure test (ie a document that contains both disclosable and non-disclosable material) cannot be withheld in its entirely under the doctrine of LPP. The obligation to disclose all material that satisfies the test takes precedence.

26. It may be that the disclosable information and its source can be extracted from the original and supplied in a separate document, thereby preserving the privilege that might apply to the other parts. Or, a redacted version might be produced, revealing only those parts that satisfy the test for disclosure. In such a case that summary or

redacted version should be listed on the Non-Sensitive Schedule that is given to the defence, and a copy provided. The original (complete) document can then be placed on a schedule of 'sensitive' material that is not provided to the defence. In any event, the essential proposition to follow is that the defence are given the maximum disclosure consistent with the proper application of the test at s.3 CPIA.

27. This significant modification to the usual application of LPP can give rise to the problem of private prosecutors moving from one firm to another, hoping to avoid disclosure problems caused by instructions that have given to their original firm, and of leaving unhelpful legal advice behind.

28. However, the definition of 'prosecution material' to which the disclosure regime applies is at s.3(2) of the CPIA: "*Prosecution material is material—*

    (a) which is in the prosecutor's possession*, and came into his possession in connection with the case for the prosecution against the accused,"*
    (emphasis added).

29. The 'prosecutor' remains the prosecutor regardless of who they choose to instruct. Thus, once the client has been provided with advice, or a document summarising their instructions etc, that material is within their possession for the purposes of the CPIA, and it will fall to be considered for disclosure in the usual way.

30. Therefore a private prosecutor will need to understand that any failure to provide their solicitors with details of previous instructions or advice etc may have serious consequences both for them and their case. As stated above, the fact that the previous advice is unhelpful to the client may not, of itself, render it disclosable; but unless those acting for them are aware of its existence they cannot take an informed decision about it. Those representing a private prosecutor therefore need to be alive to the potential requirement to disclose material over which they would ordinarily expect to assert LPP.

(c) Public Interest Immunity

31. The grounds for seeking to withold from the defence otherwise disclosable material on the grounds of Public Interest Immunity ('PII') are likely to be limited. Issues of PII are most frequently engaged by matters of national security, the existence of material supplied by security/intelligence services, the involvement of informants, and the use of covert surveillance techniques. These will probably rarely be a feature of a private prosecution.

32. Paragraph 6.15 of the Code to the CPIA lists the principal categories of such 'sensitive' material, although that list is neither exhaustive nor closed – per Lord Hailsham in D v. NSPCC [1978] AC 171.

33. For PII to apply, the material needs to engage 'an important public interest'. However, material held by Insolvency Service, liquidators, social services and organisations involved in child welfare such as the NSPCC have all previously been properly withheld on grounds of PII, particularly where that material has been either provided to the holder 'in confidence', or it relates to the private life of a witness - both specifically listed as categories of material capable of attracting PII.

34. Therefore, if a private prosecutor is in possession of material that (i) is prima facie disclosable to a defendant but (ii) falls into a category of material that engages an important public interest, in order to discharge their disclosure obligations they must obtain the Court's consent before than can withold it from the defence.

35. In R. (Barons Pub Co.) v. Staines Magistrates Court [2013] EWHC 898 Admin, the Court held that a document recommending and recording the Crown's decision to prosecute is generally confidential and would often contain information that it was not in the public interest to disclose. That may be because the factual detail referred to is inherently 'sensitive' and thus cannot be disclosed. There is no reason why that principle should not apply to a private prosecution as much as one brought by the Crown.

36. For example, a defendant may make an abuse of process application based on a private prosecutor's reasons for bringing the prosecution (eg it is vexatious, or politically motivated etc). The solicitor's records of their discussions with the prosecutor about whether to bring the case refer to information that satisfies the test for disclosure but which was originally provided in confidence by an identifiable third party.

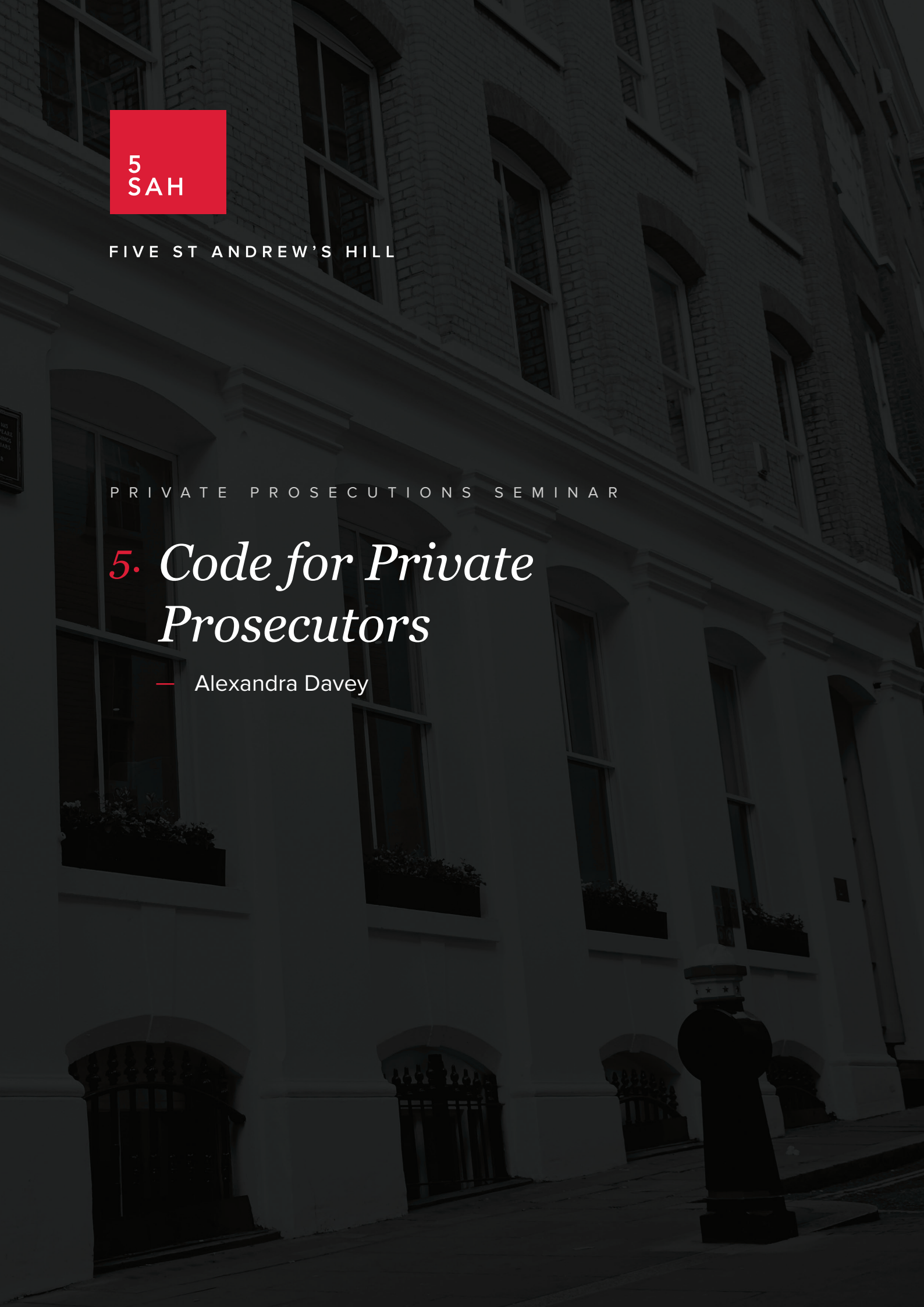
37. In such circumstances it would be necessary to seek an order from the Court allowing the withholding of that document, or such part of it as might identify the original informant. The fact that the prosecution is brought privately in itself is no impediment: s.3(6) of the CPIA provides that: "*Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly*" (emphasis added). As noted above, these provisions of the CPIA apply equally to public and private prosecutors.

38. The ability to make an application for PII is a common law one, currently based on the decision in R v. H & C [2004] UKHL 3. The process for doing so is set out in the Cr.PR at rule 15.3. There is also useful guidance on the making of PII applications, much of which is of general application, in the CPS Disclosure Manual at Chapter 13 and Annex C.

(d) Referral/takeover by the DPP

39. In the event of a referral of the prosecution to, or a take-over by, the DPP the private prosecutor will be asked to hand over a complete set of papers to the CPS, including the disclosure schedules, the DMD and copies of all unused material that satisfies the test for disclosure. Of course, the private prosecutor is under no obligation to do so, but failure may result in the case being adopted by the CPS and then stopped (see eg the CPP, para 6.6).

40. Material that falls to be provided to the DPP because it satisfies the disclosure test may well include material that is adverse to the private prosecutor; they may ultimately have preferred to withdraw the case themselves than have that material handed to the defence or made public. Therefore, where the DPP makes a formal request for such material (particularly at a very early stage of the proceedings, where few formal decisions about what does or does not fall to be disclosed have been taken) a thorough review of the impact that the unused material might have on the private prosecutor is advisable before any such material is handed to the CPS. In such circumstances, the private prosecutor may again prefer to withdraw the case themselves without the involvement of the CPS.



5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

5. *Code for Private Prosecutors*

— Alexandra Davey

CODE FOR PRIVATE PROSECUTORS

ALEXANDRA DAVEY, barrister 5 St. Andrew's Hill

Introduction

1. Vast funding cuts, a consequential lack of resourcing and entrenched problems within the police and Crown Prosecution Service are just some of the reasons for the rise in private prosecutions over the past few years. Criticism surrounding the public system was rising, particularly around charging rates and in light of some frightening examples of disclosure failures and a general lack of careful case preparation. With the rise in private prosecutions, however, came a new raft of criticism specific to these proceedings; a two-tiered justice system with a lack of regulation, lack of transparency and the easy allegation of malicious prosecution.

The rise of the private prosecution

2. Within the past few years, a number of large private prosecutions have been widely reported, mostly surrounding fraud offences which the police had simply declined to pursue, the high level of complexity and the low level of resourcing having left little option. In setting out their vision for policing at that time, it became abundantly clear that the Metropolitan Police's focus was elsewhere, and that there was simply less appetite for taking forward these lengthy and complex cases. Likewise, even the specialist set-up of Action Fraud couldn't guarantee to investigate a reported fraud with a loss of less than £100k.

3. An interesting article from October 2018 discusses the figures of fraud reports, actions and outcomes at that time:

   https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/515/51507.htm

4. The trend saw a rise in interest in private prosecutions, because it was quickly becoming the only option open to those who had fallen victim to such offending. With this increase came an associated rise in publicity and public awareness, and combined with critical Judgments as to particular aspects of the proceedings, private prosecutions became exposed as an area ripe for reform.

5. Criticisms included the obvious lack of regulation. There had clearly been an increasing need to develop a formal structure around private prosecutions given the rising numbers, but as such proceedings had previously been relatively uncommon, the lacuna would surely have been unintentional rather than by design. Critics also seized on the apparent lack of independence of the parties and the undefined disclosure management – already a popular topic with the public on the back of the high-profile CPS failures.

6. A field which was once dominated by large, corporate-style frauds however, has now expanded into virtually all areas of criminal justice. The only universal features are that a) high standards are required across the board whether publicly or privately brought, and b) the ability to bring a private prosecution remains restricted to those with significant financial resources.

The steps towards better regulation

7. Where previously, conscientious private prosecutors would follow as closely as possible the most relevant legislation and guidance - the Criminal Procedure Rules and the Code for Crown Prosecutors, for example – it was unsatisfactory because they were often not mandatory and/or applicable.

8. In April 2018, the Criminal Procedure Rules was amended to codify the procedural requirements for an application for a summons (CPR7.2(6)), but an exception (CPR7.2(5)(a)) excluded represented private prosecutors from this provision at that

time. Soon thereafter, following the case of *Kay*[1], a consultation involving the Criminal Procedure Rule Committee, the Law Society's Criminal Law Committee and the Private Prosecutors' Association resulted in further amendment which took effect in April 2019. In addition to removing the previous discrete exclusion and levelling the procedural obligations, the effect of the changes was to formally extend the duty of candour in commencing a proceedings to represented private prosecutors for the first time. This initial collaboration between the public and private markets unfortunately does not seem to have continued.

9. The move towards tighter guidance and regulation saw a consultation period in 2019 led by the Private Prosecutors' Association ("the PPA"), which was formed in 2017 with a specific aim of creating a code of conduct.

10. As with any such process the consultation period will no doubt have involved conflicting views, and a number of the questions which featured in the consultation[2] shows just how complex some of the areas of private prosecutions can be. They are far from straightforward, and that is much of the difficulty.

The introduction of the Code for Private Prosecutors

11. The consultation period led ultimately to the introduction of the Code for Private Prosecutors ("the Code") in July 2019. The Code sets down the standards and duties for private prosecutors, providing a benchmark as to what those involved in such proceedings should expect.

12. Arguably, one of the most important aspects of the Code is the formal distinction of the private prosecutor as a Minister of Justice (Paragraph 2.2.2). This seems simple, but it

[1] *R (Kay and Scan-Thors (UK) Ltd) v Leeds Magistrates' Court* [2018] EWHC 1233 (Admin)
[2] https://private-prosecutions.com/consultation-questions-form/ - note that the consultation period ended in March 2019, but the questions remain visible at the time of writing.

tells the lay client of a significant distinction which the legal world may take as read. It explains that the role of the lawyers the client has instructed in a private prosecution is different than the lawyers they might instruct in surely any other circumstance. The lawyer owes a duty to the court over and above that which they owe to the person paying their bill. It will often be something that simply hasn't crossed their mind.

13. Similarly, the explanations of the disclosure obligations, in particular as to the interplay between disclosure and privilege (4.2.3 and 7.5.1), is another legal construct which a lay client is unlikely to have considered.

14. Private prosecutors can use the Code as part of the terms of engagement. It is written simply and accessibly, and it provides a standardised mechanism for explanation and reference without the risk of sounding suspicious or accusing.

15. The Code has the capability of driving up standards of private prosecutions and creating accountability for those who undertake them. It is, at the very least, the first step towards a formal procedure for private prosecutions. I say the first step, because it is not without difficulty.

16. Perhaps the most significant difficulty is that it is not binding. It applies to members of the PPA as a condition of membership. Membership is by application and acceptance by the PPA Committee. Those who adhere voluntarily (either formally through PPA membership or by informal guide) are assisted, yes, but presumably they are also the private prosecutors who already acted with integrity and to exacting standards. Clearly with time and wider application it will become established best practice, and once it is recognised as the industry standard, it will be difficult to justify departing from its framework, even to those who are not technically bound to follow it.

17. There inevitably remains the issues of the perception of independence and malicious prosecution. Those challenges are not overcome with the introduction of the Code, but

it does help all parties and the Court to understand the role divisions, and to assess each challenge on its merit against a framework that simply didn't previously exist.

What is next?

18. With the continuing lack of resourcing for the police and CPS, private prosecutions will inevitably continue to grow in number. Those who do not adhere to the highest standards in conducting private prosecutions have the capacity to affect the reputation of private prosecutions generally, and only enforceable requirements can combat this in any sense other than retrospective professional misconduct.

19. As the Code becomes familiar territory for private prosecutors and in courts, it will become better known and is likely to be revised to include new considerations or requirements, and to better fit the changing trend of cases. Perhaps the CPS Guidance on Private Prosecutions ought to make reference to the Code, or at least recognise its existence.

20. As to a binding and enforceable version of the Code in the future, it seems that we are in the hands of the government, but those hands are rather full.

5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

6. *Costs*

— Benjamin Burge

5
SAH

FIVE ST ANDREW'S HILL

COSTS IN PRIVATE PROSECUTIONS

BENJAMIN BURGE, barrister 5 St Andrew's Hill

Introduction

1. Private prosecutions, although seen as a cheaper alternative to civil litigation, are invariably expensive. The private prosecutor possesses all of the functions and responsibilities of a public prosecutor and must account for the cost of ensuring that their legal teams, "*observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice*" (*R v. Zinga* [2014] EWCA Crim 52).

2. In understanding the financial implications borne by private prosecutors, the need for adequate reimbursement for properly incurred expenses has long been recognised.

The Principles

3. The starting point for the recovery of private prosecution costs is the discretion provided to the court in section 17 of the Prosecution of Offences Act 1985 ("POA 1985"). In addition, section 18 enables prosecutors to recover costs from convicted defendants.

4. The responsibility of bringing a prosecution is kept in check by section 19 of the POA 1985, which can be used by defendant who has been caused financial loss due to an unnecessary or improper act or omission by a private prosecutor.

5. These statutory provisions are also supplemented by the well-known guidance in the Practice Direction (Costs in Criminal Proceedings) 2015 ("the Practice Direction") and Criminal Procedure Rules 2015 ("CPR").

6. Over the summer the Code for Private Prosecutors ("the Code") has for the first time codified four general principles in relation to costs that members of the Private Prosecutors' Association ("PPA") have agreed to adhere to. These are that:

(a) the purpose of costs orders are to compensate the prosecutor's reasonably incurred legal costs;

(b) the prosecutor should firstly consider seeking costs from the defendant(s) rather than directly from central funds;

(c) due to the discretionary nature of their award, the costs awarded (and sought) should be both "just and reasonable"; and

(d) applications for costs against a defendant can include the investigators' costs and costs of the investigation.

The Statutory Regime: Prosecution Costs (section 17)

7. Section 17 of the POA 1985 states as follows:

17.— Prosecution costs.

(1) Subject to subsections (2) and (2A) below, the court may—

(a) in any proceedings in respect of an ***indictable offence***…

order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

(2) [No order to be made in favour of public authorities]

(2A) Where the court considers that there are circumstances that make it inappropriate for the prosecution to recover the full amount mentioned in subsection (1), an order under

this section must be for the payment out of central funds of such lesser amount as the court considers just and reasonable.

(2B) When making an order under this section, the court must fix the amount to be paid out of central funds in the order if it considers it appropriate to do so and—

(a) the prosecutor agrees the amount, or

(b) subsection (2A) applies.

(2C) Where the court does not fix the amount to be paid out of central funds in the order—

(a) it must describe in the order any reduction required under subsection (2A), and

(b) the amount must be fixed by means of a determination made by or on behalf of the court in accordance with procedures specified in regulations made by the Lord Chancellor.

(5) Where the conduct of proceedings to which subsection (1) above applies is taken over by the Crown Prosecution Service, that subsection shall have effect as if it referred to the prosecutor who had the conduct of the proceedings before the intervention of the Service and to expenses incurred by him up to the time of intervention.

8. Guidance on the exercise of the discretion is set out at CPR 45.4. The general rule is that the court must make a prosecutor's costs order but *may* decline to do so if, for example, ***the prosecution was started or continued unreasonably***.

9. If the court does decide to make an order, CPR 45.6 to 45.8 reiterates the various considerations of the court in determining the amount or in deciding to send it for assessment by the National Taxing Team. Relevant factors are set out in CPR 45.2(7).

10. Paragraph 2.6.1 of the Practice Direction additionally states that:

> *"…In the limited number of cases in which a prosecutor's costs may be awarded out of Central Funds, an application is to be made by the prosecution in each case.* ***An order should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause.****…"*

11. Paragraph 2.6.4 of the Practice Direction reminds private prosecutors that no costs will be awarded from central funds where there has been misconduct on their part (*R v Esher and Walton Justices ex p.Victor Value & Co Ltd* [1967] 111 Sol Jol 473).

Criminal "Proceedings"

12. In order to recover costs under section 17, the proceedings must be "criminal". In most cases this will not be contentious. It includes confiscation proceedings (*R. (on the application of Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823) but does not include civil enforcement proceedings in the High Court even though they stem from criminal proceedings (*Re Somaia* [2019] EWHC 227 (QB).

13. In addition, any application made pursuant to section 17 is limited to costs in the proceedings (s.17(1)(a)). Work undertaken by investigators before the commencement of proceedings (determined by the National Taxing Team to be when the summons is issued) is therefore excluded from the remit of section 17.

Exercising the Discretion

14. Determining whether a private prosecution was either unreasonable or being continued without good cause will be a matter of fact in each case. To do so invariably involves the court making an objective assessment of the prosecutor's conduct based on all the circumstances, and their knowledge both prior to and during the prosecution.

15. That there might be some motivation by the private prosecutor, which wouldn't have impacted a public prosecutor, does not of itself result in the proceedings being unreasonable (*D Ltd v. A* [2017] EWCA Crim 1172). It is accepted that "*a private prosecutor will almost by definition have a personal interest in the outcome of a case"* (*The Private Prosecutor as a Minister of Justice*, [2009] Crim LR 427).

16. Although in the above case of *D Ltd* both the Serious Fraud Office and the police declined to take on the case, the fact that a private prosecutor has not consulted or referred the matter to a public prosecutor or agency is not a bar to recovering costs.

17. Whilst the costs applications are not wholly dependent on the private prosecutor obtaining a result, interestingly there is a lack of reported case law on costs being awarded from central funds following successful dismissal applications. This would tend to indicate that where judges make such findings there are also concerns about whether the prosecution began unreasonably or continued without good cause.

The Defendants' Judicial Safeguard?

18. To a certain extent the discretion under section 17 is therefore a safeguard designed to deter vexatious private prosecutors from commencing or pursuing proceedings through the criminal courts for their own self-satisfaction of seeing ex-colleagues or business partners in the dock. Realistic legal advice is important in order to prevent clients being left with a substantial set of costs, without a conviction, or as will be discussed below, the potential of them being equally liable for an adverse ruling under section 19.

5
SAH

FIVE ST ANDREW'S HILL

The Statutory Regime: Costs from the Accused (section 18)

19. In addition to obtaining costs from central funds, a successful private prosecutor can also seek a contribution from the accused under section 18 of the POA 1985.

20. As there is no ability for these costs to be assessed, the court must resolve any disputes between the parties and decide any amounts which are to be paid by the defendants (*R v Associated Octel Ltd* [1996] EWCA Crim 1327).

21. Section 18 of the POA 1985 states as follows:

> *18.— Award of costs against accused.*
> (1) Where—
>
> (a) any person is **convicted** of an offence before a magistrates' court;
>
> (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
>
> (c) any person is **convicted** of an offence before the Crown Court;
>
> the ***court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable***.

22. Paragraphs 3.4 and 3.5 of the Practice Direction states:

> "3.4 An order ***should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay***. The order is not intended to be in the nature of a penalty which can only be satisfied on the defendant's release from prison. An order should not be made on the assumption that a third party might pay…

3.5 Where co-defendants are husband and wife, the ***couple's means should not be taken together***. Where there are ***multiple defendants the court may make joint and several orders, but the costs ordered to be paid by an individual should be related to the costs in or about the prosecution of that individual***. In a multi handed case where some defendants have insufficient means to pay their share of the costs, it is ***not right for that share to be divided among the other defenders***."

23. Furthermore, paragraph 3.8 expressly states that when awarding prosecution costs the court may award costs in respect of time spent bringing the offences to light (i.e. investigation costs). This includes rebutting any potential defences. However, they must be costs that would be paid by the prosecutor rather than additional expenses.

The distinction between sections 17 and 18

24. Whereas section 17 is specifically focused on reimbursing the prosecutor, section 18 is a much wider power available upon conviction only. It can be used, for example, to recover some of the costs incurred as a result of bringing the investigation in the first place bearing in mind that very rarely will these investigations be conducted by public agencies. Given this is an application against the defendant themselves the scope for recovery will be limited and dependent on their current resources. The Court of Appeal has recently reminded prosecutors generally that it will always be necessary to assess a defendant's individual means (*R v. Olaniregun* [2019] EWCA Crim 1294).

25. Whilst section 18 enables the recovery of some investigation costs it will very rarely satisfy the needs of a prosecutor trying to recover substantial private prosecution costs.

The Code

26. The Code has identified the headlines in seeking private prosecution costs and provides a clear overview of the jurisprudence that has developed in recent years. Chapter 11.2 sets out a simple checklist that all private prosecutors should adhere to:

(a) Cost applications should be made against the defendant, with sufficient information to enable submissions to be made and for the court to consider if they are "just and reasonable".

(b) In relation to section 18 applications, the defendant must have an opportunity to respond.

(c) It may be necessary to consider market research and tendering before the instruction of solicitors or counsel (*R (on the application of Virgin Media Ltd) v. Zinga* [2014] EWCA Crim 1328).

(d) No costs will be awarded where this is misconduct.

The Statutory Regime: Costs in other circumstances (Section 19)

27. As explained above, section 19 is the "table turning" provision that an aggrieved and out of pocket defendant can rely upon to pour scorn on a private prosecutor.

28. Section 19 of POA 1985 states as follows:

19.— Provision for orders as to costs in other circumstances.

(1) The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case ***where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs.***

29. The Regulations referred to are the Costs in Criminal Cases (General) Regulations 1986, which explains the procedure to be followed by an aggrieved defendant:

> "The procedure to be followed when such an order is sought, or where the court is considering making such an order on its own initiative, is set out in rule 45.8 of the Criminal Procedure Rules. This provides, among other things, for a written application specifying the relevant act or omission and the reasons why the act or omission meets the criteria for making an order. That procedure was followed in this case."

30. Paragraph 4.1.1 of the Practice Direction provides a three-stage test on how the courts ought to approach the decision making process and the exercise of its discretion:

> "The court may find it helpful to adopt a three stage approach. **(a) Has there been an unnecessary or improper act or omission? (b) As a result have any costs been incurred by another party?** (c) If the answers to (a) and (b) are 'yes', ***should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs***, and if so what specific sum is involved?"

31. Conduct is deemed to be "improper" if it "*would not have occurred if the party concerned had conducted his case properly" (DPP v Denning* [1991] 2 QB 533).

32. In *R (Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232 the court, in affirming that the use of private prosecutors should not be restricted because of the concerns of section 19, went on to say at paragraph 37:

> "…While the private prosecutor too must enjoy a wide measure of discretion and s.19 must not be abused so as to have a chilling effect, realistically there will likely be more room for questioning the initiation and conduct of a private prosecution. This is, perhaps, especially so where individuals, in effect, seek to prosecute or turn the tables on their accusers: *R (Dizaei) v Westminster Magistrates' Court* [2012] EWHC 4039 Admin … where the contrast with the independence and detachment of a public prosecutor is particularly noteworthy. That said, when scrutinising private prosecutors, the principles set out in *Evans* and *Cornish* (both supra) will be applicable, *mutatis mutandis* . A private prosecutor will not be liable for costs merely because the prosecution fails or is withdrawn, still less because it is a private prosecution."

33. Section 18 has recently been considered in *R. (on the application of Holloway) v Harrow Crown Court*, 2019 WL 02895833. This involved a private prosecution for blackmail in relation to the sale of a property. The case was later taken over by the Crown Prosecution Service and discontinued. Males J found that based on the evidence (and disclosure failures) the decision to prosecute was one that no reasonable prosecutor could have reached and thus regarded the conduct as "improper".

34. Within his ruling he confirmed that the guidance of *Serious Fraud Office v Evans* [2015] EWHC 253 (QB), and Coulson J in *R v Cornish and Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 779* (QB), at paragraph 16, was equally applicable to private prosecutors:

> "16. … I consider that the principles to be applied in respect of an application under s.19 and Regulation 3 are as follows:
>
> (a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19 (R v P, Evans).
>
> (b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly (Denning).
>
> (c) The test is one of impropriety, not merely unreasonableness (Counsell). The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision making process is necessary to establish it (Evans).
>
> (d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because 'no one has a monopoly of legal wisdom, and many legal points are properly arguable' (Evans).
>
> (e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions (R v P , Evans).

> (f) In consequence of the foregoing principles, the granting of a s.19 application will be 'very rare' and will be 'restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him' (Evans)."

35. Males J laid down a stark warning to private prosecutors at paragraph 68:

> "68. I have concluded, therefore, that there was an improper act by Mr Holloway as a result of which the Interested Parties incurred costs. That leaves the question of discretion. Although this is a matter for the Crown Court, and not every such improper act should lead to an order for costs, the circumstances of the present case are such, in my judgment, that the only proper exercise of discretion would be for an order to be made. That is so for two reasons. First, even allowing for the fact that the test is whether there is a clear and stark error, this is in my judgment a very clear case. Second, the Interested Parties warned at the outset that, if a summons were to be issued, they would not only invite the Director of Public Prosecutions to take over the case and discontinue it, but would seek an order for their costs against Mr Holloway under section 19 of the 1985 Act. He chose nevertheless to go ahead with the prosecution, and did so with his eyes open as to the consequences."

The duty under the Code

36. Paragraph 11.3.1 of the Code should be welcomed, in that it places a duty on members of the PPA to advise potential private prosecutors of the stark realities of pursuing private prosecutions for their own self-gratification.

37. Private prosecutions are a privilege awarded to all citizens and should not be misused. Failure to heed this advice could result in them facing significant cost rulings.

Encouraging Private Prosecutions

38. It is apparent from the case law dealing with section 19 of the POA 1985, and the Code, that both the courts and the legal profession recognise the important role of genuine private prosecutors in the criminal justice system.

39. At a time when resources are limited both within the public prosecuting and investigatory agencies, and the prevalence of white collar crime is on the increase, the ever-expanding number of private prosecutions is welcome. With that in mind, the courts are alive to the fact that section 19 should be used sparingly and only in the most obvious of cases. It is a fine balancing act because bringing someone before the criminal courts has serious consequences beyond those of civil litigation. In taking the approach they have in not allowing section 19 applications in all cases where a private prosecution either fails at half time or through the verdict of the jury, the courts have put private prosecutors on an equal footing with their counterparts in the public sector.

The Code and Practice

40. With the increasing number of private prosecutions, and the increasing demand on central funds one can understand why the Code's guidance on costs has been drafted in the way it has, and why it is right for private prosecutors to try and obtain their costs from the defendants at the first instance.

41. The reality may be somewhat different. Private prosecutions come at a price. They rely on prosecutors instructing experienced advocates and solicitors on the open market, who are fully aware of, and able to exercise, their roles and responsibilities as ministers of justice. A cursory glance through the case law provides a snap shot of the sums involved. Only against the most-wealthy of defendants are private prosecution costs likely to be satisfied in full, under section 18, and this explains why all too often the lower courts find it difficult to grapple with the real value of private prosecutions.

Conclusion

42. The legislature and courts in recognising the benefit of private prosecutors has sought to provide a balanced approach to the recovery of costs. Whilst the system allows for the recovery of reasonably incurred costs where justified, it is also keen to set down benchmarks to ensure that the standard of prosecutions remains high. The only way that standard can be maintained is through the use of cost sanctions when it falls short.

5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

7. *Restraint and Confiscation in the context of a private prosecution*

— Sarah Wood

5 SAH

FIVE ST ANDREW'S HILL

RESTRAINT AND CONFISCATION IN PRIVATE PROSECUTIONS

SARAH WOOD, barrister at 5 St Andrew's Hill

RESTRAINT

Obtaining a restraint order

A. Legislative framework

POCA 2002, section 41

41 Restraint orders

(1) If any condition set out in section 40 is satisfied the Crown Court may make an order (a restraint order) prohibiting any specified person from dealing with any realisable property held by him.

…..

(7) The court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.

POCA 2002, section 40

40 Conditions for exercise of powers

(1) The Crown Court may exercise the powers conferred by section 41 if any of the following conditions is satisfied.

(2) The first condition is that—

(a) a criminal investigation has been started in England and Wales with regard to an offence, and

(b) there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct.

(3) The second condition is that—

(a) proceedings for an offence have been started in England and Wales and not concluded, and

(b) there is reasonable cause to believe that the defendant has benefited from his criminal conduct.

……

(7) The second condition is not satisfied if the court believes that—

(a) there has been undue delay in continuing the proceedings, or

(b) the prosecutor does not intend to proceed.

B. Practical application

1. For the purposes of satisfying the first condition within POCA section 40, consideration needs to be given to the meaning of 'criminal investigation' as defined within POCA section 88(2):

   'A criminal investigation is an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.'

   Can it be said that those investigating a private prosecution have a duty to do so? There is no statutory duty to investigate and any duty is likely to be derived from a contract between the private prosecutor and the Investigator. Arguably that is insufficient for the purposes of satisfying this condition and so pre-charge applications are to be avoided by private prosecutors.

2. For the purposes of satisfying the second condition within POCA section 40, the definition of 'proceedings starting' is contained within POCA section 85(1)(a):

   '(1) Proceedings for an offence are started—

(a) when a justice of the peace issues a summons or warrant under section 1 of the Magistrates' Courts Act 1980 (c. 43) in respect of the offence;'

A restraint order can therefore be applied for once a summons has been issued by the Magistrates.

3. Applications are to be made to the Crown Court. The Application doesn't have to be made by an accredited Financial Investigator as POCA section 42(2) makes it plain that it can be made by either an accredited FI or the prosecutor.

4. It can be made *ex parte* provided it can be demonstrated that the application is urgent or the Defendant is likely to dissipate assets if he is put on notice of the application (CPR 33.51(2)).

5. CPR 33.51(3) sets out that the application must be made in writing and be supported by a witness statement. The witness statement must set out the grounds for the application; details of the realisable property over which the order is sought and the person holding the property, along with a draft order. The statement is vital to the application being successful. It must clearly set out the detail of the alleged offence and the basis for the reasonable grounds for believing that the defendant has benefited from his criminal conduct. It must also be demonstrated that there is a real, as opposed to a fanciful, risk of dissipation (*Re B*, [2008] EWCA 1374). The author must be prepared to give evidence during the course of the application and to answer questions from the Court, and Defence, if the application is on notice.

6. If the application is being made *ex parte* the duty of disclosure and candour is vital *(Re Stanford International Bank* [2010] EWCA Civ 137). This ought to include, for example, the details of any unsuccessful application for a freezing order in the civil courts.

7. Applications can be made without the need for a hearing, but sufficient time has to be given to the Court for the application to be considered properly. With that in mind it is good practice to provide a reading list to the Court and a time-estimate for the reading, and it is generally recommended that these applications ought to be done by way of a hearing. If the hearing is *ex parte* then it is good practice to ensure that a note of the hearing is provided to the Defence (as happens in civil injunctive relief applications) that records, in particular, the reasons given by the Judge in making the order.

8. Whilst the Court has a discretion as to whether to grant a restraint order, the Court must have regard to the legislative steer within POCA section 69 that the Court's powers must be exercised with a view to ensuring that there is no reduction in the value of the Defendant's realisable property so that any subsequent confiscation order can be satisfied.

9. If the order is made, the Prosecutor will have to serve a copy of the order and the application upon the Defendant and all named parties, and serve the detail of the order upon all those known to be affected by it (CPR 33.52(8)]).

C. Scope of the order

10. Section 41(7) confers a wide power on the Court to be able to make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective. In the context of the restraint of cryptocurrencies in particular the Courts have been prepared to make novel orders so as to ensure that the assets are preserved. For example, in the case of *R v Teresko* [2018] Crim LR 81 the Court made an order pursuant to section 41(7) permitting the Police to convert 295 Bitcoin into sterling that were held in the Defendant's digital wallet.

11. The Restraint Order itself can contain a provision that requires the Defendant, and any named third party, to disclose the details of their assets. A failure to comply with this requirement can give rise to an application for contempt of Court.

12. The Order ought to allow for reasonable living expenses of the Defendant and Legal Aid payments (if appropriate). Reasonable legal expenses can also be provided for, but not if they are incurred in connection with the underlying offence giving rise to the Restraint Order.

Associated Costs applications

13. CPR 33.47 to CPR 33.50 sets out the rules in connection with costs applications that can be made as part of Restraint proceedings. If, for example, a Defendant successfully appeals the imposition of a Restraint Order to the Court of Appeal, then an application for costs can be made against the Prosecution. Similarly, a successful application to vary an order by a Defendant that has been litigated rather than agreed could give rise to an application to costs.

14. Whilst not commonly used against the CPS in restraint proceedings, these applications are a reality in the context of applications made by a private prosecutor. They underline the importance of ensuring that the duty of disclosure and candour have been complied with at the application stage, and for ensuring that the statements served in support of the application are based upon evidence as opposed to speculation and inference.

CONFISCATION

Ability of a Private Prosecutor to bring confiscation proceedings

15. *Regina (Virgin Media Ltd) v Munaf Ahmed Zinga* ([2014] EWCA Crim 52) provides clear authority for the fact that a private prosecutor can bring confiscation proceedings. In reaching its judgment the Court of Appeal referred to the following:

    a) Section 6 of the Prosecution of Offences Act 1985 permits the bringing of 'criminal proceedings' by a private prosecutor. Sentencing is part of the

criminal proceedings instituted against a Defendant, and it is well established that confiscation proceedings are part of the sentencing procedures (*R v Rezvi* [2002] UKHL 1 and *R v Johnson* [1991] 2 QB 249). It follows that confiscation proceedings are also part of criminal proceedings and within the scope of section 6 of the Prosecution of Offences Act 1985.

b) There is nothing within POCA that limits that the institution of confiscation proceedings to the CPS or other state prosecutors. Section 6 of POCA states that the Court must proceed to consider the making of a confiscation order if *'the prosecutor….asks the court to proceed'* or *'the court believes it is appropriate for it to do so'.* The Court of Appeal had in mind that Section 40(9) states that '*references in this Part to the prosecutor are to the person the court believes is to have conduct of any proceedings for the offence'* and concluded that this sub-section is to be read throughout Part 2 as referring to all prosecutors, including private prosecutors.

Ability of a Private Prosecutor to undertake the financial enquiry necessary for confiscation proceedings

16. The Court of Appeal also considered the ability of a private prosecutor to conduct the financial investigation and supply the section 16 statement. At paragraph 32 the Court of Appeal stated:

"It is, in our view, clear that POCA makes a distinction between those who can investigate and those who can prosecute. The fact that a prosecutor cannot investigate does not impair the ability to participate fully in confiscation proceedings, provided that an appropriate officer, as defined in POCA, assists that prosecutor by exercising the various investigatory powers."

17. This observation was in response to Counsel for the Defendant highlighting that only accredited financial investigators can apply for production orders pursuant to section 345, disclosure orders under section 347 and customer information orders pursuant to

section 370. This is because these orders can only be sought by an appropriate officer who is defined within section 378(1) as including a member of staff of the NCA, an accredited financial investigator, a police officer and a customs officer.

18. For the most part, an accredited financial investigator is a person accredited by the NCA under POCA section 3. In addition POCA sections 68 and 453, in conjunction with SI 2015/1853 ('The POCA 2002 [References to Financial Investigators] Order 2015) identifies further individuals who are to be regarded as accredited financial investigators for the purposes of particular applications. On the basis that any accreditation lapses if the financial investigator ceases employment with the Police/NCA/etc, it follows that it is not possible to directly employ an accredited financial investigator as part of the investigation team, although an agreement can be reached with the Police to employ the services of an accredited financial investigator (as happened in *Zinga*).

19. However, the power to "supply" a section 16 statement is not reserved to an "appropriate officer". Having raised the question at para [32], the Court of Appeal in Zinga did not in fact answer it. The statute suggests that a "prosecutor" should "give" the court a statement of information under section 16. This can be done without use of any of the investigative powers reserved by Part 8 POCA to an "appropriate officer". Thus the prosecutor can rely upon any disclosure provided within the Defendant's section 18 statement, evidence from the trial, open source material and the material already obtained in the investigation. This was not an option considered by the Court of Appeal in *Zinga.* Depending on the volume of material obtained within the investigation, it may be that any section 16 statement drafted without the use of a financial investigator will be rather limited in its scope; particularly in relation to any criminal lifestyle/assumptions assertions. If the Court requires further information then the route is to require it from the convicted Defendant under section 18.

20. If an agreement is reached between the Police and the private prosecutor for the use of the services of an accredited Financial Investigator, then regard ought to be had to the

comments of the Court of Appeal at paragraphs 53 and 64 of *Zinga*. Virgin had initially applied for the confiscated funds to be paid to them by way of a compensation order pursuant to section 130 of the Powers of Criminal Courts (Sentencing) Act 2000. It had also reached an agreement with the Metropolitan Police that it would make a cash donation to them of 25% of any sums recovered under a compensation order. In due course Virgin abandoned its application for compensation and as such there was no basis for any argument that the agreement with the Police gave rise to any abuse of process.

21. However, the Court observed at paragraphs 53 and 54 that the agreement as between Virgin and the Police ran some of the risks identified by Gage LJ in *Hounsham* as it provided an incentive for the police to devote resources to assist Virgin in their claim for compensation and gave rise to a perception that their independence was being compromised. Notably the Court went onto say that it was not appropriate for it to make further comment on the circumstances in which the police should assist in confiscation proceedings brought by private prosecutors (particularly where the private prosecutor was a commercial enterprise) or in the obtaining of compensation by such private prosecutors and the terms on which the police do so. The Court stated that the issues raised required urgent consideration by ACPO, the Association of Crime Commissioners and the Home Office so that guidance could be provided. To date no such guidance has been forthcoming.

Compensation claim – potential abuse?

22. Leaving aside any funding issues deriving from the supply of an accredited financial investigator by the police, it is open to any private prosecutor to seek a compensation order out of the confiscated funds in respect of any losses incurred as a result of the Defendant's criminality if it is believed that a Defendant cannot afford to pay both a confiscation and compensation order (POCA section 13(5) and (6)). However, such applications need to be considered carefully in the light of paragraphs 59 to 63 in *Zinga* where the Court identified that there may be the potential for a conflict of interest on

the part of the private prosecutor. The Court stressed that it was incumbent upon instructed prosecution counsel and solicitors to ensure that the confiscation proceedings were being conducted in the public interest, and if necessary the Court (perhaps with assistance from the CPS) will scrutinise the proceedings to ensure that the proceedings are not being abused. In an appropriate case the CPS could take over the confiscation proceedings.

23. In *R v Somaia* [2016] EWCA Crim 2267 the Court of Appeal reaffirmed the principle set out in Zinga and confirmed that a private prosecutor could institute confiscation proceedings both under POCA and the Criminal Justice Act 1988 (CJA 1988). However, the court in *Somaia* also considered the question of compensation, concluding that in an appropriate case, a private prosecutor could seek compensation in confiscation proceedings.

24. The defendant had been convicted of obtaining money transfers by deception and, following confiscation proceedings, was ordered to pay a confiscation order in the sum of £20.5 million and two compensation orders to his victims totalling £18.2 million. Following his refusal to make any payments towards the orders, the default sentence was activated. He appealed, arguing that the private prosecutor, who was also the principal victim, was conflicted in carrying out the "*quasi-judicial*" role required of a prosecutor in commencing proceedings under CJA 1988. This argument effectively sought to prevent private prosecutors from pursuing confiscation proceedings.

25. The Court of Appeal did not agree that the private prosecutor was "*irremediably conflicted*". It held that a private prosecutor is still a prosecutor and is subject to the same obligations as a public prosecutor and that those acting on behalf of the private prosecutor had in place sufficient safeguards to ensure those obligations were complied with.

Relationship with applications for costs and other financial orders

26. POCA section 13 makes it plain that any order for costs or a fine has to be considered by the Court after the confiscation order has been determined.

Confiscation following conviction in the Magistrates Court

27. In the event of conviction in the Magistrates, the matter has to be committed to the Crown Court for any confiscation proceedings (POCA section 70).

5 SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS SEMINAR

8. *Private Prosecutions in the international forum*

— Ben Keith

5
SAH

FIVE ST ANDREW'S HILL

PRIVATE PROSECUTIONS IN THE INTERNATIONAL FORUM

BEN KEITH, barrister 5 St Andrew's Hill

Introduction:

1. Private prosecutions in the international forum can be extremely complex. Unlike domestic government prosecutors a private prosecutor does not always have the same status or standing in the international sphere. This means that the use of international instruments such as the European Arrest Warrants ("EAW") become more complex in the hands of a private prosecutor than they would be in the hands of a CPS agent. It is also more difficult to conduct the necessary diplomatic and police to police communications as a private prosecutor. However, the mechanisms exist to allow private prosecutors to take advantage of international instruments and lawyers should not be afraid to use them in appropriate circumstances.

2. The issue of Universal Jurisdiction (UJ) is another interesting area. UJ is the process of bringing to justice and prosecuting individuals for crimes against humanity, war crimes and torture. These proceedings are becoming increasingly more common, and while many of them are taken over by the CPS, many clients wish to start the process by drawing to the attention of the authorities the alleged perpetrators. This can include providing detailed witness statements and comprehensive evidence to the police or other agencies to investigate allegations against individuals of human rights violations. Sometimes this is for altruistic motives, sometimes partly financial.

Extradition

EAWs

3. Extradition inside the European Union and a few additional states is governed by the EAW scheme, incoming requests and how to make them are detailed in Part 3 of the Extradition Act 2003. The CPS guidance on private prosecutions is remarkably short when comes to such complex area and states "Where the private prosecution requires

extradition proceedings, prosecutors should follow the Legal Guidance on Extradition."[1] So far, so easy. The real problem comes when you actually want to make a request for somebody's extradition. Whilst the CPS are of course familiar with making extradition requests and drafting EAWs, the extradition section is not used to dealing with private prosecutors. It therefore requires not just a good legal case but some diplomatic ability in order to be able to negotiate with the CPS so that the request can be made speedily and effectively.

4. The EAW is a European judicial cooperation measure, it is designed to allow judge to judge communication and requests. That is to allow the different types of jurisdiction within the European Union and other members of the EAW scheme to communicate effectively when both investigating and prosecuting offences. Many countries use the EAW to investigate as part of the pre-trial investigation stage, especially in parts of Scandinavia and Eastern Europe. The UK will not issue an EAW without an underlying domestic warrant.

5. The first step is therefore to obtain an underlying domestic warrant on which you can base the EAW. The second step is to draft an EAW; whilst this is not strictly necessary my strong advice is that taking the CPS a complete package of what you want and asking them to rubberstamp it will considerably expedite matters and allow the EAW to be issued more speedily. Once the CPS approve, the case will usually go to Westminster Magistrates' Court for the EAW to be issued.

6. My strong advice is that private prosecutors attempting to use the EAW should be aware that the costs of the ongoing litigation could be considerable and also the certainty of success is very low. However, there are number of things the private prosecutor and/or client can do to assist matters and increase the chances of the EAW being effective.

[1] https://www.cps.gov.uk/legal-guidance/extradition

7. Local cooperation is essential, it depends on the outcome the private prosecutor is looking for. If the outcome desired is to be allowed to proceed in absence then simply issuing an EAW may be sufficient. If the outcome is the extradition of an individual so they can be put on trial then it is important to give as much information as possible to the state where you think a person is located.

8. For instance, it is beneficial to provide known residential addresses, known business addresses, family connections any other information that might assist in the apprehension of person. Once an EAW is issued the easiest way of finding the person's whereabouts is when they cross a border that requires a passport check. Within the Shengun System it is very difficult to locate individuals and many police forces will not be interested. There is therefore some merit in contacting local police through an agent in order to assist them with the location of an individual. It also means that the private prosecutor will have a reasonable update of what is happening to the EAW in a foreign state.

9. Before issuing an EAW or extradition request you will need to find out if the alleged offence is in fact one can be extradited. Different countries view offences in different contexts for instance, many financial offences are not considered to be extraditable matters in Switzerland (Not in EAW scheme) neither will Switzerland extradite in relation to confiscation matters. That is in spite of the case of ***R (Director of Revenue and customs Prosecutions) v Birmingham Magistrates' Court v Exp Woolley*** [2012] and ***Woolley v The United Kingdom*** — 56 EHRR [2012], essentially because of the diplomatic issues caused by that case. It is therefore worth taking a least some local or extradition advice on the likelihood of extradition and the types of offences available.

10. One common question is also whether extradition can be requested on the basis of contempt of court. In practice this has not been done but there may be very limited scenarios that this may be looked at.

11. Whilst I have advised many people on the availability of EAWs for private prosecutors, I am not aware of a private prosecutor in the UK attempting to extradite anybody as yet.

12. In practice the main issues that a private prosecutor will need to consider are the existence of an appropriate warrant and the type of offence. The appropriate warrant is defined in section 142 of the Extradition Act 2003:

> (1) The appropriate judge may issue a Part 3 warrant in respect of a person if—
>
> (a) a constable or an appropriate person applies to the judge for a Part 3 warrant, and
>
> (b) the condition in subsection (2), or the condition in subsection (2A), is satisfied.
>
> (2) The condition is that–
>
> (a) there are reasonable grounds for believing that the person has committed an extradition offence, and
>
> (b) a domestic warrant has been issued in respect of the person.
>
> […]
> (8) A domestic warrant is a warrant for the arrest or apprehension of a person which is issued under any of the provisions referred to in subsection (8A)…
>
> (8A) The provisions are–
> (a) section 72 of the Criminal Justice Act 1967;
> (b) section 7 of the Bail Act 1976;
> (c) section 51 of the Judicature (Northern Ireland) Act 1978;
> (d) section 1 of the Magistrates' Courts Act 1980;
> (e) […] (f)

13. The "appropriate person" is:

> (9) An appropriate person is a person of a description specified in an order made by the Secretary of State for the purposes of this section.

14. A crown prosecutor is a specified person. Therefore, the application needs to be made by a CPS prosecutor even if you help them to draft the EAW.

15. In relation to the offence definition that is governed by section 148 of the Act:

> ***148 Extradition offences***
> (1) Conduct constitutes an extradition offence in relation to the United Kingdom if these conditions are satisfied—
>
> (a) the conduct occurs in the United Kingdom;
>
> (b) the conduct is punishable under the law of the relevant part of the United Kingdom with imprisonment or another form of detention for a term of 12 months or a greater punishment.
>
> (2) Conduct also constitutes an extradition offence in relation to the United Kingdom if these conditions are satisfied—
>
> (a) the conduct occurs outside the United Kingdom;
>
> (b) the conduct constitutes an extra-territorial offence punishable under the law of the relevant part of the United Kingdom with imprisonment or another form of detention for a term of 12 months or a greater punishment.
>
> (3) But subsections (1) and (2) do not apply in relation to conduct of a person if—
>
> (a) he [has been convicted][1] by a court in the United Kingdom of the offence constituted by the conduct, and
>
> (b) he has been sentenced for the offence.
>
> (4) Conduct also constitutes an extradition offence in relation to the United Kingdom if these conditions are satisfied—
>
> (a) the conduct occurs in the United Kingdom;

(b) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the United Kingdom in respect of the conduct.

(5) Conduct also constitutes an extradition offence in relation to the United Kingdom if these conditions are satisfied—

(a) the conduct occurs outside the United Kingdom;

(b) the conduct constitutes an extra-territorial offence;

(c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the United Kingdom in respect of the conduct.

(6) The relevant part of the United Kingdom is the part of the United Kingdom in which the relevant proceedings are taking place.

(7) The relevant proceedings are the proceedings in which it is necessary to decide whether conduct constitutes an extradition offence.

(8) Subsections (1) to (5) apply for the purposes of sections 142 to 147.

16. There is a lot of case law guidance on what constitutes an offence, especially in cross-border cases. That of course does not deal with the law in the receiving state.

Role of the NCA

17. The NCA's role in EAW cases is a limited one. Its role is to communicate the EAW to the relevant authorities. It is also responsible for the practical arrangements of surrender. It is not however responsible for the issuing of the EAW or its content. For an example in an outgoing case see ***R(on the Application of Gary Mann) v City of Westminster Magistrates Court and ors*** [2010] EWHC 48 (Admin) dealing with the NCA's predecessor the Serious Organised Crime Agency.

18. However, the NCA is the designated authority for the communication of further information and may become involved if the extradition request become complicated and request are made by the extraditing state.

Brexit

19. One huge caveat is that the situation after Brexit is unknown…

NON-EUROPE

20. The position with Non-EAW cases in theory is not much more complicated. However, in practice making request in non-EAW cases is considerably more involved. That is because it requires states to state contact rather than judicial corporation. It will involve the Foreign and Commonwealth Office and Home Office and there will also be diplomatic considerations to take account of as well as purely legal. In my opinion it will be far more difficult to persuade the CPS to issue an extradition request than an EAW. However, it is still possible to make their lives easy by drafting the docuemnts in advance.

21. The criteria for extradition requests in non-EAW cases are varied, those countries who are signatories to the European Convention on Extradition 1957 ("ECE") require the UK to provide four elements:

    a. A summary of the facts alleged
    b. A summary of the law
    c. Particulars of identity
    d. The underlying domestic arrest warrant

22. The same criteria operate for a number of countries with whom we have very strong and diplomatic relations including: South Africa, Australia, Canada, USA and New Zealand.

23. All other countries with whom we have extradition arrangements the UK is required to produce a prima facie case, including signed witness statements and a detailed analysis of the law. These countries include: UAE, India, British Overseas Territories, Nigeria, Brazil, Ecuador, Paraguay.

24. When considering whether that it is appropriate to request extradition the prosecutor should consider the issue of confidentiality. In my experience many of these jurisdictions will not treat an extradition request as confidential and the fact that an individual is being sought for extradition is often leaked.

25. It is also worth considering the litigation risk that alerting foreign jurisdiction to a prosecution may involve. If the alleged offending is cross-border alerting foreign prosecutors of the existence may man that they start their own proceedings which may not be in your own client's interests. They may also not cooperate so as not to prejudice their own investigation.

The status of a private prosecutor:

26. This area of law is untested, we do not know the attitude of different jurisdictions to the use of private prosecutors and their subsequent use of international agreements. In many states the victim has equal status with the prosecutor and the defendant. In those states there may be considerably more sympathy towards private prosecutors using extradition arrangements. In other countries the involvement of a private prosecutor maybe the death knell of any potential extradition.

Not for an ulterior motive

27. Private prosecutions must of course be for a proper purpose. There is only one UK case that deals with private prosecutions and extradition, that case was an incoming request from Ukraine for the extradition of Igor Kononko on allegations of fraud. The case was part of the BTA bank litigation and the allegations totalled some $6billion. In that case there were two private prosecutors involved in the case. The first private prosecutor

was a Ukrainian law firm hired by the Kazakhstan government. They inveigled their way into Ukrainian system managed to get an extradition request issued. The case was prosecuted by a UK firm with an international presence and then taken over by a US firm for the appeal proceedings. That case was found by the High Court to be an abuse of the Court's process not because of private prosecutions but because the Kazakhstan Government was using extradition as a front for political means. The case is reported at ***Government of Ukraine v Igor Kononko*** [2014] 1420 (Admin) Collins J said:

> 11. In addition to that, details had been obtained of email traffic between the firm of Ilyashev in particular and a Major Melnik, who was the individual behind the request for extradition on behalf of the Prosecutor General's Office, or so he said, he himself being a police officer described as a "Major" in that force. The email correspondence is of the greatest of interest because it shows, so submits Mr Keith, beyond any question that there was abuse in the manner in which this request for extradition was made and, in particular, there was not only a failure to disclose material information but it was clear that the material upon which the request was based was orchestrated by Ilyashev and the two individuals named who were particularly concerned with this and who put to Mr Melnik various statements and documents. All he was required to do was simply, where necessary, append his signature so that they appeared to be his investigation, whereas, in fact, they were nothing of the sort. They were what he was put up to requesting by the two involved with Ilyashev. There was, when this was originally discovered back in February of this year, a defence, as it were, by the Appellant saying that the documents were not admissible because they had been obtained unlawfully, albeit they are now, I gather, in the public domain.

<u>Other matters</u>

28. It is also possible to extradite individuals for breaches of confiscation orders where the terms in default has been activated – see ***Hickman v Governor of HMP Wayland Prison*** [2016] EWHC 719 which followed on from the case of ***Woolley***. In Woolley Laws LJ stated:

> "24. We are entirely satisfied that the default term (which the court is obliged to impose as a matter of law in such circumstances as part of the process of sentencing) forms part of the original sentence, since it is an integral part of the confiscation order which, it is common ground, is unarguably part of the original sentence."

29. It is therefore open to a public prosecutor to request extradition in confiscation proceedings once the default has been activated.

Universal Jurisdiction

30. Universal Jurisdiction (UJ) is a field of law that often requires assistance of private prosecutors although more in the preparation of the case that the prosecution of it. The government statement on UJ stated that:

> • War crimes under the Geneva Conventions Act 1957, and a small number of other grave offences, are subject to universal jurisdiction. This enables prosecution to take place here even though the offence was committed outside the United Kingdom, and irrespective of nationality.
>
> • A private prosecution can be brought in universal jurisdiction cases. It is open to any individual to initiate criminal proceedings by applying to Westminster Magistrates Court for a summons or an arrest warrant.
>
> • The evidence required for the issue of a summons or warrant is far less onerous than that required by the Crown Prosecution Service (CPS) in determining whether a prosecution should go ahead. The court must simply be shown some information that an offence has been committed by the accused, and it does not need to decide that there is a realistic prospect of conviction.

31. However, the consent of the DPP is required in almost all cases the Government Guidance states[2]:

> 17. There may be circumstances in which a private prosecutor wishes to make an arrest without involving the police and seeks a private arrest warrant. Section 1(4A) of the Magistrates' Courts Act 1980 provides that the consent of the Director of Public Prosecutions is required before an arrest warrant is issued for crimes such as grave breaches of the Geneva Convention, torture and hostage taking. In effect this means that an application will not be made without the Director of Public Prosecutions first indicating his or her consent. Separate guidance has been published in relation to applications for the consent of the Director of Public Prosecutions. This separate guidance is attached at Annex B and should be followed when there is an imminent prospect of a suspect arriving in England or Wales.

32. In other cases the consent of the Attorney General is required.

33. This is a growth area. There are many people who have suffered abuse in foreign states and want to bring them to justice or if not, then create pressure on them that brings them to the negotiating table for discussions, on financial settlement or release from custody of friends and relatives.

34. In these cases much of the work involves referring the case to the Metropolitan Police for investigation and providing sufficient evidence to allow them to commence a prosecution. Many clients need this to be done in combination with press coverage in order to get any useful result. For instance the recent case of the academic in the UAE, Matthew Hedges although it did not get as far as UJ prosecution meant that there was the opportunity for pressure and negotiation to take place resulting in his release.

---

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf

35. There can also be a certain amount of forum shopping. A perpetrator who may be more likely to be found in Spain or Germany can also be prosecuted there and the laws on private prosecution make UJ prosecution viable overseas. The same evidence gathered in the UK can form the basis of a prosecution in a foreign state.

5
SAH

FIVE ST ANDREW'S HILL

For further information on our team please contact:

Dave Scothern

CHAMBERS DIRECTOR

dscothern@5sah.co.uk | 020 7332 5400

RANKED IN Chambers UK BAR 2019 5 St Andrew's Hill

The LEGAL 500 UNITED KINGDOM LEADING SET 2019

WHO'S WHO LEGAL WWL

WWW.5SAH.CO.UK