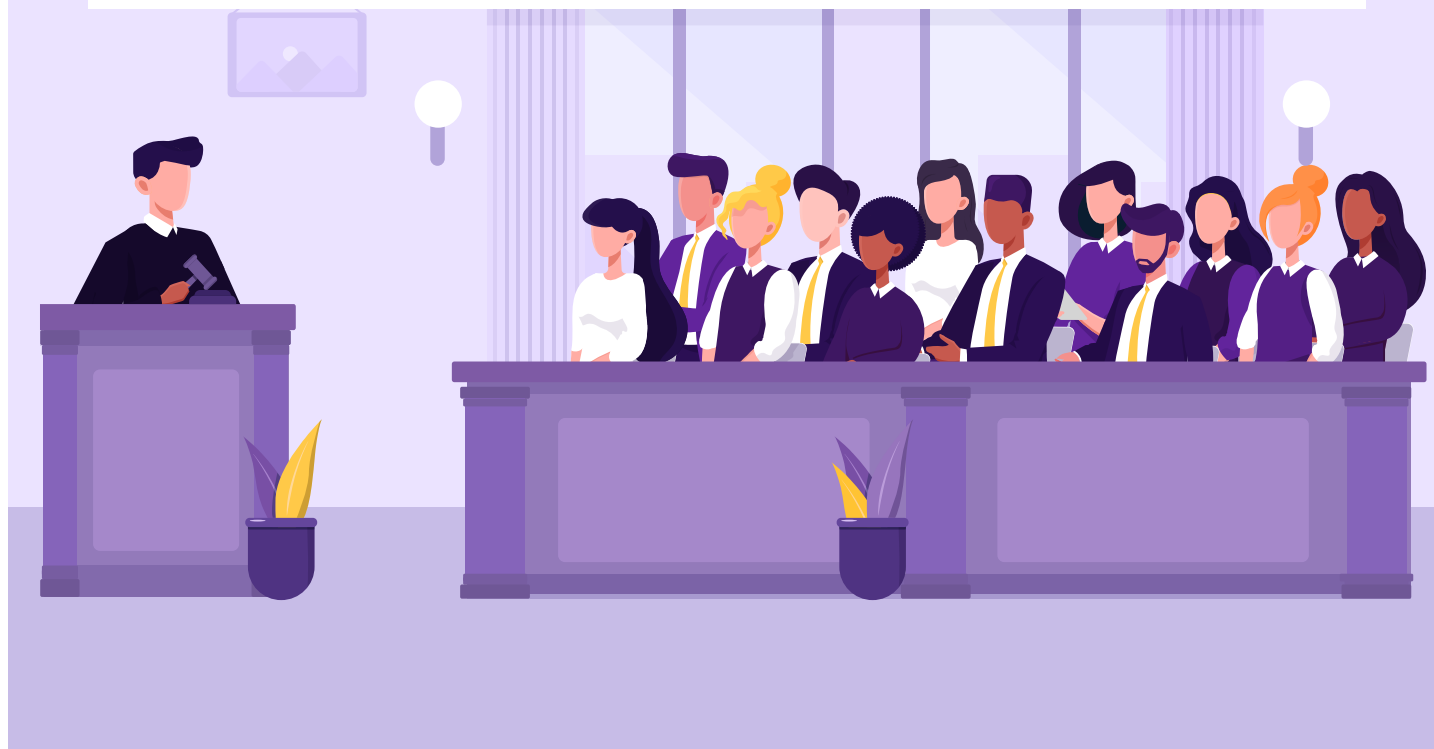


PRIVATE PROSECUTIONS & ECONOMIC CRIME:

A ROUTE TO JUSTICE FOR VICTIMS



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Economic crime is widely reported to be on the increase, but with the limited resources of the state's agencies stretched widely across the full spectrum of criminal offending, victims of fraud and related crimes are too often denied justice and left without effective recourse.

Gareth Minty and Owen Griffiths consider how private prosecutions may help to fill the resulting gap and enable victims to obtain the justice they desire.

The current economic crime wave

Although many crime types have seen a reduction in offending during the COVID-19 pandemic and the ensuing lockdowns, economic crime has followed a markedly different pattern.

The Office of National Statistics' ('ONS') most recent year-end report ¹ details that there were 5.1 million fraud offences in the year ending September 2021, a 36% increase compared with the year ending September 2019.

The ONS further notes that industry body UK Finance reported a 53% increase in remote banking fraud, reflecting fraudsters' attempts to adapt to lifestyles focused increasingly on mobile and internet use.

The ONS report also records an astonishing increase in computer misuse, with 1.9 million offences in the year ending September 2021, an 89% increase compared with the year ending September 2019.

The report emphasises that a significant part of this increase relates to large-scale data breaches, another key aspect of modern economic crime. Separately, the damaging impact to the UK economy from the growth in counterfeiting and intellectual property crime is also well established ².

1 Crime in England and Wales - Office for National Statistics (ons.gov.uk)

2 Trade in counterfeit goods costs UK economy billions of euros - OECD

Set against this background of prolific offending, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services ('HMICFRS') reported in August 2021 that victims of fraud were often denied justice and that *'the amount of intelligence, investigation and prevention work that fraud requires is not matched by the resources allocated to it'*³. In November 2021, the Ministry of Justice separately published the latest edition of its Criminal Justice Statistics quarterly, which recorded that despite total prosecutions for indictable offences having increased overall, the latest year's data in fact saw a reduction in proceedings against defendants charged with fraud offences, down 7% to 5,500⁴.

Yet the impact on victims remains considerable, with the HMICFRS report emphasising that 'the suffering felt by fraud victims cannot be overstated' with the effects including 'serious psychological and emotional problems' which put 'a great strain on individuals, families and relationships'.

Private Criminal Prosecutions: A Solution

Despite this gloomy outlook, private prosecutions can nevertheless provide victims with a route to justice. The right of a person (natural or legal) to institute and conduct their own criminal prosecution⁵ was expressly preserved by the same legislation that simultaneously created the Crown Prosecution Service⁶. A private prosecution is one that is started and funded by a private individual, company or other interested party (e.g. a charity), and therefore does not directly involve the police or any of the state prosecuting authorities. It nevertheless follows the same process and is subject to the same rules of evidence and procedure as a public prosecution, including ensuring a defendant's fundamental right to a fair trial.

Where a case concludes with a defendant's conviction – whether by a guilty plea or verdict (after a trial) – the court will impose the same punishment as it would with a public prosecution, which includes a sentence of imprisonment. Additionally, the court has the power to make an order for compensation in favour of the victim, where they have suffered a measurable loss as a direct result of the criminal conduct.

The punishment of wrongdoing by a criminal court, in proceedings conducted in public and therefore capable of being reported upon, can also serve as an effective deterrent against future offending, particularly for corporate victims who may be the target of repeated offences.

Additionally, under the Proceeds of Crime Act 2002 it is possible for a private prosecutor to apply for a financial restraint order, to prevent the dissipation of assets and to preserve the position in anticipation of a post-conviction confiscation order. The latter can entail the court confiscating not only a defendant's benefit from the conduct of which they have been convicted, but also – in most economic crime cases – any additional benefit arising from a defendant's wider 'criminal lifestyle'. This can therefore represent a further significant measure when it comes to targeting and disrupting criminal enterprises, both now and for the future.

Private Criminal Prosecutions: Case studies

In *R v Clements*⁷, KDB Isolation S.A., which was a French company involved in manufacturing in the construction sector, brought a private prosecution at Southwark Crown Court against a shadow director of its former UK distributor for unauthorised use of a registered trademark, contrary to s.92(1) Trade Marks Act 1994,. The defendant, through the company's former distributor and later as a sole trader, was alleged to have applied infringing trademarks to approximately £300,000 worth of goods. He was convicted and sentenced to a period of two years' imprisonment, which was suspended for two years, and he was additionally disqualified from acting as a director for a period of five years. This is just one of many examples of rights holders bringing private criminal prosecutions as a means of both punishing an offender and deterring others from targeting the same victims on a repeated basis.

In *R v Sultana*⁸ a private prosecution was brought by Allseas Group S.A., a company based in the Netherlands and Switzerland operating in the oil and gas industry. The company had been the victim of a complex €100m investment fraud that involved events – and



3 Spotlight report - A review of Fraud: Time to Choose (justiceinspectorates.gov.uk)

4 Criminal Justice Statistics quarterly (publishing.service.gov.uk)

5 Prosecution of Offences Act 1985, s.6(1)

6 About CPS | The Crown Prosecution Service

7 R. v Clements (James) | Westlaw UK

8 Private prosecution success over fraudster - BBC News



therefore also evidence – in a number of international jurisdictions, including the UK, the US, Canada, Hong Kong, the Netherlands, Switzerland, Vatican City, Liechtenstein and Malta.

Although the Crown Prosecution Service had concluded against prosecuting this UK-based defendant for his central role in the fraud, the private prosecution instigated by the company resulted in the defendant being convicted of conspiracy to defraud and sentenced to eight years' imprisonment.

What does the future hold?

Recent developments indicate that the Government may be seeking to increase its focus on supporting victims of this unprecedented wave of economic crime.

In July 2021, the Government's Beating Crime Plan⁹ set out that a new Fraud Action Plan would be forthcoming and that Action Fraud would be replaced by an improved national fraud and cyber-crime reporting system.

It also stated that victims of economic crime will be better supported in future through the impact of the recently-launched National Cyber Security Centre and the proposed expansion of the National Economic Crime Victim Care Unit.

Separately, the House of Lords Committee on the Fraud Act 2006 and Digital Fraud has recently published a call for evidence¹⁰ to examine whether the Act is in need of reform and what more needs to be done across the public and private sector to effectively detect, prevent and prosecute fraud.

These developments are of course welcome, although the success or otherwise of the Government's response will ultimately be measured by actions and any consequent results, rather than just words.

In the meantime, with overstretched law enforcement and public prosecution agencies facing difficult ongoing resourcing decisions, the immediate outlook for victims of economic crime remains extremely challenging. Against that backdrop, private prosecutions can play an important role by helping victims to secure access to justice that would otherwise be unavailable, as well as also forming a vital and effective part of businesses' strategies to counter economic crime.

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9 Beating crime plan (publishing.service.gov.uk)

10 <https://committees.parliament.uk/committee/582/fraud-act-2006-and-digital-fraud-committee/news/161575/fraud-act-2006-committee-publishes-call-for-evidence/>