Private Prosecutions: The foundations are laid

Assessing the impact of Regina (Virgin Media) v. Zinga

The headline in The Guardian on Wednesday 29th January 2014 (“Metropolitan Police accused of acting on behalf of big business”) would undoubtedly have caused a stir amongst private prosecutors, public prosecutors, the police, the Home Office and others interested in the issue of commercial organisations seeking redress in the criminal courts in relation to crimes committed against them. The story, based upon observations made by the Lord Chief Justice in a recent Court of Appeal case, queried the efficacy of private prosecutions brought in such circumstances and – quoting labour MP Tom Watson and Jenny Jones, a London assembly member for the Green party – suggested that they represented the “…creeping privatisation of policing…”. The former spoke of “…two tier-policing where corporate interests can buy the time of the police…” whilst the latter complained, “I hate the thought that if you are rich you can buy more justice than if you are poor…”. And yet at a time when funding for public bodies – and in particular prosecuting authorities – is under such severe strain, it is inevitable that there will be a growing demand for the private sector to operate in areas that were once solely or mainly inhabited by the state. Private prosecutions are here to stay – that much is clear from the case concerned. But are the criticisms levelled against them fair? And what is the real impact of the case on private prosecutions, confiscation and compensation and the very real problem of fraud on commerce?

The case was an interesting one. A man called Zinga, with the help of others, had sold set top boxes and software which enabled non-subscribers to access Virgin Media premium services without payment. The loss to Virgin Media was estimated to be in the region of £380 million. Virgin decided not to bring civil proceedings but instead chose to mount a private prosecution, in which regard it enlisted the assistance of the Metropolitan Police. Soon after arrests were made, it entered into an agreement with the Met under which it promised to make a cash donation to the Met Police Authority of 25% of any sums recovered under any compensation order. The prosecution duly proceeded, Zinga and another man were convicted of conspiracy to defraud, Zinga was sentenced to 8 years’ imprisonment and both defendants appealed against their conviction. This appeal failed; but in the meantime, confiscation proceedings had been commenced. And in due course, Virgin having abandoned their claim for compensation, a confiscation order in the sum £8,771,300.00 was made against Zinga. The Guardian story revolves around comments made by the Lord Chief Justice in the context of Zinga’s appeal against this order.

The first issue raised was whether a private prosecutor such as Virgin Media was entitled to bring confiscation proceedings (even if it had no financial or other personal interest in the outcome). The second issue raised was the propriety of the agreement between Virgin and the Met, in which regard the appellant argued that it amounted to ‘an abuse of the process of the court’.

On the first issue, the Court of Appeal was clear: Commercial businesses have a well-established right to bring private prosecutions; and, equally, they are perfectly entitled to initiate confiscation proceedings. In other words, the concept of private prosecution in such circumstances is an entirely well-founded one and to the extent that the Guardian article suggests otherwise, this is erroneous.

As to the second issue, the Lord Chief Justice ruled that the agreement concerned did not amount to ‘an abuse of the process of the court’. At paragraph 52 he stated: “*Given that the only benefit of the confiscation proceedings inured to the benefit of the state as no compensation or other recompense was sought by Virgin, there is no basis on which it can be contended that the agreement with the Metropolitan Police Authority gave rise to any abuse of process.”* Thus, the appeal was dismissed and ZInga’s extremely large confiscation order remained intact.

In addressing the arguments put forward, the court examined the propriety of the agreement that had been made between Virgin and the Met. It recognised the growth in private prosecutions as an alternative to civil proceedings, particularly in areas relating to the criminal misuse of intellectual property. No doubt commercial fraud would be a similarly appropriate backdrop: It is widely reported that the cost of counterfeit goods on trademark owners, consumers and the UK is huge; some estimates say the criminal gain from such activity in the UK is worth £1.3 billion annually. It is also well documented that the cost of commercial fraud on the economy may far exceed this figure. All this at a time when the financial constraints on law enforcement and prosecuting authorities has never been more extreme.

It is easy to look at any case such as this and see it as an example of the police assisting big business when it should be fighting ‘real crime’. However, such a conclusion ignores the very real effect that such crimes have on the economy, and therefore on all of us. Any argument that suggests that all such criminal acts against large corporates such as Virgin should be dealt with in the civil courts fails to address the very real benefits such private prosecutions bring to us all. As the Court of Appeal recognised, the benefits of a criminal case are that it tends to be much speedier, it has a significant deterrent effect on would-be-fraudsters and it brings to justice, often by way of imprisonment, those who seek to make their living defrauding others. In other words a criminal prosecution can address the threat posed by crimes on commerce and the economy in ways that civil action cannot, particularly in acting as a deterrent to such crimes in the first place. These are benefits we would all recognise. In such circumstances it seems good sense to allow and in fact encourage the private sector to pursue criminals in this way. This is something that the court recognised. At paragraph 57 it said: *“At a time when the retrenchment of the state is evident in many areas, including the funding of the Crown Prosecution Service and the Serious Fraud Office, it seems inevitable that the number of private prosecutions will increase, particularly in areas relating to the criminal misuse of intellectual property. In the overwhelming majority of such cases, a prosecution will serve the public interest in addressing such criminal conduct.”*

If it is right to bring private prosecutions it must be right that such bodies can also bring confiscation proceedings. Indeed this was endorsed by the Court of Appeal, saying at paragraph 59: *“Again in the overwhelming majority of such cases, the pursuit by a private prosecutor of confiscation proceedings will also serve the public interest to the same extent.”*

However, having recognised what it described as the inevitable rise in such prosecutions and recognising the benefits of such action in the majority of cases, the court did acknowledge potential ethical difficulties with certain aspects of private prosecutions. Specifically, the court concluded that the agreement between Virgin and the Met did in fact provide an incentive for the police to devote resources to assisting Virgin in their claim for compensation and gave rise to the perception that their independence was being compromised.

However, the court also thought it inappropriate to comment further on the circumstances in which the police should assist in confiscation proceedings brought by private prosecutors, particularly where they were commercial companies or trade organisations with substantial resources available. Neither was it appropriate to comment further on the obtaining of compensation by such prosecutors and the terms on which the police assist in such a process. However, the court did stress that urgent consideration be given to the issuing of clear guidance on what the police may or may not do in these situations – by the Home Office, Association of Chief Police Officers (ACPO) and the Association of Police and Crime Commissioners.

The problem for the police may be that if they assist without accepting funding, they might be accused of using state funded public resources to help big business; yet on the other hand, if they accept funding, they may end up being accused of diverting resources to where there is financial incentive for them to do so. The problem for the private prosecutor is that, although they are able to bring confiscation proceedings, they are not able to conduct the financial investigate for the purposes of those proceedings as relevant orders to the process can only be sought by an appropriate officer (as defined under s.378(1) POCA). This is why such a prosecutor needs the assistance of a police officer, accredited investigator or other officer as defined by the section.

In relation to private prosecutions where the prosecutor was seeking recompense for its own benefit, the court recognised that there may be cases where there is concern as to the interrelationship between the prosecution in the public interest and such claims for compensation. It suggested that in these cases the court can rely in part on the professional duties of the advocates and solicitors under their professional codes and on the duties owed to the court. However, ultimately it acknowledged that it was for the court to ensure that an order is not disproportionate and the proceedings were not abused. It also advised that in private prosecutions where compensation or recompense is made by the defendant, a court must carefully consider whether it requires the assistance from the CPS and said that in those circumstances *“We trust that the Director will use the powers given to intervene in the proceedings either by taking over the proceedings or assisting the court.”*

CONCLUSION

In other words, the foundations for private prosecutions brought by commercial organisations are very much in place. And so is the structure to pursue confiscation proceedings. No doubt, guidance is needed on the issue of police funding and also on the potential conflicts of interest which may arise where the prosecutor seeks a compensation order for its own benefit. But what is clear from Zinga’s case is that a private prosecution can bring significant benefits to the victim of fraud and intellectual property crime and therefore to the economy and subsequently to us all. Many of these cases would not be prosecuted but for private prosecutions, mainly due to the state’s lack of resources and funds but also because of fiercely competing priorities. A criminal prosecution sends out a powerful deterrent to those who might commit these types of offences and any subsequent reduction in the loss incurred as a result of such a deterrence is in all our interests.