Disputes 2017: Civil and criminal crossover

The trend of civil proceedings arising out of, and running in parallel to, criminal investigations and prosecutions looks set to continue.

In brief

- Parallel criminal and civil proceedings are becoming more common, a trend that is set to continue.

- Differences in the rules of evidence in civil and criminal procedures can complicate defence strategies for companies.

- Threats to commence private prosecutions or hand information to authorities are also being seen in civil claims, but can backfire badly if mishandled.

The corporate criminal landscape

2017 will see further efforts to broaden the scope of criminal laws aimed at business behaviour (see our article for more on this), a process that has been underway for many years now. As the criminal law becomes more of a feature of the business landscape, more civil claims will inevitably arise from criminal investigations. Whenever a business is found to have committed a criminal wrongdoing, there will be parties who will claim to have suffered a loss as a result. A rival whose bid in a tender process was unsuccessful will claim that they lost out as a result of alleged bribery, customers may claim that they suffered losses due to fraud and shareholders in a company under investigation may claim that their shares have lost value due to business practices that were not disclosed when they purchased their shares.

Evidential difficulties

Already the courts are seeing some major cases arising after or alongside criminal investigations and we expect this trend to grow. It raises difficult issues for those involved, as evidence in one set of proceedings can be highly relevant in the other, but the rules on evidence are very different. A company may find that if it interviews employees involved, it risks being seen as uncooperative at best, and interfering in the course of justice at worse, by the prosecuting authorities. Without interviewing potential witnesses, however, a company may find it impossible to properly defend a civil claim. The defendant company may therefore wish to stay civil proceedings until the criminal proceedings are complete, but this is not easy to achieve. Increasingly, companies will find investigations complicated by the threat or reality of fighting on two fronts at once.
Claimants will often wish to obtain documents created during the course of criminal proceedings, or obtained by an investigating or prosecuting authority during the course of a criminal investigation. This can give rise to contested applications to the court, where a number of public interests may be in play, including preserving the integrity of criminal investigations, protecting witnesses, informants and other third party information providers and maintaining relationships with cooperating foreign states. Arguments in favour of use are likely to be most persuasive where the subject matter of the criminal and civil proceedings are closely linked, and the criminal investigation material sought to be used is highly relevant to the matters at issue in the civil case as per Tchenguiz v Director of the SFO.

**Tactical considerations**

Criminal proceedings are now being used tactically by some parties to civil litigation. There has been a rise in the use of private prosecution actions, including as an alternative to or in conjunction with civil proceedings. We expect to see this trend continue in 2017, as some parties seek to send a message of deterrence and bring pressure to bear on their opponents. Anyone has the right to bring a prosecution against another party for criminal wrongdoing, though an accused person may prevent abusive proceedings beginning by making representations to the court or, once proceedings have commenced, by requesting the Crown Prosecution Service (CPS) to take over the case and discontinue it.

Threatening criminal proceedings, or threatening to hand information to a prosecuting authority, is obviously a tempting way for claimants to put pressure on a defendant company. That temptation is increased by the fact that, if the threat is made in settlement discussions, it may appear to be protected by Without Prejudice privilege. This means that it may not be referred to in court, nor in pleadings or witness evidence. However, as one party found to its cost in the 2016 case of Ferster v Ferster, this can backfire badly. Where a threat of committal proceedings is held to amount to unambiguous impropriety, that is an established exception to Without Prejudice privilege. There is therefore no impediment to referring to the threat in court, where it will not look good for the party who made it. Blackmail is, of course, itself a criminal offence, and the fact that a person makes a threat to do something which they are entitled to do does not prevent the making of the threat being blackmail.

**What it means for you**

Any company involved in an investigation into allegations of criminal wrongdoing needs to consider the possibility of related civil litigation. If a claim is likely, that needs to be factored into the plan for managing the investigation from the outset, and particularly how issues of evidence are approached. We expect to see more parallel criminal and civil proceedings in 2017 and it is a trend that is unlikely to reverse while corporate criminal law continues to expand. More on the issues that arise when civil and criminal proceedings overlap can be found in our collection of articles on this topic.

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