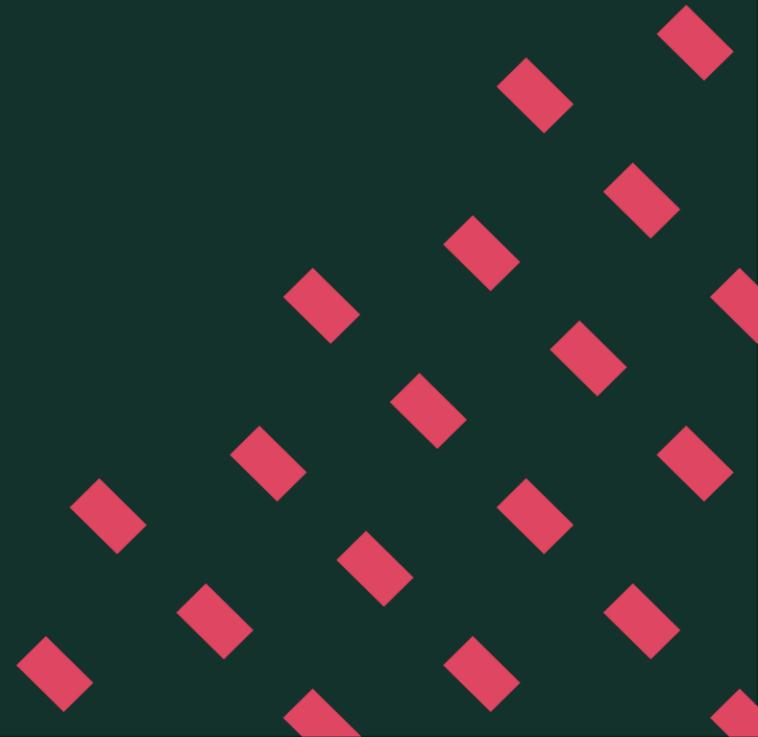


White Paper Conferences

Civil Fraud 2019

Speaker

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Can you coat-tail freezing actions brought by the police or make use of prosecution evidence?

Considering the different burdens of proof, how do you progress the civil case if there are acquittals?

Agenda

- (1) Admissibility and impact of convictions and acquittals**
- (2) Accessing criminal evidence in civil proceedings**
- (3) Lessons from the civil recovery cases in the UK and ECHR – a developing jurisprudence**

Previous convictions and acquittals

Provision for previous convictions or acquittals to be used as evidence

- **Civil Evidence Act 1968 s11(1):**
 - “In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom ... shall ... be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings.”
- **Police and Criminal Evidence (PACE) Act 1984 s73(1):**
 - “Where in any proceedings the fact that a person has in the United Kingdom or any other member State been convicted or acquitted of an offence ... is admissible in evidence, it may be proved by producing a certificate...”
- **PACE Act s75(1):**
 - Where evidence of a conviction or acquittal is adduced, the contents of the information, complaint, indictment or charge-sheet is admissible.

Foreign convictions and acquittals

When can a foreign conviction be used? What is its evidential status?

Foreign convictions may be admissible in some circumstances:

- **R v Kordasinski [2007] Crim. L.R. 794** relied upon convictions from Poland as propensity evidence by stating that the **Hollington v Hewthorn & Co Ltd [1943] KB 587** rule was abolished, insofar as it ever applied, for criminal convictions by **s99 Criminal Justice Act 2003**.
- The extent to which **Hollington** still applies to criminal proceedings is unclear but appears narrow.

Foreign convictions and acquittals

When can a foreign conviction be used in civil proceedings? What is its evidential status?

- In the civil context, Supperstone J in **NCA v Hajiyeva [2018] EWHC 2534 (Admin)** permitted the NCA to have regard to husband's conviction in Azerbaijan when considering the income requirement within the UWO framework.
- A foreign conviction can be used as evidence of **s241 POCA** "unlawful conduct" for the purposes of civil recovery, as was done in **Assets Recovery Agency v Virtosu and another [2008] EWHC 149 (QB)**, but note it is adduced as evidence of "conduct", not a conviction.
- Foreign convictions may be referred to in affidavits in support of a freezing injunction where forming part of the narrative against a defendant in **Arab Monetary Fund v Hashim (No 2) [1990] 1 All ER 673**.

Accessing police and CPS evidence

How can evidence obtained through police investigation be obtained?

CPS, Disclosure of evidence to third parties, Legal Guidance

- Material discovered and generated by the police during a criminal investigation is supplied to the CPS for prosecution purposes and is not public information other than that which is adduced in open court.
- The CPS and the police can consider applications for disclosure to third parties and can disclose some material without a court order.
- Material which is not the subject of public record, such as witness statements, defendant statements in interview and material seized by police, will require a court order from the court in which the matter was heard or express consent from the subject or owner.

Accessing police and CPS evidence

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CPS, Disclosure of evidence to third parties, Legal Guidance

- CPS disclosure to third parties is governed by general principles including:
 - Genuine interest in the matter, i.e. contemplation of civil proceedings
 - Consent of the maker where witness statements made for police in respect of criminal proceeding only are requested
 - Completion of criminal proceedings confirmed
 - Public interest immunity consideration
 - Third party confidentiality undertaking

Civil proceedings following acquittal

What is the impact of an acquittal or lifting of a criminal restraint order?

- Prima facie, there is no impact.
- The general rule is that civil proceedings can be pursued following an acquittal or restraint order removal.
- Affirmation at the international level from civil recovery case law:
 - European Court of Human Rights accepted as matter of principle that a person's acquittal of criminal offences does not prevent their property being the subject of civil forfeiture proceedings – **Walsh v United Kingdom (Application no. 43384/05)**.

Civil proceedings following acquittal

In civil proceedings, are there any due process protections for a person acquitted in criminal proceedings?

- As matters stand, there are very few protections, even where evidence excluded from the criminal trial is concerned.
- Evidence excluded from a criminal trial can be admitted in civil proceedings:
 - Where evidence was declared inadmissible in criminal proceedings because of an unlawful arrest, separate civil proceedings were not bound by criminal courts and therefore criminal evidence was admissible in subsequent civil recovery efforts, per **Serious Organised Crime Agency v Olden [2010] EWCA Civ 143**.

Civil proceedings following acquittal

Possible implication of due process protections on admissibility of evidence in civil proceedings

- But could there be a breach of the presumption of innocence where civil proceedings substantially question an acquittal?
- There is some learning in the context of civil recovery proceedings where these have followed a failed criminal prosecution.
- **Larranaga Arando v Spain (Application no. 73911/16)** - there could be due process implications where there is a 'link' between criminal and civil proceedings, particularly
 - “where subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant’s participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant’s possible guilt.” [42]

The issue of double jeopardy

What is the impact of an acquittal or lifting of restraint order?

- Developing the argument –
- Double jeopardy – *ne bis in idem* - might arise where the same set of facts and evidence are used in different proceedings.
- In the ECHR framework, **Article 4 of Protocol 7** forbids more than one criminal trial on the same facts, so it is crucial to determine the nature of the civil proceedings.
- This requires an assessment of the true character of the proceedings – considering the classification, purpose and any punitive effect.
- The issue has been raised in civil recovery proceedings. Might the same line of argument apply to a situation where the police and CPS provided the evidence used for the civil recovery?

Application to civil fraud and other proceedings

What is the position on civil proceedings following acquittal? A developing jurisprudence

- Can a distinction be drawn between the approach to double jeopardy between civil recovery proceedings and other civil proceedings where there has been a failed criminal prosecution?
- Similarities
- **POCA Part 5** creates a civil cause of action enabling the State to commence recovery proceedings following an acquittal. Broadly, standard rules of civil process apply.
 - Evidential rules
 - Standard of proof
- On this analysis, a civil fraud action is analogous, and therefore the same rules should apply.
- This gives room for a developing argument raising the issue of double jeopardy where there has been a previous acquittal on similar facts and similar evidence.

Application to civil fraud and other proceedings

What is the position on civil proceedings following acquittal? A developing jurisprudence

Differences

- Are the following differences between an action for civil recovery and a private claim sufficiently significant to impact on this argument?
 - Remedies in **Part 5** are *in rem* whereas a civil action is *in personam*.
 - Civil recovery is a civil claim but having been brought by the State following the State's acquittal, the principle of the indivisibility of the Crown arises. In other words, it is the same party, i.e. the State, which is having two bites at the same cherry.
 - **Protocol 7 Article 4 ECHR** (double jeopardy protection) is expressed to apply in criminal proceedings (as defined in ECHR cases). Query, how far it applies in civil proceedings.

Application to civil fraud and other proceedings

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- Rejoinder
 - The argument can be turned on its head.
 - If double jeopardy operates in civil recovery proceedings which are *in rem*, how much more so would you expect the rule to apply in private law proceedings which are *in personam*? Unlike a private law action, civil recovery proceedings are (supposed to be) less focussed on the activities of an individual but rather the property and its origin.
 - Also, even though a private law action is not “criminal” within the meaning of the ECHR, the reputation of a person may still suffer as a result of an adverse ruling.

Mutual Legal Assistance

Can criminal evidence obtained from MLA be used in civil proceedings?

- Where the UK has obtained evidence on a specific issue by a mutual legal assistance request from abroad, the position on subsequent use of the material for other purposes (such as civil proceedings involving confiscation, or a private law action) is provided by **Crime (International Co-operation) Act 2003 s9(2)**:
 - “The evidence may not without the consent of the appropriate overseas authority be used for any purpose other than that specified in the request.”
- However, the position may soften if the evidence has been used in open court and has become part of the public record.

Mutual Legal Assistance

Can criminal evidence obtained from MLA be used in civil proceedings?

- **Crown Prosecution Service v Gohil [2012] EWCA Civ 1550** affirmed this position. It did however note the practical difficulties with barring other uses of the information where it has been discussed in open court.
- The Court said that “although she [the complainant] cannot adduce the documents, she can use the information contained in them as a springboard for conducting her own enquiries”.

Private prosecutions

When can a private prosecutor coat-tail the police or CPS?

- The general rule is that private prosecutors do not have a right to access information held by CPS, per **R v DPP ex parte Hallas [1988] 87 Cr App R 340**.
- Witness and defendant information provided to the CPS and police is confidential, but this information can be shared with those classified as “investigators”, per **Taylor and another v Director of the Serious Fraud office and others [1999] 2 AC 177**.
- CPS disclosures to private prosecutors may be slow where the evidence did not meet the evidential stage of the Full Code Test when the CPS gathered it.
- But it is possible for a private prosecutor to build a case and use police or CPS evidence as a supplement.

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