

## Parallel Proceedings - Civil and Criminal

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12 Sep 2019 Syedur Rahman.

### **Syedur Rahman considers the factors that determine when civil proceedings can go ahead before, or at the same time as, criminal proceedings relating to the same circumstances.**

It will often be the case that a set of circumstances could prompt civil and / or criminal proceedings. If the allegations appear, upon examination, to be strong enough and supported by evidence there is the possibility that a criminal prosecution will be brought by the authorities – or even by a member of the public that chooses to bring a private prosecution under section 6 (1) of the Prosecution of Offences Act 1985. It is also possible that the allegations and any evidence in support of them could form the basis of a civil action brought by the aggrieved party against those alleged to have committed the wrongdoing.

In such situations the issue of timing may arise: whether the civil proceedings can go ahead at the same time as or before the criminal proceedings.

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## The Traditional Position

The traditional position was that where a set of circumstances raise criminal and civil liability then the criminal case ought to be concluded before civil proceedings can be started; see *Smith v Selwyn* [1914] KB 98.

That basic position has been eroded over the years.

The concern was always the perceived risk of prejudice. If the commencement and / or continuation of civil proceedings could cause a real risk of serious prejudice to criminal proceedings that have begun, or are likely to be brought then the party against whom the civil proceedings are being brought can apply for a stay on them.

There is also the practical consideration that a conviction in the criminal courts, based as it would be on the higher standard of proof, might well mean that a civil case cannot be sensibly contested.

So what happens when a defendant to proceedings wishes to prevent that case going ahead until the other case has been concluded?

He or she will have to apply to the Court to stay proceedings until the conclusion.

In *Panton v The Financial Services Ltd* [2003] UKPC 86 (an appeal from the Jamaican Court of Appeal) the defendants were in criminal and civil proceedings arising from the same set out facts.

The Privy Council considered that the *Smith v Selwyn* rule had been discarded and the application for a stay of the civil case until the conclusion of the criminal case was refused.

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## A Matter of Discretion

In fact the law here had already moved on from Smith v Selwyn.

It has, for some years now been a matter of discretion for the trial judge in the civil proceedings to decide whether to adjourn ( Jefferson v Betcha [1979] 1 WLR 898 ).

That discretion was to be exercised "with great care" only where there is "a real risk of serious prejudice"

( R v Panel on Takeovers and Mergers, ex parte Fayed [1992] BCC 524 ).

The Judge must balance that risk with the public interest in the civil proceeding.

In Mote v Secretary of State for Works & Pensions [2007] EWCA Civ 1324 the Court heard arguments that the hearing of the civil claim ahead of the criminal case, raised issues under the Human Rights Act 1998.

Continuation of civil proceedings pending the hearing of criminal proceedings arising out of the same facts, did not of itself give rise to a breach of the HRA 1998.

If there is a risk of prejudice, then that will weigh heavily in favour of an adjournment pending the conclusion of the criminal proceedings, but it will not necessarily be decisive (Lord Justice Richards at para 31).

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## Grounds for Adjournment

In

Financial Services Authority v Anderson and Ors [2010] EWHC 308 (CH) the defendants had applied for adjournment of the hearing of a summary judgment brought against them by the FSA. The first of the two grounds put forward for the adjournment was that the hearing could be prejudicial to them as they were the subject of a criminal investigation by the City of London Police; which was said to be based on suspicion of fraud and conspiracy arising from the same facts that were an issue in the FSA's civil proceedings.

But Mr Justice Briggs was not persuaded that the civil proceedings would be of any real consequence in the context of the suspected crimes of fraud and conspiracy as dishonesty would be at the heart of the criminal charges but was not being alleged in the civil context. He also stated that the judge in any criminal trial that followed would have the discretion to exclude any evidence considered unfairly prejudicial to the defendants.

He emphasised that, at that point, there was only a criminal investigation and no charges.

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It should also be noted that an application to grant a stay can be refused on the grounds that any risk of prejudice can be addressed through the court's powers. In *Akcine' Bendrove' Bankas Snoras v Antonov and another* [2013] EWHC 131 (Comm), the court would not grant the defendant's application for a stay until criminal proceedings had been concluded in Lithuania. The court held that any possible prejudice the defendant may suffer by disclosing its defence in civil proceedings before it did so in criminal proceedings was not sufficient to grant a stay of civil proceedings. The court instead stated that prejudice would arise from delaying the civil claim.

But the court did introduce some safeguards to address the risk of prejudice to the defendant: preventing the distribution of statements of case and other defence documents to anyone other than the claimant bank and its legal team, witnesses or experts unless the court gave its permission.

The court also refused a stay in *Polonsky v Alexander Dobrovinsky and Partners LLP and others* [2016] EWHC 1114 (Ch) where the Claimant wanted to delay his own case. In that case, the claimant was pursuing an action in the English courts against his former lawyers who he accused of improper conduct regarding the sale of a business. The claimant was the subject of criminal proceedings in Russia and wanted a stay of the civil proceedings because, he argued, the defendants in the English civil proceedings were being given access to privileged documents which would have a "chilling effect" on the criminal proceedings against him in Russia. The court refused to grant a stay asserting that the claimant's allegation lacked credibility and a stay would cause real prejudice to the defendants.

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It is certainly possible, therefore, to have civil and criminal proceedings relating to the same matters progressing in parallel.

Careful thought needs to be given about why an application needs to be made and how to best advance it.

It seems to us that there can be real dangers in a civil fraud case, for example, taking place before similar allegations in the Crown Court and those arguments need to be formulated with care and skill given that what was once a cardinal rule is merely a discretionary point now.

This article was also featured on Lexology and can be viewed [here](#).



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Syedur Rahman is a Legal Director at Rahman Ravelli with a great depth of experience in top-level global investigations and corporate crime. Legal guides have highlighted his achievements in the fields of worldwide asset tracing and recovery, high-stakes commercial and financial disputes and cross-border investigations.

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