



JONES DAY
COMMENTARY

DEFRAUDED IN THE UK: IS YOUR BEST OPTION CIVIL OR CRIMINAL?

On discovering large scale fraud within a business often the instinctive reaction is to pick up the phone and call the police. However, in certain circumstances, immediately reporting the discovery of fraud to a law enforcement body may not be the best course. While most companies want to conduct themselves in a socially responsible way, their primary responsibility (subject to any legal obligation to report the matter) is to their shareholders and investors, which means maximising recoveries, minimising reputational damage and deterring similar actions by others¹. In some circumstances, civil law may provide the best route to achieving those aims.

The aim of this *Commentary* is to provide some guidance as to the options available to an organisation upon discovering that a substantial fraud has been perpetrated against it and the key considerations its officers should have in mind when responding to the situation. For these purposes,

we have assumed that the organisation either does not have a legal obligation to report the fraud to a regulatory or other body² or has complied with that duty.

THE OPTIONS

Victims of fraud generally face three options: (1) contact law enforcement to commence a criminal investigation, (2) contact a commercial solicitor to pursue a civil action, or (3) contact both to pursue parallel investigations/actions.

OPTION 1-CRIMINAL PROCEEDINGS

There is a widely held perception that UK law enforcement is less effective than its US counterparts at the Securities and Exchange Commission, the US Attorney's Office or the Department of Justice

¹ Retribution is increasingly a motivating factor, especially where law enforcement bodies do not prosecute, but it is rarely decisive.

² Such as by filing a suspicious activity report with the Serious Organised Crime Agency, pursuant to the Proceeds of Crime Act 2002 or the Terrorism Act 2000.

when it comes to tackling economic crime. Historically that perception has been justified, although UK law enforcement bodies work to a wholly different set of rules to those at play in the US³ and there are signs that enforcement activity in the UK is becoming more aggressive, possibly in response to criticisms of weak enforcement following the global financial crisis⁴. Fresh legislation in the shape of the Bribery Act and more frequent use of civil recovery to deprive offenders of illicit funds are signals of an increased readiness to use all the means available to tackle financial wrongdoing. Broad structural changes are also planned and designed to deliver enhanced enforcement⁵.

The UK has a multiplicity of prosecuting authorities that are available to investigate and prosecute economic crimes:

- **Serious Fraud Office (“SFO”)**: The SFO has jurisdiction to both investigate and prosecute cases of complex/serious fraud, including corruption. The precise scope of its jurisdiction is examined in greater detail below.
- **Crown Prosecution Service (“CPS”)**: The CPS prosecutes all crimes charged by the police and deals with the vast majority of criminal casework in the UK, including fraud.
- **FSA**: The FSA has a limited criminal jurisdiction over regulated and non-regulated entities that fail to meet FSA standards or are in breach of the Financial Services and Markets Act (2000).
- **Department for Business, Innovation and Skills (“BIS”)**: BIS can commence criminal proceedings when a company or LLP incorporated in England and Wales is suspected of misconduct. The criminal jurisdiction of BIS arises primarily under companies legislation (i.e. the Companies Act 2006 or the Directors Disqualification Act 1986).
- **Office of Fair Trading (“OFT”)**: The OFT currently has criminal jurisdiction to prosecute, for example, cartel offences under the Enterprise Act 2002⁶.

- **Her Majesty’s Revenue and Customs (“HMRC”)**: HMRC investigates criminal fraud perpetrated against the tax and revenue system, although the prosecutions themselves tend to be conducted by the CPS.

What Factors Influence Whether a Particular Case Is Pursued by the CPS or the SFO?

In relation to general corporate fraud, a defrauded organisation is in practice likely to be choosing between calling the police (who will, if necessary, liaise with the CPS) or the SFO. According to the SFO’s implementing legislation, the SFO has jurisdiction over “any suspected offence which appears to [the Director of the SFO] on reasonable grounds to involve serious or complex fraud”⁷.

The SFO also has published case acceptance criteria⁸ that it will take into account in exercising its discretion to investigate suspected fraud offences:

- a) Does the value of the alleged fraud exceed £1 million?
- b) Is there a significant international dimension?
- c) Is the case likely to be of widespread public concern?
- d) Does the case require highly specialised knowledge, e.g. of financial markets?
- e) Is there a need to use the SFO’s special powers, such as Section 2 of the Criminal Justice Act⁹?

These criteria are now quite old and do not accurately reflect the SFO’s current practices. Indeed, most cases accepted for investigation by the SFO will involve losses far higher than £1m, and generally in excess of £10m.

Following the enactment of the Bribery Act 2010, the SFO has also become the lead agency in England and Wales for the investigation and prosecution of domestic and overseas corruption. The practical impact of this augmentation of the

3 By way of illustration, in 2010 the DOJ netted \$2.3 billion from 32 deferred prosecution agreements. In the UK, there is ongoing debate about their merits.

4 See article by Brooke Masters, Caroline Binham and Kara Scannell for *The Financial Times*, “UK looks to bridge regulatory divide with US”, 5 February 2012, available at <http://www.ft.com/intl/cms/s/0/40721b86-4ffb-11e1-a3ac-00144feabdc0.html>.

5 For example, on 2 April 2012, the FSA became the Prudential Regulation Authority and the Financial Conduct Authority in shadow form.

6 It has recently been announced that the OFT and the UK’s Competition Commission will merge into a single body—the Competition and Markets Authority (CMA). Under the government’s proposals the CMA will investigate mergers, market dominance and cartels, and the OFT’s consumer and enforcement functions will be transferred to another body.

7 The Criminal Justice Act 1987, section 1(3).

8 See the SFO web site available at <http://www.sfo.gov.uk/about-us/our-policies-and-publications/does-the-fraud-fit-sfo-criteria.aspx>.

9 Section 2 of the Criminal Justice Act 1987 gives the SFO its prime investigatory power to search property and to compel individuals to answer questions and produce documents.

SFO's remit and powers is that the number of serious fraud cases that the SFO can accept for investigation is now even more limited. If, therefore, the fraud under consideration is of relatively low value, not particularly complex and was committed entirely within the UK, it is unlikely that the SFO will take the matter up for investigation¹⁰.

Where a fraud case does not meet the SFO's referral criteria, it should be reported to the police who, upon completion of an initial investigation, will pass the matter to the CPS. The CPS does not publish figures for the volume of frauds it prosecutes, but the figures below, provided by the Attorney General in response to a Parliamentary question, provide some indication of the relative size of the caseloads tackled by the SFO and the CPS¹¹.

| Year | No. of cases prosecuted by the CPS | No. of cases concluded by the SFO |
|------------------------|------------------------------------|-----------------------------------|
| 2006-07 | 1,078,301 | No figure provided |
| 2007-08 | 1,064,194 | 7 |
| 2008-09 | 1,032,598 | 18 |
| 2009-10 | 982,732 | 13 |
| 2010-11 | 958,834 | 17 |
| 2011-12 (April-Jan 31) | 748,774 | 15 |

Advantages of Pursuing a Criminal Response

- A criminal prosecution offers the prospect of retributive justice. This is especially compelling when the offender is not financially able to repay what he has taken.
- Although it is highly unlikely that a criminal investigation will be a "no cost" option for a victim¹², the cost to the company of a criminal investigation and prosecution will be significantly less than the cost of pursuing a civil investigation and recovery proceedings.
- Although the victim may not pursue civil recoveries itself, a criminal prosecution may nevertheless result

in compensation. Both the SFO and the police are able to take steps to restrain criminally acquired property (by way of a civil restraining order) and to confiscate such property in the event of a conviction (by way of a confiscation order). The Court also has powers to award compensation to the victims of fraud from sums confiscated¹³.

- Law enforcement has wide powers to acquire information and documents. It can enter homes and offices to execute search warrants and can arrest suspects. Where there is sufficient evidence to charge the suspect, they can be remanded in custody to ensure their attendance at trial.
- The SFO has power to compel witnesses to answer questions and provide information (subject to the privilege against self-incrimination). Law enforcement authorities will also find it easier to obtain information held by other government departments and public authorities through use of "gateways"¹⁴. Further, UK law enforcement has well-established contacts with counterparts around the world and can obtain information from certain overseas financial institutions and other organisations comparatively easily¹⁵.

Disadvantages of Pursuing a Criminal Response

- When a fraud is reported to the police, an investigation and prosecution does not follow automatically. Indeed, it may prove difficult to persuade either the police or SFO to adopt a case for investigation, and the complexity of the criminal framework results in some cases falling between the gaps. Tackling fraud is not a national policing priority, and many police forces do not have fraud squads, meaning that many police forces lack the resources to tackle large or complex fraud cases¹⁶.
- Even where a case is adopted for investigation, there can be a lag of days, weeks or even months between

10 On 1 May 2012, the new SFO Director was quoted in *The Guardian*, "The SFO needs to do the type of investigation it is best equipped to do. Is it really the SFO's business to do routine boiler room and mortgage frauds?"

11 These figures are not directly comparable because the SFO both investigates and prosecutes the cases it deals with, and the cases it takes on are among the most serious and complex coming before the UK Courts. On the other hand, fraud will be a small fraction of the total casework undertaken by the CPS, although it too deals with some large and complex matters.

12 Where a company has been the victim of serious fraud, there will often be an internal investigation conducted by the company's lawyers and it will have to set aside sufficient resources to comply with law enforcement requests for company records and statements from staff.

13 Powers of Criminal Courts Act 2000, s 130; and Proceeds of Crime Act 2002, s 13.

14 "Gateways" are statutory provisions that permit government departments and public authorities to share confidential information subject to certain conditions.

15 There are of course certain jurisdictions where UK law enforcement struggles to operate. In such cases use of the civil route may prove more productive.

16 7th Report of the Select Committee on Home Affairs (2008), paragraph 39, available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/364/36406.htm#a8>.

the initial report and formal adoption, although both the police and SFO have in recent years demonstrated an ability to provide an instant response in certain high-profile cases.

- The victim has little or no control over the investigation and subsequent prosecution; law enforcement will set the investigation strategy and take all decisions about the progress of the investigation. The victim may, therefore, find itself not only excluded from decisions about how the investigation is to be run but also find it difficult to obtain information about the steps that are being taken in the case. In extreme cases, a decision to discontinue the investigation may be taken without the victim's being consulted. This occurred recently in relation to the prosecution of Magnus Peterson, the former principal investment officer of Weaving Capital (UK) Limited ("WCUK"), the London-based investment manager of a Cayman Islands hedge fund called the Weaving Macro Fixed Income Fund Limited that collapsed spectacularly in March 2009 with losses of more than \$500 million. Despite a two-year investigation by the SFO, ongoing cooperation from the liquidators of WCUK and the proximity of a civil trial at which the facts underlying the fraud were to be (and were indeed) fully examined, in September 2011, the former Director of the SFO decided to discontinue the office's investigation into the affair without any consultation with victims¹⁷. Following a seven-week civil fraud trial starting in October 2011, on 30 May 2012, Mr Peterson was found to have been the mastermind of a fraud on investors using sham interest rate swap transactions with a related party to cover trading losses and ordered to pay \$450 million in damages.
- Where a matter is reported to law enforcement, corporate premises may be raided without notice and documentation seized, even where the company may itself be one of the victims of the fraud (such as where its assets have been misappropriated by management). As a result, civil recovery proceedings

on behalf of the company (and ultimately its shareholders) may be significantly impeded.

- A victim's loss of control also extends to publicity about the investigation. Coupled with the fact that the involvement of law enforcement significantly increases the prospect of the fraud coming to the public's attention, this risk factor should be taken into account especially in instances where, but for the involvement of law enforcement, the fraud may not become public knowledge. Both the police and SFO will work with a victim's public relations department or agency in an effort to avoid making damaging public statements, but the interests of the corporate or individual victim and those of law enforcement do not always coincide.
- Before a victim can expect any form of recovery or retribution, there must be a conviction, and convictions in criminal proceedings can be secured only where the case is proved to the higher criminal standard (beyond all reasonable doubt) following a jury trial if the matter is contested. This reduces the certainty of outcome and often means that criminal cases take considerable time. Indeed, in cases prosecuted by the SFO, there is often a lengthy gap between the commencement of an investigation and any eventual conviction. According to the SFO's web site, the current average length of an SFO case is four to six years¹⁸.
- The lengthy criminal justice process in turn affects the likelihood and timing of payment of any compensation to the victim. As a matter of routine, issues of confiscation are dealt with some time after conviction and sentence, and in complex cases, there can be considerable delay. Further, even when a convicted fraudster is made the subject of a confiscation order, he is likely to be given time to pay, and that grace period can be a year or more. The order will then need to be enforced, which is the responsibility of the Courts Service working with the prosecuting authorities, and enforcement is generally perceived to be a major weakness in the confiscation regime¹⁹. According to recent figures from HM Courts and Tribunal Service²⁰,

¹⁷ Jones Day continues to act for the liquidators of WCUK in relation to the proceedings against Mr Peterson and others and other ancillary claims and proceedings.

¹⁸ See SFO web site, available at <http://www.sfo.gov.uk/about-us/common-misconceptions.aspx>. The case of *R v Davenport* was, however, rightly held up by the former Director of the SFO as an example of the SFO acting proactively and expeditiously. In that case the gap between the commencement of the investigation and sentencing was two years.

¹⁹ See, for example, *Evening Standard*, 6 March 2012, Martin Bentham.

²⁰ HMCS Trust Statement 2010 – 11.

as at 31 March 2011, £1.3 billion of confiscation orders were outstanding and the collection rate for the year 2010/11 was 22 percent. Accordingly, organisations deciding what course of action to take need to understand that, even where the fraudster has available assets to repay what he has taken, the victim may still wait several years before recovery and may not recover at all if the confiscation/compensation order is not enforced effectively.

- In addition, compensation orders are not always ordered in high-value or complex cases. “Policy considerations” are relied upon by Crown Courts to confine compensation orders in certain instances to “simple, straightforward cases ... where no great amount is at stake”²¹.
- All of these factors are exacerbated when there is a significant international element to the dispute. It may prove difficult to persuade the police or SFO to take a matter up for investigation at all if the principal suspects are outside the jurisdiction, and even in cases where overseas jurisdictions co-operate fully with requests from UK law enforcement, observance of the procedural steps in international law enforcement co-operation adds considerable time to an investigation.

OPTION 2—CIVIL PROCEEDINGS

In contrast to criminal investigations and prosecutions, civil fraud proceedings are commenced directly by the victim without the involvement of a governmental body. The victim simply needs to file the requisite documents (a Claim Form and Particulars of Claim) at Court and pay a comparatively small court fee.

Once the victim has sufficient evidence to establish the constituent elements of one of the various causes of action that arise under English law in the event of a fraud, it is open to it to commence a civil action immediately. Typically a civil claim will take 12 to 24 months to get to trial, but in the interim, English Courts have broad and highly developed powers to grant invasive and worldwide injunctive relief including freezing orders, asset and document disclosure

orders, search and seizure orders, passport delivery up orders and foreign repatriation orders²² and can grant permission for the applicant to seek to have such orders recognised abroad. English courts expect strict compliance with these orders and impose financial penalties and even custodial sentences for breaches of their terms.

In certain cases, such orders can be obtained within 24 hours or sooner if there is a clear risk that the fraudster will abscond or dissipate his assets. Even in extremely complex multijurisdictional cases, proceedings can be commenced and freezing orders obtained within a matter of days or weeks.

Advantages of Pursuing a Civil Approach

The advantages of the civil approach are generally the converse of the disadvantages of the criminal approach:

- Proceedings can be commenced and ancillary orders obtained very quickly, without the uncertainty associated with whether a criminal authority will adopt the case.
- As the claimant in civil proceedings, the victim has considerably more control over proceedings in terms of determining the scope of the claim and dictating the timetable. Civil proceedings also give the victim more control over what information, if any, is released into the public domain.
- Civil fraud trials tend to be considerably shorter than criminal fraud cases and come to trial more quickly than at the Crown Court. They are also conducted to a lower standard of proof (balance of probabilities) and before a judge who will determine issues of both fact and law. As a result, there is likely to be greater certainty of outcome.
- The primary thrust of civil proceedings is also the recovery of, or compensation for, losses suffered by the victim. English civil law includes established legal principles designed to maximise recovery for victims of civil wrongdoing, which include (i) the attachment of liability to persons who, whilst not primarily responsible for the fraud, assisted or benefitted from the wrongful

²¹ *R v Miller* (1979) 68 Ct App R 56. See also *R v Ernest Arthur Bewick* [2007] EWCA Crim 3297.

²² Such orders require assets to be transferred to and held in this jurisdiction pending trial.

acts, and (ii) the availability of proprietary remedies pursuant to which misappropriated assets can be identified and traced.

- Civil law is designed to resolve issues of financial loss and is adept at dealing with complex questions concerning interests in property. In contrast, criminal law is reluctant to trespass into this area with the result that, when a claim for compensation in the criminal courts becomes complex, the Crown Court is often reluctant to make a confiscation (or compensation) order. Further, criminal courts are unlikely to award compensation for loss of future profits.
- Save in selected jurisdictions (such as Switzerland), there are minimal impediments to taking civil witness evidence abroad and effective cooperation regimes within the European Union and elsewhere²³.
- English judgments can be enforced in foreign jurisdictions, enabling victims of wrongdoing to seize the assets of the defendant in foreign jurisdiction without the need to re-litigate the case abroad. On the other hand, confiscation orders obtained in criminal proceedings can be registered overseas, but in most cases the foreign government will want to retain a significant share of the assets subject to the order.
- The existence of a formal investigation and civil recovery proceedings tends to reduce the likelihood of potentially catastrophic raids by law enforcement agencies.

The recent case of *Langbar International Ltd v Rybak & Others* (in which Jones Day acted) is a useful illustration of the international reach and impact of English civil proceedings. Langbar was a Bermudan entity, its directors and principal shareholders lived in Monaco, Spain and Switzerland and there were no obvious assets within the UK. Langbar had floated on the Alternative Investment Market (AIM) in London with purported cash assets totalling approximately US\$600 million. In fact, those assets were entirely fictitious. Langbar applied successfully to the English courts for permission to bring claims in this jurisdiction against its directors and principal shareholders and for the grant of worldwide freezing orders over their assets (with Langbar then obtaining additional injunctive

relief in support in Switzerland and Singapore). In the course of the proceedings, the company obtained committal orders against two of the defendants (sentenced in their absence to terms of imprisonment of six and 12 months) and ultimately recovered more than \$50 million, being substantially all of the assets of the former chairman, a Monaco resident. Despite an extensive investigation and subsequent prosecution by the SFO, the only protagonist to be charged over the Langbar affair was its former chief executive, Stuart Pearson, even though he joined the company only a few months before the fraud was discovered. No doubt this was in part because he was resident in the jurisdiction.

Disadvantages of Pursuing a Civil Approach

- The most obvious disadvantage of civil proceedings is their expense. Civil litigation is expensive, especially fraud proceedings, since the claimant (at least initially) bears the costs of the investigation and proceedings, and the standard of proof for demonstrating fraud is high, albeit not as high as the criminal standard. In the event that the claimant is ultimately successful at trial, it is standard practice for the Court to order the unsuccessful defendant to satisfy the claimant's costs. However, such orders are at the Court's discretion (in terms of entitlement and amount) and subject to the defendant's having sufficient funds.
- Where a company has been severely defrauded, a motivating factor in pursuing action against the wrongdoer is often retribution. While the outcome of a successful criminal trial may be the imprisonment of the defendant, the most severe outcome of civil proceedings is often the bankruptcy of the wrongdoer and/or disqualification as a director. Civil courts lack jurisdiction to impose custodial sentences on a party found liable for fraud, but they do have jurisdiction to commit individuals to prison for up to two years for contempt of court, for example, where the defendant intentionally contravenes a court order, such as an asset freezing order. Although such orders are rare, the High Court recently imposed a 22-month custodial sentence for breaches of court orders relating to seizure of funds and disclosure of information on Mukhtar Ablyazov, the former chairman of BTA Bank

²³ For example, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and 28 U.S.C. § 1782 to compel evidence in the U.S. in aid of a non-U.S. proceeding.

who is currently facing a £3 billion fraud case brought by the bank²⁴.

- There is also a possibility that, in cases where the victim of fraud takes swift civil action to recover its losses, law enforcement may consider that it is not in the public interest to expend public resources on a criminal investigation where the victim has the means to recover some or all of what it has lost.

OPTION 3—PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

The decision to commence criminal or civil proceedings is not, however, mutually exclusive. Parallel criminal and civil proceedings relating to the same facts can and do take place.

One difficulty in such cases is whether the existence of concurrent proceedings will offer the defendant the opportunity to claim that he or she will suffer prejudice by defending both sets of proceedings and, on that basis, seek a stay of the civil proceedings pending outcome of the criminal proceedings. In 1979, *Jefferson Ltd v Bhetcha*²⁵ established that, in such cases, the burden is on the defendant in the civil action to show that, if the civil proceedings continue, there is a real risk of serious prejudice to him or her in the criminal proceedings which might lead to injustice. This serious risk of prejudice might arise from publicity, the disclosure of documents in one set of proceedings being used against the defendant in the other or his privilege against self-incrimination being undermined by evidence given in the civil proceedings.

In practice, a real risk of serious prejudice is a high threshold that is rarely demonstrated by defendants. Indeed, arguments based on adverse publicity have failed in a number of very high-profile cases (including notorious UK murderers and serial killers, such as Harold Shipman²⁶, Rosemary West²⁷ and Barry George²⁸). So, while the risk of civil proceedings being stayed is present, the reality is that, save for certain extreme cases of prejudice, a stay is practically unlikely²⁹.

Further, some case law³⁰ suggests that the burden of protecting the defendant in concurrent proceedings should generally fall to the criminal courts rather than the civil courts, especially where the civil proceedings involve numerous victims. The theory is that the criminal courts have wide powers to exclude evidence under PACE³¹, so it may be more appropriate for them to handle any prejudice that might arise from the concurrent proceedings via the exclusion of evidence and other procedural powers in the criminal trial, rather than taking the dramatic step of granting a stay of the civil proceedings (especially when the public interest favours resolving the civil proceedings due to that being the forum where numerous victims may be seeking relief, and a stay would effectively delay recovery by those victims of their losses).

In any event, in our experience, it is occasionally possible to work closely with prosecuting authorities so that civil judgments are secured before the risk of prejudice in criminal proceedings becomes a factor.

In addition to the risk of stayed proceedings, there are certain practical repercussions of parallel criminal and civil proceedings:

24 *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm). Mr Ablyazov has now fled the jurisdiction.

25 [1979] 1 WLR 898; see also *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324.

26 Family doctor Harold Shipman was jailed for life in 2000 for murdering 15 patients. It was feared that he could have been behind another 150 to 250 deaths. During the criminal trial it was put to the Judge that Shipman faced a serious risk of prejudice from the adverse publicity surrounding his trial, but the judge simply instructed the jury to ignore the evidence and the trial continued as normal.

27 Rosemary West was convicted in 1995 of torturing and murdering 10 women (including her own daughter) whom she and her husband subsequently buried under their house. On the first day of her trial, the Judge acknowledged that the case had attracted a "certain amount of publicity" but merely asked the jury to clear their minds of all prejudice. Following her conviction, Mrs West's barrister, Richard Ferguson QC, tried and failed on appeal to get the conviction against her thrown out due to the adverse publicity.

28 Barry George was convicted of murdering Jill Dando, a famous English TV presenter, in 2001 and subsequently cleared on appeal in 2007. Prior to the appeal in which he was cleared, the Judge, Lord Chief Justice Phillips, refused to order a reporting ban despite there being considerable media coverage of the case.

29 Further, even if a real risk of serious prejudice is established, granting a stay of the civil proceedings is not the only way in which such prejudice may be addressed by the Court; the Court has alternative jurisdiction to grant orders ring-fencing the civil trial until further order (Proceeds of Crime Act, s 426).

30 See, for example, *Balfour Trustees Ltd v Petersen* [2001] CLY 665 and *Secretary of State for Trade and Industry v Crane and another* [No 2] The Times, 4 June 2001 (Ch).

31 Police and Criminal Evidence Act 1984.

- Where criminal proceedings take place concurrently with liquidation proceedings, the criminal process is often awarded priority, which can have a prejudicial effect on civil recovery claims and the available actions of liquidators. Under section 426 of the Proceeds of Crime Act 2002 (“POCA”), if a restraint order over certain assets is granted prior to a winding-up order appointing a liquidator over the same assets, the restraint order will take priority over the winding-up order and restrict the liquidator from dealing with the assets. However, if the liquidator is appointed prior to the grant of a restraint order, the liquidator has priority in dealing with the relevant assets³². In addition, where there are foreign liquidation proceedings, the usual rule on priority under section 426 of POCA does not apply and the civil restraint order will take precedence over competing foreign liquidation proceedings irrespective of whether the civil restraint order was obtained before or after the date of the foreign winding up order³³.
- If a wrongdoer is found guilty of a criminal offence, evidence of the conviction may be admissible in subsequent civil proceedings³⁴ which may be powerful evidence for a claimant in the civil proceedings (especially considering the higher standard of proof in criminal proceedings). Similarly, judgment against a defendant in civil proceedings may be admissible in criminal proceedings under the provisions governing the admissibility of bad character evidence.

It is also important that commercial organisations that have suffered losses as a result of fraud and have reported the matter to the authorities are alive to the increasing trend for law enforcement agencies to shift the investigative burden onto the victim. This is a result of shrinking public sector budgets. This trend can be observed in its starkest form in the recent announcement that the City of London Police have set up a specialist unit to tackle insurance fraud, the unit being funded by the insurance industry. In most instances, fraud victims will not be expected to meet the entire costs of the investigation, but when seeking to persuade hard-pressed law enforcement bodies to take on large and often complex investigations, there is an obvious

advantage if the company reporting the fraud undertakes some or all of the routine investigation work (such as the production of company records and banking evidence).

CONCLUSION

The decision whether to opt for a civil or criminal response to a fraud is rarely straightforward, requiring consideration of a range of complex issues and a unique set of facts. Matters are made even more difficult because the decision will often be made under time pressure and without a full suite of necessary information. Despite this, in many cases, neither victims nor their civil lawyers thoroughly analyse their approach or its implications. For those reasons and to ensure the best possible outcome, it is sensible for victims of fraud to take professional advice from experienced lawyers on the best way to navigate the civil and criminal landscapes and the interplay between them.

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³² Proceeds of Crime Act, section 426.

³³ Re Stanford International Bank Ltd (in Liquidation) [2010] EWCA Civ 137.

³⁴ Civil Evidence Act 1968, section 11.