

KEY POINTS

- It is increasingly common in cases of banking fraud for criminal and civil proceedings to run concurrently.
- It is open to defendants in banking fraud disputes to apply for the civil proceedings to be stayed pending the outcome of criminal or other regulatory proceedings.
- Such a stay will only be granted where there is a real risk of serious prejudice which may lead to injustice. This will be difficult to establish.
- If no stay is granted, defendants may be able to secure safeguards in order to protect against injustice.

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Banking fraud: concurrent civil and criminal proceedings

Oliver Cain examines the increasing prevalence of concurrent civil and criminal proceedings in banking fraud disputes.

BACKGROUND

There has been a noticeable increase in recent years of concurrent civil and criminal proceedings as a result of greater regulation of the banking and financial services industries combined with legislation which leads to breaches of the regulatory regime giving rise to criminal offences.

In addition, banks or other financial institutions which have been the subject of a substantial fraud increasingly want to pursue aggressively those they consider to be responsible for the fraud and to be seen to be taking all avenues open to them in order to recover their losses rather than sitting back and leaving it to the state authorities to pursue those responsible. The pursuit of civil proceedings against defendants will give the bank control over the proceedings and the ability to freeze the assets of the defendants easily and quickly at the outset of the case and to manage the process of locating and securing the assets, something which is obviously of fundamental importance.

As well as pursuing civil proceedings banks often push for criminal proceedings to be instigated as this will increase the pressure on the defendants, it may lead to valuable information and disclosure coming to light, there may be restrictions placed upon the defendants' movements and, with the possible exception of an action in contempt, civil proceedings alone will not satisfy any desire on the part of the bank for retribution.

Moreover, as criminal prosecuting authorities are subject to increasingly tight budgetary constraints they will tend to welcome a bank taking the lead

in the investigation of the fraud as part of the pursuit of civil proceedings and therefore saving the prosecuting authorities considerable amounts of time and expense.

Defendants are likely to want to delay any civil proceedings pending the outcome of the criminal proceedings. This is because:

- They will be concerned about the impact on the criminal proceedings of revealing the nature and details of their defence in the civil proceedings given that traditionally a defendant in criminal proceedings could keep his cards very close to his chest until a late stage of the proceedings;
- Defendants often feel that they have a greater chance of acquittal from a jury in the criminal courts than defeating a claim heard by a judge in the civil courts. Having said that it should be noted that any party to civil fraud proceedings in the Queen's Bench Division or the County Court is entitled to a trial by jury "unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury..." (s 69 of the Senior Courts Act 1981). Any such application for a trial by jury must be made within 28 days of service of the defence;
- Similarly, there is a considerable difference between the standard to which allegations must be proved in criminal proceedings, namely proof beyond all reasonable doubt, and the standard in civil proceedings which is proof on the

balance of probabilities. Defendants are frequently attracted by the first set of proceedings being decided according to a higher standard rather than vice versa. Whilst it is clear that the civil standard of proof applies in cases of fraud there remains some uncertainty in this area as set out in the author's article published in this journal at [2014] 11 JIBFL 743B;

- The delay caused by the fact that major fraud prosecutions can take a long time to get to trial will often be attractive to defendants, as will the possibility that the prosecuting authorities will ultimately decide not to prosecute. The decision whether to prosecute depends upon whether there is sufficient evidence and whether it would be in the public interest to prosecute, although in practice costs and the availability of resources will often be a factor in the decision-making process.

It is clear from the above that there is a tension between civil and criminal proceedings taking place at the same time. A particularly important question arises as to the circumstances in which defendants will be entitled to a stay of civil proceedings whilst criminal proceedings are pending.

STAY OF CIVIL PROCEEDINGS

The main principles concerning whether civil proceedings will be stayed where there are ongoing criminal investigations or proceedings are as follows:

- The court has a discretion to stay civil proceedings until related criminal proceedings have been determined, but this "is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead

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to injustice" – *R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524;

- The discretion has to be exercised by reference to the competing considerations between the parties and the court has to balance justice as between the two parties – *Panton v Financial Institutions Services Limited* [2003] UKPC 8;
- The burden of proving that there should be a stay lies on the defendant – *Panton (supra)*;
- A defendant must point to a real and not merely notional risk of injustice – in particular, "A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in criminal proceedings" – *Panton (supra)*;
- The Human Rights Act 1988 is not relevant to the issue of whether the civil proceedings should be stayed – *Mote v The Secretary of State for Work and Pensions* [2007] EWCA Civ 1324.

There are four main arguments which defendants may use to seek to argue that the court should stay civil proceedings pending the outcome of criminal proceedings. These are as follows:

Privilege against self-incrimination

Defendants may seek to argue that the privilege against self-incrimination, namely the principle that a person cannot be compelled to say anything or produce documents which might tend to incriminate him into the peril and possibility of being convicted as a criminal, means that it would be unfair for him to have to defend civil proceedings prior to the conclusion of ongoing criminal proceedings.

However in recent times it has become expected for defendants in criminal proceedings in England and Wales to adumbrate a positive defence at an early stage in those proceedings with the result that it has become increasingly difficult to argue that the disclosure of a defence in civil proceedings will disadvantage the defendant in the criminal proceedings. The courts will also take into account that a positive defence is likely to exculpate rather than incriminate a defendant.

As a result the courts have expressed the view that:

"The fact that a defendant has a right to remain silent in criminal proceedings, and would, by serving a defence in civil proceedings, be giving advance notice of his defence, carries little weight in the context of an application for a stay of civil proceedings." (*Mrs Justice Gloster in Bankas Snoras v Antonov* [2013] EWHC 131).

This is not however the end of the matter. Defendants may still proceed with an application for a stay in the knowledge that if not successful there is a reasonable prospect of safeguards being granted regarding the use of evidence from the civil proceedings. A good illustration of this is *Bankas Snoras v Antonov (supra)*.

Mr Antonov, who was the Chairman of the Supervisory Board of Snoras Bank and its majority shareholder prior to its collapse in 2011, was facing extradition proceedings to Lithuania and criminal proceedings in that country both of which were brought by the Lithuanian prosecuting authorities regarding an alleged fraud on the bank in an amount in the region of €500m.

Gloster J rejected Mr Antonov's application for a stay of civil proceedings brought by the bank in England pending the extradition proceedings and the criminal proceedings on the basis that the prejudice that would be suffered by the bank and its creditors by delaying the opportunity to pursue an action to recover funds outweighed any inconvenience or prejudice to the applicant from the continuance of the civil proceedings.

However she did recognise that the Lithuanian state had a considerable economic interest in the litigation as the bank had been nationalised and that the bank and the Lithuanian prosecutor had a common interest in establishing Mr Antonov's liability in the civil proceedings, with the result that:

"An entirely free flow of the information provided by Mr Antonov in his defence of the civil proceedings from the Bank to the Lithuanian Prosecutor does not ...

sit altogether happily with the concept of a fair criminal trial, particularly in circumstances where there are allegations of political motivation on the part of the Lithuanian Prosecutor."

She therefore considered that certain safeguards should be put in place which would:

"... at least to a limited extent, operate to prevent the use or deployment of Mr Antonov's defence, and of any information contained in it, in the Lithuanian criminal investigation and in any subsequent trial proceedings."

The safeguards were that no statements of case, disclosed documents, or documents setting out the applicant's defence be disseminated beyond the bank, its administrator and legal team, and any necessary witnesses or experts, without prior permission of the English court. The ring-fencing of the proceedings in this way had previously been approved by the Court of Appeal in *Zambia v Meer Care and Desai* [2006] EWCA Civ 390 in which it was held that if the court was satisfied that there would be a real risk of serious prejudice leading to injustice if the civil proceedings continue, then the proceedings should nevertheless not be stayed if safeguards can be imposed in respect of the civil proceedings which provide sufficient protection against the risk of injustice.

It is important that any application to ring-fence the evidence in the civil proceedings is made at an early stage in those proceedings. Delay in making the application can be fatal as was the case in *Access Bank v Erastus Bankole Oladipo Akingbola and others* [2012] EWHC 1124. The court in that case also took into account that it was in the public interest for the case to be heard in public since it related to a substantial fraud.

Double Jeopardy

English law states that a person cannot be tried more than once for the same criminal offence and the doctrine of *res judicata* in civil proceedings precludes re-litigation of the

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same causes of action arising out of the same facts and matters as have been the subject of a previous judgment. However these doctrines merely operate to prevent repeat proceedings in either civil or criminal processes, they do not prohibit litigation of the same facts in different fora.

Adverse publicity

A common concern of defendants who are the subject of parallel civil and criminal proceedings is that publicity resulting from the civil proceedings may prejudice the fairness of the trial by jury in the criminal proceedings.

In *Jefferson v Betcha* [1979] 1 WLR 898, Lord Justice Megaw stated:

“... a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings.”

At first sight this appears an attractive argument, but the reality is that the concern is met by the ability of the criminal courts to safeguard against prejudice caused by adverse publicity, for example by excluding from the jury any individuals who have preconceptions as a result of the publicity.

Indeed, Megaw LJ went on to highlight the need for there to be a specific identifiable risk:

“It might be that it could be shown, or inferred, that there was some real – not merely notional – danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way.”

One only has to look at extreme examples such as the publicity prior to the criminal trials of serial-killers Harold Shipman and Fred West to see that, in the absence of a very

specific risk of injustice on the facts of the case, it is going to be a very difficult argument to run.

Burden

One basis on which defendants may have a greater prospect of being successful in obtaining a stay is as a result of the burden placed on them by two or more sets of proceedings taking place concurrently. The cases in this area mostly concern disciplinary proceedings where decisions by regulatory bodies to proceed with disciplinary proceedings at the same time as civil proceedings have been challenged by way of judicial review. The cases are relevant however since the tribunals concerned have applied the Fayed test mentioned above (ie that the power to stay has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice).

In *R v Institute of Chartered Accounts in England and Wales ex p. Brindle* [1994] B.C.C. 297, the accountants Price Waterhouse challenged a decision of its regulatory body to proceed with disciplinary proceedings against the firm in relation to the firm's actions as auditors of various BCCI companies. The Court of Appeal found that the burden on Price Waterhouse in defending disciplinary proceedings in parallel to various civil proceedings would be “so powerful as to give rise in itself to a real risk of injustice”.

A more cautious approach was adopted in *R v Chance ex p. Smith* [1995] B.C.C. 1095 in which the court did not consider that the burden involved in Coopers and Lybrand defending parallel proceedings relating to the collapse of the Maxwell empire would give rise to injustice. The court noted that the facts in that case were significantly different from those in *Brindle* in that in *Chance* the disciplinary proceedings were not so daunting in terms of scope, they were less serious since there was no allegation of misconduct and there was no urgency.

It is therefore clear that the question as to whether the court will find that the burden of defending parallel proceedings may lead to injustice will be highly fact dependant. A further illustration is *R on*

the application of Roy Ranson and others v Institute of Actuaries [2004] EWHC 3087 where the court emphasised the importance of the factual context and found that on the facts in that case it would be unfair to allow the disciplinary proceedings to proceed in circumstances where:

“... these claimants face charges, as a result of which they may be struck off, and that at the same time mammoth civil litigation due to start in less than a year's time, when they are not represented or only to a limited extent represented in civil proceedings.”

Therefore the burden placed upon the defendants in heavyweight fraud disputes may be such as to give rise to a sufficient risk of injustice to warrant the grant of a stay.

CONCLUSION

The Government has in the past advocated a unified system whereby criminal and regulatory proceedings would take precedence and civil proceedings could only follow subsequently, but it appears unlikely that this would be considered attractive in the current climate given the resources which would need to be provided by the state to take the lead in investigating and prosecuting fraud.

Indeed it seems likely that the shifting of the burden onto the victim will become increasingly prevalent which in turn will result in a significant number of parallel civil and criminal proceedings which defendants are unlikely to have much option other than to defend concurrently. ■

Further Reading:

- Banking fraud: The standard of proof and the cogency nostrum [2014] 11 JIBFL 743B.
- Look but don't touch: Restrictions on the collateral use of disclosed documents [2015] 5 JIBFL 290.
- LexisPSL: Corporate Crime: What problems can arise in bringing a civil claim when criminal proceedings are on-going?