

White Paper Conferences

Civil Fraud 2021

Coat-tail freezing actions on criminal investigations / proceedings

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**, in criminal proceedings the prosecution 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.
- In **Hajiyeva v National Crime Agency [2020] EWCA Civ 108, [2020] All ER (D) 34 (Feb)** one of the factors the NCA relied upon to support the initial application for an unexplained wealth order was the Appellant's husband's conviction in Azerbaijan for fraud and embezzlement.

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.

<https://www.cps.gov.uk/legal-guidance/disclosure-material-third-parties#:~:text=Generally%20an%20MG3%20and%20other,and%20often%20public%20interest%20immunity.&text=This%20also%20applies%20to%20police%20crime%20reports> .

Accessing police and CPS evidence

When can evidence obtained through police investigation be used?

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

Accessing police and CPS evidence

When can evidence obtained through police investigation be used?

- Disclosure to third-parties, in accordance with the Legal Guidance, is non-statutory disclosure. It is not governed by the CIPA 1996 and should not occur until the conclusion of a prosecution.
- ***Taylor and another v Director of the Serious Fraud Office and others* [1999] 2 AC 177.**

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Accessing police and CPS evidence

How can the information obtained by the CPS be used in a civil trial?

- Obtaining information from the CPS is only one step in utilising criminal evidence in civil proceedings. If the information is obtained, it is not guaranteed it will be admissible in civil proceedings.
- While the scope of **Hollington** is limited, it still has been applied in cases such as:
 - ***Bird v Keep* [1918] 2 KB 692**: Conclusion from a coroner's inquest not admissible.
 - ***Three Rivers District Council v Governor of the Bank of England (No 3)* [2003] 2 AC 1**: The conclusions in Bingham Report was not admissible since Lord Bingham was acting in a judicial capacity.

Accessing police and CPS evidence

How can the information obtained by the CPS be used in a civil trial?

- There are circumstances where the information gathered could make an evidential impact, bypassing the rule in **Hollington**:
 - Expert evidence from parties not instructed in the proceedings:
Rogers v Hoyle [2014] EWCA CIV 257, [2015] Q.B. 265
 - *It is not necessary to hope for legislative intervention, however, where the findings are those of an expert investigator and not a judge...I consider that the rule in **Hollington v Hewthorn** does not apply to them."*

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.
- The ECHR definition of criminal proceedings is an autonomous one.
- 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.

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)**.
- Remedies in Part 5 are *in rem* whereas a civil action is *in personam*.

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**.

Application to civil fraud and other proceedings

What is the position on civil proceedings following acquittal?

Does it make any difference that the cases to date, where evidence from a prior criminal trial, have involved civil recovery proceedings?

- As already noted, remedies in **Part 5** are *in rem* whereas a civil action is *in personam*. So there, the focus of the proceedings is different.
- Are the differences between an action for civil recovery and a private claim sufficiently significant to impact on this argument? Does the argument have more traction in other civil proceedings?
- It is not so much that a defendant is placed in double jeopardy but that the civil proceedings undermine the previous acquittal.
- At some point in time, the argument will be taken.

Civil proceedings following acquittal

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

- Is there an emerging argument? Could there be a breach of the presumption of innocence where civil proceedings substantially question an acquittal?
- **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 case was considered in **Agapov v Russia (Application no. 52464/15)**.

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.”
- **Crown Prosecution Service v Gohil [2012] EWCA Civ 1550** affirmed this position, confirming that even where the evidence was read in open court, section 9(2) of the Act prohibited the use if it was outside of the purpose listed in the letters of request.
 - Consider **R v Gooch [1999] Cr App R (S) 283**: where the Court of Appeal held that **Crime (International Co-operation) Act 2003 s9(2)** also applies to confiscation proceedings following a case involving evidence obtained from MLA. But the MLA purpose still has to be clearly stated.

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