Private prosecutions: an essential part of your business' tool kit with William Boyce QC

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| Alice | Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth.  In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this, and indeed every episode of Taxing Matters, on our website at [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).  Today we are talking about private prosecutions with the cream of the Queen's Counsel crop, the titan of the criminal bar, William Boyce QC. Bill is a Queen's Counsel at QEB Hollis Whiteman Chambers, where he has too many honours and accolades to name. Former Treasury Counsel, Recorder, member and guiding light to almost every professional association in law including the Criminal Bar Association and the International Bar Association. He has also recently been appointed to the General Committee of the Private Prosecutors’ Association.  He has been flown over all the world to lend his masterful aid in cross-examination and has been described as a force of nature in advocacy and a devastating cross-examiner.  He defended one of the three Barclays’ bankers acquitted of fraud charges, advised on a Rolls-Royce bribery/corruption investigation and acted for the private prosecutor in the largest private prosecution to date brought by a private individual. He's basically done it all. He is also one of the kindest, most generous people and a personal friend. Bill, welcome to Taxing Matters. |
| **William** | Alice, I hardly recognise myself, thank you very much indeed. It's a real pleasure to be here, I've listened to the previous episodes and I feel very flattered to be invited to provide the next chapter. |
| **Alice** | **Thank you very much, Bill. Well, let's start with the basics. What is a private prosecution and how is it different from what people think of as a normal prosecution?** |
| **William** | Well, there's the long answer and the short answer. The long answer is that many academics are still pondering on ‘what is a private prosecutor?’, but I will go for the pragmatic and short answer, if I may. It's effectively anyone who doesn't fall into the rather loose category of government or state prosecutor.  That would include the Crown Prosecution Service, the Serious Fraud Office, this is not technically precise but I am going to include the Competition and Markets Authority and the Financial Conduct Authority - and outside that sort of body, almost everyone would be considered to be a private prosecutor, either individual or company or organisation such as the Post Office, which is very much in the public eye at the moment. And until last week, the RSPCA was a very prominent private prosecutor, until they decided, mid-last week, to give up prosecuting. They will carry on investigating but hand their prosecutions over to the CPS.  And so, there was always a historic right for the individual and groups of individuals, companies, to bring prosecutions in our system. In 1985, the system of prosecution was reviewed in the Prosecution of Offenders Act 1985 and parliament specifically reserved the right of the private prosecution, subject to the ability of the DPP/the Crown Prosecution Service to take over any private prosecution and either continue it or to discontinue it on the basis that it fails the two stage Code for Crown prosecution test, that is the evidential test and the public interest test. So, in short, you or I can be a private prosecutor, as can BP, ICI, anything of that kind, and often are. |
| **Alice** | **Why might a business want to consider a private prosecution?** |
| **William** | Well, there are enormous advantages, I'm sure your listeners don't need me to tell you that, at the moment in this country, there is, and I'm going to use the term very loosely, an epidemic of economic crime, and it is virtually never prosecuted.  Fraud just goes unprosecuted notwithstanding the best efforts of the Specialist Fraud Division of the Crown Prosecution Service and the SFO. They barely scrape the tip of the iceberg and, as such, there are many, many victims - individuals, companies, partnerships - who are having nowhere to go to right the wrongs that are being done to them. And, especially since the private prosecution, which I prosecuted about 10 years ago, it's opened the eyes of many people to the fact that the private prosecution route opens up opportunities to right wrongs, to recover losses and to punish offenders, which could all work very much to the advantage of the victim in one way or another, and we may turn to that shortly I'm sure. |
| **Alice** | **So, as you've said, there are a number of benefits in relation to commencing a private prosecution. What are the risks associated with it?** |
| **William** | There are comparatively few risks, as long as you get it right. And, of course, if anybody came to RPC dare I say, they would get it right and it wouldn't be a worry so much. But things that have turned up, which have, as it were, caused real problems for private prosecutors might be summarised as follows:  Firstly, a failure to appreciate that once you start a private prosecution, you have to put yourself into the position of a ‘Minister of Justice’, just like a state prosecution. And so, therefore, taking forward a private prosecution should put you into the mindset of someone instructed by, or in fact being, the Crown Prosecution Service, if you are a solicitor, and that involves heavy duties and responsibilities, as well as the privilege of bringing the prosecution in the first place.  The first one, right at the very beginning, is to make sure that your investigation is sound, and, in many cases, that is just a given. I'm sure the sorts of firms and individuals who come to your firm would do nothing in any way other than the best possible way, but, sometimes, people do engage (say) investigators, who aren't all they might be. And an unsound investigation is likely to lead to an unsound prosecution, and potential hazards in costs, if and when it falls apart.  Next, there is the duty of candour to the Court. So, where there is a prosecutor, you go off as you would to start a private prosecution to the Magistrates’ Court – presenting: your materials; your results of your investigation thus far; your summary of the case. You really have to ‘put on the hat’ of the Defender to make sure the court is informed of all the relevant matters that a Defence Counsel or solicitor might wish to draw to the court's attention before issuing the summons to bring the proposed defendant into the criminal justice system. And those who have failed in that duty, have found themselves to be heavily criticised on Judicial Review proceedings brought by the prospective defendant and have effectively lambasted lawyers and private prosecutor, as the individual, alike for failing in their duty of candour and reflecting their condemnation of the approach in costs - and so one has to be very much aware of that.  The second matter is something that crops up in every private prosecution – ‘motive’. Why is a private prosecution being brought? Because you will bear in mind that there is always in the background the requirement, effectively, for any private prosecutor to have in mind the CPS ‘evidential test’ and ‘the public interest test’. It's not necessarily as easy as that but it's a working hypothesis or basis on which to go forward. And when one comes to that, the question of ‘motive’ is very much at the front and is often the subject of ‘abuse of process’ arguments, which defendants, in due course, use to try to derail the proceedings - the proceedings stayed with costs consequences sometimes. And, therefore, although the courts realise that any potential prosecutor might come to the criminal justice process with mixed motives - they may feel deeply unhappy as the victim, they may feel betrayed, they may have lost money and so on - as long as there is a proper understanding of the duty of the prosecutor and also a proper understanding that there is a real public interest in bringing criminals before the courts, especially when so little crime is prosecuted by the state these days, then those arguments are usually sustained on behalf of the prosecutor and the proceedings are allowed to proceed.  Other matters that can crop up, they are varied. Costs. Until comparatively recently, costs were very much in favour of the prosecutor. It's in a state of flux at the moment and, as I'm sure we'll come to speak about in due course, the Justice Select Committee Report of last year highlighted the issue of costs and there is a great deal of debate at the moment.  In relation to costs, there are enormous advantages to a private prosecution over sometimes, civil proceedings, certainly over doing nothing. For example, at the end of a criminal trial, a private prosecutor can usually get their costs back either from the Defendant himself or, even if the Defendant has no money, they can get their costs back from Central Funds, ‘win or lose’. That's bad terminology, because prosecutors never ‘win or lose’, they only ensure that there are fair proceedings, but you understand what I mean. If there's a conviction or an acquittal, private prosecutors can usually get their costs back from Central Funds.  The issue, which is occupying a lot of people at the moment, though, is costs in private prosecutions, and the immediate issue that arises at this stage of our discussion is a recent decision, which suggests that one, as a private prosecutor, cannot recover your costs of the investigation before the proceedings are commenced. That, no doubt, would be subject to appeal and we have to wait and see how that goes. It's not necessarily the end of the world and, indeed, it may not make a great deal of difference, in the sense that many individuals and organisations will have conducted an investigation, in any event, to bring them to the stage of when they are going to decide whether to bring a prosecution or not.  So it may not, in fact, require much extra work or costs being involved, and it is always possible to commence the proceedings and ‘rear-load’ one's investigation, or at least the significant parts of the investigation - as long as it is not, you think, going to affect the overall picture of the case - until after the issuing of the summons to get the defendant into the criminal process.  The other advantages, I know we're talking about disadvantage, but the big advantages in relation to a private prosecution is that, if there is a conviction, then the Defendant may well be brought into the compensation regime and also into the Proceeds of Crime Act regime, in respect of which there may be criminal penalties should a Defendant not comply with the orders of the court. And that usually encourages Defendants in that position to pay up the money that they are ordered to pay by the court, especially as, in some cases, the sentence in default for not paying the compensation to the private prosecution that is ordered may be as long as the prison sentence imposed for the offence itself. So, the powers can be really quite draconian.  And so, one may look at the Select Committee Report from last year and feel a little ‘down’ as a private prosecutor. One may feel that: all the debate that is going on at the moment in relation to the role of private prosecutor; what steps should be taken; should there be issues of governance; of accreditation; better monitoring; and so on - all of that is ‘up for grabs’ and in active debate in academia and political and in legal life at the moment.  Overall, I would suggest that it is still very much a valuable tool in the ‘toolkit’ for anyone who is interested in listening in ‘Taxing Matters’ and is something that, whenever an issue arises as to “we have been done wrong”, “we are a victim”, or “we may be a victim”, “what shall we do about it”, a possibility of a private prosecution should be ‘on the table’ along with everything else, such as internal investigation, internal discipline, civil action and so on and so on. It's something that really should never be ignored. |
| **Alice** | **Wow. I think you answered all of the questions just brilliantly.** |
| **William** | Shall I go now? |
| **Alice** | **Is there much to expand on in terms of procedural requirements?** |
| **William** | In relation to procedural matters once the case gets past the Magistrates’ Court, there will be the usual process which is followed in all criminal trials, state or private prosecution, and, therefore, one needs to bear in mind that the sort of process one will be following is as follows:  Firstly, ‘disclosure’ is a big issue in relation to private prosecutions. In relation to state prosecutions, the state is obliged to disclose to the defence, in good time, anything in their possession or anything readily available to them, especially anything they have seen and reviewed themselves, which might undermine the prosecution or assist the defence. And one of the things that any private prosecutor has to do, especially when he is instructing solicitors and/or counsel, as almost all of them do, the first thing they have to do is to apply their mind to their responsibility as acting as ‘Ministers of Justice’ and, therefore, a natural inclination not to disclose something which may damage their own case has to be immediately tempered and, as it were, put to one side - that simply isn't permissible.  Therefore, a proper disclosure regime - listing of documents, decisions recorded, and the ability to justify a decision not to disclose - will be called into question very quickly, because a typical tactic, when defending someone subject to a private prosecution, is to attack the disclosure regime and, effectively, to challenge the innate tension that exists in any private prosecution in a private prosecutor, who on the one hand has to act as a ‘Minister of Justice’ and, therefore, disclose matters which might damage his case or assist the defendant, and the innate feelings of any human being or company that “why should I give away material, which is actually going to harm my position” - and that is not up for debate. It's not a, as it were, spectrum. It is a binary decision; you do what is right or you don't do it at all.  The other matter I have already touched upon, which is, again, another major point that almost invariably arises from a defence in private prosecutions, is the question of ‘motive’ and whether the motive for the private prosecution is vexatious or improper or is really just a continuation of civil proceedings and it’s just almost like a table tennis game as the two protagonists bat the litigation from one to the other through sometimes arbitration, sometimes civil proceedings and then, whoever the loser was in relation to the particular stage of the table tennis game, bats it back by commencing a private prosecution against the other party. That sort of situation, which is not uncommon, brings into question really very close scrutiny from the defence, obviously, but also from the court, because the criminal courts are not to be used as private battlegrounds between two protagonists, who have nothing much better to do with their money.  There may be mixed motives, but there has to be an element of public interest, which justifies the continuation of the proceedings for them to be allowed to continue. And there is the ever-present possibility that either the Defendant or the Trial Judge, may refer the proceedings to the CPS for them to consider whether or not to take over the proceedings. Again, that is not uncommon, it happens quite a lot, particularly where the private prosecution emerges from, is linked with, or is contemporaneous with, civil proceedings of some kind.  And so, once the matter is referred to the CPS either by the Defendant or by the Court or sometimes by the prosecutor themselves, if they wish for CPS to take it over or ‘authorise’ in inverted commas the private prosecution before it goes too far, the CPS then has a duty to consider, as I've said, whether to take over, and if they do, whether to continue or discontinue. Except in very rare cases, if the CPS do decide to take over a private prosecution, and they do that sometimes, it's not rare, it doesn't happen every day, but it's not rare, then they will usually be doing so with a view to discontinuing.  The CPS usually have more than enough work to do, not enough people, and not enough money to do it, so the last thing they want to do is to take over somebody else's private prosecution and continue it. If they don't find any objection to it continuing they will normally say to the private prosecutor there is no objection to you continuing with this, it passes both the ‘evidential test’ and the ‘public interest test’, you carry on with it and we'll leave you alone.  Reasons for taking over and discontinuing are sometimes because the ‘evidential test’ is not met, that's comparatively rare because most private prosecutors are represented by lawyers and most lawyers can be expected to get the ‘evidential test’ right.  It's much more unpredictable in relation to the ‘public interest test’, and that is not any criticism of the lawyers who might be instructed on behalf of the private prosecutor. It arises from the fact, in particular, that the courts have well acknowledged that two reasonable, rational lawyers might have different opinions as to what the public interest is in any particular case. And so, the CPS lawyer reviewing it might have a professional opinion that it is not in the public interest to continue, which is both reasonable and rational, and the private prosecutor's lawyer/solicitor may have formed exactly the opposite view as to the public interest test being satisfied, which is also reasonable and rational. And, currently, the position is that the view of the CPS lawyer will prevail, and the matter will be discontinued.  The only option then, effectively, is for the private prosecutor to apply to the Admin Court for Judicial Review - leave to begin with - on the basis, and it's a very limited basis, that either the CPS prosecutor has been irrational or has failed to take into account matters he or she should have done or has taken into account matters he or she should not have done and that is a very narrow ground - and the CPS normally get that right. And, therefore, ‘difference of opinion’ is not a valid basis for Judicial Review.  So, that is the next stage before trial. And then the next stage is trial itself, with the usual ‘rough and tumble’ of the criminal justice process, where proceedings aren't very different from state prosecutions, if at all. And then once one gets (say) a conviction, then there are various nuances that one needs to be careful about to preserve the position of the private prosecutor in relation to availability of recompense, a broad term in terms of compensation or awards via the Proceeds of Crime Act and so on, too technical for this short podcast. |
| **Alice** | **You've mentioned the Select Committee and that there was a Report that was issued last year, if you were to put your future gazing hat on do you think that there are likely to be significant changes to the way that the private prosecution regime is conducted?** |
| **William** | Yes, I do. As to when, I don't know, because, as you will appreciate like everybody else, government has its hands full with other things just at the moment. Quite when they'll get round to it, I don't know, but there is - and I know some of the details privately, ‘Chatham House’ rules, so I can't go into it too much - but there is a lot of work going on, and the two main areas I think that will be taken forward are firstly, in a sense, governance and accreditation.  As in all, what's the word, developments, adventures, prospects, opportunities, once somebody appreciates that the opportunity is there, not only are the highly responsible, highly qualified and completely well-ordered prosecutors by way of lawyers advising private prosecutors moving into the market place, so, too, do a number of people, who, quite frankly, shouldn't be doing it, because they are simply incompetent and/or inexperienced.  But also, and it is a warning, sometimes, even the most highly qualified and experienced lawyers in the most highly reputable firms in all sorts of circles, sometimes just get too close to the client and they lose ‘balance,’ and they lose independence and objectivity, and they simply forget to put on the mantle of ‘Minister of Justice’, in the sense of advising the private prosecutor to wear that mantle as ‘Minister of Justice’.  One doesn't have to read too many cases in relation to this field to spot, sometimes, the courts pointing out to the most unlikely candidates from very reputable firms really quite strong criticism saying they have just ‘lost their way’ and they have lost track of how they do have to keep a degree of independence from their client, and they were simply viewing the proceedings from their clients' spectacles to, as it were, adopt a metaphor. And so those twin elements bring into question, I suspect, what the Select Committee is very concerned about, which is there should be some form of governance standards.  As you know Alice, there is the Private Prosecutors’ Association at the moment, which has issued a Code of Conduct, which many courts increasingly look at and seek to rely upon. It encourages all private prosecutors to apply the Crown Prosecution Service two stage test and other ethical considerations, but it is not binding. Sometimes, people behave as though they have never read it or even heard of it, so that should be encouraged, obviously, to be promulgated further.  But going back directly to your question about the Select Committee and government going forward, in addition to governance, and I suspect they may appoint a Minister or some other body to govern the conduct of private prosecutors, there is also the question of accreditation, and, again, the most obvious body to accredit a private prosecutor would be the Crown Prosecution Service, keeping governance and accreditation separately. In relation to the sanctions, how it will be done, one envisages perhaps rather ‘light touch’, not overdoing it.  Secondly, that there will be some, as it were, renewal over every period of year/years of accreditation. It may be that it wouldn't be mandatory, but if any private prosecution was brought using lawyers who were not accredited or an organisation which wasn't accredited, then the CPS might automatically review those cases, whereas if it is brought with accredited people being involved then it may not automatically review those cases, as is the current position.  There may also be a distinction, I think, between natures of private prosecutors, in the sense that a firm, such as yours, which has a big and heavy practice in relation to private prosecution would be required to have one form of ’heavy’ accreditation, because it is part of your business model to bring them regularly, as it were, and often every time a client comes through your doors and follows your advice if it is your advice, to bring a private prosecution, as opposed - and we haven't really discussed this given the nature of your audience - as opposed to the other form of private prosecution at the other end of the spectrum, which might be a neighbour dispute where one neighbour has put the other neighbour's cat in a dustbin and the aggrieved cat-less neighbour decides to bring a private prosecution. Obviously, a one-off of that kind probably requires very little, if any, accreditation at all in the private prosecutor.  So that is one element. It shouldn't, I suspect, adversely affect the field too much and the availability and the desirability and the attraction of private prosecutions, and may actually be a good thing - to weed out the ‘bad apples’ and the ‘bad smelling eggs’ and even the ‘curate's eggs’, which really don’t have any place in our system.  The other matter, which I suspect may cause real concern is their inevitable review of costs. There is clearly a sense, which isn't necessarily very latent, a sense in the Select Committee and others that there is just something unfair about the current costs system, because, for example, the private prosecutor may bring with it enormous resources in terms of costs and, therefore, instruct the best - not only go to the best in terms of RPC and others, at first stage, top solicitors, but then instruct the best, most senior, most experienced counsel to bring the prosecution.  Whereas, many defendants will be on legal aid, and will not have those resources through a legal aid solicitor and/or counsel, who may be much more junior, not in silk, all those sorts of things allocated by the legal aid authorities under the current system.  So that is thought to be inherently unfair and it may be thought, and is thought, to be exacerbated by the system in private prosecutions, when, at the end of the day, in a private prosecution, even if the prosecutor is unsuccessful, that bad word again, if there is an acquittal, the private prosecutor can still get his or her costs from Central Funds, but if there is an acquittal, the successful defendant, defendants are allowed to ‘win or lose’ to be ‘successful or unsuccessful’ with the usual phraseology, but an acquitted defendant is not allowed to get his costs from Central Funds, which causes many people to think that the system is inherently ‘unbalanced’.  I think the real problem there is that, given the nature of government funding, and they simply don't fund the system properly as it is, there is no possibility that they will right that imbalance by giving more money to defendants who are acquitted and letting them have their costs. Inevitably, they will, I imagine, try to strike a balance by refusing private prosecutors, or reducing the amount private prosecutors can recover from Central Funds, still leaving it open to the private prosecutor to recover their funds from the defendant, if he or she has any. And, I suspect, that that may have a comparatively ‘chilling’ effect on private prosecutions.  However, at the end of the day, I think one has to really bear in mind - and it needs to be rammed home for these politicians and others who are anti-private prosecution, and there is a body of people in all sorts of walks of life who do have that, bent, I'm sure on the premise of the inherent unfairness of it all - David and Goliath sometimes, although quite often it is Goliath and Goliath.  The inherent reality that crime is severely under investigated and even more severely under prosecuted in this country. And that a private prosecution is effectively a victim’s remedy, and there are victims in all walks of life and not least the victims in the sort of field that these talks go out to, because all sorts of people in companies, big, large, small and in partnerships are being defrauded, cheated, abused by employees, by competitors, at home and abroad.  And there are two matters, really, that one would focus on. The normal approach in relation to crime – ‘prevention’, (‘rehabilitation' you can forget), and ‘deterrence’ - so that's one limb, prevention and deterrence, and the other limb is compensation/recompense, and both of those limbs are really very well served by private prosecution.  And I know that your title is ‘Taxing Matters’, so it doesn't need me to tell you or your listeners that in relation to taxing matters they are going to have built into their practices all sorts of encounters with all sorts of crime, which affect their tax practices, be it fraud, theft, computer misuse, tax evasion has now extended extraterritoriality - there is now extraterritorial jurisdiction in relation to some tax matters as you know following from recent legislation - there's a whole host of matters that private prosecutions can bring to their armament and their toolkit.  And the other matter, I know I'm going on quite a bit, but the other matter is that there are real issues arising from ‘reputation’, it seems to me. And also from the increasing focus of government on imposing conditions on firms to put into practice ‘prevention working practices’, which give them a defence to offences such as ‘bribery’ and ‘facilitation of bribery’ and so on, if they have proper working safeguards and practices in place. And if you have a regimen with private prosecutions as it were lined up, and you demonstrate that you investigate all matters with a view, in serious cases, to taking it forward, there are two things:  Firstly, your reputation will be such that you are going to be right at the bottom of the list of people who are going to take advantage of you, so your assets, your income streams and your reputation in the marketplace will all be enhanced it seems to me by strong action.  And secondly, if, unfortunately, somebody (say) under your control or associated with you to use the terminology, does facilitate bribery or tax evasion here or abroad, and somebody investigates you as the company or the employer to see whether you have in place a proper regime to, as it were, stop that happening, it's pretty good evidence that you have a demonstrable regime of investigating with a view to private prosecutions and in fact have conducted some private prosecutions.  And, in terms of deterrence, no matter how much you, as it were, let somebody slink away into early retirement or gardening leave or just disappear into the darkness or take their pension from them or any of that, that may have, obviously, a deterrent effect, but nothing has such a deterrent effect as going to prison, and that may be very helpful to the environment in which the company wishes to operate. |

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| **Alice** | Well thank you very much Bill for that masterclass in private prosecutions and how they might be relevant to businesses.  As ever, a big thank you goes to our miracle working producer Mary Mitchell, Josh McDonald who does all the work pulling each episode together, our music is from musical genius Andrew Waterson, and of course a big thank you to all of our listeners for joining us. A full transcript of this episode together with our references can be found on our website at [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters) and you can find Bill on his Chambers website QEB Hollis Whiteman or via LinkedIn.  If you have any questions for me or for Bill or any topics you would like us to cover in a future episode please do email us on [taxingmatters@rpc.co.uk](mailto:taxingmatters@rpc.co.uk). We'd love to hear from you.  If you like Taxing Matters why not try RPC's other podcast offering Insurance Covered which looks at the inner workings of the insurance industry hosted by the brilliant Peter Mansfield and available on Apple podcasts, Spotify and Acast.  If you like this episode please do take a moment to rate, review and subscribe and remember to tell a colleague about us. Thank you all for listening and talk to you again in two weeks. |