Referral orders

This involves referral to a youth offender panel and is intended to trigger an inquiry into the reasons for the offending behaviour and to impose on the offender, who must be under 18, the principle of restorative justice. This involves making restoration to the victim and reintegration into the law-abiding community and taking responsibility for the consequences of the offending behaviour. The panel concerned with a referral draws up a programme entitled a 'youth offender contract' that gives effect to the above objectives and with which the offender must comply. A court making the order can make a parenting order to run alongside the referral order. Where the court decides to make a parenting order with a referral order, the court must obtain a report by a probation officer, or a social worker or a member of the youth offending team. The report will indicate what the requirements of the parenting order might include with reasons. If the offender is under 16, information about the family's circumstances and the likely effect of the order on those circumstances is included.

A *youth offender panel* must be distinguished from a *youth offending team*. A youth offender panel is set up under a referral order for *that particular offender*, and consists of a member of the local youth offending team and two members who are not from that team but are volunteers from the local community. In regard to referral orders, the youth offending team is responsible for providing administrative support, accommodation and other facilities required by the youth offender panel. The team also arranges for the supervision of the youth offender contract and the member of the team who is on the panel keeps records of compliance or non-compliance.

Parenting orders

A parenting order requires the parent(s) to comply for a period not exceeding 12 months with such requirements as are specified in the order and to attend for a concurrent period not exceeding three months and not more than once in any week such counselling and guidance sessions as may be specified by the responsible officer, i.e. an officer of the local probation board, or a social worker or a person appointed by the chief education officer or a member of the youth offending team. The requirements shall as far as practicable avoid conflict with the parents' religious beliefs and with their normal working times. The requirements of the order are in general terms to involve the parents in the supervision of the child with the aim of preventing a recurrence of criminality or truancy. Breach of a parenting order can result on prosecution to a fine not exceeding level 3 on the standard scale i.e. £1,000.

Restitution of property in criminal cases

Restitution orders

Restitution orders may also be made in regard to property which is the object of an offence under ss 148 and 149 of the Powers of Criminal Courts (Sentencing) Act 2000. Restitution orders may also be made in respect of an offence which the accused asks to have taken into consideration. A restitution order and a compensation order may be made in respect of the same goods if recovered in a damaged condition.

Restitution and money-laundering legislation

As part of the law relating to restitution in criminal cases note should be taken of the Proceeds of Crime Act 2002. This is the most important of the legislative measures for

business in terms of its wide scope and effect on commercial undertakings though there are measures covering particular areas, e.g. the Prevention of Terrorism Act 2005.

The money-laundering provisions of the 2002 Act are as follows:

- it creates the Assets Recovery Agency to investigate and recover wealth that has been obtained through criminal conduct;
- it gives a right of recovery at civil law which enables the Agency to recover property that was obtained through criminal conduct, including the right to recover property from third parties not involved in the criminal conduct. The Agency is only required to prove its case on the civil standard of proof, i.e. that the property was 'probably' the result of crime, and can apply to the High Court for an interim freezing order in regard to suspect property to prevent the movement of the property which will be managed by a receiver;
- the Agency has a right to exercise the functions of the Inland Revenue and tax the suspected proceeds of a crime without identifying the source of the income as the Revenue must do;
- it creates new powers of investigation including customer information orders. These require banks and other financial institutions to identify accounts that are held by persons connected with an investigation. There is also power to monitor accounts. A code of practice provides guidance on how these functions are to be exercised;
- it creates new obligations to report where there are reasonable grounds to know or suspect that a person is engaged in money laundering.

Some concerns have been expressed in regard particularly to the civil burden of proof and that offences can be committed even where money laundering, e.g. by a customer, is suspected or where it *should* have been suspected. It is now essential that firms, particularly those involved in financial services, review their procedures especially the 'know your customer' procedures to ensure that they do not commit, by mere negligence, a money-laundering offence.

Injury compensation in criminal cases

The compensatory awards set out above are ineffective if the offender is never caught or if when caught he has no money or property with which to pay compensation. In consequence, there is, under the Criminal Injuries Compensation Act 1995, a scheme of state compensation operated by the Criminal Injuries Compensation Authority under a Scheme Manager.

The Authority may make discretionary payments to those suffering personal injury which is attributable to certain criminal offences, e.g. rape and assault under s 47 of the Offences Against the Person Act 1861. Payments are not made for offences against property unless it was a physical aid to the victim, e.g. glasses, a hearing aid or a wheelchair. Dependants of a person who dies as a result of a relevant crime may claim. There are rights of appeal to Adjudicators appointed by the Secretary of State. The Authority can, having made an award, seek to reimburse itself by a claim against the offender. Those who cannot show the need for this sort of compensation may, of course, make an application under s 130 of the Powers of Criminal Courts Act 1973 if possible. Compensation is based on a tariff or scale of payments up to £500,000 together with additional payments for special expenses and loss of earnings for those who are incapacitated for at least 28 weeks.

The government issued a consultation paper in 2005 in which it is proposed that the current maximum payment of £500,000 be increased for serious injuries but no compensation for less serious injuries, only more practical and emotional support. It seems clear that there will be no extra money for victims of crime.

Rehabilitation of Offenders Act 1974 – non-disclosure of sentence

The provisions of this Act are an attempt to give effect to the principle that when a person convicted of crime has been successful in living down that conviction and has avoided further criminal activities, common justice demands that his efforts should not be prejudiced by the unwarranted disclosure of that earlier conviction.

All sentences are subject to rehabilitation except imprisonment for life and custodial sentences of more than 30 months. After the expiry of certain defined periods the offender is rehabilitated as follows:

■ an absolute discharge	6 months
■ a conditional discharge	1 year or for the period of the order if longer
■ an attendance centre order	1 year after the order expires
■ a fine or community sentence	5 years
■ a custodial sentence up to 6 months	7 years
■ a custodial sentence between 6 and 30 months	10 years

In the case of those who were under 18 at the date of conviction, the rehabilitation periods are halved.

So far as the employment of persons with previous convictions is concerned, it should be noted that any questions seeking information as to a person's pervious convictions shall be treated as not relating to spent convictions and any obligation on any person to disclose matters shall not require him to disclose a spent conviction, and a spent conviction or failure to disclose a spent conviction is not a proper ground for dismissing or excluding a person from or prejudicing him in any occupation or employment. There is an exception (see SI 1986/1249) where the employment allows contact with persons under 18, e.g. in care, leisure and recreational activities. Here questions can be asked designed to reveal spent convictions particularly those with a sexual connotation. Such spent convictions are a ground for dismissal which will not, for that reason alone, be unfair.

In this connection, the Protection of Children Act 1999 makes changes to the law with the object of creating a framework for *identifying* people who are unsuitable for work with children and to compel or, in some cases, to allow employers to access a single point for checking the names of people they propose to employ in a post involving the care of children. This involves the check of names against criminal records and two lists of people considered unsuitable for work with children. The Department of Health and the Department of Work and Pensions maintain the lists to be made available via the Criminal Records Bureau under Part V of the Police Act 1997. These disclosures, via the records and lists, provide exceptions to the Rehabilitation of Offenders Act 1974. The above procedures are a response to the increasing number of cases involving the employment of paedophiles in local authority and other children's homes.

Another exception occurs under the Financial Services and Markets Act 2000. One of the primary purposes of the Act is to protect the public from the activities of unscrupulous and dishonest people who may find their way into the investment business. For example, those who are authorised to conduct investment business are under a duty to take reasonable care not to employ or continue to employ unsuitable persons. In this connection, the Act of 2000 provides that the 1974 Act does not apply to a spent conviction for fraud or dishonesty or to an offence under companies legislation such as insider dealing or under legislation relating to building societies, friendly societies, insurance, banking or other financial services,

insolvency, consumer credit or consumer protection. There exceptions are now contained in the Police Act 1997 (see below).

The Police Act 1997 provides for access to criminal records for the purposes of employment and spent convictions are not to be included in the conviction certificate. However, spent convictions can be shown under the Financial Services and Markets Act 2000 where the conviction is, e.g., for fraud or dishonesty and where the certificate is required by an individual who will be working on a regular and unsupervised basis with children or is seeking appointment as a judge or magistrate.

Further exceptions are made from time to time by statutory instrument. For example, the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2002 (SI 2002/441) adds to the exceptions where disclosure is required to those seeking employment with Customs and Excise, those who wish to be involved with work concerning vulnerable adults and those concerned with monitoring Internet communications for the purposes of child protection.

In addition, certain employees are excluded from the 1974 Act and their convictions can be disclosed. Included are doctors, chartered accountants and chartered certified accountants, insurance company managers and building society officers (see SIs 1975/1023 and 1986/2268).

5

CIVIL PROCEDURE

In this chapter we shall consider the way in which a civil action is brought and concluded in the High Court.

For the purposes of our High Court claim, we shall consider a case of alleged breach of contract on the lines of the case of *Mitchell (George) (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* (1983) (see below Case **187**).

The claim is for breach of contract by reason of the supply by the defendant company of defective cabbage seed. The amount of the claim is an estimated alleged loss of £100,000. The defendant will defend the claim mainly on the basis of an exemption clause in the contract.

Initial considerations

The following matters will be considered by the claimant's solicitor before a claim form to commence the claim is served.

Time-bars

The Limitation Act 1980 (as amended) sets out a number of fixed periods of time for issuing a claim form to commence proceedings. In cases of our kind, i.e. breach of contract, the claimant has six years from the date on which the claim accrued, i.e. when the defective seed was delivered, or (as in our case, where there was latent damage not emerging until the defective seed had grown) there is a period of three years from knowledge of the defect if this period expires after the six-year period. It is unlikely that our claimant has left his claim for so long and limitation of claims rules should not affect him.

Cutting short liability

The Court of Appeal has ruled in *Granville Oil and Chemicals Ltd* v *David Turner & Co Ltd* [2003] 1 All ER (Comm) 819 that when a business is dealing with another business, but not a non-business consumer, the six-year period for contract claims can be reduced by a term in the contract. This leads to earlier ascertainment of potential liability. The facts were briefly that it was a standard condition of a freight forwarder's contract that the freight forwarder would be discharged of all liability arising if a claim in respect of alleged liability was not commenced by the customer within nine months of the provision of the relevant service. The condition could equally have been applied to alleged liability in respect of goods.

The condition was challenged in the Court of Appeal on the basis that it was an unfair term and unreasonable under the Unfair Contract Terms Act 1977. However, the Court of Appeal ruled that the condition was not void under the Act of 1977 after taking into account the fact that the parties had equal bargaining strength and that the condition had been brought to the attention of the customer. Furthermore, it was practical to commence a claim in that time since any damage could be ascertained on delivery of the goods by the carrier.

Comment The Court of Appeal stressed the value of the Act of 1977 to consumers and their protection and would not it seems have decided the case as it did unless both parties were in business and of equal bargaining strength. The court was not, however, so keen to allow the Act of 1977 to intrude into contracts between commercial parties such as these. They should, said the court, be capable of reaching agreements of their own choosing and should expect to be bound by them.

Defendant's finances

There is no point in making a claim against an individual who is insolvent nor against a company which is in a terminal insolvency procedure, such as liquidation. A search of the company's file at Companies' House, Cardiff, which is online, should be made. For individuals, the matter is not so straightforward and may require the services of an inquiry agent.

The cost effectiveness of the claim

Consideration should be given to the cost of the claim and the possibility of a successful outcome must be discussed, i.e. does the claim merit the bringing of civil proceedings which cannot be guaranteed to be successful?

Alternative approaches

These could include arbitration where the contract contains an arbitration clause or alternative dispute resolution.

The remedy

There is a variety of remedies which a claimant may ask for from the court. These are considered as we proceed through the chapters on substantive law, e.g. contract and tort. However, in our case, the claimant will be asking for damages on the ground that the defendant has caused loss by reason of his failure to perform his obligations under the contract. The object of the damages in this situation is to put the claimant in the position he would have been in, at least financially, if the contract had been properly performed. In our case, where the remedy sought is money damages, the court may award interest on the sum outstanding. The rules are further considered in Chapter 18. It is enough to say here that a claimant suing for interest must claim it specifically in the statement of case, which gives particulars of the claim.

Funding the claim – generally

Under the Access to Justice Act 1999 the Community Legal Service (CLS) replaces the former civil Legal Aid Scheme in regard to the provision of funds for civil cases. The CLS is administered by the Legal Services Commission (LSC), which replaced the Legal Aid Board.

The two levels of service which are of most importance are:

- initial advice and assistance referred to as legal help; and
- representation in the court should litigation ensue referred to as help at court.

The above categories of aid are available subject to what is said below to claimants and defendants. However, the matter of the success or failure of the claim is relevant in the granting of aid for representation.

In broad terms, it will be available:

- where the prospects of success are very good (80 per cent or more) – that the damages are likely to exceed the estimated cost;
- where there is a good chance of success (between 60 per cent and 80 per cent) – that the applicant expects to recover a sum at least three times the likely costs; and
- where the case has only a moderate chance of success (between 50 per cent and 60 per cent) – that the applicant expects to recover a sum of at least four times the likely costs.

By way of explanation of the above, the point is that if the claim is more risky in terms of success, the LSC will not finance it unless it will produce considerable funds if it is successful.

The following points should also be noted:

- funding by the CLS will not normally be available where the case could be funded by a conditional fee agreement; and
- it is not available for personal injury cases, except those for medical negligence.

Since personal injury claims were a large part of the state funding arrangements and since these claims lend themselves to conditional fee arrangements, the amount of state aid for civil matters has considerably decreased.

Financial eligibility

The solicitor involved will assess financial eligibility. The position for individuals is set out below.

Legal help

Income. The solicitor will take the actual gross income in the past month of the client and partner if any. If this exceeds £2,288 the client will not be eligible. A higher limit applies if there are more than four dependent children in the client's family for whom child benefit is received. Where the gross income is £2,288 or less, the solicitor will calculate the disposable income (see below) and if the disposable income exceeds £632 per month the client is not eligible.

Capital. The solicitor will work out the client's and any partner's disposable capital and if this exceeds £8,000 the client is not eligible.

Clients who are in receipt of income support, income-based jobseekers' allowance or guarantee state pension credit will be eligible on income and capital.

Where the client qualifies, it is not necessary for him or her to pay a contribution from income or capital.

Legal representation

Income. If the gross monthly income of the client and any partner exceeds £2,288, the client will not be eligible for funding. The rule regarding four or more children, however, applies (see above). If the gross monthly income is £2,288 or less, the solicitor will assess disposable

income (see below) and if this is £632 or less, the client will qualify on income for all types of representation.

Capital. If the client's and any partner's disposable capital is £8,000 or less, the client qualifies for all types of legal representation on capital.

Even when a client qualifies, it may be necessary to pay a contribution to costs e.g. where the monthly disposable income is £273–£400 the contribution is one-quarter of income in excess of £268.

As will be seen, the provision of legal aid is irrelevant in the normal commercial case such as ours and the figures are only included to give a flavour of the paucity of the state provision in this area for non-business clients. In this connection, government consultation papers and statements suggest that matters relating to financial provision will get worse rather than better.

Family cases

Since these are not subject to conditional fee arrangements in terms of their suitability, they continue as state-aided civil matters. In fact, as a broad generalisation, it may be said that in the developed future only family lawyers will be doing civil legal aid work to any degree. In this connection funding is available for family mediation and general family help until the solicitor's fees have reached a certain level the highest in mediation being £350 and in family help £1,500.

Franchising of firms of solicitors

Additionally, legal aid work can be carried on only by those firms of solicitors which are accredited by the Legal Services Commission as being competent to provide the relevant service. The Commission also monitors the accredited firms to see that the appropriate range of experience is maintained, with the resulting withdrawal of some firms from legal aid capacity.

Reform

Following proposals outlined in Lord Carter's initial review of legal aid published in February 2006, the Legal Services Commission has consulted on a national *preferred supplier scheme*, which will radically change the way in which it administers legal aid. Approved suppliers will have to meet stringent entry requirements and will have to deliver consistently good quality advice to clients and take greater responsibility for managing their own performance. Solicitors and advice agencies can expect to benefit from greater autonomy, simpler processes and lower transaction costs. Ultimately, the LSC will be working with fewer larger organisations by the time the proposals are fully implemented in 2009.

These arrangements are seen as a move forward from the franchising scheme outlined above.

Conditional fee agreements

Under these arrangements, the client's solicitor will receive no payment if the client's claim fails. However, usual or higher than usual fees are payable where the client succeeds. Section 27 of the Access to Justice Act 1999 applies, together with statutory instruments made to support it. The section inserts ss 58 and 58A into the Courts and Legal Services Act 1990. Section 29 of the 1999 Act allows the recovery of insurance premiums from the losing side (see below).

These agreements can be made in regard to any civil litigation matter, but matrimonial cases are excluded. No such agreement can be made if the client is legally aided.

CFA with success fee

If the fees are to be higher than usual if the client is successful, as is the case with a conditional fee agreement, the maximum permitted percentage increase is 100 per cent. The Access to Justice Act 1999 allows recovery of the normal fees and the success fee by a successful client against his opponent.

In *Designers Guild Ltd* v *Russell Williams (Textiles) Ltd* [2003] 1 Costs LR 128 the House of Lords granted a success fee of 100 per cent in a case where leading counsel had advised that the chances of success were no more than evens. The claimant had succeeded at first instance but had lost in the Court of Appeal. The case is important because it gives an example of a dispute in which a 100 per cent success fee was merited and also because previously it was doubtful whether CFAs were permissible in the House of Lords since the Civil Procedure Rules do not specifically apply to proceedings in the Lords. This case rules that they are because, said the House of Lords, CFAs are authorised by the Courts and Legal Services Act 1990 and do not derive validity from the Civil Procedure Rules.

In effect, in this sort of agreement the maximum fees payable to the solicitor comprise two parts: the base or normal fee usually calculated by reference to hourly rates in terms of time spent on the case, and a success fee expressed as a percentage of the base or normal fee. In the case therefore of a 100 per cent success fee, the solicitor's fees would be double the base or normal fee. Therefore and in general terms, a client who loses will pay no fees and a client who wins will pay both the base or normal fees and the success fee. The defendant may be ordered to pay the fees as part of costs awarded against him including the success fee. If there is an appeal on the matter of costs, the appeal court can reduce the success fee (see *Callery* v *Gray* [2001] 1 WLR 2112 and 2142).

Contingency fees (or CFA without success fee)

The 1999 Act provides also for a contingency fee agreement, i.e. one where there is no success fee but either all or part of the solicitor's fees are payable only if the client wins the case and not at all if he loses. An example would be a fee reduction of 30 per cent if the case is lost and the usual fee if it is won.

It is still unlawful for a contingency fee to provide for the recovery by the lawyer of a percentage of any damages awarded to the client, e.g. 'There will be no fee if you lose but if you win I shall take 40 per cent of your damages'. Such an agreement is contrary to public policy (see Chapter 16) as being champertous. Champerty is the maintenance of any person in a legal claim upon condition to have part of the property or money recovered. The statutory provisions for conditional and contingency fees are, of course, exceptions to the common law rule.

Contingency fees in assessment of damages

Agreements to receive a percentage of damages by those who have assisted a client in ascertaining the size of the claim AFTER liability has been established in court do not necessarily fall foul of the public policy rules mentioned above. Thus in *Regina (Factortame Ltd and Others)* v *Secretary of State for Transport, Local Government and the Regions (No 8)* (2002) *The Times*, 9 July, the accountants Grant Thornton were paid 8 per cent of the final settlement in this case under an agreement with the claimant and this was not, said the Court of Appeal, a

void agreement as contrary to public policy and was recoverable by the claimant against the defendants as costs. The Court of Appeal did however stress the following points as relevant in arriving at their ruling:

- when the agreement was made the claimant had already succeeded on the issue of the defendant's liability; and
- the accountants had not played any part in the proceedings leading to the establishment of that liability.

Comment The decision is of importance to experts such as accountants who are often engaged to provide back-up services of this kind in litigation.

Insurance

Obviously, the law does not allow a person to proceed with a claim against another under conditional or contingency arrangements unless he can pay the other side's costs if he loses. Therefore, a solicitor will always ask whether a client has an insurance policy covering litigation. This type of insurance may be purchased separately or may be part of a household policy. This is called 'before the event' insurance. It may well be possible to purchase 'after the event' insurance. The premium payable will be related to the strength of the applicant's case, a more difficult case to win attracting a higher premium. As we have seen, this premium may be recovered from the losing party (but see below). The payment of what may be a large initial premium for a personal injury claim worth, say, £100,000 can be a problem, but it may be possible in a claim which is likely to succeed to negotiate with an insurance company so that a client only pays the premium if he wins. If the client loses, the insurance company pays the costs of the other side and the smaller share of costs of the claimant and that is that. Clearly, there are no lawyers' fees to pay for the client's side.

The role of the insurance company

It is important that clients understand the role of the insurance company and its interest in the case. The claimant's insurer, like his lawyer, is only interested in whether the case is won. If it is, the lawyer gets the success fee and the insurer will have received a premium and not had to pay out. In the insurance deal, therefore, it will be a requirement of the insurer that the solicitor inform the insurance company if the defendant makes an offer to settle or makes a payment into court. These matters are explained later in this chapter but, as an example, if the claim is for £20,000 and the defendant offers to settle by a payment of £16,000, the insurance contract may require the claimant to accept the offer to avoid possible loss of the case if it goes to trial with consequent expense to the insurer. Failure to accept an offer, if required by the insurer, can, under the contract of insurance, lead to withdrawal of cover so that the claimant who wishes to try for more money may have to do so at his own expense.

Payment by insurers

The system of conditional fees has suffered because of the tactics of insurance companies who having entered into insurance commitments have used tactics such as arguing in court over the way in which fees have been calculated and even whether the conditional fee provisions are valid, all to delay payment. However, in a number of cases such as *Hollins* v *Russell* (2003) 147 Sol Jo 602 the Court of Appeal gave a firm ruling that technical challenges on compensation by insurers should not in general be allowed. Brooke LJ referring to the 'trench warfare' that had broken out between solicitors and insurers said that provided there was no serious breach of the legal rules and a claimant was not adversely affected the no-win, no-fee agreement plus insurance was valid and would be enforceable.

It is also worth noting here that the Court of Appeal decided in *Callery* v *Gray* [2001] 1 WLR 2112 and 2142 that the cost of after the event insurance was recoverable even when as in this case proceedings were only in contemplation and in fact never took place.

Sarwar v *Alam* [2001] 4 All ER 541 is also worth noting because in it the Court of Appeal allowed, as part of recovery of costs, the premium on an after the event insurance even though the claimant had before the event insurance (which was recoverable) because the ATE insurance provided additional benefits in that it was custom built for the particular road traffic claim. However, the court warned that all solicitors conducting these no-win, no-fee claims should inquire after and investigate the adequacy of any BTE insurance before advising ATE insurance. This could involve asking the client to bring in any relevant motor policy. Failure to take advantage of an adequate BTE insurance could result in the ATE premium being disallowed as a head of recoverable costs.

Finally, an attempt by the defendant's insurer to refuse to pay an ATE insurance premium as costs in the cause because the premium was not payable at the time the ATE was entered into but only on conclusion of the case if the claim was successful (which it was) was a credit agreement and was void because the formalities of the Consumer Credit Act 1974 had not been observed failed. The ATE was an insurance contract not falling within the statutory framework applicable to credit agreements (see *Tilby* v *Perfect Pizza Ltd* (2002) 152 NLJ 397).

Other disbursements

It is also important that clients understand that, in addition to the insurance premium, there are other 'up-front' payments that will have to be made and which will only be recovered if they win. These include medical reports, experts' fees, accident reports and court fees, which may run into a few hundred pounds. Where the claim has a very good chance of success, the solicitor may cover these payments, but is in no way obliged to do so.

Environmental Protection Act 1990 cases

Conditional fee agreements are available for proceedings under the 1990 Act, s 82 which allows those aggrieved by a statutory nuisance to ask the court for an order to put that nuisance right. An example would be the failure of a landlord to maintain rented housing in a habitable condition. It should be noted, however, that there is no success fee here. The lawyer gets his usual fee if he wins the case for the client but no more and, of course, nothing if he loses.

Formalities

Conditional and contingency agreements between clients and solicitors must be in writing and signed by both parties. Importantly, also an agreement for a success fee must briefly set out the reasons for setting the percentage increase at the level stated. Regulations also require a conditional fee agreement to include a term that a solicitor may not recover from a client any part of the success fee disallowed by the court (see below).

Costs

When it comes to recovery of the success fee from the losing side, it should be borne in mind that the court in assessing costs may reduce it on the ground that it was set at an unreasonable level, given the level of risk of failure of the client's case. The amount of the success fee