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## CHAPTER 2

### AN OVERVIEW OF THE LEGAL PROCEDURE

For all intents and purposes legal procedure should, as in most Continental jurisdictions, be distinguished into (i) civil, and (ii) criminal. A distinct difference in the English legal system is that, with the exception of certain classes of persons,<sup>167</sup> any person is entitled to represent himself before any of the Criminal or Civil Courts without anyone else legally representing him.

A brief note about the legal profession in England and Wales here would serve as a good guide to the differences of the legal systems of other Continental jurisdictions. The legal profession is divided into (i) solicitors, and (ii) barristers. The effect of the difference in so far as procedure is concerned may be summed up as follows:

- Usually litigants<sup>168</sup> would approach for advice and instruct a solicitor directly.
- The legal training of barristers is very much 'focused' on the law of evidence and in the development of advocacy skills.
- Solicitors have limited rights of audience in the higher Courts, although this is currently changing with a number of experienced solicitors having being granted full rights of audience in the Crown Court and higher appeal Courts.
- Usually, after a civil action or a prosecution commences the solicitor would instruct a barrister, whom he would refer to as 'Counsel', for advice on evidential points and representation of the client in Court.
- In the criminal legal system, the prosecuting authority is currently the Crown Prosecution Service (C.P.S.). The C.P.S. is independent of the police, and is the authority which decides whether a person should be prosecuted or not, depending on the evidence presented to them by the

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<sup>167</sup> For example, in civil procedure, limited companies must be legally represented. In criminal procedure there has been considerable criticism on this issue for prosecutions against alleged rapists. Indeed, in such cases Courts would not allow a person accused of rape to conduct cross-examination of the prosecution witness (who is normally the rape victim).

<sup>168</sup> Except the Crown, which is advised, (i) in the case of any publicly important matters by the Attorney-General, and (ii) in the case of publicly important criminal matters by the Director of Public Prosecutions (D.P.P.).

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Police. The service is headed by the Director of Public Prosecutions (D.P.P.), with Chief Crown Prosecutors and Crown Prosecutors below him. All or any of them must be barristers or solicitors of considerable standing and experience before appointment to the relevant office.

- The C.P.S. is represented by solicitors and/or barristers, depending on the seniority of the Court.
- In criminal litigation most solicitors have no rights of audience in the Crown Court or the other superior Courts, but only in the Magistrates Court.
- In civil litigation most solicitors have no rights of audience in the County Court or in the other superior Courts, but only in the Magistrates Court.
- In civil procedure, all hearings, except the actual trial, are considered to be 'interlocutory' hearings. These are more informal in that they do not usually take place in 'open Court'. Solicitors, or trainee solicitors, may appear in all these hearing to represent their clients. Or a barrister may appear in any of these hearings on his own or with a solicitor.
- The expressions K.C. (King's Counsel) and Q.C. (Queen's Counsel) refer to the seniority of barristers. Since in the U.K. the Monarch is currently the Queen, senior barristers are called Queen's Counsels (Q.C.).
- It is usual that Q.C.s are 'called to the bench', i.e. are invited to become Judges, although nowadays a considerable number of solicitors are also invited to take the appointments.

## LIMITATION PERIODS

Although mention of limitation periods, i.e. the time within which the State, in the case of criminal law, or persons, in the case of civil law, may take action, will be made at the appropriate chapters, it would be useful to be given a summary of all these time limits from the outset.

## CIVIL LAW

- (1) An action on a simple contract must be brought within six years of the date when the cause of action accrued.<sup>169</sup>

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<sup>169</sup> Section 5, Limitation Act 1980. A simple contract is one that does not require any particular formality, i.e. it may be made orally, in writing, or indeed, in any other way. See further *infra*, p.75.

- (2) An action on a contract made under seal will be statute barred after twelve years from the date when the cause of action accrued.<sup>170</sup>
- (3) Where the claim includes damages in respect of personal injuries caused by a tort, the period is three years.<sup>171</sup>
- (4) In the case of non-personal injury actions based on negligence, where the damage is latent then it is either (i) six years from date when the cause of action accrued, or (ii) three years from date of knowledge of certain material facts about the damage.<sup>172</sup>
- (5) For all other tort actions, excluding defamation,<sup>173</sup> personal injury and latent damage, it is six years.<sup>174</sup>
- (6) In enforcing a judgment, it is six years from the date when the judgment became enforceable.<sup>175</sup>
- (7) Loss or damage to goods while they are carried between two or more countries, is covered by different time limits, depending on whether such carriage is by sea, road, or air.<sup>176</sup>

Finally, section 32 of the Act states that deliberate concealment, either after the cause of action accrued and/or at the time when it accrued, of any fact relevant to the right of action of a person, would postpone the start of limitation period.<sup>177</sup>

## CRIMINAL LAW

In so far as the more serious criminal offences, known as ‘indictable’,<sup>178</sup> are concerned, there are no statutory time-limits for commencing criminal proceedings.

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<sup>170</sup> Section 8, Limitation Act 1980.

<sup>171</sup> From accrual of cause of action or knowledge if later; s.11, Limitation Act 1980. Note that s.11A has been added which imposes a ten year period on actions brought under the Consumer Protection Act 1987.

<sup>172</sup> Section 14A, Limitation Act 1980. This new section was inserted by the Latent Damage Act 1986.

<sup>173</sup> For defamation the time limit is one year, s.4A, Limitation Act 1980.

<sup>174</sup> Section 2, Limitation Act 1980.

<sup>175</sup> Section 24, Limitation Act 1980.

<sup>176</sup> For time limits under these legal regimes, see *infra*, pp.259, 285, 293, respectively.

<sup>177</sup> *Williams v. Fanshaw Porter & Hazelhurst* [2004] 2 All E.R.616, C.A.

<sup>178</sup> Indictable offences are generally the more serious forms of crime, such as all forms of homicide, major theft, assaults inflicting bodily harm, rape. See further page 49 for classification of criminal offences.

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However, prosecutions for less serious offences, known as 'summary',<sup>179</sup> must be dealt with by a Magistrates' Court within six months after the alleged offence was committed.<sup>180</sup>

## CIVIL LITIGATION

Before we outline how a civil action is usually conducted in England, it would be useful to come to grips with some expressions one might come across in the process of a case.

An expression used considerably in practice but also found in most civil litigation books and reported cases is 'interlocutory'. The word means intermediate, and may refer to (i) a hearing, (ii) an injunction, (iii) an order, or (iv) a judgment. In effect all four of these are preceded by the word 'interlocutory' and are not final.

- (i) Interlocutory hearing usually refers to hearings before a Judge in Chambers, i.e. not in open Court. All solicitors, including trainee solicitors, have a right of audience in most of these hearings. As a rule, all hearings before the actual trial are called interlocutory. Indeed, all the following are usually granted at an interlocutory hearing.
- (ii) An interlocutory injunction is an injunction<sup>181</sup> granted by the Court in order to maintain the *status quo* between the parties to a case until it is finally decided. Obviously, an interlocutory injunction will be granted at an interlocutory hearing.
- (iii) An interlocutory order or sometimes referred to as an 'interim' order, is simply an order of the Court, which does not conclude a case.
- (iv) Again an interlocutory judgment is a judgment given by the Court which is only intermediate and does not determine the action.

Finally, one may come across the expression 'ex parte'. This simply means that what follows after the expression has been granted after the Court/Judge heard only one-side. Thus, an interlocutory *ex parte* injunction means that it

<sup>179</sup> Summary offences are offences specifically named as being triable before the Magistrates' Court, hence all summary offences are defined by statute. They are generally the less serious forms of crime, such as minor thefts, minor assaults, road traffic offences. See further page 49 for classification of criminal offences.

<sup>180</sup> Section 127, Magistrates' Courts Act 1980.

<sup>181</sup> See also *infra*, p. 107, on civil injunctions.

was granted after hearing one side only. Such interlocutory injunctions are usually applied for by one side only because either secrecy is required in order to restrain some action by the other party, or because of great urgency.<sup>182</sup>

The opposite of *ex parte* is *inter partes* and it means that, for example, an *inter partes* interlocutory hearing will be conducted with the parties concerned in the action present. Indeed, interlocutory *ex parte* injunctions only last until either the trial or some earlier event. Such event would usually be an application to the Court for an *inter partes* interlocutory hearing. It must be noted that whenever there is an application for an *inter partes* hearing, the party applying for such hearing must give notice of it to the other parties in the action at least three clear days before the Court is to deal with the application. Such applications are also referred to as 'on notice' applications. Therefore, most interlocutory hearings are, in practice, *inter partes*.

## PROCEDURE

A civil action usually begins with a 'letter before action' by the solicitor to the defendant. Of course, if the solicitor is already aware that the defendant has solicitors acting for him then the letter should be addressed to the solicitors, otherwise the solicitor will be committing a breach of the Rules of Professional Conduct by writing directly to the defendant. Normally such letter would require a response within a specified period of time, failing which the solicitor should warn the defendant that proceedings will be issued without further notice.

In some cases, a party may wish to see documents held by the opponent in order to decide whether or not to take proceedings. Therefore, an application for disclosure of documents prior to the start of proceedings may be made to the other party(ies) in the first instance, and if refused then by way of an application to the Court.

There are also cases where a party may need access to another party's property to inspect certain objects, which may be vital to any subsequent proceedings. In such cases, again, an application for preservation and or inspection of the 'thing' concerned should be made to the other party(ies) concerned in the first instance, and if refused then to the Court.

When a party decides to issue proceedings, then a claim form must be completed, either with or without the 'Particulars of Claim',<sup>183</sup> which is sent

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<sup>182</sup> It is noteworthy that such injunctions may, in appropriate circumstances, be granted by the Court even over the telephone without the production of any documents; *Allen v. Jambo Holdings Ltd.* [1980] 1 Q.L.R.1252.

<sup>183</sup> The primary function of the Particulars of Claim is to state concisely the facts upon which the claimant relies.

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to the Court office.<sup>184</sup> It must be noted that the expression 'claimant' has recently replaced 'plaintiff', and therefore the person who makes the claim is described as the claimant and the person against whom it is made is the defendant.

Once the claim form has been served on the defendant, then the latter would have three ways in which to respond: (i) filing an acknowledgement of service, (ii) filing a defence, (iii) filing an admission.

- (i) The time for acknowledgement of service is 14 days from service of the claim form provided Particulars of Claim were also included therein. If Particulars of Claim were not included then the defendant does not have to acknowledge service until 14 days after service of the Particulars of Claim.
- (ii) The time for filing a defence is 14 days of service of the Particulars of Claim, or if the defendant has acknowledged service (as above), then 28 days of service of the Particulars of Claim.
- (iii) Without going into the detail of different types of admission, if the defendant admits the claim, then he should file an appropriate form of admission (a copy of which usually accompanies the claim form) within 14 days of service of the Particulars of Claim.

Once the proceedings have been served, as above, it may be that the defendant does not respond, i.e. does not return the acknowledgement of service, or does not file a defence. If this is the case, then the claimant may apply to the Court in order to obtain 'Judgment in default' against the defendant.<sup>185</sup>

If a defence has been served by the defendant then the claimant may, if he wishes, to reply to the defence. Replies are not in practice used extensively since by not replying there is no presumption that the claimant admits the matters raised in the defence. However, replies are used where the defendant

<sup>184</sup> It must be noted that under E.C. Council Regulation 1348/2000, (O.J. L 160, 30/06/2000, p.37), which came into force in May 2001, service between E.C. States of judicial and extra-judicial documents in civil or commercial matters is very much harmonised and regularised. E.C. States have now set up 'transmitting agents' and 'receiving agencies' for the transmission and reception of, for example, Court proceedings. In simple terms the transmitting agency in an E.C. State will transmit the proceedings' documents to the receiving agency in another E.C. State which in turn would serve the document(s) upon the intended recipient. Such service should be effected by the receiving agency not later than one month after receipt. Upon successful service, a certificate of completion should then be sent to the transmitting agency. The subsequent Commission Decisions 2001/781/EC (O.J. L 298, 15/11/2001, p.1), 2001/781/EC (O.J. L 31, 01/02/2003, p.88), 2001/781/EC (O.J. L 60, 05/03/2003, p.3), and 2002/350/EC (O.J. L 126, 13/05/2002, p.1), have produced a list of all the 'receiving agencies' and documents which may be served.

<sup>185</sup> Note, however, that judgment in default would not be appropriate in all types of claim, e.g. mortgage claims, or claims for goods under a contract regulated by the Consumer Credit Act 1974.

has made a counterclaim,<sup>186</sup> or if the claimant wishes to allege facts in answer to the defence which were not included in the Particulars of Claim.

If a defence has been served, then the Court's part becomes more active in the action. This is the 'allocation' stage, whereby the Court will allocate the case to one of the three tracks, depending on the information the parties in the action have filed to the Court by way of an 'allocation questionnaire'.<sup>187</sup>

Thus, the Court will normally allocate claims (i) not exceeding £5,000 to the 'small claims' track, (ii) between £5,000 and £15,000 to the 'fast' track, and (iii) exceeding £15,000 to the 'multi-track'. It must be noted that the Court will also take into consideration the likely duration of the actual trial of the case, before allocating a case to either (ii) or (iii) above. Together with the allocation of the case, the Court at this stage is likely to give 'directions' as to how the case is to proceed to trial. These directions usually would include a timetable within which, for example, witness statements should be exchanged.<sup>188</sup>

Next in the procedure is the 'disclosure' stage. The main purpose of it being to enable the parties to evaluate their case in advance of the trial. In simple words, at this stage the parties have to reveal to each other the documents which have a bearing on the case. Furthermore, any party to the proceedings has a right of inspection of any disclosed documents.<sup>189</sup>

Next is the 'setting-down' stage, which is in effect the preparation for trial. At this stage it is usual that the parties to the action may reach some kind of settlement, or perhaps the claimant discontinues his claim.<sup>190</sup> Furthermore, the claimant must bear in mind that he has to prepare and file to the Court the

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<sup>186</sup> A counterclaim is also known as a 'Part 20' claim. In simple words, this occurs where C, the claimant, issues proceedings against D, the defendant, and the latter either wishes to (i) make a claim against C, or (ii) to pass the blame on to a third party.

<sup>187</sup> This is a document served by the Court to all parties in the proceedings, and which should be completed and returned to the Court within 14 days. The questionnaire asks the parties, for example, whether they know what witnesses they will be calling and what facts they are witnesses to.

<sup>188</sup> In practice, there are obvious variations on these directions. For example, in multi-track cases the Court may give directions as to the holding of a 'case management conference', whereby a review of all steps taken in the preparation of the case will be considered. It must be noted that as from July 2004, the E.C. Council Regulation 1206/2001 on co-operation between national Courts in the taking of evidence in civil and commercial proceedings (O.J. L 174, 27/06/2001, p.1) has come into force. Briefly, under this Regulation a civil Court in one E.C. State will be able to request a competent Court in another E.C. State (except Denmark) to take evidence directly in the requested State. Such requests should be executed within 90 days of receipt and in appropriate cases a video-conference or tele-conference may be requested under Article 10 of the Regulation.

<sup>189</sup> It is obvious that only *relevant* documents which are or have been in a party's control must be disclosed. There are also certain documents which attract 'privilege', or documents which tend to incriminate the party who would produce them, and *inspection* of such documents may be withheld.

<sup>190</sup> However, if there are other claimants then in order to discontinue a claimant would need the other claimants' consent in writing, or the permission of the Court to do so.

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‘trial bundle’ not more than seven days and not less than three days before the start of the trial. A copy of the trial bundle should also be given to all the parties in the proceedings. If the presence of a barrister is necessary then the solicitor should instruct counsel to deal with the trial.

The penultimate stage in the civil procedure is that of the actual trial. Usually, it would be for the claimant to make an opening speech before the Court. The claimant’s witnesses will then give evidence.

Next, the claimant’s witnesses may be ‘cross-examined’ by the defendant. Following cross-examination, the claimant is given the opportunity to ask further questions of his witness.

The defence will present its evidence in exactly the same way as the claimant. After the evidence has been given, the defendant will make a closing speech followed by the claimant.

The Court will then deliver its judgment, and depending on the complexity of the case, can do so immediately, or at a later date. The general rule is that the Court will order the unsuccessful party to pay the costs of the successful party.<sup>191</sup>

The final stage, which it is intended to be briefly highlighted here, is that of enforcement. In simple words the winning party will have to consider with his solicitor the best method of enforcing the judgment.

This is particularly in ‘money judgments’ where they are not enforced by the Court automatically but the winning party should take enforcement action.

It must be remembered that in money judgments the enforcement action is considered as a ‘debt’ by the unsuccessful party, and the main methods of such enforcement action are as follows:

- (i) **Execution:** The Court may seize and sell the debtor’s goods to pay the judgment debt and associated costs.
- (ii) **Charging order on land:** Simply, this is a Court order whereby a land charge is registered at H.M. Land Registry against land owned by the debtor to the amount due under the judgment.
- (iii) **Garneshee order,** or to use its modern term, a ‘**third party debt**’ order: Where money is already owed to the debtor by a third party, then the Court may order that the ‘garneshee’, i.e. the person who owes such money to the debtor, to pay the successful party an amount that represents the judgment debt.

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<sup>191</sup> Bear in mind however, that this is not an inflexible rule and a Court may make a different order for costs if it considers it appropriate.

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- (iv) **Attachment of earnings:** This is a Court order whereby the debtor's employer is compelled to regularly deduct from the debtor's earnings, and pay them into Court towards satisfaction of the judgment debt.
- (v) **Insolvency:** Depending on whether the debtor is a company or an individual, the successful party may decide to 'wind-up' the company, or 'petition for bankruptcy' of the debtor individual.

## **CRIMINAL LITIGATION**

Criminal procedure in England and Wales differs considerably from that found in most Continental systems. A distinction that must be made clear from the outset in so far as criminal law is concerned, is that there is a presumption that the accused is innocent and it is for the prosecutor to produce evidence which shows that the accused is guilty 'beyond reasonable doubt'.<sup>192</sup> Up to 1967 offences in England and Wales were classified into felonies, which were the more serious offences,<sup>193</sup> and misdemeanours, which were the less serious ones.

### **CLASSIFICATION OF OFFENCES**

Nowadays, offences are classified in accordance to the mode of trial:

'Indictable' offences are generally the more serious forms of crime.<sup>194</sup> The word 'indictment' means a document which sets out in writing the charges against the accused, each separate charge is called 'a count' of the indictment. In indictable offences the person accused of the offence is actually tried before a Judge and jury.

'Summary' offences are offences specifically named as being triable before the Magistrates' Court,<sup>195</sup> hence all summary offences are defined by statute.<sup>196</sup>

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<sup>192</sup> In civil law no such presumption exists, and the evidential burden of proof is based 'on the balance of probabilities'.

<sup>193</sup> Up to 1870 some felonies, such as rape, carried a death penalty. Furthermore, if a person was convicted of a felony he was liable to forfeiture of his property.

<sup>194</sup> For example robbery, or murder.

<sup>195</sup> However, it must be noted that although the Magistrates' Court may try summarily an accused person, if it convicts such person but the Court feels that its own sentencing powers are inadequate, then, under section 38 of the Magistrates' Courts Act 1980, it has the power to send the defendant for sentence to the next sitting of the Crown Court.

<sup>196</sup> They are generally the less serious forms of crime, e.g. taking a conveyance, driving without insurance, harassment, careless and inconsiderate driving, etc.

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There is also another class of offences which is a 'hybrid' of the two mentioned above. These are the so-called '**triable either way**' offences,<sup>197</sup> and as their name suggests may be tried at the Magistrates or the Crown Court, depending on the seriousness of the case, the Magistrate Court's sentencing powers to deal with it, and the circumstances in which the offence was committed.

Within the above mentioned three classifications, there is also another classification of offences, which was introduced by statute,<sup>198</sup> that of '**serious arrestable offences**'.<sup>199</sup> It must be borne in mind that the reason for this classification relates to the powers of the police to detain a suspect and to delay access to legal advice. However, this must not be confused with the powers of the police to actually arrest a person.<sup>200</sup> The police have such wide powers to arrest 'without a warrant' that it is nowadays exceptional that a warrant is necessary. So, for example, a constable may arrest a person if he has reasonable grounds to suspect that any non-arrestable offence has been committed or attempted, and appears to the constable that service of a 'summons' would be impracticable or inappropriate.<sup>201</sup>

Whether with or without a warrant, on arrest by the police a person must be cautioned as follows:

'You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in Court. Anything you do say may be given in evidence'.

As a brief reminder of the time limits applicable for prosecution of criminal offences, for indictable and most either way offences there are no statutory time-limits for commencing criminal proceedings. Prosecutions for summary offences must commence within 6 months after the alleged offence was committed.

A note should be made here about 'road traffic' offences, since the statute applicable<sup>202</sup> provides that a defendant may not be prosecuted unless notice/warning of intended prosecution was given to him/her, either (i) orally at the time of the offence, or (ii) in writing within 14 days of the offence.<sup>203</sup>

<sup>197</sup> For example theft, burglary, assault occasioning actual bodily harm, dangerous driving.

<sup>198</sup> Section 116, Police and Criminal Evidence Act 1984.

<sup>199</sup> For example theft, burglary, robbery, taking a conveyance, assault occasioning actual bodily harm.

<sup>200</sup> Indeed, the initial decision of whether an offence under investigation is a serious arrestable offence is taken by a police superintendent at the police station while the suspect is being held.

<sup>201</sup> Section 25, Police and Criminal Evidence Act 1984. For example, where a person does not furnish a satisfactory address it could lead to his arrest.

<sup>202</sup> Section 1, Road Traffic Offenders Act 1988 (as amended by the Road Traffic Act 1991).

<sup>203</sup> However, s.2 of the same Act provides that where an accident occurs at the same time or immediately after the offence, then there is no requirement to give the defendant any notice/warning of prosecution.

## PROCEDURE

The prosecution of almost all criminal offences starts in the Magistrates' Court<sup>204</sup> irrespective of the type of crime committed. The method of commencement depends on the seriousness of the offence. It must be borne in mind that in the proceeding parts, 'summary procedure', as opposed to a summary offence, refers to criminal litigation procedure before the Magistrates' Court.

**(a) Non - Arrestable:** The prosecution of a non-arrestable offence may start by the 'laying of an information' which would lead to the Court considering whether to issue a 'summons'. In effect this means that either the prosecutor or just any person may submit a signed written allegation against the accused to a Magistrates' Court, who in turn may issue a summons and serve it on the accused.

An information is the charge to which the accused would plead at the Magistrates' Court when the trial commences, and it serves as a method of securing the accused's appearance before the Court. It should be noted that an information must specify one offence only, so if it is required to bring more than one charge against an accused then separate informations must be submitted to the Court.<sup>205</sup>

If the summons is issued by the Court, then it will contain the contents of the information initially submitted to the Court. Furthermore, a summons may cover more than one information, i.e. it may contain several charges. Next, the summons will be served on the accused, either personally or by post at his last known address. The summons will notify the accused of the time and venue of the hearing at the Magistrates' Court.

**(b) Arrestable:** After the defendant is arrested by the police, whether with or without a warrant, he is taken to the police station where he is charged and either released on bail<sup>206</sup> or kept in police custody.<sup>207</sup>

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<sup>204</sup> A minor may be prosecuted and defend himself (or be represented) in criminal matters, however, for criminal liability, minors are divided into three classes: (a) It is an irrebuttable legal presumption that minors under the age of ten years are incapable of any crime. They may be restrained by the police under their Common Law powers to protect property or detained under the Children and Young Persons Act, 1969, if they are beyond the control of parents or guardians. (b) Between the ages of ten years and 14 years, the Common Law presumption that the minor was unable to have 'guilty intent' may be rebutted by showing that the minor was able to understand that the act was morally wrong. (c) Minors of 14 years and over are fully liable for crimes, however, the procedures and penalties are different to those for adults.

<sup>205</sup> This is important since once the trial has commenced there is no power to amend the information.

<sup>206</sup> Bail is administered under the Bail Act 1976, as amended by the Crime and Disorder Act 1998.

<sup>207</sup> Sections 47(3A) and 46(2), Police and Criminal Evidence Act 1984.

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## 1. SUMMARY PROCEDURE - Summary Only Offence

On the day of the first hearing before the Magistrates' questions of legal aid and bail are usually dealt with. It is usual for the defence to request 'advance disclosure' (or 'advance information') of the prosecution case, but in practice defence solicitors usually get voluntary disclosure by the prosecutor on the day of the hearing.<sup>208</sup> The charge will be read to the defendant and he will ask to plead. The defendant will plead (i) 'guilty' or (ii) 'not guilty', and on conviction will be sentenced.

- (i) **Guilty - Summary Only Offence:** The Court is likely to adjourn for 'pre-sentence' reports to be prepared to assist the Court in deciding the most appropriate method of dealing with the defendant.<sup>209</sup>

If an adjournment for pre-sentence report takes place, then the Magistrates should consider whether the defendant should be 'remanded on bail' or 'in custody' until the reports are prepared. It is normal, at this stage, for the defence to make an application for bail to the Court, and for the prosecution to indicate any objections to such bail. These pre-sentence reports are usually prepared by a probation officer or a social worker.

Once these pre-sentence reports are prepared, a copy is given to the prosecutor, the defendant, and the Magistrates.

The defence will need to have prepared and produce to the Court a completed 'means enquiry' form, which may be used by the Court if a financial penalty is being considered.

The prosecution will summarise the facts of the case<sup>210</sup> and present details of the defendant's background and previous convictions.

Next the defence speech in mitigation is presented to the Court. Here the objective of the defence is to ensure that a balance is maintained in that the sentence passed by the Court will be appropriate to both, the circumstances of the offence and of the defendant.

Finally the Magistrates will proceed to sentence the defendant.

- (ii) **Not Guilty - Summary Only Offence:** The prosecution has no obligation

<sup>208</sup> Since in summary trials there is no obligation on the prosecution to notify the defence of its case; *R v. Kingston upon Hull Justices, ex parte McCan* (1991) 155 J.P.569

<sup>209</sup> In practice, it is an indication that the Court is not considering a custodial sentence. Indeed, there are occasions where the Court feels that a report is not necessary, i.e. where a custodial sentence is inevitable.

<sup>210</sup> Note that if the defendant pleads guilty but he/she still disputes some allegations made by the prosecution, which are substantial, then the Court has two 'options', either to accept the defence account, or to give the parties the opportunity of calling evidence so that the dispute may be resolved. In the latter case, where evidence is called, this is known as a 'Newton hearing', after the case of *R v. Newton* (1983) 77 C.App.R.13.

to provide advance information of their case to the defence.<sup>211</sup> In practice the defence requests such information which may be provided by the prosecution on a voluntary basis. However, the prosecution has an obligation to make available to the defence any material of relevance to the case upon which it does not intend to rely.<sup>212</sup> Furthermore, the prosecutor must disclose to the defence any previous undisclosed material which he considers might undermine the prosecution case, or confirm in writing that there is no such material.<sup>213</sup>

At this stage, i.e. following 'primary disclosure', the defendant may, if he so wishes, give a 'defence statement'. This is a written statement by the defendant whereby he outlines his main terms of his defence.<sup>214</sup>

If the defendant provides a defence statement, then the prosecution must disclose to the defence any previously undisclosed material which might assist the defendant's defence, as expressed in the defence statement, or confirm that there is no such material.<sup>215</sup>

Following all the above matters, the prosecution will make its opening speech, summarising the issues involved in the offence and the witnesses who will be called.

Next, the prosecution will call its witnesses, who will be 'examined-in-chief', i.e. asked questions initially by the prosecution, then 'cross-examined' by the defence, and 're-examined' by the prosecution (if necessary).

Next, the defence will make its opening speech, although in practice this is not always the case. Instead, the defence would call the defendant, if he wishes to give evidence, followed by any other defence witnesses. Again, these witnesses will be examined-in-chief, cross-examined by the prosecution, and if necessary re-examined by the defence.

Finally, the defence addresses the Court, making its closing speech. It must be remembered that the defence would always address the Court last.

Then, the Magistrates will consider the merits of the case, and, with the assistance of their clerk will reach a majority verdict. If the defendant is

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<sup>211</sup> The Magistrates' Courts (Advance Information) Rules 1985, (S.I.1985, No.601).

<sup>212</sup> Criminal Procedure and Investigations Act 1996. This material is referred to as 'unused material'.

<sup>213</sup> Section 3, Criminal Procedures and Investigations Act 1996. This is referred to as 'primary disclosure'. It must be noted that it is not actually the prosecution which makes the disclosure, but the 'disclosure officer', who is a policeman in charge of the investigation.

<sup>214</sup> Sections 5 and 6, Criminal Procedure and Investigations Act 1996. This is sometimes referred to as 'defence disclosure'.

<sup>215</sup> Section 7, Criminal Procedure and Investigations Act 1996. This is referred to as 'secondary disclosure'. Note that if no defence statement has been given, then there is no obligation on the prosecution to provide such information.

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convicted, then an adjournment for pre-sentence reports may be ordered. At this stage it is normal for the defence to make an application for bail to the Court, and for the prosecution to indicate any objections to such bail. The defence will need to have prepared and produce to the Court a completed 'means enquiry' form, which may be used by the Court if a financial penalty is being considered. Next the defence speech in mitigation is presented to the Court. Finally the Magistrates will proceed to sentence the defendant.

## 2. SUMMARY PROCEDURE - Either way Offence

If the offence is an either way offence, then the defence should request 'advance disclosure' from the prosecution. In fact, it is the obligation of the prosecution to notify the defence of its case.<sup>216</sup> This advance disclosure usually includes copies of written statements of prosecution witness and must be furnished by the prosecution before the 'mode of trial' hearing.

Then follows the 'mode of trial' enquiry which takes place at a hearing before the Magistrates' Court. The purpose of this hearing is to determine whether the case will be dealt by the Crown or the Magistrates' Court. If the defendant at this hearing he has not yet obtained advance disclosure of the prosecution case, then he is entitled to adjourn the hearing to enable disclosure to take place.

Following advance disclosure, then at the 'mode of trial' hearing the defendant will be asked to indicate whether he would plead guilty or not guilty if the case is to proceed.

If the defendant refuses to indicate a plea or indicates not guilty then the prosecutor will outline the nature of the charge and he will indicate in which Court it feels the case should be tried, i.e. the Magistrates' or the Crown Court.

The defence will then outline the nature of the charge and indicate which Court it feels is more suitable for the case to be tried.

Next, the Magistrates will announce whether they are prepared to deal with the case or whether the case should be sent to the Crown Court for trial.

- (a) If they decide that the case should be tried in the Crown Court, then it is adjourned to a future date when 'committal proceedings'<sup>217</sup> will take place. The purpose of committal proceedings is to ensure that there is a case for the defendant to answer in the Crown Court.

<sup>216</sup> The Magistrates' Court (Advance Information) Rules 1985, (S.I.1985, No.601).

<sup>217</sup> See *infra*, p.57.

- (b) If the Magistrates decide that they are prepared to deal with the case then the defendant is asked whether he consents to Magistrates' Court trial. It is also explained to the defendant that he/she is entitled to elect for trial in the Crown Court before a Judge and a jury.

The defendant then decides whether he wishes to be tried by the Magistrates' Court or by the Crown Court.

-If he asks for Crown Court trial, then he will not be asked to plead, i.e. guilty or not guilty, and the case will be adjourned to a future date for committal proceedings.

-If he consents to Magistrate's Court trial and pleads not guilty then the case will be adjourned to a future date for trial.<sup>218</sup>

-If he consents to Magistrates' Court trial and pleads guilty, then the procedure for summary trial, described below in '(ii) Guilty - Either Way Offence' will be followed.

- (i) **Not Guilty - Either Way Offence:** Where the Magistrates are prepared to deal with the case and the defendant has pleaded not guilty, the next step is for the Court to fix a future date for trial. At this stage the Magistrates should consider whether the defendant should be 'remanded on bail' or 'in custody' until the day of the trial. It is therefore normal practice for the defence to make an application for bail to the Court, and for the prosecution to indicate any objections to such bail.

On the day of the trial, the prosecutor will address the Court, giving an outline of the case and indicating the witnesses which he intends to call.

Next, the prosecution will call evidence, either witnesses or witness statements. Witnesses will firstly be examined by the prosecutor, followed by cross-examination by the defence. If prosecution so wishes, may re-examine the witnesses.

The defence witnesses are then called, including the defendant, who must testify first. These witnesses are firstly examined by the defence, followed by cross-examination by the prosecution.

Finally, once all the evidence has been submitted by both prosecution and defence, it is the turn of the defence to make the 'closing speech' to the Court.

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<sup>218</sup> It is important to bear in mind that similarly to the not guilty summary procedure described earlier, this not guilty plea by a defendant before the Magistrates' Court triggers off certain obligations to be fulfilled by the prosecution, under the Criminal Procedure and Investigations Act 1996. These are (i) duty to disclose any relevant 'unused material' to the defence, upon which prosecution does not intend to rely, and (ii) duty to disclose to the defence any previous undisclosed material which might undermine the prosecution case ('primary disclosure').

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Then, the Magistrates decide on the outcome of the case, either immediately, or more usually after withdrawing to a room where, with the assistance of their clerk, deliberate on the case. This process may sometimes last for hours, depending on the complexities of the evidence. The defendant will be either 'acquitted', in which case he may make an application for costs, or convicted.

If the defendant is convicted, then the Court will proceed sentence, but after hearing the 'plea in mitigation' by the defence, and adjourn if 'pre-sentence reports' need to be prepared. In effect the procedure from that point onwards is the same as in '(ii) Guilty - Either Way Offence' below.

- (ii) **Guilty - Either Way Offence:** If the defendant actually pleads guilty then the Court is likely to adjourn for 'pre-sentence reports' to be prepared to assist the Court in deciding the most appropriate method of dealing with the defendant.<sup>219</sup>

If an adjournment for pre-sentence report takes place, then the Magistrates should consider whether the defendant should be 'remanded on bail' or 'in custody' until the reports are prepared. At this stage it is normal for the defence to make an application for bail to the Court, and for the prosecution to indicate any objections to such bail.

Once these pre-sentence reports are prepared, a copy is given to the prosecutor, the defendant, and the Magistrates.

Irrespective of whether an adjournment for pre-sentence is ordered, the following procedure would be common in both cases.

The defence will need to have prepared and produce to the Court a completed 'means enquiry' form, which may be used by the Court if a financial penalty is being considered.

The prosecution will summarise the facts of the case<sup>220</sup> and present details of the defendant's background and previous convictions.

Next the defence speech in mitigation is presented to the Court. Here the objective of the defence is to ensure that a balance is maintained in that the sentence passed by the Court will be appropriate to both, the circumstances of the offence and of the defendant.

Magistrates will proceed to sentence him.

<sup>219</sup> In practice, it is an indication that the Court is not considering a custodial sentence. Indeed, there are occasions where the Court feels that a report is not necessary, i.e. where a custodial sentence is inevitable.

<sup>220</sup> Note that if the defendant pleads guilty but he still disputes some allegations made by the prosecution, which are substantial, then the Court has two 'options', either to accept the defence account, or to give the parties the opportunity of calling evidence so that the dispute may be resolved. In the latter case, where evidence is called, this is known as a 'Newton hearing', after the case of *R v. Newton* (1983) 77 C.App.R.13.



**Committal Proceedings:** As mentioned above, where the Magistrates indicate that they are not prepared to deal with the case, or that they are prepared to deal with the case but the defendant has not consented to be tried at the Magistrates' Court, then the case is adjourned to a future date for 'committal proceedings' to take place.<sup>221</sup>

The purpose of committal proceedings is to ensure that there is a case for the defendant to answer in the Crown Court. In effect this is a hearing before the Magistrates' Court, where prosecution evidence is outlined and put forward to the Court. It could be said that most 'paperwork', e.g. written witness statements and other documents, is produced by the prosecution for the Court's, as well as the defence's, consideration.

For example, if a witness would not produce a written statement voluntarily, the prosecution will put forward the point to the Magistrates who, if they consider that a written statement relevant to the case can be made by such witness, will issue a summons requiring him to attend the Court to give evidence which will be taken down in writing by the Clerk (or the Magistrates) in the form of a 'deposition'.<sup>222</sup>

Very briefly, at this prosecution stage, the prosecution will offer the defence one of two types of committal proceedings, and the defence will subsequently have to decide, depending on the evidence, which one to have:

- (a) **Without Consideration of the Evidence:** In essence this type would be appropriate where the defendant intends to plead not guilty but he accepts that the prosecution have a *prima facie* case against him. The hearing of such proceedings is usually very short, and it could be described as administrative in nature.
- (b) **With Consideration of the Evidence:** This type of proceedings would be appropriate where the prosecution's case seems so weak 'on paper' that the defence consider that there is a realistic prospect of having the case dismissed by the Magistrates.<sup>223</sup> If the Magistrates do not commit the defendant for trial, then the accused is usually

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<sup>221</sup> Please note that not all 'either way' offences are subject to committal proceedings, and there are also ways of 'bypassing' these proceedings, but these are beyond the scope of this book. Those interested in researching these 'exceptions' to the normal procedure would be referred to the various practitioner's reference works on the Crime and Disorder Act 1998, 'voluntary bills of indictment', and 'notice of transfer'.

<sup>222</sup> Section 5C, Magistrates' Courts Act 1980. A deposition is a statement taken on oath before a Magistrates' Clerk. Of course, if such witness fails to attend the Court's invitation, then a warrant for his arrest might be issued by the Magistrates.

<sup>223</sup> In such a case the defence will make a 'submission of no case to answer'; *R v. Galbraith* [1982] 2 All E.R.1060. Alternatively, the defence may feel that the Court could be persuaded to commit the defendant for trial on a lesser charge than the one being dealt with at this committal stage.

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'discharged', as opposed to 'acquitted'. This means that the prosecution may re-charge the accused for the same or another offence and start the procedure again.

Where the defendant is committed for trial under either type of committal proceedings, a date is set for a 'plea and directions' hearing at the Crown Court.<sup>224</sup> Furthermore, legal aid will be dealt with at the conclusion of the committal proceedings hearing.

Finally, if the defendant is already on bail, it is usual for such bail to be extended until the Crown Court trial. However, if the defendant has been remanded in custody until committal proceedings, the defence may make a (further) bail application to the Magistrates.

### **3. SUMMARY PROCEDURE - Indictable Offences**

A defendant who is charged with an offence triable only on indictment will appear before the Magistrates' Court only for a 'preliminary' hearing, following which he will be sent straight to the Crown Court.

The purpose of this hearing is to consider and determine (i) whether there is an indictable only offence charged, (ii) whether there are other related offences which should also be sent to the Crown Court, (iii) the grant of legal aid, (iv) the date on which the first Crown Court 'preliminary' hearing (see below) will take place, and (v) whether to remand the defendant in custody or on bail.

### **4. PROCEDURE IN CROWN COURT**

There is a slight difference in the procedure depending on whether the defendant was actually committed for Crown Court trial following committal proceedings, or he was sent to the Crown Court for trial. The former will normally be most cases of either way offences, where committal proceedings will have taken place, whereas the latter relates to indictable only (and sometimes either way) offences where the Magistrates send the case to the Crown Court for trial.

In effect the difference is that where the case has been sent for trial to the Crown Court the first hearing will be a 'preliminary' hearing, whereas the first hearing for a defendant committed for trial at the Crown Court will be the

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<sup>224</sup> This 'plea and directions hearing' must take place either (i) within 4 weeks of committal if the defendant is in custody, or (ii) within 6 weeks of committal if the defendant is on bail; Practice Direction: Crown Court (Plea and Directions Hearings) [1995] 1 W.L.R.1318.

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'plea and directions hearing'. However, there are other differences relating to disclosure, which are only outlined below.

When the case has been sent to the Crown Court, a preliminary hearing will be held whereby the Judge will have the opportunity to consult the prosecution and hear any application for bail. Furthermore, the Judge will set a date for the plea and directions hearing.

Obviously, where the case has been sent, as opposed to being committed, to the Crown Court, there would not have been any disclosure of the prosecution's case. Therefore, the prosecution would have to serve its case, and once this is done (or not done!) there would usually be another hearing whereby the Judge will review the case and confirm the plea and directions hearing date.

Apart from the above distinctive steps which apply when the case has been sent to the Crown Court, what follows is common whether the case has been committed or sent to the Crown Court.

The prosecution must give 'primary disclosure', by disclosing to the defence any previous undisclosed material which might *undermine* the prosecution case and upon which the prosecution does not intend to rely ('unused material'), or confirm in writing that there is no such material.

Next, the defendant must give a defence statement to the prosecution whereby he outlines his main terms of his defence, e.g. alibi.

Following service of the defence statement the prosecution must give 'secondary disclosure', by disclosing to the defence any material which might *assist* the defendant's defence and upon which the prosecution does not intend to rely.

The plea and directions hearing would then be held, whereby the defendant is required to plead to the charge(s). If at this stage the defendant pleads guilty he may, in most cases, be sentenced at this hearing. Otherwise, on a not guilty plea, the Judge will proceed to gather information from all the parties on various matters relating to the case, and a trial date will be set.

There is a special procedure which is followed where the alleged crime is indictable. All trials on *indictment* begin with the 'arraignment'. This is a procedure whereby the accused pleads to each of the counts in the indictment. The jury at this stage is not present, and the purpose of this procedure is to clarify matters so that no inconvenience is caused, for example, by a late change of plea.

**THE TRIAL:** Here follows an outline of the procedure usually followed in a Crown Court trial.

As mentioned earlier, on a not guilty plea there is a full-trial which involves a jury. Indeed, a Crown Court trial would commence with the jury being sworn in, and then being informed of the charges.

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Next, the prosecution will open the case, summarising the facts and the evidence, and in general an introduction of the prosecution case, and the relevant law, will be given to the jury.<sup>225</sup>

The prosecution witnesses will then be called and examined in chief by the prosecution. The defence will then cross-examine them, and the prosecution may re-examine them, if the prosecution feels that it has become necessary for clarification purposes.

Next, the defence will present their case, by making an opening speech.<sup>226</sup> Following this stage, the accused may testify but is not compelled to do, otherwise the defence witnesses will be called to be examined in chief by the defence and cross-examined by the prosecution.

At the end of the evidential stage, counsel for the prosecution will make a closing speech, followed by counsel for the defence.

The Judge will then sum up, commenting on the evidence and explaining the role of the jury and directing them to retire and consider their verdict, which must be unanimous.<sup>227</sup>

If the jury delivers a guilty verdict then the judge will proceed to deal with mitigation, pre-sentence reports (if appropriate), and bail.

If the verdict is not guilty the accused will be discharged.

**SENTENCING:** In so far as sentencing is concerned, the Criminal Justice Act 1991 (as amended by the Criminal Justice Act 1993) lays down a structured approach, in that the starting point is a fine. If a fine is not appropriate, i.e. the offence is too serious, then 'community sentence' is to be given. Again, if the offence is too serious for community sentence,<sup>228</sup> then a custodial sentence is imposed.<sup>229</sup>

<sup>225</sup> Note that under the Criminal Procedure and Investigation Act 1996, evidential matters which are to be challenged by the defence are not to be dealt with before the jury, but at a preliminary hearing before the Judge.

<sup>226</sup> It must be noted that it may be that the defence would not adduce any evidence and therefore may proceed to make a closing speech.

<sup>227</sup> The jury is allowed to ask questions on any relevant matters, and the Judge will answer them. Please note that after a certain period of time has expired (usually 2-3 hours) following the jury's retirement, the Judge may indicate that he will accept a *majority* verdict by no less than ten to two, or eleven to one. Of course, if the jury still fails to agree, then there may be a new trial before a new jury.

<sup>228</sup> Section 152 of the Criminal Justice Act 2003. Furthermore, such sentence should be examined against the five principal purposes of sentencing, i.e. protection of the public, punishment of the offender, reduction of crime, rehabilitation of the offender, and reparation for the victim; s.142, Criminal Justice Act 2003.

<sup>229</sup> The Criminal Justice Act 2003 makes significant changes to sentencing in criminal cases. For example, s.224 classifies for sentencing purposes an offence as either a specified violent offence or a specified sexual offence. A serious specified offence is one that involves death or serious personal injury, and carries a penalty of life imprisonment or ten years' custody or more.

What follows is a brief outline of the sentences available to the Crown Court.

- (1) **Custodial Sentences:**<sup>230</sup> If the offender is aged between 18 and 21, he is detained in a young offenders institution, otherwise is sent to prison. Obviously, for offenders under the age of 18, different sentences would apply.
- (2) **Suspended Sentence of Imprisonment:**<sup>231</sup> A term of imprisonment not exceeding 2 years may be suspended for a period of 1-2 years, unless the offender is aged between 18 and 21, where his detention cannot be suspended.
- (3) **Community Sentences:** These consist of (i) Probation,<sup>232</sup> (ii) Community Service Orders,<sup>233</sup> (iii) Combination Orders,<sup>234</sup> (iv) Curfew Orders,<sup>235</sup> (v) Drug Treatment and Testing Orders,<sup>236</sup> and (vi) Attendance Centre Orders<sup>237</sup> for offenders under the age of 21.
- (4) **Compensation Orders:**<sup>238</sup> The Crown Court may order an offender to pay an unlimited amount of compensation (subject to his means) to the victim of an offence. This order may be combined with any other sentences.
- (5) **Forfeiture Orders:**<sup>239</sup> Any property in the offender's possession at the time of apprehension may be forfeited by the Court, provided the offender

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<sup>230</sup> Criminal Justice Act 1991.

<sup>231</sup> Powers of Criminal Courts Act 1973.

<sup>232</sup> Section 2, Powers of Criminal Courts Act 1973. The offender is placed under the supervision of a probation officer and 'probation requirements', e.g. psychiatric treatment for alcohol dependency, are usually imposed. Please note that the offender's consent is usually required.

<sup>233</sup> Section 14, Powers of Criminal Courts Act 1973. This is imposed when the Court feels that the offender should be deprived of leisure time or should make reparation to community for his offending. Please note that the offender's consent is required.

<sup>234</sup> Section 56, Criminal Justice Act 1991. This is in effect a combination of Probation Order and Community Service Order. Please note that the offender's consent is required.

<sup>235</sup> Section 12, Criminal Justice Act 1991. The offender is required to stay for specified periods in specified places, e.g. to remain at his residence between the hours of 20:00 and 7:00. The offender's consent is required for this sentence.

<sup>236</sup> Sections 61-64, Crime and Disorder Act 1998. This is available to offenders over the age of 15, and it is an order whereby the offender is required to submit to treatment for drug dependency and may also be required to submit some tests indicating his progress. The offender's consent is required for this order to materialise.

<sup>237</sup> Sections 17-19, Criminal Justice Act 1982. This requires the offender to attend a specified place and take part in supervised activities. Please note that the offender's consent is not required.

<sup>238</sup> Section 35, Criminal Courts Act 1973.

<sup>239</sup> Section 43, Powers of Criminal Courts Act 1973.

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was convicted for an offence which (i) is indictable, and (ii) two or more years' imprisonment has been imposed on the offender.

- (6) **Confiscation Orders:**<sup>240</sup> Any proceeds of crime may be subject to a confiscation order by the Court. Such order may be combined with any other sentences.
- (7) **Costs Orders:** A convicted offender may be ordered to pay costs to the prosecution, in addition to any other sentences.<sup>241</sup> If the accused is acquitted then he may be entitled to the defence costs to be paid.<sup>242</sup>
- (8) **Deferment of Sentence:**<sup>243</sup> The Court may defer sentence for up to six months. In this case, the Court must specify the offender's expected conduct during the period and also the sentence likely to be imposed if he does not comply. Although it may at first seem that this is similar to a Probation Order, in practice it is only granted if the offender claims that a recent change in circumstances mean that it is unlikely he re-offends. For example, if the offender is an unemployed person convicted of theft, but he has been offered a stable job. In such a case the Court may decide to defer sentence to see how the offender reacts to the change in his circumstances, and if the offender's conduct has been favourable then, at the end of the period of deferment, a custodial sentence would not be imposed by the Court.

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<sup>240</sup> Sections 71-102, Criminal Justice Act 1988. See also s.83, Crime and Disorder Act 1998.

<sup>241</sup> Section 18(1), Prosecution of Offences Act 1985.

<sup>242</sup> Section 16, Prosecution of Offences Act 1985.

<sup>243</sup> Section 1, Powers of Criminal Courts Act 1973.

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