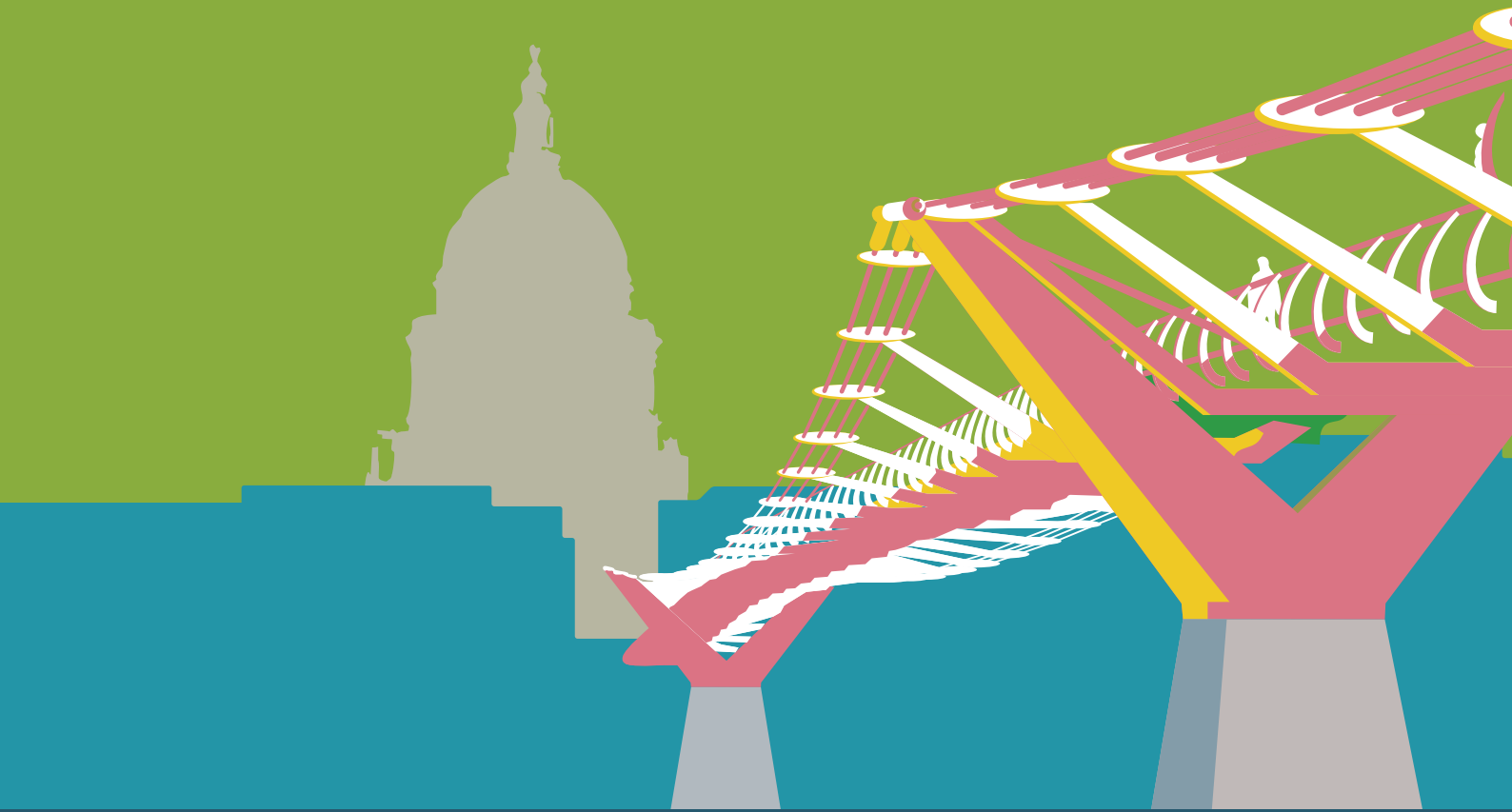


GUIDE:

# An Introduction to Litigation



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## THE AIM OF THIS GUIDE

This guide is designed to provide an outline of how to resolve a commercial dispute using the courts of England and Wales. Throughout this guide we will be referring to court proceedings in England and Wales because Scotland and Northern Ireland both use different court systems. Moreover, this guide will refer to civil claims only. This guide condenses a typically long and possibly complex litigation process. The information provided aims to be thorough and detailed but this guide does not intend to replace professional legal advice. As such, there are many more details not covered here and the full range of issues (some highly complex) cannot be addressed entirely in this guide. It is always our firm advice to seek legal advice should you or your organisation be involved in a dispute.

## 1. What is Litigation

Litigation is the process of an individual or a business taking legal action against one or more parties to resolve a dispute. Litigation is governed by a procedural code known as the Civil Procedure Rules. They apply to all civil claims started after April 1999 in England and Wales. The aim of these rules are to enable the courts to deal with civil cases fairly.

## 2. Alternative Dispute Resolution

It is generally accepted that litigation should be used as a last resort. There may be other methods of resolving the dispute which are available to the parties these are known as Alternative Dispute Resolution ('ADR'). ADR could include simply offering to enter into direct negotiation with your opponent, embarking on mediation (the use of an independent person to assist the dispute that is binding on the parties). Each of these methods has their various pros and cons and ADR may not work for all disputes but it is important for parties to try and settle a dispute before commencing court proceedings. You must consider whether any of these methods are appropriate prior to issuing a claim at court and at various different stages throughout litigation. The court will expect all parties to have considered whether ADR is appropriate before and during litigation.

## 3. The Pre-Action Stage

The parties to a dispute are expected to try and resolve it before a claim is issued at court. This is known as the pre action stage. All actions taken to resolve a dispute by prospective parties before court proceedings have been issued are referred to as 'pre-action conduct'.

### 3.1 Pre-Action Protocols

Pre-Action protocols are a series of steps that the court expects the parties to a claim to follow before a claim can be issued at court. There are currently 13 protocols in force that apply to certain types of claims for example professional negligence, personal injury, construction and engineering disputes and clinical disputes. Pre Action protocols are approved by the Court and can be found annexed to the Civil Procedure Rules. In cases where no specific pre-action protocol applies the Practice Direction Pre-Action Protocol will apply.

Commonly, the protocols specify that a party wishing to begin a claim must send a letter before claim to their opponent, setting out the details of the claim, what they want and if money, how the amount is calculated. The opponent must respond to the letter before claim confirming whether the claim is accepted and if it is not accepted the reasons why. The parties are also encouraged at an early stage to send to each other documents relevant to the issues in dispute. The court will not look favourably on a party if they have withheld documents which are later used to aid settlement after the commencement of court action. This will likely result in costs penalties against the non-compliant party (see Costs below). If no response is provided or the claim is not accepted, the party making the claim may have the right to issue a claim at court (See Issuing a claim below). If the parties do not comply with the Pre-Action protocols their conduct may be criticised and their costs may be penalised by the Court.

### 3.2 Limitation period

A limitation period imposes a time limit within which a party can bring a claim against an individual(s) or a business. The Limitation Act 1980 sets out various time limits for specific types of claims. For example breach of simple contract claims have a limitation period of 6 years or 12 years if the contract is executed as a more formal deed. Time begins to run from the date of breach. Before commencing a claim, it is of paramount importance that a party wishing to make a claim checks that the time limit for making the claim has not expired. If the limitation period has expired the claim will be statute barred and the opportunity to make a claim will have passed, unless the other party to the dispute agrees or the court's permission is obtained to make a claim out of time.

### 3.3 Injunctions

There may be other factors to consider at this stage depending on your circumstances. For instance you may need to make an urgent application to the court for an injunction. This is a request for permission to freeze an opponent's assets. This may be required if your opponent pose a flight-risk or you may have to consider preserving or organising documents and information required to support your claim.

### 3.4 The opponent's financial position

Prior to issuing a claim consideration should be given to whether the party you are claiming against has sufficient funds and/or assets to meet your claim. If the party receiving the claim does not have sufficient funds or assets to pay a financial award and the costs awarded to you by the Court this could lead to problems later on (see Enforcement below). It may not be worth commencing a claim and incurring extensive legal costs if you suspect that the party you are claiming against is unlikely to have sufficient funds and assets to satisfy the claim. There are companies that can provide wealth and asset tracing reports on individuals.

## 4. Funding

Perhaps one of the most important things to consider before making or if you are defending a claim is how you will the legal costs of the claim. Litigation can be time-consuming and expensive. This may make low-value disputes unappealing as the costs of bringing the case to trial could outweigh the amount disputed. In litigation, the general rule is that the unsuccessful party pays the successful party's costs. However, there are certain circumstances where a successful party could be liable for the unsuccessful party's costs (see Costs below). Even if a party is successful, it is rare for a court to award that the loser pays all of the winner's costs. As a rough guide, our experience tells us that the loser is normally ordered to pay 40 –70% of the winner's costs therefore, the winner will still be liable to its legal representation for any unpaid legal costs. It is therefore, important that the parties to a claim discuss their funding options available to them with their legal representatives. It is also important that the party making or defending a claim understands and agrees to a fee structure that suits them and their financial capabilities. Our advice would also be for a party wishing to make a claim to check whether they have legal expenses cover included within any of your insurance policies. This may provide an alternative source of funding for their claim.

## 5. Issuing a claim

A claim is a legal demand by an individual or a business for compensation, payment or reimbursement from an individual or business for a loss suffered under a contract or as a result of an injury. To issue a claim, a document called the claim form must be sent to a Court –this is known as 'filing' a claim. The claim form contains a summary of your claim and information such as the names of the parties, the nature and value of the claim. A court fee is payable when filing a claim. More information on court fees can be found here: <https://www.gov.uk/court-fees-what-they-are>. The court will subsequently "issue" the claim, by stamping it and checking for procedural compliance. The party form at court is the Claimant. The party which the claim is being made against is the Defendant. Once the claim has been issued by the Court the Claimant has 4 months from the date of issue to send ('serve') the Claim Form on the Defendant. There are very strict rules on how and when a defendant must be served. In straightforward matters the claim form is usually accompanied and served with the particulars of claim, which is a comprehensive document setting out in detail the allegations being made against the Defendant and the losses suffered by the Claimant. If the particulars of claim are not served with the claim form it can be served separately but must be served no later than 14 days after the claim form has been served.

## 6. Responding to a claim

When the particulars of claim have been served the defendant must respond to this within 14 days of service and in one of the following ways:

- File or serve an admission to the claim whether in full or in part;
- File a defence to the claimant court and serve a copy on the claimant.

- Where a claim is admitted only in part the defendant should file both an admission (confirming what aspects of the claim are admitted) and a defence (setting out what aspects of the claim are denied and reasons why).
- File an acknowledgement of service if more time is required to respond to a claim. This will allow the Defendant a further 14 days (28 days from the date of service of the particulars of claim) to respond to the claim.

A defendant may issue a counterclaim with the defence (which is a separate claim against the claimant and is based on the same or related facts) if the defendant has suffered losses as a result of the dispute. It is important that a response is provided within the above timeframes as failure to do so could result in the defendant being unable to put forward a defence to the claim. The defence must deal with each issue raised in the claim form and in particular – you can respond to these by stating if each allegation is:

- Admitted
- Denied
- Neither admitted nor denied, but is to be proved – by the Claimant using evidence, this part of the claim

A defendant may issue a counterclaim with the defence (which is a separate claim against the claimant and is based on the same or related facts) if the defendant has suffered losses as a result of the dispute. It is important that a response is provided within the above timeframes as failure to do so could result in the defendant being unable to put forward a Defence to the claim. Upon receipt of a claim the defendant should consider whether ADR is appropriate. These alternative methods of resolution may assist the parties in reaching early settlement.

## 7. Directions Questionnaires and Directions

Once the parties have formally set out their respective cases as described above the court will invite the parties to complete 'Directions Questionnaires' to provide further information about their case to the court. For instance, the number of witnesses needed or what kind of expert evidence is required – if at all. In addition the parties will be asked to file proposed directions (a timetable of the different stages of litigation such as witness statements, disclosure, expert reports, trial date) which are used to manage the claim, ensuring efficient handling. The parties should try to agree (where possible) a set of directions to file with their directions questionnaire for the court's approval. The Court may approve the agreed directions or it may set its own directions.

## 8. Allocation

Upon receipt of the above documents and as part of the court's active management powers, a hearing called the 'Case Management Conference' (the CMC) may be called to decide the future conduct of the case. The court will allocate the case to a 'track' and will set directions. The aim of this hearing is to identify and narrow the issues. The allocation of a claim to a track depends on the value or complexity of the case. A 'track' is a defined, procedural route which dictates how a claim will progress and the allocation stage is part of the court's active case management powers which are designed to ensure the claim is dealt with justly and efficiently. These tracks have different rules to cater to the different types of claims. These tracks are: the Small Claims Track; the Fast Track; and the Multi Track.

The **Small Claims Track** deals with claims with a value below £10,000 and is suited to smaller disputes or more straightforward claims which do not require the involvement of legal representatives. The proceedings are much less formal (eg. less strict rules of evidence) and very limited costs are recoverable by the successful party.

The **Fast Track** deals with claims between £10,000 and £25,000 and cases assigned to it are likely to last no more than a day at trial. Other rules apply including those relating to the use of experts, disclosure and witness evidence. There are also fixed timetables and fixed costs aimed to streamline and speed up the process.

Claims with a value above £25,000 are allocated to the Multi Track. These cases can sometimes be quite complex or simply worth a high value. The Multi Track is therefore more flexible than the other two tracks but is subject to more active costs and case management by the court.

## 9. Costs Budgeting

The Cost Budget sets out in detail the likely costs of each stage of litigation up to and including the trial. A costs budget takes the form of a document called the 'Precedent H' and can be very complex due to its comprehensive nature. It is common for costs draftsmen to be instructed to prepare the Precedent H.

Generally, where the value of a claim on the claim form exceeds £25,000 but is less than £50,000, cost budgets must be exchanged between the parties and sent to the court with the Directions Questionnaire.

In any other case the budget must be filed and served no later than 21 days before the case management hearing. It is important for the parties to do this and to serve this in time otherwise the winning party will be restricted to recovering only the court fee (unless the court orders otherwise) – and nothing else.

In some cases such as claims made on behalf of children, against litigants in person (individuals/business with no legal representation) or claims subject to fixed costs are exempt from the cost budgeting process.

The parties should try to agree the costs for the different stages of litigation where possible. However, if no agreement can be reached the court will examine the costs budgets and will make a final decision on the party's legal costs. After the trial the court will assess how much of the successful party's costs are recoverable in accordance with the previously approved costs budgets (see Costs below).

Increasingly, the CMC is also being used to deal with the issue of costs, allowing the courts to scrutinise the parties' cost budgets. These types of hearings are called Costs and Case Management Conference (CCMC).

## 10. Disclosure

Disclosure is the process whereby the parties to a claim notify each other of the existence of documents relevant to the claim. A 'document' for the purposes of disclosure is anything capable of recording information (eg. photographs, emails, CDs, computer programs etc). At this stage parties are usually required to give standard disclosure this includes all documents that the parties currently have in their control or have previously controlled and which they intend to rely on at trial. This also includes the disclosure of documents that may be harmful to a party's claim and supportive of the other party's claim. When giving standard disclosure a party is required to make a reasonable search for documents and this will depend upon the number of documents, nature, complexity and the expense of retrieving any particular document.

Documents subject to disclosure are usually recorded within a court form called the list of documents. In this form a party should list in chronological order the documents that it has which are available for inspection, documents which are no longer in the party's control, documents that are available but the party objects to inspection of the same, where the documents are located and how they are stored.

This list will be exchanged between the parties. Once a party has received its opponent's a list of documents they have the right to ask to inspect documents from that list. Not all documents in this list can be inspected. In some circumstances the party completing the list of documents will object to certain documents being inspected by its opponent if it is believed that a document is 'privileged'. There are different types of privilege that can apply. One example is legal advice privilege which protects correspondence aimed at the giving and receiving of legal advice between an individual and their solicitor.

Due to the importance of Disclosure, it is therefore highly important to preserve documents – in fact you have a duty to do so – once litigation has commenced or once you become aware litigation is likely. You must be careful not to dispose of documents or delete files that are likely to be relevant to the claim.

Furthermore, the duty of disclosure continues until proceedings have concluded and thus applies to any documents created or coming into your control during the course of proceedings.

## 11. Witness Statements

Once disclosure is completed, the court typically orders the parties to exchange witness statements. A witness statement contains the evidence a witness will give orally at trial. This witness statement must not have any inadmissible or irrelevant material and should be drafted in the words of that witness. It must also be accompanied by a statement of truth signed by the witness. A statement of truth must be included in any statement of case (eg. the particulars of claim, defence) witness statement, expert's report, that confirms that the facts stated in the document are true. If witness statements are not exchanged in accordance with the deadline given by the court, this may result in the witness not being allowed to give evidence at the final hearing. When you call a witness to attend the hearing to give oral evidence your barrister will ask them questions with the aim of extracting evidence from them to support your case. They may also be cross-examined by your opponent which is when the witness is questioned by your opponents barrister with the purpose of, challenging your witness' evidence and credibility. The outcome of a trial can rest heavily on witness evidence therefore, it is vital to identify witnesses at an early stage and to confirm if they are willing and available to assist at the trial.

## 12. Instructing Experts

Not all cases will require an expert to provide evidence but where specialist or technical knowledge is required, an expert will be called to assist the judge in addressing issues within their expertise/knowledge. You may instruct an expert to obtain a report but you will require the court's permission to rely on expert evidence. This is done by providing their details and reasons for requiring an expert in the Directions Questionnaire (see Directions above). Generally, the parties instruct their own experts but the court does have the power to order a single expert-instructed jointly by both parties. In some cases, where the parties have instructed their own experts the court may order discussions between experts to narrow the issues for trial and encourage the experts to agree on common issues. A report is normally prepared – presented as an independent product – and like other witnesses, the expert(s) may be called to give oral evidence at trial and/or be cross-examined. It is important to note that expert witnesses have a duty to the court to assist in all matters within their expertise. This overrides any duty owed to the party instructing them. Expert witnesses can be instructed in the early stages too – such as during the pre-action stage if you are the Claimant – to provide an opinion. The parties must also bear in mind the costs of instructing an expert, and these fees must be paid in addition to their legal fees. Experts can be costly particularly if the case is highly complex or involves large volumes of documentation. Whilst this is something to bear in mind an expert opinion can be vital to understanding the strength of your case.


## 13. Instructing a Barrister

Your legal representative will likely instruct a barrister to argue your case before the court at a trial. It is common for a barrister to be part of your legal team – including your solicitor or legal representative – at an early stage in a dispute. A legal representative will select a barrister based on their specialism, skills and expertise which makes them suitable for the dispute. You may see some barristers referred to as 'Queen's Counsel'; usually their names will end with the title 'QC'. If the reigning monarch is a king, they are referred to as King's Counsel or KCs. Only a limited number of barristers are appointed as QC and this appointment represents a mark of outstanding ability. All other barristers who are not appointed as QCs are referred to as junior barristers – or 'juniors'. Generally, a QC is seen to be more skilled, more experienced and more costly than a junior. A barrister can add value to a dispute, by:

- Providing an opinion on the merits of your claim before proceedings have been issued;
- Drafting legal documents;
- Providing legal advice where they have particular expertise or experience – this can be at any stage of litigation;
- Attending interim hearings on behalf of a party.

## 14. Pre Trial Checklists

After the exchange of witness evidence the parties may be invited by the court to complete 'pre-trial checklist' (usually at least 8 weeks before the trial date). They allows the court to check if previous directions have been complied with, to confirm whether any further directions are required before the Trial and if not, to set a date for



the trial. Parties must include details of their experts, witnesses, barristers and their availability. Parties are required to file and serve pre trial checklists with the court and each other by a date specified by the Court. If parties have not filed pre-trial checklists on or before the date specified, they run the risk of their claim, defence or any counterclaim being struck out. Once the pre trial checklists have been filed and no further directions are required the court will fix the trial date, time, location and will give a time estimate for the trial.

## **15. Preparation for trial**

When the trial date has been set the parties will need to ensure that the following documents are prepared:

### **15.1 Trial Bundles**

The parties will need to send a trial bundle to the court no more than 7 days and no less than 3 days before the trial. The trial bundles will become the folders from which the judge and the parties will work from and will refer to during the trial. Generally it will contain the parties disclosure documents, the claim form, particulars of claim, defence, witness statements, expert reports, etc. Wherever possible, the parties should try to agree the contents of the bundles before it is filed at court.

### **15.2 Case Summaries**

The court will expect the parties to include a case summary in the trial bundle. This document will provide the trial judge with a brief overview of the facts of the case and the issues in dispute. The parties should try to agree (where possible) the contents of the case summary before sending it to the court.

### **15.3 Skeleton Arguments**

A skeleton argument summarises the arguments and authorities (previous case law, legislation, etc) upon which a party intends to rely on at the trial. The skeleton argument is usually prepared by your barrister but can be prepared by your solicitor. This document must be filed at court and exchanged with the other side at least 3 days before the trial.

### **15.4 Witness summons**

A witness summons is a document issued by the Court requiring a witness to attend court to give evidence or to produce documents to the court. A summons must be issued at least 7 days before the trial. You may need to secure the attendance of witnesses and experts at the trial if you suspect that the witness will not turn up at the trial. A party will need to obtain the court's permission to have a summons issued less than 7 days before the trial. The party requiring the witness summons is required to send a cheque for an amount of his choosing to accompany the witness summons request to cover travel expense.

## **16. Offers to settle**

Both the Claimant and the Defendant can inform each other prior to and during the litigation process of what they will accept or offer to resolve a dispute. Parties receiving an offer should consider the same carefully as a failure to accept a reasonable offer could result in cost consequences.


### **16.1 Part 36 offers**

The aim of a Part 36 offer is to encourage your opponent to settle without going to trial. Part 36 offers are generally open for acceptance for 21 days. These offers also set out the costs and other consequences that a party may face if it rejects a reasonable offer to settle. There are very strict rules that must be adhered to when making a Part 36 offer failure to comply with these rules may render an offer unenforceable. If a party is considering making a part 36 offer then this must be made no later than 21 days before the trial. The earlier the offer is made the better the cost protection.

### **16.2 Calderbank offers**

As an alternative to Part 36 offers a party may make a calderbank offer. These types of offers are more flexible than a part 36 offer and are often be used when a party wants to put a time limit on their offer or if there is less than 21 days to trial and a party wishes to make an offer that puts the other party at risk of costs.





During the trial preparation stage both parties should re-consider existing offers to settle and or whether to make any further offers to settle. If the parties are able to settle before the trial, you must notify the court – otherwise costs penalties may be imposed.

### **17. Trial**

The trial begins with the Claimant's barrister setting out their case, followed by the Defendant's barrister making its submissions. Evidence will then be heard from witnesses and experts. Both parties will be given the chance to challenge witnesses and experts during cross-examination (see Witness Statements above). Barristers for both parties will then make their closing submissions to conclude their case. The judge then considers all the issues and evidence presented by the parties during the trial before coming to a decision on the case: this final decision is called the judgment. This judgment can be given in court immediately after the trial or it can be delivered at a later date to the parties – either in writing or at a hearing.

### **18. Costs**

The unsuccessful party is responsible for the costs of the successful party, but as described above, only in exceptional circumstances does a party recover the full amount of their legal costs incurred. Generally, the decision of the unsuccessful party's liability for costs is subject to the court's discretion, reviewing whether the conduct of the parties both before and during the proceedings was reasonable and/or proportionate. Examples of behaviour that could be considered unreasonable or disproportionate:

- refused to engage in ADR;
- rejected a reasonable settlement offer from the other side;
- incurring 'wasted costs' making unnecessary applications;
- withholding information at the outset or during disclosure;
- intentionally putting forth a vague case (eg. unclear defence, statement or particulars of claim) which prevented –

The court decides how much is to be awarded to the successful party in respect of their costs, either immediately at the end of the trial ('summary assessment of costs') or after the parties have submitted a bill of costs which details all work carried out by the legal team and the costs of this work. This will be examined by the court and the final amount to be paid decided at a hearing ('detailed assessment'). If costs budgets (see Costs Budgeting above) have previously been approved by the court, the court will use these to assess how much of the successful party's costs are recoverable, broadly complying with the amounts set out in the approved costs budget.

### **19. Appeals**

You may be able to appeal the outcome of the trial if you feel this was unsatisfactory or if you were unsuccessful. However, there are few circumstances that allow you to appeal – these are called 'grounds' and these are very limited. These grounds are if the decision was:

- Wrong due to an error in law or was a misunderstanding of fact, or;
- Unjust due to a serious procedural irregularity.

Following the conclusion of the trial, it is necessary to apply for permission before you are able to pursue an appeal. Permission is only granted if there is a real prospect of success or any other compelling reason for the appeal. This is called the permission test. In addition, if you do wish to appeal you must apply to do so no later than 21 days from the date of the original decision, as a general rule. This is done by completing a form called an Appellant's Notice and paying the correct fee. It is important to note that an appeal will be limited to reviewing the decision and will not act as a second attempt at a trial. Fresh evidence will not be allowed at the Appeal hearing. Further there is also a reluctance to overturn a judge's findings of fact (especially if this was based on witness credibility).



## 20. Enforcement

While you may have been successful at trial this does not necessarily mean the court process is over. As explained, you will receive a judgment at the end of the trial (see Trial above). This judgment could include an award of 'damages' as compensation for your losses suffered. For example, for a breach of contract claim your damages will likely be the financial loss you have suffered as a result of that breach. In addition, an award of legal costs might have been made. If the unsuccessful party is unable or unwilling to pay the amount owed to you – called the 'judgment debt' – you may need to consider issuing enforcement proceedings. As the judgment holder you must take appropriate steps to enforce the judgment. Briefly here are several methods of doing so, among others:

- Applying for a bailiff to seize their goods up to the value of the judgement debt;
- Applying for a charging order over property to secure the value of the debt against their property. When used in conjunction with an order for sale, the unsuccessful party can lose their home if the judgement debt is not paid;
- Initiating bankruptcy or liquidation proceedings to wind up the company or make your opponent bankrupt;
- Applying for an attachment of earnings – which if granted will result in payments being made to the successful party from the unsuccessful party's salary until the judgement debt has been paid or;
- Applying for third party debt orders to secure the judgment debt against any monies held in the opponent's bank account or any trade debts owed to them by other parties. The court may order that these debts be paid directly to you.

These options may not be suitable for all claims as each of these options comes with their own advantages and disadvantages. Each case must be considered on a case by case basis to determine the best option for the successful party.

## Saunders Law - About us

Our experienced commercial litigation team act on a wide range of contentious matters for both Claimants and Defendants, covering various sectors. We have a wealth of experience of handling straightforward as well as complex and high value litigation.

If you have any questions about this guide or any questions regarding a contentious matter please do not hesitate to contact a member of our Commercial Litigation team who are always happy to help. If you or your business would like to discuss a claim – whether you are considering commencing litigation or you are faced with litigation – please contact us on **0207 632 4300**.

Matthew is a partner who along with James Saunders leads the Dispute Resolution team at Saunders Law.



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Saunders Law is a central London law firm, practising from offices facing the High Court in the Strand.

The practice traces its roots back to 1974 and is the successor practice to Saunders Law Limited. Our partners pride themselves on being accessible to the firm's clients, and they have a "hands on" approach to legal work and to the supervision of staff working on our client's cases.

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