



**A guide to commercial litigation:
a step by step approach**

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Commercial dispute
resolution



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Ranked in
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– Commercial litigation

1. What lies ahead – an introduction



This guide provides an outline of the different stages in court proceedings in England and Wales (the court system is different in Scotland and Northern Ireland) and sets out some of the options available to those involved in litigation. It focuses on commercial disputes in the High Court.

As the illustration opposite shows, litigation is a process. The guide aims to take the reader through each stage, broadly in the order that it happens.

Achieving a successful outcome in litigation, however, requires a great deal more than knowledge of the process. It usually depends on hard work, a strong team, careful preparation and a willingness to review and flex the approach as a case proceeds.

There are a number of important steps and rules in English civil proceedings that are not covered by this guide. For example special rules apply to certain types of case, such as family proceedings and mortgage possession proceedings. There are also different rules in the Commercial Court. Every case will differ.

This guide is based on court rules as of March 2023 – and of course, these rules may change. It should not therefore be relied on by anyone contemplating bringing a claim, or who faces the prospect of defending a claim.

Should you or your company become involved in a dispute, we recommend you seek immediate legal advice.

“Clever, thoughtful people. Very responsive and down to earth. They make you feel like you’re their most important client, even though they must have many more.”

Legal 500 Commercial litigation premium 2024

Stages in litigation

Before litigation starts

Preliminary investigations and document preservation



Negotiated dispute resolution



Pre-action protocols (including letter of claim and response)



Preparing your case

Claim form and particulars of claim



Defence (and any counterclaim)



Reply (and any defence to counterclaim)



Allocation, directions and cost budgeting for the case



Disclosure of documents



Witness statements



Expert reports and meeting of experts



Trial and enforcement

Trial preparation



Trial



Enforcement



Appeals

2. Before litigation starts



Pre-action protocols

The English courts take the view that litigation should be a last resort. For some disputes, a specific pre-action protocol will apply – for example, in respect of professional negligence and defamation claims. If a specific pre-action protocol applies, then save in exceptional circumstances such as for matters of great urgency, you will need to comply with the detailed requirements of that protocol. This will involve, among other things, the early exchange of information and documents.

Even if one of the specific pre-action protocols does not apply, as soon as litigation is contemplated, parties are under a duty to preserve relevant documents under their control. You will also still be expected to make serious attempts to resolve your dispute without recourse to the courts. In all disputes, therefore, the courts expect you to exchange information and documents and to behave reasonably to try to avoid litigation. This will normally mean that the claimant should write a detailed letter of claim to the defendant setting out the basis of the claim and giving the defendant a reasonable time to ask for more information and to respond in detail to the claim. The parties should, if possible, conduct genuine and reasonable negotiations with a view to settling the claim.

The parties should also consider negotiated dispute resolution (see opposite).

If a party is found not to have acted reasonably in attempting to settle the dispute before proceedings are started, then the courts can take this into account at a later stage when deciding which party should pay costs, and the level of those costs (see page 4).

Negotiated dispute resolution

Parties to a dispute are encouraged by the courts to consider whether some form of negotiated dispute resolution (or NDR) would be more suitable than litigation. Whilst the parties can choose whatever form of NDR they consider to be appropriate, the more conventional options include:

- Arbitration – a form of dispute resolution (normally confidential) pursuant to which one or more arbitrators decide a case rather than a court appointed judge.
- Mediation – this is a facilitated negotiation assisted by an independent third party mediator appointed by the parties.
- Early neutral evaluation by an independent third party, who advises in a non binding way on the merits of each party's position.
- Expert determination – in which an independent expert is appointed to resolve the matter by producing a legally binding decision.
- Other forms of discussion and negotiation.

It might be that one or more of the above procedures is provided for in a contract which forms the basis of the dispute. If the contract does provide for some sort of NDR then the parties should, save in exceptional circumstances, follow the procedure provided for.

Consideration should also be given to other ways of settling a dispute – for example, by referring a complaint to an ombudsman.

Whilst it might be possible to settle the case before proceedings start, if this is not possible you can still agree a settlement with the other parties at any time during the court proceedings – even after the trial. However, most cases do settle before trial.

Costs

Litigation can be expensive. You should therefore seek advice on how much court proceedings might cost. Be aware that litigation is often unpredictable, so it can be hard to estimate costs accurately. Generally, English lawyers charge for their work on an hourly basis.

The general rule in English litigation is that the losing party pays the winning party's reasonable costs – although it is rare that all of these costs will be recovered. A losing party therefore usually has to pay not only their own costs but also those of their opponent.

It might be possible for you to enter into a conditional fee agreement (under which you would pay no, or a reduced, fee if the case is unsuccessful, but generally a higher than normal fee if the case is successful). You will not be able to claim the success amount from your opponent.

There are other ways in which litigation might be funded (in other words, not directly by the claimant or defendant). It might be possible to find a third party funder, who would agree to finance your legal costs, normally in return for a share of the proceeds if the case is successful. These types of arrangement will be allowed by the courts if they have no additional features that make them contrary to public policy. The third party funder could be liable for the costs of the opposing party if the claim is unsuccessful.

“Damages based agreements” (or contingency agreements) are also permitted, although they are not widely used. Under these agreements, fees are based on a percentage of recoveries from the litigation.

Alternatively, insurance is sometimes available for litigation costs. There are two types of insurance available. ‘Before the event’ (“**BTE**”) policies can be taken out (usually with an annual premium) to provide cover for possible future disputes. You may also be able to take out an ‘after the event’ (“**ATE**”) policy to cover litigation costs once a dispute has arisen. These policies generally cover a party's own expenses as well as the risk of having to pay an opponent's legal costs if a party is unsuccessful in the litigation. You will not be able to claim the insurance premiums from your opponent even if you are successful in your claim. In some circumstances policies can also be obtained to cover your own solicitor's costs, in part. Insurance is unlikely to be available if the prospects of success are not good.

Although the third party funder market is increasing, it remains the case that the vast majority of major commercial cases in England and Wales are not funded by such alternative means. You should seek legal advice on your options.

Which court?

The English courts might not have jurisdiction to hear your dispute. For example, a contract that is the subject of a dispute might have a choice of jurisdiction clause in favour of a foreign jurisdiction, and this will normally be respected by the English courts.

Large commercial cases in England and Wales are most likely to be brought in the Business and Property Courts, which is a division of the High Court. Lower value claims must usually be issued in a County Court. There are plenty of County Courts around the country.



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Other considerations before starting litigation

Preservation of documents

Once litigation is reasonably in contemplation, the parties are under an obligation to preserve all documents (paper and electronic, including recordings of telephone calls). Automatic document destruction policies should be suspended.

Pre-action disclosure

In certain circumstances, it might be appropriate to apply to the court for copies of documents from an intended defendant before proceedings have started.

Preservation of privilege

You do not have to provide legally privileged documents to other parties as part of the disclosure process in English litigation. Care should therefore be taken to ensure that harmful, non-privileged documents are not created. See Section 3 for an explanation of privilege.

The defendant's ability to pay

Does the defendant have any assets? If you are bringing a claim, it is important to find out if the defendant has any assets or whether the claim is covered by insurance. Otherwise, there is a danger that a successful claim is unenforceable (see enforcement overleaf).

Interim measures

Is urgent assistance needed from the courts, such as a freezing order? For example, is there a risk of the defendant moving its assets out of the jurisdiction to avoid meeting a judgment in your favour? If this is a possibility, you will need to act urgently to protect your position.

Limitation periods

Are there any 'limitation periods' you should be aware of? In short, a claim must be brought within a certain period of time – normally within six years of a dispute arising – although this is a complex area of the law and the time periods can vary depending on the facts and the type of claim.

3. Preparing your case



Bringing and defending a claim

A claim is started by a claimant issuing a claim form in the relevant court office. Particulars of claim, which set out the alleged facts on which the claim is based, may be included in the claim form or served within 14 days of the date of service of the claim form. The claim form and particulars of claim also set out what remedies you are seeking from the court – e.g. damages, an injunction and a declaration. Unless otherwise agreed (or another exception applies), the key documents upon which a party relies and the key documents necessary to allow the defendant to understand the claim must also be provided. This includes any documents which adversely affect the claim. A formal search for documents at this stage is not required. The claim form and particulars of claim must then be served on (that is, formally delivered to) the defendant within four months of the date of issue, or six months if the defendant is not in England and Wales.

The defendant then has 14 days to file a defence (or 28 days if they have filed an 'acknowledgment of service' form) responding to the particulars of claim if they do not admit the claim. This deadline may be extended by agreement between the parties or on application to the court. In practice, an extension is often requested. Usually, the defendant must also supply the key documents upon which they rely (including adverse documents) when filing the defence.

If you are served with an English claim form it is very important that you take urgent legal advice so that you do not miss the deadlines. The English courts require strict compliance with deadlines and the court rules generally. If a defendant fails to acknowledge service, or to file a defence within the relevant time period, the claimant can normally obtain 'judgment in default', which is a judgment in the claimant's favour obtained without a court application or hearing.

It is open to a defendant to bring a counterclaim against the claimant, if they have grounds to make their own claim against the claimant, or to bring in a third party as another defendant to the proceedings (for example, if it is said that another party is responsible for the claimant's loss). Counterclaims are sometimes brought purely for tactical reasons – to put pressure on the claimant to settle.

The claimant can, if desired, serve a reply, responding to points raised in the defence.

After service of the defence, the parties file a 'directions questionnaire', which gives the court information about the case, such as the number and identity of witnesses that they intend to call. The court then normally holds a hearing, called a case management conference, to decide the future conduct of the case, including matters such as disclosure of documents, exchange of

witness statements, expert reports and costs budgets. The court will also fix the trial date. In simple cases, the trial date may be within one year of the start of the litigation. More complex cases can take longer – between one to three years – to reach a final judgment i.e. after all appeals have been exhausted.

It may be possible to obtain a quicker judgment if you have grounds to ask the court for ‘summary judgment’ on either the whole of the claim or defence, or on a particular issue. The court will give summary judgment, which means that the case does not need to go all the way to a full trial, if it considers that there is not a real prospect of a party succeeding in its claim or defence and there is no other compelling reason why the case or issue should be disposed of at trial.

The court also has power to ‘strike out’ a party’s claim, either in whole or in part, if it is satisfied that it discloses no reasonable grounds for bringing or defending the claim, it is an abuse of the court process or a party has failed to comply with a rule or court order.

Costs budgeting

A costs budget is an estimate of the costs (including disbursements such as barrister’s and expert’s fees) which a party estimates it will incur in the proceedings.

In all cases where the claim value is between £50,000 and £10 million, parties must file and exchange budgets setting out estimated costs for each stage of the proceedings before the first case management conference. If a party does not do so, they will not be able to recover their legal costs from the losing party, save for the applicable court fee.

Unless the parties agree the costs budget, the court will review the estimates and, if necessary, revise them to a level it considers appropriate in an approved costs budget. At the end of the litigation, the recoverable costs of the winning party are assessed by the court in accordance with the approved budget.

Disclosure

In advance of the first case management conference (a hearing at which the future conduct and timetable of the case is decided by the court), the parties must try and agree their approach to disclosure. At the case management conference the court will order (or approve, in the event the parties have agreed between themselves) the ambit of the disclosure process. Disclosure gives each party the chance to test the opponent’s case at an early stage. A case will often turn on the documents that are disclosed. Disclosure can however be an expensive process.

Since the introduction of a new disclosure scheme in January 2019, the courts have steered parties towards a more request-led approach to disclosure, more commonly seen in international arbitration. Parties can choose from a range of disclosure models, from Model A (confined to known adverse documents) through to Model E (the widest, search-based model). Model E will only be approved by the court in exceptional circumstances. Whether or not the parties agree a wide or narrow approach, known adverse documents still need to be disclosed.

Once the model, method and scope of disclosure has been agreed, the parties must then give disclosure of those documents, which involves listing them and making them available for 'inspection' – usually giving copies. Each party must set out the extent of the search it has carried out and certify that, to the best of its knowledge, it has complied with its duty of disclosure. Generally, you cannot avoid disclosing a document or information merely because it is confidential.

You are not entitled to inspect another party's documents if they are privileged. You will need to take specific advice on whether documents are privileged. In general terms, a document is subject to 'legal advice privilege' if it is a communication between a lawyer and their client and its dominant purpose is to give or receive legal advice. Only communications between a lawyer and the client are protected by this privilege. The privilege extends to advice on both what should sensibly be done in the relevant legal context and the party's strict legal rights and obligations. A document might also be subject to 'litigation privilege'. Litigation privilege applies to communications between a lawyer and their client, or between either of them and a third party, for the dominant purpose of giving or receiving legal advice in connection with litigation, or collecting evidence for use in litigation, from the time when the litigation is pending or is in reasonable contemplation.

You are not permitted to use documents which are disclosed by the other parties for any purpose other than the proceedings in which they are disclosed. Misuse of disclosed documents can amount to contempt of court.

Witness statements

Before the trial, the parties exchange written statements containing the evidence of their witnesses. These statements are usually the 'evidence in chief' of the witness, which means that there is no need for the witness to give oral evidence setting out the matters in his statement. A witness is usually then cross-examined on (i.e. asked questions) the statement at trial.

It is possible to rely on a witness statement as evidence at trial even where the witness is not called to give oral evidence. The relevant party must inform the other parties that the witness is not being called to give evidence, and explain the reasons why not. However, a witness not being called to give oral evidence may affect the weight given by the court to that witness's evidence. Further, the other party can apply to court for permission to call the witness to be cross-examined.

"Stephenson Harwood has an excellent and diverse commercial litigation team. It is always a pleasure to work with them, they are professional, engaged, dynamic and effective."

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Experts

For many cases, there will be specialist or technical issues on which the court will require the assistance of independent experts, or a single expert. For example, in a medical negligence case, the parties might instruct medical experts to opine on the question of whether or not a doctor's actions were negligent.

Experts are generally appointed by the parties rather than by the court. However, the court does have power to direct that only one expert give evidence on an issue. In a commercial context, this is generally only done in relatively uncontroversial matters. In these circumstances, the parties jointly instruct the expert.

The role of the expert is to provide an opinion to the party (or parties) instructing them. In so doing, they owe their instructing party a duty to exercise reasonable skill and care. However, when instructed to give or prepare evidence for court proceedings, the expert has a duty to help the court on matters within their expertise, and this duty overrides any duty to the instructing party.

There is normally an exchange of expert reports. The experts are then called to give oral evidence, and are cross-examined, at trial. The experts may also be ordered to meet up before the trial to see to what extent their reports can be agreed.

An expert's instructing party pays their fees. However, these will form part of the costs of the action that a party may recover from the opposing party, provided that the court has approved these in advance – see the earlier paragraphs on costs budgeting.

4. Trial and enforcement



The trial

The parties will give the court a written outline of their case before the trial. This is called a skeleton argument. The length of the trial will depend on matters such as the complexity of the case and the number of witnesses giving evidence.

There is one judge, who listens to all the evidence. It is for the parties to present the evidence. The judge does not investigate the case, but listens to the evidence and usually also asks questions. Hearings are generally held in public and there is no restriction (aside from physical space) on who attends, whether they are connected to the proceedings or not.

In English proceedings in the High Court, the case is usually presented orally at trial by a barrister (although some solicitors have the right to present cases in the High Court). In larger and more complex cases, a barrister is actually likely to be instructed at the beginning of a case, and will be fully involved in drafting the court documents such as the particulars of claim. The barrister will also often represent a party at any other court hearings before the trial.

The claimant's advocate usually starts by presenting their case. The defendant's advocate then presents their case. This is called 'opening submissions'.

In civil cases in England and Wales, there is no jury, save in some defamation cases. The general rule is that, at trial, witnesses of fact give oral evidence and are cross-examined. Expert witnesses may also be cross-examined. Cross-examination takes place after opening submissions. The parties then summarise their cases (called 'closing submissions').

Judgment

Following trial, the judge usually takes a period of time to write the judgment. It is then typically delivered (known as being 'handed down') in court, sometimes read out by the judge and, more often, copies are made available to the parties and the public by the judge's clerk. Once handed down, the judgment is public. Only in very exceptional circumstances do parts of or even whole judgments remain confidential (at the request of the parties and where the court agrees this). Frequently, the draft judgment is provided to the parties' legal teams in advance of the delivery of the decision to allow typographical errors or (more controversially) obvious errors to be pointed out. Sometimes the legal teams can communicate the decision to their clients at this stage and sometimes they cannot – this

depends on the wording of the embargo placed on the front of the judgment by the judge. There can even be challenges to the decision during this period and before the decision is formally handed down. Following handing down of the judgment, there is often a further hearing where the judge hears argument as to appropriate remedies based on the judgment and makes the final order.

Appeals

An unsuccessful party (the 'appellant') can appeal from a County Court to the High Court or from the High Court to the Court of Appeal, subject to permission from the lower court or appeal court. The court only grants permission if it considers that the appeal has a real prospect of success or there is some other compelling reason for the appeal to be heard.

It is possible to appeal in relation to findings of both law and fact. However, the appeal courts are generally reluctant to overturn a trial judge's findings of fact, particularly where these depend on the judge's view of the credibility of the witnesses.

The appellant must file an 'appellant's notice' (a request for permission to appeal made to the appeal court) within 21 days of the date of the decision appealed against, unless the lower court has directed a different period.

A respondent can serve a respondent's notice, and must do so if it is also seeking permission to appeal, or wishes to ask the appeal court to uphold the judge's order for different or additional reasons. The respondent's notice must be filed within 14 days of service of the appellant's notice or (if later) of notification that the appellant has been granted permission to appeal.

Enforcement

If a claimant wins, they will get judgment in their favour. If the defendant does not pay, the claimant can take steps to enforce the judgment. The main enforcement means are:

- The High Court can give a sheriff authority to seize and sell the debtor's (defendant's) property.
- Third party debt orders, which redirect to the creditor (i.e. the claimant) funds owed to the debtor by a third party – for example, funds in the debtor's (defendant's) bank account.
- Charging orders over land or securities – this gives the claimant a charge over the defendant's property.
- Insolvency proceedings – i.e. steps taken to put a non-paying defendant company into liquidation, or bankruptcy in the case of individuals.

"They have technically gifted lawyers who are able to grasp tricky matters very quickly and who always factor the business implications into the advice given."

Chambers & Partners UK 2023, corporate and commercial litigation

5. Managing litigation – some practical considerations



Success in litigation doesn't just require a strong case. It involves hard work, commitment, careful preparation and a well-conceived strategy.

Get a head start

If possible, spend some time and effort investigating a claim before issuing proceedings. This should include locating relevant documents, allowing your solicitors to speak to relevant witnesses and establishing whether or not your opponent has sufficient assets to pay a successful claim and/or costs. That way, you will be better prepared for litigation, have fewer surprises when proceedings start, and gain a clearer idea of your chances of success.

Seek early advice

There might be limitation periods that are about to run out; urgent court applications that should be made such as an application to freeze your opponent's assets; or court deadlines looming.

Consider the alternatives

Consider whether there are other options available for resolving your dispute – the courts will expect you to do so and you might be able to do a good deal that avoids the time and expense of litigation.

Take care with documents

Take advice on matters such as privilege and disclosure at an early stage – it is important, for example, not to create documents that could damage your case, or to destroy documents that should be disclosed.

Prepare for disclosure

Remember that disclosure is a very important part of litigation in England and Wales. You are likely to have to disclose relevant (non-privileged) documents, even if they are unhelpful, confidential or embarrassing. On the other hand, you might receive documents from your opponent that really assist your case.

Make time

Be prepared for the amount of time involved in litigation. A lot of management time might be involved in preparing a case – particularly if employees are required to give evidence. In our experience the more involvement in a case a client has, the better their prospects of success.

Count the cost

Bear in mind that litigation can be very expensive, particularly in large and complex cases that last for a number of years.

Review your approach regularly

Litigation can be a very complex process, requiring a careful and regular review of your chosen litigation strategy and tactics.

6. Common terms

A

Acknowledgment of service

A form filed by a defendant responding to the commencement of a claim.

Arbitration

A contractually agreed form of dispute resolution (normally confidential) pursuant to which one or more arbitrators decide a case rather than a court-appointed judge, and which uses different procedural rules from those adopted by the courts.

ATE policy

A policy for 'after the event' insurance, taken out to cover costs after a dispute has arisen.

B

BTE policy

A policy for 'before the event' insurance, taken out to provide cover for possible future disputes.

C

Case management conference (or CMC)

A court hearing to decide the future conduct of a case, including certain procedural matters such as the exchange of evidence.

Charging order

A method of enforcing a court judgment, in which the court gives the applicant a charge over another party's (usually the losing defendant) property.

Claim form

The form which a claimant uses to start a claim.

Conditional fee agreement

An arrangement whereby a party to litigation agrees with their solicitors that they will pay no fee, or a reduced fee, if the case is unsuccessful, but a higher fee if the case is successful. A party will not be able to recover the success fee from its opponent.

Counterclaim

A claim brought by a defendant, against the claimant, in response to the claim brought by the claimant. See also Part 20 claim.

Cross-examination

The questioning of a witness at trial by the opponent's advocate (see also: evidence in chief).

D

Damages

Money awarded by the court to the claimant, payable by the defendant, by way of compensation.

Damages based agreement

An arrangement whereby a party's lawyers are paid a percentage of any recoveries from the litigation.

Defence

The document in which a defendant sets out the grounds on which he is defending a claim.

Directions questionnaire

Means a form filed by the parties before a case management conference, giving the court information about the case.

Disclosure

Means the process pursuant to which the parties to litigation identify to the other parties, normally by the provision of a list, those documents which they are obliged to disclose (see also: inspection).

E

Evidence in chief

The evidence given by a witness for the party who called them to be a witness.

Expert witness

An individual, appointed by a party (or the parties jointly), to provide technical or specialist assistance to the parties and the court.

F

Freezing order

A type of injunction, given by the court, which prevents a person gaining access to or moving their assets.

I

Inspection

The process of allowing the other parties to inspect disclosed documents (or the provision of copies of disclosed documents to the other parties).

J

Judgment in default

A court judgment in a claimant's favour which can be obtained by a claimant if a defendant fails to respond to a claim.

L

Limitation period

The period of time within which a claim must be started. For commercial claims, this is normally six years from the date on which the cause of action arises.

M

Mediation

Another form of NDR – a facilitated negotiation assisted by an independent third party mediator appointed by the parties.

N

NDR (negotiated dispute resolution)

A description of the different possible methods used to resolve disputes otherwise than through the normal court process, e.g. mediation.

P

Particulars of claim

The document in which a claimant sets out the details of his claim against the defendant.

Part 20 claim

A claim other than a claim by the Claimant against the Defendant e.g. counterclaim by the Defendant against the Claimant or against any person for a contribution or an indemnity.

Pre-action protocol

Statements of best practice about the conduct which parties to a dispute should adopt in the period before a court claim is started.

Privilege

The right of a party to refuse to give inspection of a document on the basis that the document is confidential and is either a communication between a lawyer and their client for the purpose of giving or obtaining legal advice, or

is a communication between a lawyer and their client, or between either of them and a third party, created for the dominant purpose of giving or receiving legal advice in connection with litigation.

S

Statement of Case

The document in which a party sets out its case e.g. particulars of claim and defence.

Statement of Truth

A statement that the person who signs it believes the facts in the document to be true. Certain court documents are required to be validated by a Statement of Truth.

Strike out order

An order of the court that identified written material cannot be relied on by a party.

Summary judgment

The court will give a summary judgment, if it considers that there is not a real prospect of a party succeeding in its claim or defence and there is no other compelling reason why the case or issue should be disposed of at trial. As a result, the case will not go all the way to a full trial.

T

Third party debt order

Third party debt orders redirect to a creditor funds owed to a debtor by a third party – for example, funds in the debtor's bank account.

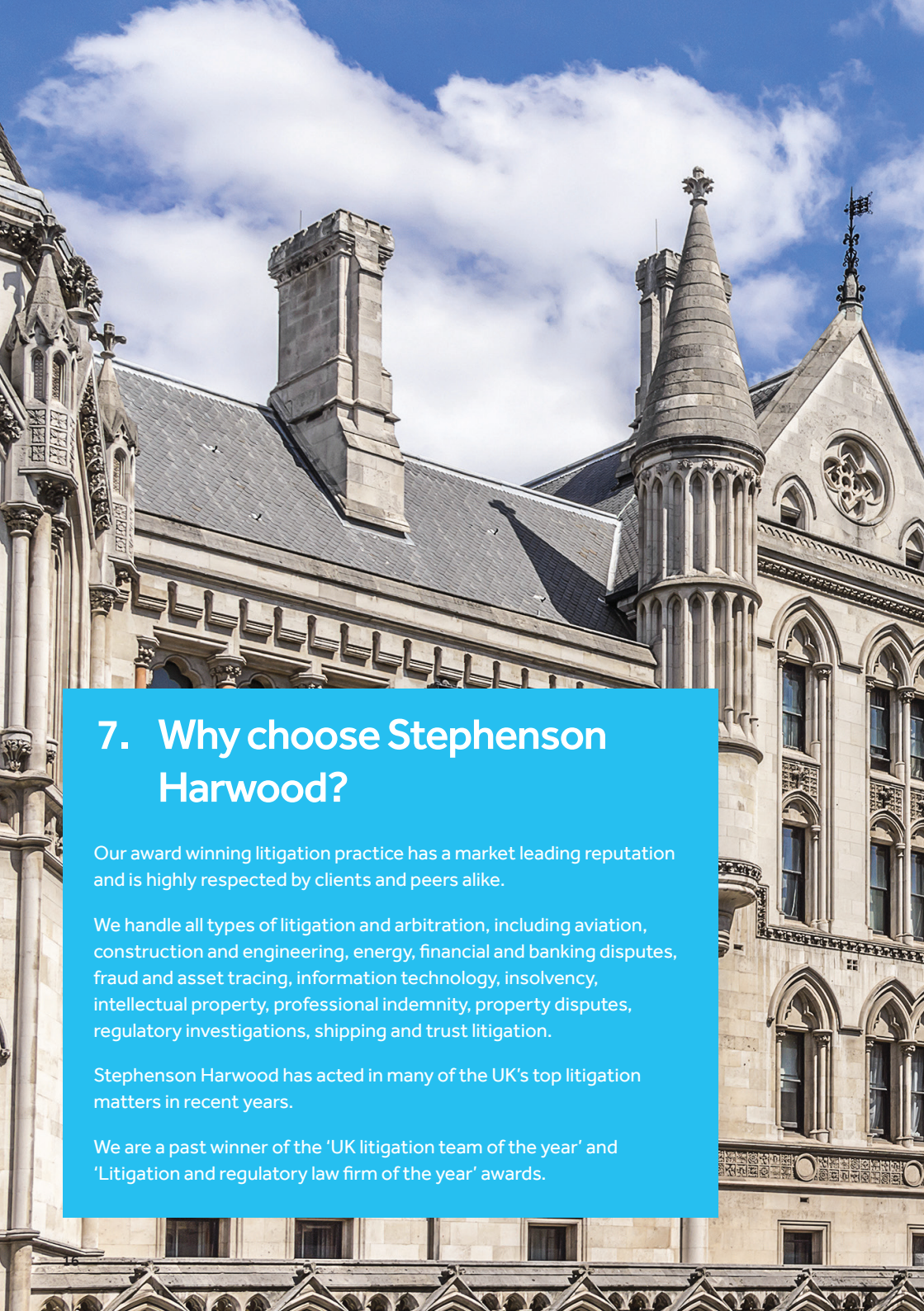
W

Witness statements

Written statements containing the evidence of the parties' witnesses.

Without prejudice

Negotiations between parties to a dispute with a view to settling the dispute are usually conducted on a 'without prejudice' basis, which means that, save in certain circumstances, the content of the negotiations cannot be revealed to the court. save in certain circumstances, the content of the negotiations cannot be revealed to the court.



7. Why choose Stephenson Harwood?

Our award winning litigation practice has a market leading reputation and is highly respected by clients and peers alike.

We handle all types of litigation and arbitration, including aviation, construction and engineering, energy, financial and banking disputes, fraud and asset tracing, information technology, insolvency, intellectual property, professional indemnity, property disputes, regulatory investigations, shipping and trust litigation.

Stephenson Harwood has acted in many of the UK's top litigation matters in recent years.

We are a past winner of the 'UK litigation team of the year' and 'Litigation and regulatory law firm of the year' awards.



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and technically excellent. They are
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"They have a good breadth of expertise."

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