

# SPICe Briefing

## Civil Justice - Going to Court

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The civil justice system exists to give people and organisations a way to protect and enforce their legal rights. It deals with issues such as accident claims, divorce and contractual disputes. The criminal justice system exists to prosecute (and, where found guilty, sentence) those accused of crimes.

This briefing looks at issues to do with taking legal action in the civil courts. Another SPICe briefing, [Civil Justice – Civil Courts and Tribunals](#) – describes the structure of civil courts and tribunals in Scotland.



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## EXECUTIVE SUMMARY

### Going to court

Scotland's civil court system is undergoing its biggest reform in a century. This has affected the structure of civil courts. It also affects how courts operate, through modernised court procedures and use of information and communications technology. The reform process is ongoing.

There are costs and risks associated with going to court. It is therefore recommended that anyone considering court action seeks legal advice before proceeding.

Legislation is planned to implement some of the recommendations from the report "[A Review of Expenses and Funding of Civil Litigation in Scotland](#)" (2013). This is expected to change some established practices to make court action less risky and the costs more predictable.

### Sources of advice

Advice about taking court action may be available from solicitors, Citizens Advice Bureaux and other independent advice agencies. Legal aid may be available to cover some of the costs of advice from a solicitor.

### Court procedure

The court reform process will see the modernisation of court rules in Scotland. It is expected that judges will take a more active role in managing the progress of litigation through the courts, so that court time is used more effectively. This is a step change from the traditional approach, which was to leave it to the parties to decide how litigation should be conducted.

The court reform process has also seen the introduction of a new court procedure in the sheriff courts – "simple procedure". This can be used for most types of court action with a monetary value of up to £5,000. Simple procedure rules are designed to be accessible to someone without any legal knowledge, so that it will be possible to take or defend court action without engaging a solicitor.

More contentious or complex cases in the sheriff courts are dealt with under "ordinary cause procedure". These rules are difficult for non-lawyers to understand. A less commonly used procedure called "summary application procedure" also exists. This is usually used for certain court processes set out in legislation.

Scotland's most senior court, the Court of Session, has its own procedure. This is very complex and difficult for those who are not legal experts to understand.

### Representation

There are strict rules about who may represent a party in court. Solicitors can represent clients in the sheriff courts. However, a solicitor must instruct an advocate or a solicitor-advocate if the case is to be heard in the Court of Session or UK Supreme Court.

Advocates are lawyers who specialise in making legal arguments. Solicitor-advocates are solicitors who have undergone extra training to operate in the Court of Session, High Court of Justiciary (for criminal cases) and the UK Supreme Court.

It is always possible for an individual to represent themselves in court (although this is not recommended outside simple procedure cases). People who do this are called “party litigants”.

It is also possible for someone to be represented in court by someone who is not a lawyer. This is known as “lay representation”. A lay representative needs the permission of the court to act and cannot be paid for their work. The ability to use lay representatives has recently been extended to companies, partnerships and associations.

## **Costs of court action**

There are a number of costs associated with taking court action. For example, a party may have to engage a solicitor, pay court administrative fees, get expert evidence and pay witness costs. These are known as “legal expenses”.

The winning side in a court case can usually recover their legal expenses from the losing side. This increases the financial risks of taking court action as, in the end, a party may have to pay the other side’s legal expenses as well as their own.

Generally, the bill charged by the winning party’s solicitor will be higher than the expenses that can be recovered from the losing party. The winning party is still liable to pay the difference between what can be recovered in expenses and the full charge.

Legal aid – publically funded assistance with legal bills – may be available to cover some of the costs of advice from a solicitor. An applicant must meet the financial eligibility criteria as well as other tests.

Clients are free to negotiate with their solicitor over how much they will pay, although it is not always possible to predict the costs of court action. There are various funding models used by solicitors. “No win, no fee” arrangements (where the solicitor is not paid unless the case is won) are common in personal injury cases.

The fees charged by a solicitor can be subjected to independent audit via a process called “taxation”. This can be used to settle disputes between solicitors and their clients – or the parties to legal action – over the amount to be paid in legal fees.

## **Enforcement**

The losing party to court action does not always do what is required by a court order. It may be necessary for the winning party to take further action to get them to comply. This is known as enforcement.

A party may be required to do something – or refrain from doing something – by the court (for example, allow an ex-partner to visit their child). Where the court order is ignored, the party can be found guilty of contempt of court.

Where a court order requires the payment of a sum of money, it is possible to seize income and assets belonging to the losing party to enforce the judgment. However, if there are no identifiable assets, this will not be possible. It is always advisable to consider how any award made by the court might be enforced **before** taking court action.

# BACKGROUND INFORMATION

## SCOTLAND'S CIVIL COURTS

### Court structure – an overview

The [sheriff courts](#) are Scotland's local courts. There are sheriff courts in many of the towns and cities of Scotland. They also deal with criminal business. Appeal, where available, is generally to the Sheriff Appeal Court. This usually sits in Edinburgh (although it is technically able to sit anywhere in Scotland).

It is also possible to raise some civil court actions (depending on their type and value) in the [Court of Session](#). This always sits in Edinburgh. Cases which are going to court for the first time are generally heard by the "Outer House" of the Court of Session.

The Court of Session also sits as an appeal court, where the judgments of lower courts are reconsidered. Appeals are heard by the "Inner House" of the Court of Session. Appeal is possible from a decision of the Outer House and from a decision of the Sheriff Appeal Court.

Onwards appeal is possible from the Inner House of the Court of Session to the [UK Supreme Court](#). This court sits in London. Its decision is final in domestic legal matters. However, there may also be a role for the European Court of Justice (in European Union (EU) law matters) and the European Court of Human Rights (in human rights matters).

There are a number of tribunals and specialist courts operating in Scotland.

More information on the operation of Scotland's civil courts is available from the SPICe briefing "[Civil Justice – Civil Courts and Tribunals](#)".

### Scottish Courts and Tribunals Service

The [Scottish Courts and Tribunals Service](#) (SCTS) provides administrative support for courts and devolved tribunals in Scotland. It is responsible for the scheduling of court hearings, the maintenance of court buildings and the provision of administrative staff. There are separate arrangements for judicial personnel.

The Lord President, Scotland's most senior judge, is responsible for the welfare, training and supervision of judges. The Lord President also chairs the SCTS board.

### Her Majesty's Courts and Tribunals Service

[Her Majesty's Courts and Tribunals Service](#) for England and Wales provides administrative support for tribunals which deal with reserved subject matters. These include, for example, employment tribunals and social security tribunals.

The Scotland Act 2016 contains procedures for devolving the administration of reserved tribunals to Scotland. This will be done using subordinate legislation on a case-by-case basis. The power to legislate in the policy area concerned – for example, employment rights – will remain reserved to the UK Parliament.

# COURT REFORM

## The Scottish Civil Courts Review

A senior member of the Scottish judiciary, Lord Gill, undertook a wide-ranging review of the civil justice system between 2007 and 2009. The Final Report of the Scottish Civil Courts Review made a raft of recommendations to improve the delivery of civil justice in Scotland.

It led to the creation of the Scottish Civil Justice Council (discussed below), as well as the enactment of the Courts Reform (Scotland) Act 2014. Work on some recommendations is ongoing, with aspects, such as modernising court procedures, likely to continue for many years.

More information about [Scottish civil courts reform](#) is available from the website of the Scottish Courts and Tribunals Service.

## Review of Expenses and Funding of Civil Litigation

### *The Taylor Review*

Following on from the Scottish Civil Courts Review, the Scottish Government asked the then Sheriff Principal Taylor to conduct a review of expenses and funding of civil litigation in Scotland. This is often referred to as the “Taylor Review”.

The review was intended to address concerns highlighted by Lord Gill that the overall costs of taking court action were disproportionate to the issues at stake. This was seen as a barrier to access to justice.

The review published its [final report](#) in 2013. It provides an in-depth discussion of issues around the funding of legal action. It makes recommendations in relation to: how solicitors can charge for their services; shifting the burden of paying legal expenses; and making the costs of legal action more predictable.

### *Proposed legislation*

In its [programme for government 2016-17](#), the Scottish Government stated that it intended to introduce a bill which will implement some of the Taylor Review recommendations. A number of the other recommendations can be implemented through changes to court procedure rules.

According to the Scottish Government, the proposed expenses and funding of civil litigation bill will (page 11):

- allow solicitors to charge clients on the basis of a percentage of the damages won in a case – this arrangement is known as a “damages-based agreement”;
- make provision for caps to be set on how much a solicitor can charge if the case is successful in different types of “no win, no fee” legal action, including damages-based agreements;
- vary the rule by which the losing party to court action pays the winner’s legal expenses in personal injuries cases. This would mean that, in some cases, the person taking the action would not be liable for the defender’s expenses, even if they lost. This is known as “(qualified) one way costs shifting” or QOCS; and
- allow for court procedures which support a number of parties coming together to take court action – known as a class action, or “multi-party action”. This approach shares the

costs and risks of court action, widening access to justice. It can also be argued to benefit the court system by consolidating numerous claims into one court action.

## GOING TO COURT

### SOURCES OF ADVICE

It is usually prudent to get advice before raising court action, as there can be significant costs and risks associated with going to court. Simple procedure (discussed in more detail below) is designed to be accessible to people without legal knowledge. Tribunals will also often have a more informal approach. However, even in these cases, seeking further advice may still be advisable.

The main sources of advice on the law are:

- **Solicitors** – legal aid (discussed below) may be available to help pay for advice from a solicitor. Membership of a trade union or professional association may enable members to access advice from a solicitor. In addition, some household insurance policies offer access to advice from a solicitor.
- **Citizens Advice Bureaux and other independent advice agencies** – Citizens Advice Bureaux can offer advice across all subject matters, but other agencies may specialise in particular areas. Advice agencies offer general advice about the law, but they do not usually offer specialist advice about court action. Advice agencies may be able to offer specialist advice (and representation) in relation to taking action in some tribunals.
- **Local authority advice services** – local authorities may provide advice services, particularly in relation to money advice and welfare benefits. Again, local authority advice agencies do not usually offer specialist advice about court action, although they may be able to offer advice and representation in relation to taking action in some tribunals.

### TERMINOLOGY

The Scottish civil court system has its own terminology which is distinct from the terminology of the Scottish criminal courts and, in many respects, from the civil court system in England.

#### Key definitions

In Scotland the **pursuer** is the individual or organisation who brings a civil court action, and the **defender** is the party against whom the action is raised. Simple procedure is the court procedure used for lower value claims. Here, the **claimant** brings an action against the **respondent**.

In England, the claimant (formerly the plaintiff) brings an action against the defendant.

Most civil court actions in Scotland are commenced by a document known as a **claim form** (previously, an initial writ) or **summons** which the pursuer lodges with the relevant court. It is then served on – in other words, sent or given to – the respondent/defender.

Certain types of civil court action in Scotland are commenced by way of a **petition**. One example is an action for judicial review, used to challenge the exercise of power by public bodies.

In such an instance, the person or body raising the court action is the **petitioner**. The person resisting the petition, or making representations to the court about it, is called the **respondent**.

Perhaps confusingly, the **respondent** is also the term used in all appeals in civil cases (including those not commenced by way of petition). Here it refers to the party resisting the appeal. The **appellant** is the party bringing the appeal.

A court is said to have **jurisdiction** in respect of a legal dispute where it has authority to hear and determine a case.

The **senior courts** in Scotland are the Court of Session (dealing with civil cases) and the High Court of Justiciary (dealing with criminal cases). The phrase may also include the UK-wide Supreme Court.

The **Lord President** is the most senior member of Scotland's judiciary. The post holder is responsible for the support and supervision of judges in their duties and chairs the board of the Scottish Courts and Tribunals Service.

The **Lord Justice Clerk** is the second most senior member of Scotland's judiciary. The post holder also plays a prominent role in criminal appeals.

The **standard of proof** describes how persuasive the evidence in a case must be for the party advancing it to win. In civil cases, it must be more likely than not that the arguments advanced are true. This standard is referred to as "the balance of probabilities".

In criminal cases, arguments must be proved "beyond a reasonable doubt" for a conviction. This is a higher standard.

## **COURT PROCEDURE**

### **Background**

Courts have detailed rules setting out how their work should be conducted. There are general rules, covering all claims of a certain category. There are also specific rules governing particular types of action or particular outcomes.

### **Scottish Civil Justice Council**

The [Scottish Civil Justice Council](#) has the role of keeping civil court practice and procedure under review. It drafts civil court procedure rules. It will, in due course, draft procedural rules for devolved tribunals as well.

These rules are then formally considered by the Court of Session as "Acts of Sederunt". The Court of Session may approve, amend or reject rules laid before it. The resulting body of rules governs how legal action is conducted in the Scottish courts.

Sometimes new legislation sets out in detail how new procedures should work. At other times, legislation lays out general principles. However, the Court of Session has broad discretion when dealing with most aspects of procedural rules.

The Scottish Civil Justice Council also provides advice and makes recommendations on reform to the Lord President. It has a key role to play in the court reform process, through the modernisation of court rules. Some of the innovations envisaged are discussed below.

## *Judicial case management*

Judicial case management requires the judge to take an active role in managing the progress of litigation through the courts. It will usually involve holding case management conferences with the parties shortly after a court action has been commenced and at other stages during any litigation which may follow.

The judge will usually also set a timetable, with the expectation that parties will do the necessary preparation to meet the deadlines set. Different procedures will have different mechanisms and levels of judicial case management.

This principle underpins the whole of the civil courts reform process. It recognises that how litigation is managed impacts on the resources the court has, including the resources available to take forward other cases.

It contrasts to the traditional approach in Scotland. This was that parties were left to make their own decisions about how a case was taken forward, without active judicial oversight.

## *Pre-action protocols*

Pre-action protocols require the parties to certain types of court action to take specific steps before a case can be brought to court. They are intended to enable settlement of less contentious cases without court action, so that court time can be devoted to cases which require judicial intervention.

There is only one compulsory pre-action protocol currently in place in Scotland, although there are additional, voluntary ones. This relates to personal injury claims with a value of up to £25,000. It sets requirements on the parties to the claim to disclose information and to meet certain deadlines. A sheriff is able to sanction a party who fails to follow the protocol.

## **Procedure in the sheriff courts**

There are three general categories of civil court procedure in the sheriff courts.

### *Simple procedure*

Simple procedure is an amalgamation of two former procedures – small claims procedure and summary cause procedure. It is a new development (flowing from the Courts Reform (Scotland) Act 2014), with the relevant rules coming into operation on 28 November 2016.

[Simple procedure](#) is available for most types of court action with a monetary value of up to £5,000. Types of action which do not have a monetary value (eg. child contact cases) are not covered by simple procedure. Summary sheriffs can hear simple procedure cases.

It is intended that simple procedure will be characterised by an informal, problem-solving approach. The expenses which can be claimed against the losing party (see below) are limited. Alternative forms of dispute resolution will be encouraged.

Simple procedure rules have been written in a way which is intended to make them accessible to someone without any legal knowledge. Some standard court rules – eg. in relation to the admissibility of evidence – will not apply. It is intended that it will be possible to take or defend court action under simple procedure without being represented by a solicitor.

Civil Legal Aid (which allows for representation by a solicitor) will not be available for most claims with a value of up to £3,000. Other forms of legal aid may be available. Legal aid is discussed in more detail below.

From early 2017, it will be possible to start actions, submit case documents and track progress of some simple procedure claims through an online portal. This is known as “Civil Online”. It is hoped that all simple procedure claims will be covered by the online system by mid-2017 (SCTS 2016).

### *Ordinary Cause procedure*

[Ordinary Cause procedure](#) applies to most other forms of civil court action in the sheriff courts. This will cover claims with a monetary value of more than £5,000, as well as family actions (eg. divorce and child contact) and various other specific actions.

Ordinary Cause procedure is complex and uses terms which will not be familiar to non-lawyers. It is therefore recommended that anyone considering court action under these rules takes legal advice.

### *Summary application*

[Summary application procedure](#) is a less commonly used form of court procedure in the sheriff courts. It is designed to be quick and informal. Sheriffs have traditional powers to hear some types of cases under summary application.

However, it is generally used for statutory applications (in other words, processes set out in legislation). For example, appeals from decisions of licensing boards are heard under summary application. Actions for the repossession of homes because of mortgage arrears also take place under summary application.

Again, due to the complexity of the procedure, anyone considering court action under summary application procedure should take legal advice.

## **Procedure in the Court of Session**

The [Court of Session Rules](#) are available from the website of the Scottish Courts and Tribunals Service. They make general provision for how cases should be dealt with, as well as applying specific rules to particular kinds of cases.

Some actions are taken forward by petition (loosely based on the court’s administrative jurisdiction – in other words, its jurisdiction to supervise public bodies). However, most actions start when a summons is issued to the defender. These terms are defined in the “Terminology” section above.

The Court of Session rules are complex and difficult for those who are not legal experts to follow. Legal advice is therefore recommended before taking action in the Court of Session.

## **REPRESENTATION**

There are strict rules about who may represent a party in court.

### **Solicitors**

Solicitors are able to represent their clients in the sheriff courts and the Sherriff Appeal Court. However, unless they are a solicitor-advocate (discussed below), they must instruct an advocate if the case is to be heard in the Court of Session.

Solicitors are regulated by the [Law Society of Scotland](#). This sets rules and standards which solicitors are required to follow.

### **Advocates**

Advocates are specialist lawyers with expertise in making legal arguments. They are often referred to as “counsel”. They represent people in the Court of Session, the High Court of Justiciary (for criminal cases) and the UK Supreme Court.

They may also be consulted for an expert legal opinion on an issue.

Advocates may also appear in the sheriff courts, usually because the court is dealing with an unusual legal point. If the winning party wishes to recover the costs of using an advocate in the sheriff court from the losing party, they must seek “sanction for counsel”. This requires the sheriff in the case to decide whether it is reasonable to instruct an advocate on the matter.

Advocates must be members of the [Faculty of Advocates](#). This sets standards for admission to the profession and regulates members’ practice and conduct.

### **Solicitor-Advocates**

Solicitor-Advocates are solicitors who have undergone extra training to qualify them to represent clients in the senior courts. They can therefore represent clients in the Court of Session (and other senior courts) in the same way as advocates can. As solicitors, they are also able to represent clients in the sheriff courts and Sheriff Appeal Court.

Solicitor-Advocates are regulated by the [Law Society of Scotland](#).

### **Other professionals with “rights of audience” in the courts**

The Law Reform (Miscellaneous Provisions) Scotland Act 1990 made it possible for professionals other than solicitors and advocates to represent clients in the courts. This is known as “having rights of audience”.

In order to gain rights of audience, a professional body must apply to the Lord President and Scottish Ministers. The application must set out in which courts and types of proceedings the body wishes its members to be able to appear. It must also set out proposals for training and regulation of members in relation to their court work.

### **Those who represent themselves**

Individuals may also represent themselves in any court (although this is not recommended outside simple procedure cases). People who do this are known as “party litigants”.

Party litigants can only appear to represent their own, personal interests. They are not able to represent the interests of another person, or an association, company or partnership which they are part of.

Associations, companies and partnerships have traditionally been required to pay for legal representation if they wish to take or defend legal action. This can result in such organisations being unable to enforce or defend their legal rights if they do not have the money to engage a lawyer. This is being addressed as part of the court reform process and is discussed under the “Lay representation for associations, partnerships and companies” heading below.

## **Lay representation**

It is also possible for a person to be represented in court by someone who is not a lawyer. This is known as “lay representation”.

Until recently, lay representation was restricted to a few situations specified in legislation (generally relating to court action involving simplified procedures or vulnerable litigants). However, since 2012, it has been possible for individuals (but not associations, partnerships or companies) to be represented by lay representatives across the civil courts.

Lay representatives have to have the authority of the party they are representing and the agreement of the court before they can act. The court can withdraw its permission at any time. Lay representatives cannot be paid for their work, and their costs are not recoverable from the other side in the event the case is won.

Lay representatives should not be confused with lay advisers. Lay advisers are able to accompany a party litigant in court, and provide assistance, for example by managing papers. They can also offer quiet advice, but they cannot speak on behalf of the party litigant. A lay adviser is sometimes referred to as a “McKenzie friend” (which is the English terminology).

## **Lay representation for associations, partnerships and companies**

New court rules have recently been introduced to allow associations, partnerships and companies to benefit from lay representation. There are additional requirements in this context. These are that:

- the body is unable to pay for legal representation;
- the lay representative is a suitable person to conduct the proceedings; and
- it is in the interests of justice to grant permission.

In some circumstances, only people holding a certain office within the organisation can act as a lay representative. For example, only partners can represent partnerships. There must be no conflict of interest between their personal interests and those of the organisation.

## **COSTS OF COURT ACTION**

### **Background**

A party to court action will often have to engage a solicitor to represent them in court. There are other potential costs, for example, administrative fees charged by the courts, reports from experts, witness costs and, where required, the costs of an advocate. These costs are referred to as “legal expenses” (“legal costs” in England and Wales).

Where a case is won, legal expenses may be recoverable from the losing side. The general principle is that “expenses follow success” – in other words, the loser pays the winner’s expenses. However, this may be deviated from where, for example, one party acts in an unreasonable way.

It is also possible for a party to partly win and partly lose in relation to their case. They may well have to pay the other side’s expenses in relation to the aspects of the case where they were unsuccessful.

The sum of legal expenses which can be recovered from the losing side is usually lower than the bill charged by the winning party’s solicitor. This is because the rates used to calculate legal expenses which can be recovered by the winning party in court action may be lower than the actual rate charged by the solicitor to that party. The rates at which legal expenses can be recovered are set in legislation.

In this case, the winning party will still be liable to pay their solicitor the difference between what can be recovered in legal expenses and the full bill.

The key point, however, is that funding legal action can be a significant financial undertaking. Financial exposure is considerably increased by the fact that one side may also have to pay the other side’s legal expenses if they lose.

## Legal aid

Publicly funded assistance with legal bills (commonly known as “legal aid”) supports those without the financial resources to take court action. Legal aid is administered by the [Scottish Legal Aid Board](#) (SLAB). SLAB also has responsibilities in relation to the availability and co-ordination of advice services.

There are three forms of legal aid available in civil cases:

- **Advice and Assistance** is available for advice (but not representation in court) on any matter of Scots law. This includes UK law that applies in Scotland. Broadly speaking, those with a weekly income of up to £245 (after essential expenditure has been deducted) may qualify for Advice and Assistance, although there are other requirements.
- **Advice By Way of Representation** (ABWOR) allows solicitors to represent clients in certain forums under the Advice and Assistance regime.
- **Civil Legal Aid** provides for advice and representation in relation to most civil court proceedings. Broadly speaking, those with an annual income (after essential expenditure has been deducted) of up to £26,239 may qualify for Civil Legal Aid, although there are other requirements.

Applicants may be required to make a contribution from their personal income towards the costs of legal advice, depending on their financial circumstances. Those with incomes at the higher end of the scale may be expected to make a significant contribution.

Where someone qualifies for legal aid, they do not have to pay administrative fees for using the courts.

In addition, they are often protected from having to pay the other side’s legal expenses in the event that the case is lost. This principle is called “modification of expenses”. Modification is a significant advantage of receiving legal aid.

## **Paying a solicitor**

Clients are free to negotiate with their solicitor over how much they will pay for a piece of work. The arrangement could be a fixed fee for the whole job, an hourly rate or some other arrangement which suits the parties (eg. an agreement based on high volumes of work).

It is not always possible to predict the amount of work required to deal with a legal matter. This is especially true in relation to court cases, where the actions of the other party may necessitate additional work. Nevertheless, the solicitor's terms of engagement should set out the contractual basis for any charges that will be made for legal services.

Solicitors can choose to carry out work for free. This is referred to as "pro bono" work.

Solicitors can also enter into no win, no fee agreements. Here, a solicitor will only be paid if the case is successful. This removes a great deal of risk from the client – although the client may still be liable for the other side's legal expenses if the case is lost. The vast majority of personal injury actions are funded under this model.

Where court action is funded under a no win, no fee arrangement, the solicitor is able to charge a premium (known as a "success fee") if the case is successful. The maximum increase is currently double the standard fee.

It is not currently allowable for the solicitor to charge on the basis of a percentage of the compensation awarded in a case. This may change in the future though.

As part of its legislative programme, the Scottish Government has announced its intention to implement the recommendation of the [Review of Expenses and Funding of Civil Litigation in Scotland](#) (2013) in relation to damages-based agreements. This is discussed in more detail above.

Where there is a written agreement in place between a client and their solicitor covering the solicitor's fees, it is not possible for the client to challenge this. However, where the cost of the work is not agreed in advance, a client can require that the bill is "taxed" by an auditor of the court. This process is discussed below.

## **Taxation**

Taxation is a process whereby a court official – the auditor of the court – carries out an independent review of fees charged by a solicitor for a piece of legal work. It can be used to settle disputes between solicitors and their clients – or the parties to legal action – over the amount to be paid in legal expenses.

The auditor will review the work carried out by the solicitor to decide if their charges are reasonable. The review looks at how much work has been done. It does not investigate the quality of that work. The auditor charges a fee for this service.

It is open to clients who are unhappy at the amount they have been charged by a solicitor to refer the account to an auditor. This is not possible where there is a written agreement in place in advance over the level of fee which will be charged. However, where there is only agreement over the hourly rate, it is still possible to ask the auditor to consider whether the number of hours worked is reasonable.

Taxation is also used to calculate the legal expenses payable by the losing party in a court action to the winning party. It is, however, possible for the solicitors representing the parties to agree the bill without submitting it for taxation.

In this context, there is a statutory table of fees showing the amount recoverable for various types of work. The account will be taxed using this. As noted above, the amount recoverable in legal expenses will usually be less than the actual fee charged by the winning party's solicitor. The winning party is responsible for paying the difference.

## REMEDIES

Civil court proceedings are brought in order to obtain a specific legal remedy which can be enforced against the other party to the action.

The most common remedies are as follows:

- **Payment:** a court order to pay a sum of money such as a debt owed under a contract.
- **Damages:** an order to pay compensation for a loss suffered, for example, for negligently causing a personal injury or damaging property or not carrying out work as contracted.
- **Interdict:** an order stopping something from happening, whether this is currently being done or is planned for the future. An example might be carrying out an act which in law is classified as a legal nuisance, such as making excessive noise from residential premises. The equivalent term in English law is "injunction".
- **Specific implement:** an order to do something that was agreed in a contract other than to pay money. An example might be keeping premises open for business in accordance with a condition in a commercial lease.
- **Declarator:** a pronouncement that an individual or organisation has a specific legal right or duty. One example is a "declarator of parentage", which is a declarator that a particular man is the father of a child.
- **Statutory remedies:** remedies which are provided for under particular statutes in particular cases. An example is an Antisocial Behaviour Order (an "ASBO"), which is applied for by a local authority under the Antisocial Behaviour etc. (Scotland) Act 2004.

## ENFORCEMENT

Someone who has won a court case may still need to take action to get the losing party to do what is required in the court order (also known as a "decree"). This is known as enforcement.

### Contempt of court

Court orders may require the losing party to do something (other than pay money). For example, a court order can require property to be given to its rightful owner, or one parent to allow another parent to have contact with a child. A court order may also require someone to stop doing something, such as causing a noise nuisance or building on land they do not own.

Where the losing party refuses to respect the court order, they may face proceedings for contempt of court. Contempt of court covers behaviour which deliberately challenges the authority of the court, including failing to abide by court orders.

The penalty for contempt of court will depend on the circumstances of the case. It is commonly a fine, but can also be punished by imprisonment.

Because of the seriousness of the consequences of a finding of contempt, the allegations have to be proved "beyond a reasonable doubt". This is the criminal standard of proof.

## Enforcement against income and assets

Many court orders require the losing party to pay the winning party a sum of money. This may be because the losing party borrowed money from the winning party (for example, in a case involving a customer and a credit card company). However, it may also be because compensation has been awarded, for example in a case involving personal injury or a breach of contract.

Sometimes the losing party may fail to pay. This could be deliberate, but it may also be because the losing party does not have the money required.

The law recognises various ways in which the winning party may seize income or assets belonging to the losing party to enforce payment required by a court order. The main methods are:

- **Attachment** – seizing money or property in the hands of the debtor. Examples include seizing money in the till at a business premises (“money attachment”) or property owned by the debtor, such as a caravan.
- **Arrestment** – seizing money or property in the hands of a third party and owed to the debtor. Examples include wages in the hands of an employer (“earnings arrestment”) or money in a bank account (“bank arrestment”).
- **Inhibition** – registering the debt against land or buildings owned by the debtor, which will make them more difficult to sell.

Where a party genuinely has no income or assets, it will not be possible to take enforcement action against them. It is therefore advisable to consider how any award made by the court might be enforced **before** taking court action. If the other party has no discernible assets, it may not be worth taking legal action against them.

## JUDICIAL COMPLAINTS

Complaints about the conduct of judges should be sent to the Judicial Office for Scotland. More information about the [complaints procedure is available on the website of the Judiciary of Scotland](#).

The process can deal with complaints about the personal conduct of judges. Where someone has a problem with the procedure used in – or the outcome of – a court case the usual route will be to appeal the decision.

Judicial members of devolved tribunals are also covered by the judicial complaints system above. There is a separate system for legal and ordinary members of devolved tribunals. This is also dealt with by the Judicial Office for Scotland.

Complaints about the conduct of reserved tribunal members should be directed to the tribunal concerned.

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## RELATED BRIEFINGS

SB 16-99 [Civil Justice – Civil Courts and Tribunals](#) (656KB pdf)

SB 16-62 [Judicial Review](#) (1,253KB pdf)

SB 14-23 [Courts Reform \(Scotland\) Bill](#) (695KB pdf)

SB 14-63 [Courts Reform \(Scotland\) Bill: Stage 3](#) (576KB pdf)

SB 16-46 [The Scottish Criminal Justice System: The Criminal Courts](#) (439KB pdf)

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