



**Small Claims
In a Nutshell
Webinar Notes**

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DEBT RECOVERY IN THE COUNTY COURT

Introduction

This guide was initially produced by Brethertons as part of the information supplied to those of its clients using its computerised debt recovery. It has, however, developed into more than an introduction to the use of court proceedings to recover unpaid debts. After all, the issue of legal proceedings is the final resort of any business to persuade customers to pay their debts.

A substantial part of this guide is, therefore, devoted to the practical steps which you can take not only to avoid extending credit to customers who, following a little investigation, would show the obvious signs of being unable to meet their liabilities, but also to improve your position should a customer for any reason refuse to settle their account.

Finally, it should be noted that this guide is not intended to be an exhaustive description of the subject. It is simply intended as a practical guide to some of the measures which may be taken to avoid problems arising and when problems arise, to the steps which may be taken. Where appropriate, proper legal advice should be sought.

Shaun Jardine

A) HOW TO AVOID BAD DEBTS

1) KNOW YOUR CUSTOMER

It is essential to know and understand the precise identity of the person with whom you are trading. Most businesses will deal with the following trading entity: -

- Individuals
- Limited companies/PLCS
- Partnerships
- Sole traders
- Limited Liability Partnership (LLP)

All of these will be familiar, but it is important to appreciate the legal differences between these entities and, in particular, to know who is responsible for the debts of each type of entity.

Individuals

An ordinary natural person! Fully liable to debts incurred.

Limited companies

A limited company is a separate legal entity in its own right.

In other words, if you are doing business with a limited liability company, you are not doing business with its directors nor with the shareholders of that company. You are doing business with the company and it is the company, which should be sued in the event of an unpaid debt.

Historically, the limited company was created to encourage the entrepreneur to take commercial risks without risking personal assets. If when extending credit to a company, it should always be remembered that there is no requirement for a company to have any assets in order to trade.

Not surprisingly, the benefit of limited liability has been abused and it is now a civil offence (known as "wrongful trading") for the directors of a company to allow that company to incur liabilities knowing that the company has no reasonable prospect of meeting them. If a company goes into insolvent liquidation, a director of that company who is found guilty of wrongful trading might be compelled to contribute to the assets of the company, but this is a rare occurrence and not to be relied upon. These actions are taken by DTI and very few actions are taken against delinquent Directors. There are similar remedies if a director has defrauded creditors ("fraudulent trading").

A limited company will always have "limited", "Ltd" or "plc" at the end of its name. A company's full name must be on its notepaper, together with its place of registration (e.g. England), its registered office and company registration number. Companies, like sole traders and partnerships, often use trading names, which may also be prominent on notepaper. Care must be taken because what, at first glance at the notepaper, looks like a partnership or sole trader, may really be a limited company.

If, having carried out some basic enquiries (see below), it is evident that a potential customer is a

limited company with no assets, guarantees from directors, shareholders or another company etc. assuming they have assets, should be considered.

The Companies Act 2006 will provide some changes to Directors and Shareholders, implementation to be phased in, commencing 2008.

Tip

Try and get directors to complete credit application forms on the company's behalf, which incorporate a personal guarantee.

Partnerships

A partnership is not a separate legal entity. It is a collection of individuals (or, occasionally, companies) each of whom is "jointly and severally" liable, i.e. liable collectively and individually, for the debts of the partnership.

A legal action brought against a partnership can be brought against any or all of the partners. A creditor will generally sue the partner with the most assets and will endeavour to enforce the judgment against that partner.

Partnership notepaper must bear the names of all the partners, even if, as is often the case, a trading name is used. The only exception being a partnership which consists of more than 20 partners. In this case the notepaper must state where the partners' principal place of work is and that the list of partners names is accessible for inspection there.

Sole traders

A sole trader - is a person who carries on a business alone and on his own account and is liable for all his debts. Sole traders often use trade names. By law a sole trader must identify himself on his business notepaper. It is important to ensure that a record is kept of a sole trader's full name, not just his trading name.

Tip

Ensure Credit Application Forms are completed.

Limited Liability Partnerships

A Limited Liability Partnership (LLP) shares many of the features of a normal partnership - but it also offers reduced personal responsibility for business debts.

Unlike members of ordinary partnerships, the LLP itself is responsible for any debts that it runs up, not the individual partners.

2) CHECKING YOUR CUSTOMER'S BACKGROUND

Having determined what type of entity the customer is, certain simple steps can be taken to discover a little about the financial status. These include:-

Company Searches

Companies are regulated by statute. Every company incorporated in England and Wales must provide the Registrar of Companies - whose principal office is in Cardiff - with certain information. The register maintained by the Registrar contains details on the constitution, capital structure, shareholders, directors, secretary and registered office. It also contains copies of audited accounts, auditors' reports, directors' reports, a list of mortgages and details of associated companies. All of this information is available to the public. It should, however, be borne in mind that the information - particularly the accounts - are not always up to date.

It is possible to obtain information about a company by searching the register. Visit www.companieshouse.gov.uk

Tip

If you have doubts as to the "genuineness" of a director, carry out a director's name search which may reveal how many defunct companies he/she has been associated with.

Bankruptcy Orders

It is possible to find out whether any individual is a bankrupt by checking in a central registry. If an individual is bankrupt, he will, for example, be excluded from acting as a director.

This type of search can be used to discover whether a sole trader or any partner is bankrupt. A bankrupt cannot be a company director, but if a person who appears to be running a small company is not a director, it may be worthwhile searching against their name.

Since the Enterprise Act 2002, most bankruptcies are automatically discharged in 1 year or less.

Land Registry Searches

It is possible to obtain a copy of entries from the Land Registry (at a cost of £3.00) against any individual property. Usually this search can be undertaken at the Land Registry of the address against which you wish to search (in some cases it is necessary to have a plan) or on-line. The search can identify the named individuals that own the property and whether any charges have been registered against it. The search will not show how much the charges have been registered for but if sold recently the sale price will be noted.

A knowledge of such matters may influence the decision as to whether to give credit in the first place, as well as helping to decide whether it is worthwhile to pursue a defaulting creditor.

Court Judgments

In the past, only judgments against an individual or a company were recorded at The Registry Trust are those made in the County Court. However, the Courts Act 2003 has allowed for High Court Judgments to be registered.

A search may be made in the County Court Judgment Register, to check whether there are any such judgments, at the premises of the Registry Trust Limited or they will appear on most credit searches. A postal search may also be made. Again, knowledge of prior judgments may be a useful tool in deciding an individual's or a company's creditworthiness.

Company Premises

It is always desirable to visit a customer's premises, since a prestigious address may be no more than an agency which provides telephone answering and mail forwarding facilities.

A visit to a customer's premises will also give an idea of such matters as the size of the operation and the number of staff. Having said this, a large office with numerous staff milling around can never be a concrete guarantee. Remember "The Sting" with Paul Newman and Robert Redford!

Tip

Beware "receptionists" who tell you that Mr X is not in but they can take messages – if you can never be put through, the business premises of the client could be no more than a telephone answering service.

Credit Circle/Discussion Groups

Credit Circles

Credit circles have always had an air of secrecy about them. They are effectively closed user groups predominantly in trade credit sectors that meet in order to exchange information about customers.

Contrary to popular belief credit circles are not actually illegal. At a credit circle it is permissible to discuss the following subjects:-

1. Exchange names and problem customers.
2. Respond to enquiries from other members as to the credit worthiness of customers.
3. Identify which customers are in arrears.
4. The extent of customer's indebtedness.
5. Encourage best practice by updating participants on relevant professional issues, e.g. legislative developments.

It is not permissible to discuss:-

- 1) Terms of credit.
- 2) Pricing.
- 3) Volume of business.
- 4) Formal agreements on collective legal action.

The reason why some subjects are "taboo" is that it is important that the meetings are not regarded by the Office of Fair Trading as an attempt to form a cartel.

If you are proposing to attend a credit circle or indeed form your own, then you should prepare minutes which should be made and circulated to all members and have an agenda prepared.

It goes without saying that a credit circle should not be used as an opportunity to defame individuals/customers.

Industry blacklist list

Some credit controllers have the added protection of an in-house refer list. However the refer list will only ever be as good as the information that it contains. If a customer is on the refer list, then the credit controllers should at least telephone each other to find out why the customer is on the list, what the scale of the debt is and whether any attempts are being made to pay off the debt.

A telephone call relatively early on may result in the Company not supplying goods at all or, if the worse comes to the worse, instructing solicitors not to issue proceedings if there is already one abortive execution on behalf of another Company. Beware of anti-competitive behaviour and the Data Protection Act if dealing with individuals!

Credit Reference Agencies

A great deal of information can be obtained from the various credit reference agencies. The information compiled by the agencies is wide and varied. It includes:-

- Details of voters' rolls - these give confirmation of residence and details of family members and others resident at an address.
- Credit details - these include records of bankruptcies, County Court judgments, defaults in respect of credit agreements and details of previous searches by other subscribers.
- Trade references - where details of credit transactions are identified, some of the credit reference agencies can arrange for trade references to be supplied from the lender.
- Profile reports - these detail key information on the capital structures, registered office, directors, shareholders and charges. Copies of the latest profit and loss accounts, balance sheets and auditors' reports are also usually available.
- Status reports - these reports not only cover limited companies, but also sole traders and partnerships and include testing of bank and trade references and photocopies of latest accounts. They also include twelve months monitoring of the subject of the enquiry during which any adverse information is reported.

Tip

Credit Reference Agencies have masses of info available and will let you have access to it for a fee.

Market Awareness

It is good business practice to be aware of what is happening within the local business community. "Bad payers" acquire reputations which will be spread by word of mouth. This type of information should not be overlooked.

3) ENTERING INTO A CONTRACT

Elements of a Contract

When one party agrees to provide goods or services to another party, a contract is made. A contract does not generally have to be in writing to be enforceable. It is, therefore, very easy to make a contract almost without realising it. For instance, if a customer telephones a concrete supplier, asks the supplier to supply them with a particular type of mortar and the supplier quotes a price which the customer accepts, a contract has been made.

It is very important that everybody involved in the supply of goods or services understands when a contract has been made and what terms govern the contract once it has been made. It is in connection with the latter that standard terms and conditions arise: see below.

To form a contract two elements need to be present: offer and acceptance. Looking at the example of the concrete supplier, the offer is to supply the concrete at the price specified, the acceptance is the agreement by the customer to buy.

There is, in reality, a third element to the contract, namely, certainty. In most cases, this means that the goods or services which form the contract must be certain (i.e. both sides must know precisely what they mean) and the price must be certain. If nothing else is said before the contract is made, all other terms (e.g. delivery date) will be implied.

A contract is made when an offer is accepted, that is, when the bargain is struck. The precise time of making the contract is important because terms of a contract cannot be introduced after this time. Thus, the concrete supplier may have standard terms of business - e.g. as to the time when payment is due - but if he does not introduce these to the customer before the contract is made, they are of no relevance. Can be implied to be incorporated through course of dealings.

Standard Terms and Conditions

Why have them?

When a contract is made, unless there is agreement between the parties to the contrary, most terms of the contract will be implied. For various reasons - but principally to improve your position (i.e. to impose terms favourable to you on the other party) - you should have standard terms and conditions. These often take the form of the "small print" on the reverse side of order forms which most people do not bother to read.

It is vital that if you have terms and conditions, you use them correctly. This means that before a contract is made the customer must be told that the goods or services will be supplied "subject to the supplier's standard terms and conditions". The best way to do this is to have the customer sign an order form which sets out the standard terms and conditions. If an order is taken over the telephone, the caller should be told that the order is subject to the supplier's standard terms and conditions and that a copy will be sent to the customer.

Interesting situations can arise when both buyer and seller have standard terms - the so-called "battle of the forms". The basic rule is that the last shot fired (ie set of terms and conditions being presented), prior to the contract being made will prevail. Thus the terms of the party to make the offer which are finally accepted will govern the contract.

The Principal Clauses

Terms and conditions vary from business to business, but there are certain principal clauses which all standard terms and conditions contain. These include:-

Description of the product or service – a contract must clearly describe the product or service to be provided. Standard terms may make reference to a given specification.

Price and Payment - this clause should clearly spell out the amount to be received and when it is due. Interest or other penalties for late payment are often seen. You may wish to make time of the essence so that you can terminate the contract. You may wish to have an acceleration clause which entitles you to demand payment in full even if some invoices are not overdue. You may also wish to have a provision that enables you to cease making deliveries if an invoice is not paid.

Delivery - the clause will stipulate where and when the product must be delivered or the services performed. A crucial point to consider is whether or not “time is of the essence”. For example, time is of the essence for ready mix concrete companies, as their terms will say that they are going to deliver the concrete whether or not you have dug a hole for it!

Retention of title - a condition should provide that the product will only become the customer's after the bill has been paid. This may be the only security which the supplier will have.

Liability - there should be a clear statement as to what responsibility the supplier has if anything goes amiss. This clause will normally include references to any warranty which is given. The whole provision should be supported by appropriate insurances (eg product liability insurance).

Intellectual property rights - especially in the case of "high tech" products, statements as to who owns the goods (and whether that ownership is transferred or licensed) are very important. These clauses normally also refer to remedies if the ownership is questioned.

Jurisdiction

Think about where you want to litigate if things go wrong. The legal systems of England and Wales are different to those of Northern Ireland and Scotland. If you are doing business abroad, in which Court jurisdiction do you want to issue proceedings?

Tip

Do not go to the trouble of having extensive terms and conditions if you will never use them. You would be surprised how many clients we see who have no idea what is in their own terms and conditions. One client had a United Nations arbitration clause!, as he had seen a clause in someone else's and liked it. Put the terms on the back of every document, letterhead, order forms, invoices and on the internet.

Tip 2

Do not copy your competitor's terms and conditions. Apart from the fact that they may be of no benefit to your business, you could find yourself on the wrong end of a writ claiming breach of copyright.

Tip 3

If you are suing a consumer, District Judges will tend to construe badly drafted Terms and Conditions in favour of the consumer. It is therefore important that they are drafted correctly. Avoid putting in confusing terms like “EOE” or “30 days net”. Judges don’t like them and may ask you to explain what you mean.

Retention of Title

One of the ways, in which sellers can protect their business against buyers that do not pay, is to incorporate a retention of title (ROT) Clause in their terms and conditions of sale. ROT clauses (also sometimes known as Romalpa Clauses after the case of **Aluminium Industrie Vaassen BV -V- Romalpa Aluminium Limited (1976)**) are often seen in suppliers terms and conditions, yet when they have to be enforced many sellers find that they cannot recover their goods.

ROT Clauses must be express

The general law will not imply a retention of title clause into a trading relationship in the same way that in any relationship there are implied terms regarding fitness for purpose and of satisfactory quality. If a seller wishes to reserve legal title to his goods, then he must expressly say so.

An ROT clause need be nothing more than "Legal title to the goods shall not pass to the buyer unless the seller has been paid in full"

In practice ROT clauses are far more detailed. When asked to interpret ROT clauses the courts look at them on a sentence by sentence basis and this means in reality that quite often ROT clauses are drafted using sub-clauses.

Is an ROT Clause desirable?

There are some industries where a ROT clause is not desirable and in some cases could cause damage if one were to exist. For example it is pointless for a sandwich manufacturer having a retention of title clause, as if the invoice remains unpaid after 30 days the manufacturer certainly does not want the sandwiches back.

Similarly, terms and conditions of many of the concrete suppliers provide that if concrete is ordered it is going to be delivered on the day and time that delivery was ordered whether or not the buyer is ready for the concrete. The last thing that the concrete manufacture wants is to have 2 tonnes of concrete setting in the back of a mixer lorry.

Incorporating the Terms and Conditions of Sale into the Contract

Terms and conditions of sale will usually have clauses relating to the price that is paid for goods, interest for late payment, delivery and warranties.

To be enforceable ROT clauses **must** form part of the contract between the parties. This does not mean that the first time the buyer sees the ROT clause is on the invoice, which is submitted at the time of delivery. The court would disregard such a clause, as it would be regarded as a post contract clause and therefore not enforceable.

If a seller's terms and conditions are to be incorporated in the contract, then it is best for the buyer to have either signed an acknowledgement that the seller's terms and conditions will apply in respect of this contract and/or all future contracts. However this is not always possible and therefore sellers should ensure that their terms and conditions appear on price lists, brochures, quotations, invoices and delivery notes. If this occurs, then the court will look far more favourably on a "**course of dealing argument**" whereby the seller maintains that his terms and conditions apply, simply because he has been trading with the buyer over a number of years and can demonstrate that the buyer has had sight of the terms and conditions on many occasions. It perhaps goes without saying that if you go to the trouble of having terms and conditions professionally drafted then you should ensure that they are used and that the sales staff understand them.

Quite often, I come across clients who have on their credit account application forms "*terms and conditions available on request*" and have not actually got any! Or even worse have got wonderful terms and conditions that would have protected their position but have never bothered showing them to the buyer.

Another word of warning, is do not copy your competitor's terms and conditions. Leaving aside the copyright problems that may arise, how do you know that they are going to be appropriate for your business? I once reviewed the terms and conditions of a bathroom-fitting supplier who had cobbled together some terms and conditions from various sets that he collected throughout his career. I was somewhat surprised to come across a clause containing numerous acronyms that I had not seen before and discovered that there was a United Nations Arbitration Provision!

Once Trading commences

Assuming that you have protected your position as far as you are able and have incorporated your terms into the contract, what further steps should you take? Notify all customers if you change your terms and conditions and be able to prove it.

Are the Goods identifiable?

One of the problems that arise when enforcing a ROT clause is whether the seller is able to identify which goods are those that have not been paid for. If for example a buyer obtains 50,000 10mm washers from five suppliers and then does not pay for any of them and mixes all of the washers up in a big box, how will supplier A be able to distinguish his washers from those of supplier B? The answer is he probably will not be able to. It may sound extreme, but believe it or not, sometimes the first thing a buyer may do when taking delivery of goods is to unpack them so there are no distinguishing features.

If possible the goods should be able to be identified by serial numbers, batch numbers or marked pallets.

All Monies Clauses

Consider using an "all monies" clause which effectively reserves title to goods until all sums that are outstanding have been paid for. An example would be "Legal title in the goods shall not pass to the buyer until all sums due on the seller's account have been paid".

The clause does not release title until all sums due have been paid.

Receivers, Administrators And Liquidators - What's their view when dealing with ROT Clauses?

The answer is they challenge them. Most liquidators/receivers will invariably always tell you your ROT claim is invalid.

I have attended lectures organised by insolvency practitioners where they have confirmed that they have a golden rule of telling creditors **five times** that their retention of title clause is not valid and if creditors still persevere after that they will only start investigating whether or not there is any merit in the sellers claims!

One insolvency practitioner told me that 80% of people that claim retention of title usually went away when he told them that he thought their clause was invalid.

Bear in mind the liquidator/administrator/receiver has a vested interest in defeating all retention of title claims, simply because there will be more assets to realise when proceedings are concluded so that secured creditors/debenture holders can be paid.

Quite often enforcing an ROT clause can be a battle of wills. The receiver/liquidator will call your bluff. Do not blink! If you are sure of your position threaten legal action and if necessary issue proceedings. One of the last things any receiver wants to do is risk precious funds in paying lawyers to defend a claim that has merit!

Arguments used by Receivers/Liquidators

There are two principal arguments that those seeking to enforce a retention of title clause will face: -

1. That the clause is invalid.
2. The goods that are subject to the clause have been incorporated into another product or fixed to the land.

Receivers/liquidators will often argue that the goods have been incorporated and therefore are not identifiable and as a result the ROT clause is invalid. In **Hendry Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd (1984)** it was held that if goods had been incorporated but were still identifiable the clause would be upheld. In this case engines and diesel generators supplied by separate companies remained identifiable and therefore the product could be dismantled to enable the goods to be returned.

If however two products had been mixed to create a new item it will usually be the case that ownership has passed to the manufacturer.

If the goods are mixed/manufactured in such a way so that they cannot be separated without serious injury or destruction to the finished product, an ROT claim can be defeated. One case, which dealt with this problem, concerned the supply of resin to a chipboard manufacturer. The resin was used to hold the chipboard together and had been used in the manufacturing process.

Perhaps somewhat understandably the court was unwilling to allow the resin manufacturer to break up the chipboard to get it back! In another case a leather supplier was not entitled to the return of his product once it had been manufactured into a handbag.

If the materials supplied have become part of the land and lost their identity, then a retention of title clause will not apply. The courts have decided that to become a fixture an item has to have "**substantial connection**" to the land as opposed to resting on it.

Charges over the Buyers assets

It is theoretically possible for a buyer to grant a seller an enforceable charge over its assets in the event that goods are sold and the proceeds of sale are not passed on to the seller. In such a case the buyer would have to acknowledge that the seller has an interest, provide the security and grant the charge, which must then be registered with Companies House.

Most buyers will be opposed to granting charges to a seller as it makes it difficult to raise additional finance (if numerous charges are registered) and also it is difficult to keep the charges register up to date as theoretically the charge would have to be renewed every time additional product was supplied. If however a seller is thinking of getting involved in a contract for a significant sum then it may be an avenue worth pursuing.

Many of the cases, which have been dealt with in the appeals courts, have been when charges and or trusts have either been expressly or inadvertently created. A detailed analysis of all of the cases is beyond the scope of this article. However if you wish to contemplate obtaining a charge over a buyers assets it would be worthwhile getting some legal advice before the product leaves your premises!

Tracing proceeds of Sale

Very often sellers will want to know whether or not they can recover the monies due to them from tracing the sale proceeds of their product once the buyer has sold them. Whilst it is a theoretical possibility, it does rely on the buyer being regarded as a "fiduciary" and in law holding the sale proceeds on behalf of the seller. Before the courts will find in favour of sellers they will look for a number of requirements to be satisfied including: -

- For the proceeds of sale to have been kept in a separate account as opposed to it being paid into a normal trading account.
- That the buyer was not able to use the sale proceeds as he wished.
- That the seller's goods were prior to sale stored separately from other goods.
- Clear wording in the contract specifying the nature of the fiduciary relationship.

Another word of caution. Drafting clauses to allow tracing to be carried out successfully is difficult. The cases which have been dealt with in the appeal courts feature many blue chip companies trying to recover their monies as their lawyers could not get it right, please don't try "do it yourself" drafting, it could end up as an expensive exercise.

Retention of Title Checklist

- I. That legal title is retained by the seller.
- II. The seller reserves the right to enter onto company premises to recover goods in default of payment (NB such a right would not extend to entering on to the premises of a third

party).

- III. Provide that the buyer must store his goods separately from other goods until paid for.
- IV. The seller should ensure that the goods are identified by serial/ batch number.
- V. Is it appropriate to include a term that the goods cannot be attached to land without the seller's consent?
- VI. Negotiate with the Receiver if you do not want the goods back.
- VII. Attend the premises as soon as possible and repossess immediately.

A final word of warning, a ROT Clause is **no** substitute for adequately checking out customers in advance.

Case Study

We recently acted on behalf of a company that manufactures and installs steam boilers for use in industrial laundries. The boiler sale price was £20,000 and the transport and installation costs were an additional £8,000.

The laundry went bust very shortly after it opened (promised contracts did not materialise) and my client had not been paid.

The receiver initially argued that my client's ROT clause was invalid. Unfortunately, my client fell into the trap of only pointing out its ROT clause on its invoice. However after a thorough search the client was able to find a quotation document which had been submitted to the buyer some four months earlier in respect of another boiler which referred to their terms and conditions, and retention of title clause. The receiver then accepted the clause existed through a course of dealing argument.

However that was not the end of the matter. The receiver then argued that the clause was invalid as the boiler had been incorporated into the fabric of the building and formed part of the land. This also was disputed and the receiver was essentially told that the boiler was nothing more than a large kettle which had been plumbed into a water and power supply and bolted to the floor. Proceedings were drafted (although not actually issued).

The receiver eventually backed down. An agreement was reached that the receiver could sell the business as a going concern and that £20,000 of the sale proceeds from the business would be remitted to my client in respect of the boiler. My client was never paid in respect of the transportation and installation costs, however through dogged perseverance it did at least recover the costs of the boiler (in which there was an element of profit), which essentially meant that the client broke even at the end of the day.

4) MONITORING THE TRADING RELATIONSHIP

Once the trading relationship has begun, even if the supplier takes all the appropriate steps (such as ensuring that his terms and conditions prevail) problems may still arise. There are, therefore,

a number of sensible measures which should be taken to ensure that any such problems are minimised. These include:-

Photocopying Incoming Cheques

Particular note should be taken of any business that frequently changes its bankers or pays for goods and services from an account which does not appear to be related to the business. This could be an indication of problems with cash flow.

Tip

A photocopy of any incoming cheque from a customer should be taken every three months or so: see below. Cross check the details of cheques with the original credit application forms.

Chasing Invoices

A proper procedure for chasing invoices should be implemented. If the terms of trading provide for payment within twenty-eight days, then a reminder letter should be sent on the twenty-ninth day.

Customers should be telephoned in order to find out what problem there is, if any. It is more difficult to ignore a telephone call than a letter.

Tip

During telephone conversations, notes of the conversation should be made and then written up in full immediately afterwards. If possible, the conversation should be followed by a letter confirming what was discussed e.g. confirming that payment would be forthcoming in fourteen days. The contemporaneous notes and letters can act as evidence should it be necessary to litigate. However, do not write anything that you would not want a Judge to see such as your opinion of the individual on the other end of the line!

Confirming Conversations in Writing

If customers state during a telephone call that they will make arrangements to pay an invoice, then if at all possible it is good practice to confirm the conversation in writing. It makes it more difficult for a customer at a later date to deny that the conversation ever took place, if there has been a follow up letter dispatched the same day referring to the conversation.

Post Dated Cheques

If a customer has agreed to make payment by instalments, then if at all possible obtain post dated cheques. Even if the cheques do not clear when presented for payment, the fact that a cheque has been tendered, at least prevents the customer from raising a defence to a claim at a later date.

5) ALTERNATIVE DISPUTE RESOLUTION/MEDIATION

ADR is becoming increasingly popular with industries which have been prone to becoming involved in long litigation cases. Many industries support ADR. The object of ADR is for the parties to get together at a relatively set date with a mediator (who will usually have a knowledge of the industry concerned). The object of the mediation is to see whether or not parties can agree a compromise.

Mediation in itself is nothing new. 99% of all cases which have proceedings issued on them reach some form of compromise prior to a trial.

Mediation is usually non-binding. It is however necessary to pay the mediators fees, which can be as much as £1,000 per day.

What is mediation?

Mediation is a voluntary, "without prejudice" process in which a neutral person helps to bring disputing parties to a settlement without having to resort to the courts. Independent research indicates that mediation is successful in about 90% of cases, which then result in a binding agreement.

What can mediation achieve for you?

Save money - management time and legal costs are kept to a minimum.

Save time - mediation can be implemented quickly avoiding the stress of a lengthy legal process.

Flexibility - unique solutions can be tailored to suit each particular dispute.

Control - the process is unthreatening, the client remains in control and can call a halt to the proceedings if desired.

Confidentiality - adverse publicity is avoided with no access to journalists or competitors.

Simplicity - the process is informal, with each case being debated in a straightforward, constructive and accessible manner.

Relationship management - mediation seeks to prevent the stress, which may be placed on both personal and business relationships by extended and costly litigation.

Finds the bottom line - a skilled mediator can rapidly identify the real issues at stake and will guide the discussion towards solution in a frank and fair way.

The Brethertons Service

Brethertons offer a comprehensive, trusted and experienced service designed to provide the optimum solution for all. We aim for a win-win situation, reducing stress and confrontation while seeking conciliation and agreement. Our nation-wide network allows us to provide the most effective neutral mediator for each individual case, with the most appropriate mix of personality and expertise. In most cases we would aim to offer mediation within 28 days of a request.

The Brethertons Panel of Mediators

Richard Pell, Partner.

Specialist in personal injury, medical and professional negligence.

Richard is an accredited mediator with ADR Group and a member of The Law Society's Personal Injury Panel. He also has considerable expertise in the commercial sphere having worked for several years for Thorn EMI plc.

Brian Auld, Partner.

Specialist in IT work, commercial contract disputes, breach of warranties, partnership and shareholder disputes, business sales and acquisitions and competition law.

Shaun Jardine, Partner.

Specialist in contentious commercial work including professional negligence, construction, partnership disputes and disputes arising from the supply of goods and services.

Simon Craddock, Partner.

Specialist in Family and Child Care Law.

Simon is a member of the Solicitors' Family Law Association (SFLA), a SFLA trained mediator and the Law Society's Family Law and Children's Panel.

Fees

Mediation can be funded privately, by Legal Aid or by legal expenses insurance cover.

Our current mediation charges are: -

£500 +VAT per party for the first three hours, with additional hours if required at £100.00 + VAT per hour per party. This charge includes any preparation work that may be required.

Travel time £25.00 +VAT per hour per party.

Travel Expenses 52p per mile.

Our fees are usually divided equally between the parties that participate in the mediation or in accordance with any agreement that may be made by the parties following the mediation.

If you do require any further information regarding our mediation unit, please contact Shaun Jardine – telephone 01295 270999.

6) TO SUE OR NOT TO SUE

Does an action make commercial sense?

Is the customer a good customer? Is it worth upsetting a customer for a debt of a few hundred pounds, if over a trading year they output a significant volume of business?

Consider involving management at a relatively early stage to see whether a compromise is possible. The manager may decide to agree a compromise on legal costs and interest if it keeps a client happy and loyal.

Does the Customer have a Legitimate Grievance or Counterclaim?

Grievances If there is a grievance, then it should be thoroughly investigated before any action is taken to recover the debt. Sometimes a customer will withhold payment of a whole account for several thousand pounds, merely because they are awaiting a credit note for less than a hundred pounds. If the grievance is legitimate, then it will no doubt be raised in the customer's defence. It makes economic sense to find out and deal with grievances before lawyers are instructed.

Counterclaims Has the customer got a potential counterclaim? If so, is it legitimate? If the counterclaim is legitimate does it exceed the amount of the claim? If so, then should proceedings be issued at all? If there is a possibility of a counterclaim being raised, then it should be thoroughly investigated before legal action is taken.

Tip 1

Try and resolve the dispute before you issue.

Tip 2

Read Tip 1 about resolving it and try again!

Does the Documentation support an action?

Order number - Is there one? Does the customer insist on them? Can the question of invoices without order numbers be clarified while the account is still current? If there is no order number does the documentation indicate who at the customer's premises ordered the material?

Delivery/Site Address - Is the invoice address the same as the delivery address? In many cases it will not be so.

Proof of deliveries - Is the signature on the delivery note legible? Can the individual who signed for the goods on the customer's behalf be identified? Is the person who signed the delivery note authorised to do so?

Goods in accordance with specification - Do the production notes confirm that materials were manufactured in accordance with any specification given by the customer?

Costs/Legal Expenses Insurance

Costs

Generally

The general rule regarding any County Court or High Court litigation is that the loser pays the winner's costs.

However the loser is only ever ordered to pay the winner's "assessed" costs. This means that if agreement cannot be reached between the parties as to how much the loser should pay, the file of papers is lodged with the Court, which decides (through a process called "assessment" (formerly known as taxation)) how much the loser should pay to the winner.

There are different scales and different bases of assessment. It is common for a successful litigant to find that there is a shortfall between the costs incurred and the costs recovered. At the end of the day, the winner in court proceedings may still be out of pocket.

Solicitors' charges are normally calculated on a time basis, i.e. the client is charged for the number of hours which their solicitor spends on the case. If, in the case of a debt collection matter, the solicitor uses a computerised system, the number of hours which they spend will be considerably reduced. The cost to the client will be reduced accordingly.

Assessing costs as a case proceeds

Judges are anxious to dispense with the need for a formal assessment of costs at all. At present, every interlocutory application (any application heard before the main trial/hearing) has its costs assessed (if possible) at the conclusion of the hearing. This means that the Solicitor has to prepare a schedule indicating how much time he has spent on the preparation of the application and estimate how much time he will spend at the hearing itself. Thus at the end of the interlocutory application the Judge will make his decision on the application itself and then make a finding as far as the costs are concerned. The idea is that a rolling bill will result in the hope that at the end of the trial itself the Judge can merely add up the figures, at least that is the theory!

Costs in Small Claims cases

In small claims cases the winner will usually only recover what is known as "fixed costs", these include any Court fee that has been paid. The successful party may also be able to claim travel expenses and loss of earnings of any witnesses who have had to come to Court to give evidence. Expert's fees can also be claimed.

Legal Expenses Insurance

Some customers may have legal expenses insurance policies, which permit the customers to have their legal costs paid for by an insurance company. A legal expenses insurance company will not be responsible for paying out any damages that are awarded, although they will pay the customers own lawyers bills. Customers that have legal expenses insurance are more prone to litigate, simply because they can effectively delay the date on which they have to make payment and are not faced by the costs considerations that customers without legal expenses insurance

have.

Tip

Ask your insurance broker to investigate legal expenses policies for your business.

Legal Aid

If you receive notification that your Defendant is legally aided, it has a very significant effect on legal costs, as if a customer defends an action and loses, it is extremely rare that a court will order that the customer pay the winning parties legal costs. Thus a Judge may order the Defendant to pay a judgment of £2,000, however if the Defendant is in receipt of legal aid, he may be ordered to pay it at the rate of £10 per week and to add insult to injury, you will not recover your legal costs in any event!

NB. It is rare for legal aid to be granted in small claims cases.

Time Limits

Court proceedings must be commenced within certain time limits.

If a claim is based on a contract, then the action must be commenced within 6 years of the date of the breach of contract.

If the claim is based on negligence, then the claim must be brought within 6 years of the date of the negligent act.

Claims brought on a speciality or deed have 12 years to pursue.

Time limits within the action

District Judges have had it drummed into them that they must be extremely proactive and not seek to clog up the Courts with cases that are not going to proceed. As a result, they impose quite rigorous timetables and if these are not adhered to, the Judge and your opponent may well seek to strike the action out.

Gone are the days where the parties could agree their own timetable between themselves and effectively ignore a timetable that the Court has set.

B) HOW TO GET HELP

There are many sources of free legal advice and assistance:-

1. Solicitors.

Tip “Use Brethertons – they are brilliant!” *Gwen Jardine (Shaun’s Mum).*

If for some unknown reason (i.e. Banbury and Rugby are flattened by a nuclear bomb) you are not using Brethertons, experiment with 2 or 3 solicitors who undertake debt recovery work. Most solicitors have a computerised system of some sort, find out which one you like.

2. Citizens Advice Bureau.

Most Citizens Advice Bureau have staff who can provide some basic information on the debt recovery process. CAB staff can also put you in touch with Solicitors who will be prepared to look at your case free of charge via the CAB rota system. You should ensure that the person at the CAB who takes your details understands exactly what your problem is, so that when they make an interview appointment on your behalf, they can ensure that you get to see the right person.

3. County Court

Technically, the County Court staff should never offer you advice on the merits of your case. The standard line that they have to pursue is “you should see a Solicitor”.

Tip

The Court service does produce a useful range of leaflets which explain how the procedure works, which you can obtain free of charge from any County Court or via the Court Service web site.

4. The World Wide Web.

The Internet is a great source of information and the law is no exception. Details of Solicitors/legal organisations offering legal advice can be obtained from Yell.com.

Some Solicitors, like ourselves, will answer questions by e-mail. This is usually OK as far as it goes, although it is not much use if you want to obtain legal advice as to whether the documents disclosed support your case.

Her Majesty’s Court Service website www.hmcourts-service.gov.uk offers links to the latest version of the Civil Procedure Rules. You can also view and download copies of the forms that you need to get proceedings underway.

C) NEW VOCABULARY - POST 26 APRIL 1999

In 1996 a report produced by Lord Woolf was published. In that report Lord Woolf set himself a task of mapping out what he described as a new landscape for civil litigation.

The Woolf proposals have been seized upon by the Judiciary who have implemented many of his recommendations in order to streamline the laborious Court process and make Justice more accessible to litigants in person.

Under Woolf's reforms set out in the Civil Procedure Rules 1998, the financial limit for small claims was raised to £5,000.

The reforms came into force on the 26th April 1999 and continue to be amended.

The distinction between High Court and County Court has effectively been abolished.

Claims are referred to as "Tracks". There are three:-

1. Small claims track – claims for £5,000 and under.
2. Fast claims track – for claims between £5,000 and £25,000*amended April 2009.
3. Multi track – for claims in excess of £25,000* amended April 2009.

Small claims that are not

Whilst technically the jurisdictional limit is £5,000, in some instances cases below £5,000 will be heard as a Fast or Multi Track claim. Such cases include: -

- a) Those cases which involve a difficult question of law and/or has complicated facts.
- b) If the Defendant is being accused of fraud.

Old Terminology

Pleadings
Action
Summons
Writ
Particulars/Statement Of Claim
Plaintiff
Defendant
Defence
Reply
Rejoinder/Rebutter/Surrejoinder/Surrebutter
Counterclaim
Third Party Proceedings
Admitting/Denying/Not
Admitting
Amendment
Payment Into Court
Taxation
Further And Better Particulars

New Terminology

Statement Of Case
Claim
Claim Form
Claim Form
Particulars Of Claim
Claimant
Defendant
Defence
Reply
(Abolished)
Part 20 Claim
Part 20 Claim
Admitting/Denying/Not
Admitting
Amendment
Part 36 Offer
Detailed Assessment
Part 18

D) HOW TO SUE IN THE COUNTY COURT

Financial Limits

The ultimate aim is for fast track claims to be dealt with by District Judges.

At present multi track claims will be dealt with by Circuit Judges, with claims of £50,000+ being dealt with by High Court Judges.

Pre Action Protocols

In an effort to try and make litigation more open and to encourage the parties to achieve settlement sooner, the Court introduced a series of pre action protocols. The following protocols are in force:-

- Personal Injury
- Clinical Negligence
- Construction & Engineering Disputes
- Defamation
- Professional negligence
- Judicial Review
- Disease and Illness
- Housing Repair

The Court takes compliance or non-compliance with relevant protocols seriously.

Attempts to create a pre action protocol for debt recovery proceedings were not terribly successful.

In cases not covered by any approved protocol, the Court will expect the parties to act reasonably and exchange information and documents relevant to the claim and generally trying to avoid the necessity for commencing proceedings at all.

Courts expect parties to a potential dispute to follow a reasonable procedure and this was enforced by the directive given regarding pre-action conduct which came into force on 6th April 2009 and should normally include:-

- a) Claimant writing to give details of the claim;
- b) the Defendant acknowledging the claim letter promptly;
- c) Defendant giving within a reasonable time a detailed written response and
- d) the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without Court proceedings.

As a general rule the Claimant's letter should:-

- a) give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;

- b) enclose copies of essential documents which the Claimant relies;
- c) ask for a prompt acknowledgement of the letter followed by a full written response within a reasonable stated period;
- d) state whether or not Court proceedings will be issued if a full response is not received;
- e) identify and ask for copies of any essential documents not in his possession which the Claimant wishes to see;
- f) state (if this is so) that the Claimant wishes to enter into a mediation or other alternative method of dispute resolution and
- g) draw attention to the Court's powers to impose sanctions for failure to comply with this practice.

The Defendant's full written response should as appropriate:-

- a) accept the claim in whole or in part and make proposals for settlement; or
- b) state that the claim is not accepted.

If the claim is accepted in part only, the response should make clear which part is accepted and which part is not accepted.

If the Defendant does not accept the claim or part of it, the response should:-

- a) give detailed reasons why the claim is not accepted, identifying which of the Claimant's contentions are accepted and which are in dispute;
- b) enclose copies of the essential documents which the Defendant relies on;
- c) enclose copies of documents asked for by the Claimant or explain why they are not enclosed;
- d) identify and ask for copies of any further essential documents not in his possession, which the Defendant wishes to see (the Claimant should provide these within a reasonable short or explain in writing why he is not doing so);
- e) state whether the Defendant is prepared to enter into mediation or other alternative method of dispute resolution.

If the claim remains in dispute, the parties should promptly engage in appropriate negotiations with a view to settling the dispute and avoiding litigation. The Courts increasingly take the view that litigation should be a last resort and that claims should not be issued prematurely when a settlement is still likely. Therefore, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and if so, endeavour to agree which form to adopt. The Legal Services Commission has published a booklet on "Alternatives to Court", CLS Direct information leaflet 23 (www.clsdirect.org.uk/legalhelp/leaflet23.jsp), which lists a number of organisations that provide alternative dispute resolution services.

The parties may be required by the Court to provide evidence that alternative means of dispute resolution were considered.

1) ISSUING PROCEEDINGS

Claim forms Part 7 and Part 8

For the purposes of this handout, Part 8 claims can really be regarded as irrelevant. They relate to complex areas of law and various declarations etc which will not trouble litigants seeking to recover debts.

Part 7 claim form basic requirement

Concise statement of the nature of the claim including the facts upon which the Claimant relies.

The remedy sought

If provisional, aggravated or exemplary, damages are sought.

If a money claim, a statement of value.

If interest is sought, basis of the claim, percentage claim, start and end dates, total amount claimed and daily rate thereafter.

If not included in the claim form, a statement that the particulars will follow.

A Statement of Truth must appear on the claim form/defence.

The claim form must be served within 4 months of issue.

If Particulars of Claim are not served then the Defendant merely serves an Acknowledgment of Service.

A Defence is due 14 days after the Particulars of Claim are served or 28 days after an acknowledgment.

Tip

If there is not sufficient space on the form N1 in the box “Claim form”, you can use a separate sheet of paper and head it “Particulars of Claim” and indicate on the form N1.

Statutory Interest

Section 69 of the County Court's Act 1984 permit Claimants to charge interest from the date that payment should have been made at the rate of 8%.

Contractual Interest

If however your terms and conditions of trade permit you to charge a sum in excess of 8%, then the Particulars of Claim should indicate what your terms of trading are and the interest rate.

Late Payment Interest 13.5%

Tip

It is important that a claim for interest is contained in the Particulars of Claim – if you don't plead it, you can't claim it!

2) WHO IS SERVED WITH PROCEEDINGS?

Sole trader - can be served at either his/her place of business and/or home.

Partnership - usually served at the place of business or on the partners at their respective homes.

Limited companies and LLPs - registered office – or at their principal places of business.

Joining Guarantors - if guarantees have been given by company directors and/or parent companies then early on in the proceedings a notice should be given to the guarantor asking them to pay the sums which are due. Should they refuse, they can be joined in the proceedings.

The Court arrange for proceedings to be served by post. If you suspect that the Defendant will be difficult these can be served by a Process Server.

3) STATEMENTS OF CASE (formerly known as Pleadings)

The Statements of Case must show all the facts, which the party is relying upon and hopes to establish to the satisfaction of the Court at trial. The purpose of the pleading is to define the issues in the case. Thus at the trial it is not open to a party to allege facts which are not referred to within the pleadings. To do that would be to take the opposite party by surprise.

There are four main types of pleadings.

Statements of Claim

This is the Claimant's statement of the facts and matters on which he relies in establishing the cause of action.

The Statements of Case are formal documents which must contain the heading of the action, that is to say the name of the Court, the action number, the title of the action, the name of the parties serving it, together with the date on which it is served. The statement should be drafted in numbered paragraphs.

The statement should be as brief as the nature of the claim permits and should not contain matters of evidence, i.e. it should not say how a party proposes to prove the facts which he is pleading, nor should matters of law usually be pleaded. Evidence is a matter for the trial and law is something, which the Court will be deemed to know.

Where a document needs to be referred to or relied upon in a statement (e.g. the provisions of a written contract), the wording of the document should be summarised. If the whole document will need to be referred to in detail at trial it is usual to say this in the pleading.

You will need to send to the Court a claim form and Statements of Case, plus a copy for the Court and a copy for each Defendant if there is more than one.

Once the Court receive the claim form and Particulars of Claim they will put the Court seal on them and send copies to the Defendant, together with a “Response Pack” which includes a form of “Admission, Defence and Counterclaim” (FADC) and Acknowledgment of Service.

The Defendant will be required to complete the FADC form and return it to the Court.

If the Defendant ignores the claim, Judgment can be entered in 14 days.

However the Defendant may complete the form and return it as an:-

Admission

Admitting the debt and making an offer to pay either in full or by instalments.

Defence

The Defence may indicate reasons why the Defendant maintains he does not owe the claim.

A bare denial is no longer accepted.

The Defence must deal with every matter contained in the Particulars of Claim and those which are not specifically answered are deemed to have been admitted. It is usual therefore for the Defendant to go through the Claimant’s Statement of Claim paragraph by paragraph and either admit, not admit or deny the matter.

Defence and Counterclaim (Part 20 Claim)

The Defendant may return the form as a “Defence and Counterclaim”. In this case the Defendant will be maintaining that he does not owe the sum claimed by the Claimant and in fact seeks to obtain an award of damages from the Claimant as a result of any loss and damage which he has suffered. The Defendant must pay a fee on the value of the Counterclaim.

Reply

If a Defence has been served which raises issues upon which a Claimant wishes to respond, a Reply can be served in which contentions of the Defendant can be rebutted.

If the Defendant is pursuing a Counterclaim, then a Defence to the Counterclaim needs to be served explaining why the Claimant maintains he does not owe the Defendant the sum that is being claimed.

On receipt of each Defence filed with the Court, the file is automatically given to a District Judge

to look at who will make any Orders that are appropriate.

Transfers between the Courts

If a County Court claim for a liquidated sum is defended, the action will automatically be transferred to the Defendant's home Court (unless it is a limited company). If your business is based in Banbury and you commence proceedings in the Banbury County Court against an individual Defendant in Newcastle, it will usually be the case that if the case is defended the arbitration takes place in the Defendant's home Court.

It is possible to apply to the Court to which the case has been transferred to have the case transferred back to the home Court, if there are sufficient reasons, i.e. it is only the Defendant's registered office that is in Newcastle and/or the Defendant has a business/home address within the jurisdiction of the Banbury County Court and/or all the witnesses live in Banbury.

Tip

You can agree with the Defendant that the matter be transferred to a Court midway between the two parties.

Tip2

It is only a liquidated claim (i.e. a claim for a specific amount) that will automatically be transferred if the Defendant is an individual.

Tip 3

Following the Woolf reforms, cases can be dealt with by the Court without a hearing if both parties agree.

Tip 4

If one party cannot attend the hearing, a written statement can be lodged with the Court and the Court be asked to hear the case without their attendance.

In the small claims court, the parties can be represented by a lawyer, a lay representative (only if party is present), employee or officer of the company.

Further & Better Particulars

Request for Further Information (Part 18 of CPR Rules) (formerly known as Further & Better Particulars)

A statement of case must not be too vague or too general. It must indicate to the opponent the case to be brought against him. Where a party is faced by a statement that is too vague or general, he may attempt to have it struck out or seek to further define the issues by raising a written request for "Further Information".

Under Part 18 of the Rules, the Court may at any time order a party to:-

- a) clarify any matter which is in dispute in the proceedings; or
- b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.

The function of Part 18 requests for information is said to be:-

- a) to carry into operation the overriding principle that litigation should be conducted fairly and openly without surprises;
- b) to inform the other side of the nature of the case they have to meet;
- c) to prevent the other side from being taken unawares;
- d) to define the issues which are to be tried.

Tip

Technically the Court cannot order that parties to a small claims matter give Further Information. If however you have raised a request for them and ultimately the proceedings are adjourned to enable Further Information to be given, it will strengthen your arguments with the District Judge with regard to costs. In Fast track or Multi track claims, a written request for Further Information has to be made before the Court will grant an Order.

Striking out the other party's claim

As the Courts now have far more “case management” powers, the Court are anxious to try and dispose of matters which do not need full investigation at trial.

The Courts can strike out cases if:-

- a) the Statement of Case discloses no reasonable ground for bringing or defending a claim;
- b) the Statement of Case is an abuse of process;
- c) there has been a failure to comply with the rule of practice direction or Court order.

Thus, if a claim does not give sufficient facts as to what the claim is about, for example “money owed £5,000” or is incoherent and makes no sense, or which contain a coherent set of facts but those facts even if true do not disclose any legal recognisable claim, the case can be struck out.

A Defence will be struck out if:

- a) it consists of a bare denial or otherwise sets out no coherent statement of facts, or
- b) the facts it sets out while coherent would not even if true amount to a defence to the claim.

It is important to note that a clear concise statement of facts is needed. The Court officer has the power to refer a claim or defence to a Judge at any time if he considers that it falls within the above criteria.

The Courts can exercise the powers to strike out on their own initiative.

Amending Pleadings

Pleadings can be amended but beware of cost penalties!

Allocation Questionnaires

The Allocation Questionnaire asks the parties to consider the following points:-

- 1) Which track the case should be allocated to (small, fast or multi).
- 2) Whether either party wants a stay of the proceedings for a month to try and effect settlement.
- 3) Which witnesses will be attending.
- 4) Whether experts will be required and whether their expert evidence can be agreed.
- 5) What dates should be avoided for hearing.
- 6) What costs have been incurred to date.

Following the commencement of proceedings and on receipt of a Defence, the Court will issue an Allocation questionnaire to both parties. If a case is below £1,500 then no fee is payable if the case is between £1500 - £5000 a fee of £35.00 will be payable by the Claimant. For cases over £5000.00 a fee of £200.00 will be payable.

On receipt of the Allocation Questionnaire, the file is looked at by a District Judge who may decide to make orders regarding the use of expert evidence or otherwise and will allocate the case to a suitable track. If the case is allocated to a fast track, the parties may well receive notification of a hearing date together with a requirement that witness statements be exchanged and/or documents be served. A hearing fee is also now required between £25-£300 in small claims track depending on value, £500 for fast track and £1000 for multi-track. This would be refunded in part should the hearing not go ahead.

NB. If the Claimant does not pay the allocation fee, the case will be struck out.

Judgment in Default

If the Defendant does not return the Admission Defence and Counterclaim form to the Court within the stipulated period, you can enter Judgment by default, by completing the request for judgment form which will have been sent to you when the Court notified you proceedings had been issued.

N.B. The Court will not enter Judgment unless you ask them to do so.

If the opponent admits part of the claim but disputes a balance, then you can ask the Court to enter Judgment for the part that is not in dispute.

Setting aside the Judgment

In some instances, a Claimant will obtain Judgment against a Defendant and once they commence enforcement proceedings, find that the Defendant applies to set the Judgment aside.

The Courts will only set aside a Default Judgment that was not entered wrongly if:-

- a) the Defendant has a real prospect of successfully defending the claim; and
- b) it appears to the Court that there is some other good reason why:-
 - i) the Judgment should not be set aside, or varied or
 - ii) the Defendant should be allowed to defend the claim.

An application to set aside a default judgment which has not been entered wrongly must be supported by evidence.

Tip

Many Defendants know how to play the system and issue applications to set aside judgment and never attend. If this happens on one occasion you should ask the District Judge to make an Order that no further applications be issued by the Defendant unless they first apply for leave of the Court.

4) APPLICATIONS FOR SUMMARY JUDGMENT

Applications for Summary Judgment (Part 24 of the Rules) set out a procedure by which the Court may give Summary Judgment against the Claimant or Defendant, either on the whole claim or on a particular issue if it considers that the party concerned had “no real prospect” of succeeding/successfully defending the claim/issue and there is no other reason why the case or issue should be disposed of at trial.

When is the application issued?

A Claimant may apply for Summary Judgment any time after Acknowledgment of Service or Defence has been filed.

A Defendant may apply for Summary Judgment (in order to strike out a claim) any time after the service of the Particulars of Claim.

Parties must be given 14 days notice of the hearing. The application and evidence must identify concisely the points on which the Applicant relies and it must state that the Applicant believes on the evidence that the Respondent has no real prospects of succeeding on the claim or successfully defending the claim/issue to which the application relates. It should also state that the application knows of no other reason why the disposal of the claim or issue should await trial.

Where the Claimant applies for Summary Judgment, it will be given if:-

- 1) The Claimant has shown a case which if unanswered would entitle him to Judgment and
- 2) The Defendant has not shown any reason why the claim should be dealt with at trial.

Where the Defendant applies for Summary Judgment, it will given if either:-

- 1) The Claimant has failed to show a case, which if unanswered would entitle him to that Judgment or
- 2) The Defendant has shown that the claim would be bound to be dismissed at trial.

Possible Orders

The Court may make a conditional order where “it appears to the Court possible that a claim or defence may succeed but improbable that it will do so”. A conditional order is one which requires a party to pay a sum of money into Court or to take a specified step (and provides for

dismissal for failure to comply).

- 1) The Court can make Judgment on the claim.
- 2) The Court can strike out or dismiss the claim.
- 3) The Court may dismiss the application.

Summary Judgment Hearing

The hearing is in Chambers (i.e. the District Judge's office as opposed to a Court room). The only evidence the District Judge can consider is that contained in the Witness Statements, therefore they should be as full and detailed as possible and exhibit all of the relevant documents.

Tip

If there is the chance that the District Judge will not award Summary Judgment in your favour it may not be in your interests to pursue an application. As indicated you have to submit your case in writing in the Witness Statement. If the judge does not award judgment in your favour, your defendant has a written summary of all the arguments you will use at the main trial and will be able to prepare accordingly.

5) PRE-ARBITRATION HEARINGS

Pre-Arbitration Hearings

It will be increasingly common for Courts to avoid allocating dates for pre-arbitration hearings at all.

Courts Standard Directions

In many circumstances the Court on receipt of a defence issues an order for standard directions, specifying what steps should be taken and endorsing on the order the date from which time starts to run. The timetable set out on the order is important – if you do not follow it the case could be struck out.

In small claims cases there are a number of standard directions. These are:-

- 1) Documents to be relied on should be served on other party and filed at least 14 days before the hearing.
- 2) There are standard directions existing for certain types of claim, including
 - a) road accidents
 - b) building disputes
 - c) tenants claim for return of deposit and Landlords claim for damage
 - d) holiday and wedding claims

Notification of Hearing

More often than not in small claims cases, the Court merely issue a notification of hearing date, which contains standard directions to the parties. These directions usually include:-

1. A requirement that both sides serve on each other copies of relevant documents upon which they will rely at the hearing.

2. That both sides notify each other of the names of the witnesses that will be attending the hearing.

Different County Courts have different form of orders and it is therefore worthwhile reading the small print that is contained and diarising any relevant dates.

Tip

Make sure you comply with the Court's orders. If the other side do not comply, draw their failures to the District Judge's attention. If the other side produce at the hearing a document you have not seen before and you need an adjournment to rebut it, tell the District Judge that they failed to comply with the order, ask for an adjournment and tell the judge you want them to pick up the wasted costs that have been incurred.

Tip 2

Each Court should have a timetable in which they hope to set proceedings down for a hearing. Enquire of the Court where the matter is going to be heard and when it is likely to be listed. For example, Oxford County Court aims to list matters for a full arbitration hearing within 8 weeks of a Defence.

6) SETTLING THE ACTION

Offers to Settle

Offers to settle an action should always be made "without prejudice". If a document is marked without prejudice, then the other party cannot refer to it at the court hearing if the offer is not accepted. Marking a document "without prejudice" effectively keeps it secret from the Judge.

Discontinuance

At any time the Claimant may decide to discontinue it's claim. If it does so and subject to the matter being a small claim, then the Defendant's legal costs will not normally be awarded against the Claimant. If, however, the Defendant has attended a directions appointment and as a result incurred travel expenses and/or lost time from work and/or incurred expert's report's fees, then the Claimant may be ordered to pay these costs.

In fast/multi track cases which are to be heard in open Court (i.e. above £5,000), the usual rule is that the Claimant would be liable for the Defendant's legal costs.

Tip

In practice, if a party is thinking of discontinuing a claim, then an order should be negotiated in advance on a without prejudice basis and here the question of costs can be determined.

Part 36 Offers of Settlement

Part 36 offers and payments replaces what was known as the "Payments into Court".

Now both Claimants and Defendants have the opportunity of trying to settle an action without the necessity for a full hearing.

A Claimant (even before proceedings are issued), can make a “Part 36 Offer” of settlement to a Defendant.

If at trial, the Claimant requires more than the sum that he had originally indicated he would accept, then the Defendant can be penalised by the Court ordering interest at 10% above base rate plus indemnity costs.

Technically, Part 36 Offers cannot be made in small claims cases unless the Court so orders.

Whilst legal costs cannot be ordered in small claims cases, a Judge may take the view that the failure to accept a Part 36 Offer should be regarded as “unreasonable behaviour”.

The Court may decide to penalise the parties as far as interest is concerned.

Defendants can make Part 36 payments. Interest is deemed included unless otherwise indicated.

Tip

Without prejudice correspondence should never be shown and/or mentioned to the judge until after he/she has made the final award. Should you do so before judgment, you may find the judge stops the proceedings, makes you pay the costs "thrown away" and orders you to come back again on another date for the case to be heard before another District Judge.

Tip 2

If a Part 36 payment into Court has been made, it is a good idea to telephone the Court in advance so that one of the Court staff “fillet” the file to remove all documentation relating to the payment. If you do not notify the Court in advance, they may well fail to do so with the result that the District Judge opens the file, reads about the payment into Court and then decides that he/she cannot deal with the matter.

7) PREPARATION FOR TRIAL

Witness Statements:-

In small claims cases, parties will usually be asked to notify each other which witnesses they intend calling.

Tip

It is good practice to obtain from the witnesses a signed statement of exactly what their evidence is going to be. This will not only act as an aide memoir for both the person that is conducting the hearing and the witness, but in some circumstances (should the Judge permit it), the witness statements can be handed up to the Judge.

Tip 2

If you are not 100% sure that your witnesses will attend Court on the day of the hearing, you can issue a witness summons in order to compel their attendance. The County Court will be able to provide you with the appropriate paperwork to enable the witness summons to be issued. You will have to arrange for the summons to be served on the witness and tender “conduct” money, which is essentially enough money to cover their travel expenses to and from Court. Should the witness not turn up at the hearing, they can be deemed to be in

contempt of Court.

Expert Witnesses

Lord Woolf thought that experts in many cases were unnecessary and partisan. He was of the view “There should be no more than one expert in any speciality unless this is necessary for some real purpose. The appointment of a mutual expert would not necessarily deprive the parties of the right to cross examine, or even call their own experts in addition to the neutral expert, if that were justified by the scale of the case”.

The experts should be under no misapprehension that their duty is to the Court, not to the person that pays them.

No party may call an expert or put in evidence an expert’s report without the Court’s permission.

Discovery and Disclosure

One of the major motivating features behind the reform of the Civil Justice System was to avoid the many thousands of pounds of client’s money that are routinely wasted on preparing bundles of documents, the vast majority of which never get looked at during the course of a trial.

One of the many objectives of the CPR’s was to achieve an overriding objective of “proportionality” where the amount of the sum in dispute was some kind of relationship with the costs that were incurred.

Under the new Rules, the Court can dispense with or limit disclosure.

If a Court orders disclosure it will normally be “standard disclosure” requiring a party to disclose only the documents

- on which the party relies
- which adversely affects the party’s own case
- which adversely affects another party’s case
- which supports another party’s case
- which the party is required to disclose by a relevant practice direction

A List of Documents now has to be endorsed with a statement confirming:

“I state that I have carried out a reasonable and proportionate search to locate all the documents which I am required to disclose under the order made by the Court on I did not search for documents:

- 1) predating
- 2) located elsewhere than
- 3) in categories other than

I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I certify that the list is a complete list of all documents which are or have been in my control which I am obliged under the order to disclose.”

The Court can order specific disclosure.

Inspection

Privileged documents may not be inspected. A party can also refuse inspection where the costs of allowing it would be disproportionate to the issues in the case.

The inspection process is usually dealt with by photocopying documents and sending them to the other side with a bill for the photocopying charges.

E) HOW TO CONDUCT YOURSELF IN THE COURT ROOM

The small claims hearing will be held in public. This is a change from the old rules where they would always be held in private.

Having said that, whilst new rules have been brought into force, no new Court rooms have been built. So in practice, whilst technically the Judge's chambers are open to any member of the public who might be wandering by the Judge's chambers rooms, the proceedings will usually be heard in private.

However, cases may be held in private if:-

1. Issues of national security arise (unlikely in small claims!), or
2. Confidential information may be released. This may include an individual's personal finances.

If you are uneasy about having a case presented in open court, then an application should be made to the Judge to have it heard in Chambers sooner rather than later.

The District Judge will sit one side of a table and will usually have the Claimant to his/her left and the Defendant on his/her right.

The proceedings are supposed to be conducted in an informal atmosphere. There is one District Judge who sits in Northampton who regularly lights up a cigarette during proceedings. It is not recommended that litigants in person adopt a similar procedure!

Set out below are some tips that litigants in person should utilise in their favour:-

1) Ensure that you get to the Court in good time.

If a District Judge is kept waiting because you have got lost, or are getting change for a parking meter then you are not likely to get off to a very good start. The District Judge may even strike out your case if you are not there to prosecute it.

2) Dress smartly.

This to some may be self explanatory, however, it is quite frankly amazing to see how some people attend court hearings. The District Judge who hears your case is administering a judicial function, make an effort to demonstrate that you are taking this matter seriously.

3) Mobile Telephones.

Turn them off. Better still, leave them with the usher. If your mobile telephone goes off in the Court room you may as well kiss your case goodbye!

4) Be Polite.

District Judges should be referred to as Sir or Madam.

Tip *If you are running late – ring the court office and ask them to let the Judge know. You will probably find that your case maybe put to the back of the list – but at least it will not be*

struck out.

Tip 2

Most courts have a leaflet showing exactly where they are located and how you can get to them. Get a copy sent to you.

5) Prepare a summary of what your case is about.

You can offer this up to a District Judge (some Judges will accept them, others won't). The summary will however be a useful aide memoir for you if you dry up and/or get flummoxed during the hearing.

6) Prepare your documents.

Think about what you want to say to the Judge in advance and prepare a paginated bundle of documents (using an index and dividers if necessary). If when you open the case (as the Claimant) you hand up to a District Judge a indexed, paginated bundle of documents and then refer to each document as appropriate, you will make the District Judge's life a lot easier. You can then refer the District Judge to the relevant documents and take him through the sequence of events as appropriate.

You should also prepare a paginated bundle for the Defendant (which you should have served prior to the hearing). It is always worthwhile having a couple of spare copies in case the Defendant maintains that he has not received one.

Tip

When you arrive at Court give the Judge's bundle of documents to the usher. Hopefully the usher will be able to let the Judge look at your documents before the hearing commences which should save time.

7) Calling witnesses.

If you are calling witnesses to give evidence on your behalf, let the District Judge know at the outset that witnesses are present. Some District Judges will invite all of the witnesses in so they can hear all of the proceedings. Technically the witnesses should not be called into the Court room until they are required to give evidence. If you are against a professional advocate, he/she may object. However, the last thing you want to do is have a District Judge decide the case when he has not heard from the witness that you have asked to attend.

The District Judge usually allocates a time estimate when the Defence is filed (see ante). If you intend calling lots of witnesses let the Court know in case the time estimate is too short.

Tip

If a Counterclaim is being made against you, ensure that you have a witness who can rebut any allocations that are being made. It is not only about winning your claim but defeating the Counterclaim made against you.

Tip 2

Bring the evidence, i.e. badly manufactured appliances, badly tailored clothes, even bits of car engine have been given to the District Judges in Oxford. If the case is technical bring along some noddy guide drawings, or something that will help the District Judge understand exactly what you are going on about. Just because you understand the intricate workings of a SU carburettor do not assume that the District Judge does.

8) Cross Examination of witnesses.

The party that calls the witness asks questions of him/her first (known as examination in chief). Once you have finished examination of your witness, your opponent is entitled to ask questions (cross examination). After the witness has been cross examined, you can seek to ask further questions of the witness in order to deal with any questions which are raised as a result of your opponents cross examination (known as re-examination).

Tip

Once your witness has been finished with, as a matter of courtesy you should always ask the District Judge whether he/she has any questions of the witness.

9) Closing Speeches.

The District Judge will usually invite both sides to make closing speeches, albeit they won't necessarily be called such, more often than not a Judge will say "Mr X, is there anything else that you would like to say to me before I consider this matter".

In a closing speech you should not seek to repeat every single piece of evidence that the District Judge has just heard. You should however seek to summarise the best points of your case and highlight any significant points of evidence which have been made by your witness and any admissions that you may have been able to extract from the Defendant.

The District Judge finds in your favour

Tip

Do not scream with delight!

Do take a careful note of any Judgment that the District Judge may give. It may be the case that the Defendant seeks to appeal any travel expenses/out of pocket expenses and/or loss of earnings. Take with you documentation to support claims. If the District Judge has not specified in the Judgment when the Defendant has to make payment, you should clarify the date (usually it will be 14 days).

The District Judge finds against you

Tip

Do not swear, raise your eyes to heaven or bang your head on the desk.

Do take a careful note of the Judgment. It may be the case that the Judge has erred in law, which means that you may, should you so wish, appeal against the decision. If you are unsure as to any point in the Judgment, you should get the District Judge to clarify the reasons given.

Tip

Technically the District Judge does not actually give a Judgment, he makes an award. If the "award" is not made in your favour, you seek to "set aside" the award. In addition to erring in law, you can get the award set aside if the District Judge has misconducted him/herself.

Appeals

The ability to appeal a decision of a District Judge is limited.

You can appeal if:-

- The Judge has made an error of law
- Made a substantial procedural irregularity

Appeals must be lodged within 14 days of the decision being made.

Costs of an appeal can be recovered from the unsuccessful party.

Tip

You cannot appeal if you presented a bad case or forgot to put in half of your evidence!

F) HOW TO ENFORCE THE JUDGMENT

Once a judgment has been obtained, it does not automatically follow that the Judgment Debtor (i.e. the defaulting defendant) will pay (see ante).

It may well be necessary to enforce the judgment in order to recover payment. You can issue two different type of enforcements at the same time. Steps which may be taken to achieve this include:-

Order to Obtain Information

The Judgment Debtor is required to attend Court in order to give evidence on oath as to exactly what assets he or his business has. It is, possible for company directors to be orally examined to give evidence about company assets.

To apply for this process, you complete a "Request to obtain information from a Judgment Debtor" form which you can obtain from the Court. It is necessary to pay a Court fee. The application must be made in the Defendant's local court, however the hearing will take place in the Judgment Debtor's home court.

Only if you are a litigant in person will the Court serve an Order telling the Defendant when and where he has to attend Court, otherwise you will have to serve the order personally or instruct an agent to do so. You cannot just post it through his letterbox. A Certificate of Service must be filed in court.

The Defendant will be examined by an Officer of the Court and the completed application form will be returned to you. Should you wish to prepare your own questionnaire form (rather than the one that the Court will automatically use), you are entitled to do so. You can, should you so wish, also be present at the oral examination hearing.

A word of caution – not all debtors turn up when they are required to do so. Thus, if your oral examination hearing is going to be in a remote Court, think twice about attending.

If the Defendant refuses to answer questions or attend Court, the Court can attach a "Penal Notice" to the Order and will be adjudged to be "in contempt of Court" if he fails to obey the Order.

It may be the case that the Defendant asks you to pay their travel expenses for attending Court.

Third Party Debt Orders

It is possible to obtain an order that a third party pay over any money which is due to the debtor as at the date of the "TPDO" (or someone else holding security).

It is, therefore, important to know where customers' bank accounts are located and, as mentioned earlier, photocopies of previous incoming cheques may be of great assistance. The TPDO has to be specific i.e. it must state the bank and the name and number of the account. For its part, the bank is only required to pay over any money in the account at the date of the Order. Accordingly, if you seize a bank account when there is nothing in it, you get nothing! If the third party is a bank or building society, within 7 days of being served with an interim order, they

must carry out a search to identify all accounts held in the sole name of the judgment debtor. In respect of each account they must tell you and the Court:-

- The account number;
- If the account is in credit; and, if it is,
- Whether the balance of the account(s) is sufficient to cover the amount being claimed in the interim order; and
- If it is not sufficient the balance in the account at the time it was served with the interim order; and
- Whether the bank or building society is entitled to retain some of the credit balance to offset debit balances or other amounts.

The bank or building society will make a charge for making the search. The charge will be deducted from out of any money standing to the credit of the judgment debtor.

If the judgment creditor is an individual and the third party is a bank or building society, an application for a hardship payment order may be made. The Judge will only make this kind of order if the judgment debtor is able to prove that, the judgment debtor and the judgment debtor's family, is suffering hardship in not being able to meet day to day living expenses as a result of an account, or accounts being frozen.

To apply for a TPDO, you must send to the Court an Application with a Statement of Truth to say that the money owed has not been repaid. You need to pay a Court fee. The Court will grant an Order which must be served on the third party. A further hearing date will then be fixed at which the Third Party can attend and make objections about the Order, i.e. if for example you garnishee a Bank and there is no money in the Defendant's account, the Bank will oppose any Order made.

Charging Orders

If the Defendant owns property, it is possible to "register a charge" against the property to show that you have an interest in the sale proceeds. Any charge obtained will not take priority over existing charges, such as Building Society mortgages.

To apply for a charging order it is necessary to prepare an Application with a Statement of Truth explaining that the debt has not been paid and for you to give details of any other creditors of the debtor (if you know of any). You should also exhibit the Land Registry entries which show that the property is actually owned by the Defendant. A fee has to be paid.

The Court will grant a charging order known as a "Interim Charging Order". They will then allocate a hearing date where the Defendant and any other owners of the property can attend and if the Court considers that a Charging Order should be made will make a "Final Charging Order".

The Charging Order can then be registered against the Defendant's land by completing appropriate Land Registry forms and by making a Statutory Declaration. A fee has to be paid.

Attachment of Earnings

If the judgment debtor is in employment and the debt is for in excess of £50.00, an "Attachment of Earnings Order" may be sought.

It is necessary to complete a "Request for Attachment of Earnings Order form" and pay a Court fee.

The Court will fix a hearing date and serve you and the Defendant with details of the hearing date. If the Judge is satisfied that the Defendant is not employed or self employed an Attachment of Earnings Order will not be made.

Once the Attachment Order is made, the Defendants' employer has to deduct a sum of money each week or month from the employee's salary and pay it into the Court. Details of the Defendant's employment, can be obtained by an employment search which costs £15 plus VAT.

Sending in the Bailiff/Sheriff (now High Court Enforcement Officer)

A Bailiff will take "walking possession" of a debtor's assets and indicate that if the judgment debt is not paid within, say, a fourteen day period, he will return and take the debtor's assets, sell them at auction and then forward the net proceeds of sale to the judgment creditor. Bailiffs cannot seize items such as bedding, clothing, pots and pans, furniture, household equipment or tools of trade. They cannot seize any goods on hire purchase or belonging to someone else.

In order to send the Bailiffs in, it is necessary to complete "A Request for Warrant of Execution" form and to pay a fee.

A Court Bailiff cannot force his way into the Defendant's home or business to seize goods.

Tip

Some County Court Bailiffs are as effective as chocolate fireguards! If the debt is for £600 you may wish to send in a Sheriff who is likely to be more effective at enforcement.

Tip 2

Some Bailiffs in inner city areas can take weeks to deal with warrants. Most Bailiffs leave the Courts at which they work by 10.30am. They usually have direct lines which you can contact them on before 10am – the time at which many court switchboards seem to open.

Sheriffs on commission are more effective, usually visit within 48 hours and reports 80% success rate. Bailiffs publish their statistics but they are lower.

Dealing with Third Party Claims/Interpleaders

In some cases, a Bailiff/Sheriff will levy execution upon a Defendant's goods only to be served with a Notice that the goods are claimed by a third party, e.g. a finance company or a parent company.

If title to the goods is not obvious, then the Court can issue an application, at which the Court is asked to decide who has title to the goods. All parties will be asked to supply evidence which will be considered by the Court prior to making its decision. Costs can be an issue.

Debt Relief Orders

At present an individual who cannot pay his debts has the option of applying for a formal arrangement which requires him/her to have funds to offer to distribute between his creditors either through an Administration Order or an Individual Voluntary Arrangement. The alternative is Bankruptcy which involves a fee to access the remedy. Following consultation the DRO was provided for those individuals who are financially excluded from the current debt solutions. The DROs will be administrated by Official Receivers and will not require any Court intervention. The effect will be that creditors will not be able to enforce their debts and the debtor will be discharged from debts after a period of one year. Creditors will have the right to object to the DRO by application to the Court.

The debtor will be required to pay an amount by way of an 'entry fee' which will be less than the cost of Bankruptcy. The debt advice sector will advise the debtor if it is the right procedure for them and in order to keep the costs down the DRO application process will only be available on-line.

The debtor will have to satisfy a criteria regarding liabilities, assets and surplus income and secondary legislation will set the financial levels. Once in force the debtor will be subject to the same restrictions and obligations as bankruptcy ie Debt Relief Restriction Order and Debt Relief Undertakings and these will be entered onto a public register. There will be provisions to account for windfalls during the period of the DRO.

G) BANKRUPTCY & INSOLVENCY

Making an individual bankrupt and winding up an insolvent company is a harsh but effective remedy.

In any Bankruptcy and insolvency proceedings, unsecured creditors are not terribly high up the list when it comes to being paid. Any assets of the debtor will usually be applied broadly in the following order:-

- i. the liquidator's or Trustee in Bankruptcy's costs;**
- ii. certain Inland Revenue debts (e.g. PAYE);**
- iii. Social Security contributions;**
- iv. contributions to occupational pension schemes;**
- v. arrears of wages or salary;**
- vi. secured creditors;**
- vii. Unsecured creditors and HM Customs are ranked as unsecured following the Enterprise Act.**

As can be seen, the unsecured creditor is a long way down the list!

If you are embarking upon Bankruptcy/Insolvency proceedings for the first time, then it is probably worthwhile viewing the Insolvency Service website <http://www.insolvency.gov.uk/>

The website has lots of very useful information and leaflets that you can download including:-

- 1) How to search the individual insolvency register.
- 2) Company Directors Disqualification Act 1986 and Disqualified Directors.
- 3) The Insolvency Service Charter.
- 4) The Civil Procedure Rules 1998.

The Debt

In order to commence any kind of insolvency action, the debtor must owe the Petitioning Creditor £750 or more.

Bankruptcy Proceedings

A debtor must be served with a Statutory Demand indicating how much is claimed and how the debtor should pay it. The Demand states that if the debt is not paid and/or an application to set aside the Statutory Demand is not made, then the Petitioning Creditor can present a Bankruptcy Petition.

Applications to set aside Statutory Demands can be made at the Defendant's home Court or if it is proposed to issue the petition out of the Royal Courts of Justice, at the Royal Courts.

Tip

Not all County Courts have Bankruptcy jurisdiction. It is therefore worthwhile checking with the Court you are using to confirm it has bankruptcy jurisdiction for the area in which the debtor resides.

Proof of service

Statutory demands should be served personally. It avoids later arguments as to whether or not the document ever reached the hands of the debtor. Many debtors will try and evade service. If this is the case then a letter of appointment should be delivered by a process server and the process server should turn up at a later date (as specified in the letter) and then serve the demand through a letterbox.

Setting Aside Statutory Demand

If a debtor wishes to set aside a Statutory Demand then he has to make an application to the Court (there is no fee payable). The application must be supported by an Affidavit which sets out the reasons why the debt is disputed.

The grounds for setting aside the Statutory Demand have to be legitimate. If they are not, then the Court may dismiss the application without a hearing.

If the Court does allocate a hearing, both parties will be required to attend the Court and explain to a District Judge why the application should be set aside or otherwise.

Bankruptcy Petition

If there is no response to the Statutory Demand and/or an application to set aside the Statutory Demand does not succeed, the Creditor can thereafter issue a Petition.

Once the Petition is issued, it must be served on the Respondent at least 14 days before the hearing.

Personal service of the Petition is required, which should again be supported by an Affidavit of service.

If a Debtor tries to evade service, then the Court can make orders for “substituted service” and allow the notice of issue of the Petition to be, say, advertised in the local paper. However, before the Courts will make orders for substituted service, all other methods of service have to be attempted, including attending residential/business address, letters of appointments and corresponding with any solicitors that were known to have acted for the debtor.

The Hearing

At the hearing (which is held in Chambers), the Petitioning Creditor must be able to produce to the Court:-

1. Affidavit of service of the Statutory Demand, Petition and Affidavit verifying Petition.
2. A Certificate of continuing debt, confirming that the debt is still owed and due
3. Draft Bankruptcy Order (not all Courts require this, but some do).
4. A list of supporting creditors (if any are known at this stage).

The Bankruptcy hearings are quite quick. In many instances, the debtor will not attend even if he/she has been served.

If the debtor does attend, then the Court will enquire as to whether or not the debtor can pay what is due. If the debtor requires an adjournment for say 7 days and can produce evidence to support the fact that he is trying to raise the money, then 9 times out of the 10, the Court will grant an adjournment. However, if the debtor confirms that he is unable to pay his debts, then the Court will make a Bankruptcy Order and specify the time of which it was made.

Thereafter, the debtor is usually asked by the District Judge to attend the court office and telephone the Official Receiver so that an appointment can be made for the debtor to be interviewed.

Can Bankruptcy Proceedings be defended?

The answer is yes.

Obviously if a debtor does not believe he owes the money the creditor is claiming, then an attempt should be made to set the Statutory Demand aside (see above).

Where a debtor intends to oppose the proceedings it is necessary for him to serve a notice setting out the grounds in which he objects to an order being made. The notice must be served at both the Court and on the Petitioning Creditor.

If it transpires that there is a legitimate reason why the debtor should not be made bankrupt, for example, he may have a legitimate argument as to why he does not owe the money, then the Court can dismiss the Petition.

Winding Up Proceedings

Statutory Demands

As in Bankruptcy proceedings, the debt owing and due by a company has to be £750 or more.

It is possible to avoid Statutory Demand proceedings altogether and merely plead the fact that a Demand for payment has been made on the debtor which has been ignored.

However, if a Statutory Demand is served and ignored, then the Court regard the failure to respond to the Statutory Demand as evidence that the debtor is unable to pay its debts.

If a creditor wishes to use the “short” procedure and not serve a Statutory Demand, then the Petitioning Creditor must prove to the satisfaction of the Court that the debtor is unable to pay its debts.

Opposing the Statutory Demand

Unlike Bankruptcy proceedings, there is no procedure as such whereby the Statutory Demand can be set aside.

If a company wishes to dispute the proceedings, then usually it will arrange for its solicitors to send to the Petitioning Creditor a very aggressive letter threatening to obtain an injunction and obtain an order for costs against the Petitioning Creditor. If the demand is not withdrawn by consent, then the debtor’s solicitors will have to issue an application in order to apply for an

injunction to restrain the petition being advertised.

Tip

If there is a legitimate grievance as far as the debtor is concerned, it is worth consenting to a statutory demand being set aside. The Courts do not like Insolvency proceedings being issued if there is a legitimate dispute. The costs that could be thrown away in respect of an injunction application could well outweigh the sum in dispute.

Formalities of Petition

A Petition needs to contain all kinds of information including details of

- 1) Share capital
- 2) Memorandum/Articles
- 3) Details of service of Statutory Demands

The Petition must also be verified by Affidavit.

Service of Affidavit/Petitions

The Statutory Demand and petition should be personally served at the debtor's registered office. It is worthwhile endeavouring to ensure that the Petition is actually served on one of the officers of the company, as some Judges have been known to throw Petitions out that have been left at a registered office merely with a receptionist.

Once the Petition has been served at the registered office, the Affidavit should be filed with the Court.

Unless the Court otherwise directs, every Petition must be advertised in the London Gazette, no less than 7 business days after it has been served on the company and not less than 7 business days before the day fixed for the hearing.

The advertisement must indicate the company's name and registered office, the name and address of the Petitioner, the date of presentation of the Petition, the date and place of the hearing and the name of the Petitioner's Solicitor, if any and to provide anyone wishing to support or oppose the Petition to give Notice of Intention to do so.

If the Petition is not properly advertised, the Court may dismiss it.

If a Petitioner desires to withdraw a Petition before advertisement, then an application can be made to the Court to do so. The Court has to be satisfied the Petition has not been advertised and that no notices in support have been received by the Petitioner and that the company consents to the order.

Certificate of Compliance

It is necessary for a Petitioner to file a Certificate of Compliance with the Rules relating to the service and advertisement showing the date of presentation of the Petition, the date of the hearing and the date on which the Petition was advertised. The Certificate must be filed at least 5 days before the hearing.

Preparation of lists of names and addresses of supporting/opposing Creditors

The Petitioner must prepare a list of names and addresses of persons who have given notice of their intention to appear at the hearing.

The list must be handed up in Court on the day of the hearing and prior to the Petition being called.

Opposing Petitions

If the Respondent wants to oppose the Petition, it must file an Affidavit in response, not less than 7 days before the hearing.

The Court may adjourn the hearing, conditionally or unconditionally or make an interim order.

If the Petition is to be defended, the Registrar will adjourn it to a Judge's list.

Unopposed Hearings

Most company winding up Petitions are unopposed.

The hearings before the Registrar are extremely short. Blink and you will miss them! It is merely a question of confirming to the Court:-

1. Name and address of the debtor.
2. Date on which Petition issued.
3. Date on which Statutory Demand/petitions have been served.
4. Confirm that the Petition has been advertised/Certificates of Rules have been complied with and thereafter the Registrar will make the "usual order".

Alternatives to Bankruptcy/Insolvency

There are a number of procedures that are open to individuals and companies that wish to avoid being made bankrupt/insolvent.

The mechanics of obtaining such orders are really beyond the scope of a fact sheet. However, briefly the options that are open to individuals and limited companies are as follows:

Individual Voluntary Arrangements

If a debtor wishes to avoid being made bankrupt, but cannot afford to pay the full amount to his creditors it is possible to apply to the Court for an individual voluntary arrangement (IVA).

It is normal for IVA's to be compiled by an Insolvency Practitioner, who will then apply to the Court for an interim order (which will give the debtor a breathing space) and thereafter liaise with all of the creditors to see whether the debtor's proposals are acceptable.

An IVA can only be granted if 75% of the creditors approve it.

If the agreement is passed, then it is overseen by an Insolvency Practitioner (who becomes known as the supervisor). The IVA would be binding on those creditors who had notice of the meeting and were entitled to vote.

Corporate Insolvency

Company Voluntary Arrangement

A company voluntary arrangement (CVA) is essentially a structured re-organisation of the company which can lead to payments of debt by instalment to enable the company to continue trading or as a worse case scenario to allow the company time to dispose of its assets in an orderly fashion rather than have a “fire sale”.

Like IVA’s, the scheme is overseen by an Insolvency Practitioner who acts as a supervisor.

Like IVA’s, the CVA requires a majority of 75% in value of the creditors.

Administration Order

Administration Orders are usually obtained by companies that are in dire financial straits and are on the verge of becoming insolvent.

An Administration Order is essentially an application to the Court to allow the company “breathing space” to dispose of its assets in an orderly fashion. The Court have got to be satisfied that the Administration Order will be of more benefit than putting it into liquidation.

If the Petition for Administration Order is successful the company has an administrator appointed.

Once the Court makes the order the company is protected from other creditors.

An independent report is required to obtain an Administration Order which is usually prepared by an Insolvency Practitioner.

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