

Managing and Recovering Debt

Expert knowledge means success

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Note: This publication has not been updated since it was last published. Some of the hyperlinks may have changed and may need updating. In addition, some of the information in this publication may be out of date.

Introduction

Failure to manage and collect outstanding debts can have very costly consequences. As ever, prevention is better than cure. This guide will take you through steps you can take to manage and recover debt, and show you how to deal with problems that arise such as:

- things to consider before you start recovering debts
- the small claims court
- how to enforce your judgment and actually get the money

This guide deals exclusively with the law of England and Wales. Some aspects of Northern Ireland law differ and Scotland has a separate legal system.

Legal action: preliminary steps

Legal action is best kept as a last resort, and it's sensible to be certain this is the best route to take. Before you begin explore all the options:

- take all other reasonable steps
- try a final, very firm telephone call
- consider some form of arbitration
- think about taking back your goods and services, if appropriate

Make sure the customer can pay

If the customer really cannot find the money, legal action is pointless. You may win but you won't get the money and on top of this you will have legal costs to pay.

Make sure the customer will or can pay

If you win judgment, the customer is required to pay the sum claimed. If properly claimed, they are required to pay court fees and interest as well. But what if they do not pay up? You will have to be prepared to take steps to enforce the judgment. (See this guide's page on enforcing the judgment.)

Be prepared for the costs:

- a court fee is payable when you issue a claim and other court fees may be payable later
- court fees are also payable if you have to enforce the judgment
- you will have to pay court fees in advance
- fees can be recovered from the defendant if you win
- you will have to pay the fees if you lose or do not succeed in enforcing your judgment
- you may have solicitor's costs and other costs, if you win and succeed in enforcing the judgment, you may be able to claim these back from the defendant

Legal action: preliminary planning

Depending on how difficult your case is, you might want to:

- handle everything yourself, which is usually straightforward;
- use a solicitor;
- use a debt recovery agent. (Find a list of these on the Credit Services Association website: www.csa-uk.com)

Choosing the legal route

You have two main options:

- issue a claim - by far the most common preliminary action
- issue a winding up petition or a bankruptcy petition

If you decide to issue a claim, the amount of your claim will determine which courts will handle it. The limits are:

- A claim in the High Court must be at least £15,000.
- There are no limits (minimum or maximum) in a county court - where most claims are issued.
- A claim regulated by the Consumer Credit Act must, regardless of the amount, be issued in a county court.



Small Claims

Mediation for Small Claims

The courts provide a free mediation service for disputes over 'small claims'. These are money claims for £5,000 or less. Mediation is a way of negotiating an agreement with the help of an impartial third person.

Find out how to use small claims mediation and avoid going to court.

Details at:

http://www.direct.gov.uk/en/MoneyTaxAndBenefits/ManagingDebt/Makingaclaimformoney/DG_195936

Small Claims Hearing

If you make a court claim for £5,000 or less, you may have to go to a small claims hearing at a county court. Find out what happens in small claims cases and what to do to get ready for a hearing. Details at:

http://www.direct.gov.uk/en/MoneyTaxAndBenefits/ManagingDebt/Makingaclaimformoney/DG_195812

The final warning letter

Whichever course of legal action you choose, you must send a final warning letter before you begin. There are two very good reasons for this:

- It often produces the money.
- The courts expect it and may penalise you on costs if one is not sent.

Using solicitors and debt recovery agents

If your case is straightforward, you could prepare the claim, fight the case and handle the enforcement on your own. If your claim is for a large amount, or the case is complicated, or even if you're simply not comfortable handling it on your own, it is probably sensible to get professional help. This will usually be a solicitor or a debt recovery agent.

Choosing a solicitor

Finding a solicitor can be a challenge, and often a personal recommendation is a good way to choose. Before you make a decision, find out:

- Is the solicitor a sole practitioner or part of a large firm?
- Is there a department specialising in debt recovery?
- How you will be charged - a rate per hour plus expenses or a percentage of the sum recovered?
- If they charge on a "no win, no fees" basis, are there any hidden costs? You will usually still have to pay court costs.

Debt recovery agents

Other organisations working in debt collection are debt recovery agents and credit agents.

Debt recovery agents employ solicitors and take legal action to recover your money. A list of debt recovery agents may be obtained from the Credit Services Association. Some credit agencies, though not all, will take over the collection of debt. They usually try to recover debt by:

- sending out routine letters
- telephoning customers

The issue and service of a claim to recover debts

All claims start with a claim form. This form, and other forms that may be needed later, are available free of charge from any county court or you can download them from the court service website.

Completing the form

- Complete the form carefully. It's best if you can type it, but if it is handwritten use black ink and write in capitals.
- You are entitled to add the court fee and interest to the amount you are claiming. If a solicitor prepares the claim, other charges may apply that you can also add to the claim.
- The claim form must be signed by you or by someone authorised to sign for you.

Issuing the claim

- You can send or take the claim to any one of around 200 county courts.
- If the claim is for £15,000 or more, you may use the High Court.
- You should supply three copies of the form. If there are joint defendants you should send to the court an extra form for each extra defendant.
- You will have to pay the court fee up front.
- Court staff will check that everything is in order. If it is, the claim will be given a number and served.

Service of the claim

- It is the court, not you, who serves the claim.
- The court will normally send the claim form to the defendant by first class post. Unless there is evidence to the contrary it will be deemed to arrive 48 hours later.



HM Courts & Tribunals Service

Her Majesty's Courts and Tribunals Service was created on 1 April 2011. It brings together Her Majesty's Courts Service and the Tribunals Service into one integrated agency providing support for the administration of justice in courts and tribunals.

HM Courts and Tribunals Service is an agency of the Ministry of Justice. It uniquely operates as a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals.

After a claim has been issued and served

On receipt of the claim the defendant can do one of six things:

- Do nothing.
- Pay the amount claimed.
- Admit the claim and ask for time to pay.
- Defend the claim.
- Defend part of the claim, admit part of the claim and pay the admitted part.
- Defend part of the claim, admit part of the claim and ask for time to pay the admitted part.

The vast majority of defendants will either pay the amount claimed or do nothing. If they choose to defend the claim, they may file a counterclaim against you.

The time allowed for the defendant to respond

The defendant is allowed 14 days from the deemed date of service of the claim.

However, the defendant can have an extra 14 days if they ask for it. The maximum is 28 days.

What to do if no defence is entered

- Wait until the end of the permitted time.
- Then apply for judgment.
- Judgment will be given.
- There will be no trial. You will have won.

Unfortunately, though, you still won't have the money. Unless the defendant then pays you must take steps to enforce the judgment. (See this guide's page on enforcing the judgment.) Two helpful Court Service leaflets are available from the Court Service website at www.hmcourts-service.gov.uk. They are:

- *No reply to my claim form - what should I do? (number EX304)*
- *The defendant admits my claim - I claimed a fixed amount of money (number EX309)*

A contested court case

If a defence is entered, the case will progress to a hearing or trial. Unless an agreement is reached first a judge will decide the case.

Allocation

Both the claimant and the defendant must complete an allocation questionnaire. This is to help the judge decide whether your case is suitable for one of three tracks:

- small claims track - for simple cases up to £5,000
- fast track - for straightforward cases from £5,000 to £15,000
- multi-track - for complex cases and all cases over £15,000

The small claims track

Also known as the small claims court. It is informal and the hearing is usually held quickly. A case in the small claims track has the following features:

- Procedures are usually very informal, but this is for the judge to decide. Evidence is not normally given under oath.
- It is expected that the claimant and defendant will represent themselves, although you can be represented if you wish.
- You will not be awarded costs for this, even if you win.
- You may receive out of pocket expenses.
- The judge may intervene more than in the other tracks. This is because the claimant and defendant are probably not skilled at presenting a case.
- The judge may propose to decide the case on written evidence only. You can say yes or no to this.

The fast track and the multi-track

Both these tracks involve a longer process. A case in either the fast track or the multi-track has the following features:

- Procedures are much more formal and the case will always go to trial in court.
- It is expected that the claimant and defendant will not represent themselves. The preparation of the case is not straightforward and there will be witnesses to be cross-examined.
- Costs are usually awarded, including court fees and legal costs.

The right to recover interest

You have the right to ask your customer to pay interest under three circumstances. Only one sort of interest can run at any one time.

Interest permitted by a contract

So long as it amounts to a substantial remedy, this sort of interest takes precedence.

Interest claimed on an issued claim form

- This is simple interest only and is a flat rate of 8 per cent. It only applies if the case is won or is undefended.
- Interest runs from when payment was due until judgment is given by the court.
- If payment is made before judgment, interest stops at that date.
- In some circumstances interest can be charged after judgment.

For further information, download the leaflet *How to make a claim* (EX302) from the Court Service website at

http://smallclaims.me.uk/smallclaims_forms/ex302_0406.pdf or get it from any county court.

Statutory interest

This can be claimed under the Late Payment of Commercial Debts (Interest) Act 1998 as amended by the Late Payment of Commercial Debts Regulations 2002. See this Act at:

<http://www.legislation.gov.uk/ukxi/2002/1674/contents/made>

In some circumstances costs of up to £100 can also be claimed.

- The rate of interest is 8 per cent over the Bank of England base rate¹.
- It does not apply when you sell to the public. Both seller and buyer must be acting in a commercial capacity.
- For contracts made from 7 August 2002 all businesses and the public sector can claim against all businesses and the public sector.
- It can be claimed after late payment has been received. The limit is six years in England and Wales.
- The interest usually runs from 30 days after it was due and claimed. A contract or custom and practice may change this, but only if it gives a substantial remedy.

- A contract cannot exclude statutory interest, but it is not compulsory to claim it.

A users' guide to the Late Payment of Commercial Debts (Interest) Act 1998, as amended and supplemented by the Late Payment of Commercial Debts Regulations 2002 may be downloaded from the Pay-on-Time website at

<https://payontime.co.uk/users-guide-to-the-late-payment-of-commercial-debts-interest-act-1988>

Enforcing the judgment

Unfortunately enforcing the judgment is often harder than obtaining it in the first place. You must be proactive.

Order to obtain information

- Obtaining this court order is a way of getting information so that you can enforce the judgment effectively.
- The customer must come to court and answer questions on oath.
- If the customer is a company, you can select the company officer who must come.
- Questions will be asked about income, assets etc.

High Court Sheriff or county court bailiff

- The customer's goods or assets will be seized, although there are safeguards in place and certain goods cannot be taken.
- After a holding period the goods or assets will be sold at auction.
- Fees and expenses will be taken from the proceeds.
- You will be given the remainder.

Attachment of earnings order

- This usually applies to an individual person in employment, but it can apply to private pensions too.
- The employer is ordered to make deductions from the person's wages or salary.
- These are eventually paid to you.

Third party debt order

- You take over the rights in a debt owing to the customer by a third party, so the third party is instructed to pay you instead.

- The debt can be a bank or building society account in credit.
- Rules apply and each supplier gets a percentage of what they are owed.

Receiver

A receiver is appointed to receive money that will become owing to the customer, for example rents.

Charging order

You take a legal charge on property or financial assets and you get your money when they are sold.

Winding up or bankruptcy

If the customer is insolvent, you can apply for a bankruptcy or winding up petition, but this is the last resort.

Further information can be obtained from a number of useful leaflets on enforcement. For example, download the guidance leaflet: *I have a judgment but the defendant hasn't paid: what do I do?* (number EX321) from the Court Service website at http://etclaims.co.uk/wp-content/uploads/2008/10/ex321_0406.pdf

Winding up and bankruptcy petitions

Most suppliers try to get their money by issuing a claim. But you can issue a winding up petition or a bankruptcy petition instead.

Winding up and bankruptcy are also ways of enforcing judgment after a claim has been won, in an effort to actually get your money.

How winding up works

- It applies to a company rather than an individual.
- After the winding up the company ceases to exist.
- If the company is insolvent at the time, not all the suppliers get paid in full.
- Rules apply and each creditor gets a percentage of what they are owed.

How bankruptcy works

- Bankruptcy applies to a person or a general partnership. If it is a general partnership, all the partners are made bankrupt.
- The assets are sold and the proceeds are paid to the unpaid creditors.

The threat and how it works

Often the mere threat of winding up or bankruptcy is very effective. If the customer still refuses to pay you might consider putting the following steps into action:

- A statutory demand must be delivered to the customer, preferably by hand. This can be obtained from a legal stationer or solicitor.
- On receipt, the customer has a fixed number of days to pay or otherwise respond.
- If they do not do so, you can issue a winding up petition or a bankruptcy petition.
- Eventually (if you are right and follow all procedures correctly) the customer will be wound up or made bankrupt.
- But just because you issue the petition does not mean you get priority over whatever money becomes available.

It's advisable to seek legal advice before you act, and you should only act if the money is definitely due.

Appointing a liquidator or trustee

Where a company is put into liquidation or a person is made bankrupt, you may have to appoint a licensed liquidator or trustee in bankruptcy.

Insolvency practitioners charge their fees to the money recovered and you may have to guarantee payment if the money recovered is not enough.

Further Information

This guide is for general interest - it is always essential to take advice on specific issues.

We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

Acknowledgement and Reference

¹ Although not binding on the English Courts, the recent Scottish case of *Farstad Supply AS v Enviroco Ltd* may have signalled a welcome judicial shift away from ignoring this disparity between the real world and statutory interest rates. Enviroco successfully argued before the Scottish Court of Session that Farstad "were only entitled to that rate of interest which would put them into the same position in which they would have been if they had not suffered loss or damage". Lord Hodge was sympathetic to this argument, and after a "broad brush" analysis identified a shift in late 2008 and early 2009 when the Bank of England base rate sank from 5% to 0.5%. He held that interest be awarded at a rate of 8% until December 2008 and 4% thereafter. Source: <http://blog.rpc.co.uk/regulatory-law/statutory-interest-and-the-real-world-%E2%80%93-time-to-bridge-the-gap>

² © Much of the text in the body of this publication is from the Government's Business Link website and Crown Copyright therein is duly acknowledged. See: <http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1074453392>

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