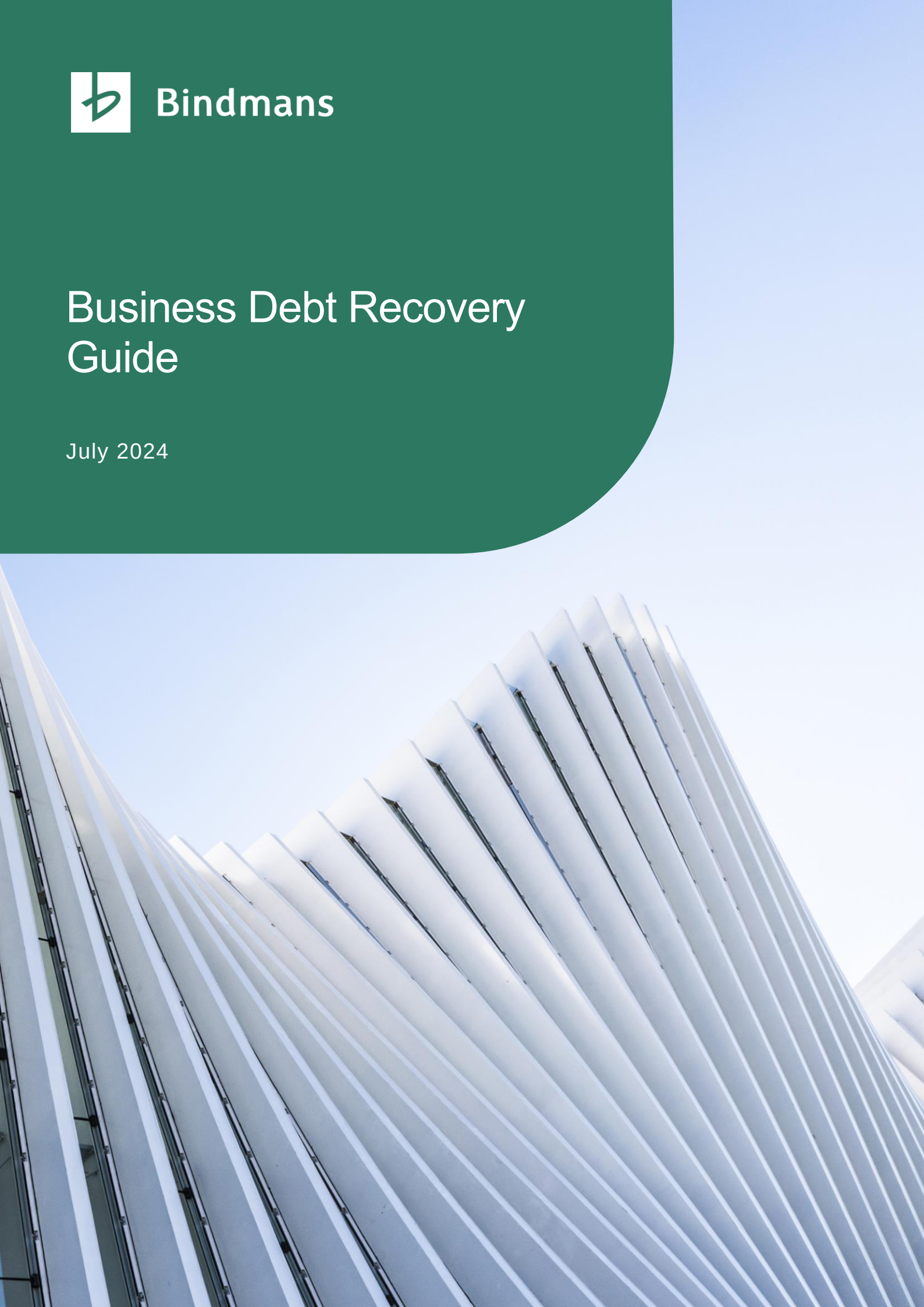
Bindmans

Business Debt Recovery Guide

July 2024



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Introduction

Our business debt recovery guide sets out the different options that are available to businesses when pursuing another company for an unpaid invoice. This guide assumes that the invoice is not disputed, that the businesses are both based in England or Wales and that the invoice has not been overdue for more than six years.

Cashflow is key to any business surviving and being successful. You need to be able to pay your own suppliers and staff and this will usually depend on being paid on time yourselves for the goods or services you have provided.

No-one wants to have to chase their customers for payment of their invoices, but it is unfortunately commonplace within the business world. Research shows that over 60% of businesses have to regularly chase customers' over late payment of invoices.

Customers will often do what they can to delay payment of invoices (often because they are waiting for their own monies to come in). Alternatively, customers may seek to negotiate on payment of an invoice or in some cases, seek to avoid payment of the invoice at all.

So what options are open to a business when they have to chase a customer for not paying an invoice either on time or at all?

There are a number of options available to a business when faced with pursuing another company for a debt:

1. Write off the debt;
2. Try to negotiate a settlement;
3. Issue Court proceedings;
4. Commence insolvency proceedings.

Considerations prior to any action

Prior to commencing any action against the debtor company, a creditor business should take into account a number of matters before deciding which course of action to take and indeed whether to take any action at all.

Relationship with the debtor

If the company which owes you money is a good customer who has previously not had any issues with payment, then you may decide that it is not commercially sensible to pursue them for the debt and instead seek to reduce the debt, come to a payment arrangement or write it off. If it is likely that you will do business in the future with that customer, you may wish to take into account

whether you are likely to lose that customer if you aggressively pursue a particular payment. This is particularly true if the debtor is one of your main customers.

Business environment

If you operate in a relatively small business environment with only a few similar company's offering the same goods or services as you, you may want to consider how your actions in pursuing a particular customer will be seen by your competitors:

- Is your business environment one where pursuing a customer for an unpaid debt would be seen as not the correct thing to do?
- Is there any sensitivity around chasing that particular customer?
- By chasing that customer, are you likely to be criticised by others within your industry or business circles?
- Are you likely to lose that customer to a competitor?
- Are there any circumstances as to why the debtor has not paid, for example, it is known within the industry that they are struggling financially or are there any personal circumstances affecting the directors or owners which may mean that they have not been focused on their business.

Can the debtor afford to pay?

Before embarking on time consuming and potentially expensive action against the company which owes you money, you should check to see if the company has sufficient assets to pay you.

There are a number of free or low-cost searches which businesses can carry out relatively quickly, without having to employ the services of any third parties, in order to see whether their opponent is likely to be able to afford any debt, judgment and/or costs order. These include:

- Claimant's own knowledge;
- HM Land Registry searches;
- Companies House searches;
- Insolvency checks;
- Check for any orders, fines or judgments;
- Ask third parties.

Further guidance in relation to each of the above searches can be found on our website.

The cost of any action

Pursuing debts from customers can be a time-consuming and frustrating exercise. Whilst larger companies may have their own credit control departments who will chase payments, many smaller companies will not have such a facility and will need to spend valuable time in chasing customers for payment, rather than concentrate on the needs of business itself.

As such, companies may decide to instruct third parties, such as debt collection specialists or solicitors to pursue the debts on their behalf. However, those third parties will need to be paid and

so it is therefore important that a company knows such costs up front as they could find themselves out of pocket even if the third party is able to recover the debt for them.

Third party costs and legal costs are often not recoverable from the debtor and you may have to commence court proceedings to try to recover those costs. Even then, for any claim below £10,000, your legal costs are not usually recoverable and even for claims between £10,000 and £100,000, these costs are likely to be fixed to a certain amount, which could be less than the amount you have to pay to a third party or solicitors to collect the debt.

Companies therefore need to take these additional costs into account when deciding what action to take and indeed, whether to take any action at all. However, it is often the case that any recovery of the debt (even after deducting any costs) is better than no recovery or writing off the debt completely.

Debt collection companies or solicitors will provide an idea of how much their fees will be to attempt to recover the debt which is owed. This may be a fixed fee, hourly rates or even a percentage of the amount that is recovered.

Writing off the debt

Having taken into account the factors set out above, a company may decide that it is simply not worth them pursuing the debt against the customer. This may be because:

- They want to maintain a good relationship with that customer;
- The customer cannot afford to pay the debt; or
- It is not cost effective to pursue the debt, as the level of the debt is lower than any associated costs of pursuing it, be it management costs or third party costs.

However, companies should bear in mind that they may not wish to write the debt off immediately if the customer does not or is unable to pay.

A company will usually be able to pursue payment of an invoice for up to six years after the due date of payment, so a company, if they are able to, may want to wait for a period of time, until the fortunes of the debtor have changed or when they may want to bring other debt claims against the same customer, by which time it may be more cost effective to pursue them all at the same time.

The creditor company is likely however to have to take this debt into account in its annual accounts, so will need to discuss with their accountants as to how the debt is identified within those accounts.

The creditor will have to take a view as to the likelihood of the debt being recovered, both in the short-term and the long-term. Economic circumstances will be a factor in this decision. If the economy is more buoyant, then the debtor company may be able to improve its fortunes and be able to pay. However, if the economic forecast is bleak, then the creditor may decide that the debtor will not be able to repay the debt within a certain period of time and decide that it is easier to write off the debt, rather than have an uncertain future of not knowing if they will be paid at a later date.

Agreeing to write off a debt or not pursuing insolvency or court proceedings can have a future benefit if the debtor's fortunes improve at a later date. The debtor is likely to be grateful that you did not pursue them for the debt at a time when they were financially struggling and this would hopefully put you in a stronger position to conduct further business with the debtor after their fortunes have improved. However, you may want to consider requesting monies up front so that you are not left out of pocket again.

Negotiating a settlement

You may start pursing a debt claim against a customer who then refuses to pay some or all of the debt which is owed. Customers may raise various arguments to avoid paying debts, such as poor service or the goods were not of the quality they were expecting.

Raising a dispute in relation to a debt, may give the debtor a subsequent defence to a statutory demand or winding up petition if the creditor decides they want to proceed down an insolvency route. However, the dispute has to be a real dispute, not a fanciful one, simply designed to prevent the creditor from using insolvency procedures to seek to recover the debt.

If faced with a dispute, one option for a creditor company is to seek to negotiate a settlement with the debtor. After all, some money may be better than none and could save the creditor from having to pursue other debt recovery processes.

Parties are of course free to try to negotiate with each other either via face-to-face meetings or via written correspondence.

If this does not work, they may wish to engage the services of solicitors to seek to negotiate a settlement on their behalf.

If the debt is less than £10,000 and a company has to issue court proceedings to recover the debt, the claim will be allocated to the Small Claims Track. Since 22 May 2024, parties are now obliged to take part in a mediation organized by the Small Claims Mediation Service.

This is a compulsory one-hour mediation before an independent mediator who will listen to the parties respective positions and seek to see if a compromise can be reached. The parties do not have to reach a settlement, but if they do it will be formally recorded as a Court order.

For claims above £10,000, mediation is one of a number of alternative dispute resolution methods which are available to parties to seek to resolve their dispute.

Mediations are a very useful tool to try and settle disputes. They are often a lot cheaper than formal court proceedings and can usually be arranged relatively quickly. The parties will get an opportunity to air their respective grievances and it will be the job of the mediator to try and facilitate an agreement between the parties. They are usually less confrontational when compared to court proceedings.

However, it is worth bearing in mind that there is no point in parties attending mediation unless they have an honest intention of wanting to resolve their dispute, as otherwise the process is a waste of everyone's time and money.

The mediator cannot force parties to reach an agreement and the mediator does not have the same powers as a judge and will not reach a decision in favour of one of the parties in the same way a judge or arbitrator would.

A settlement reached at a mediation is not binding until it has been recorded in a written agreement signed by both parties.

Indeed, if you are able to reach a resolution with the debtor, it is advisable to record the terms of any settlement in writing, signed by both parties. In the event that one party later reneges on the agreement, the other party will be able to refer to the written agreement in court proceedings.

Instalment arrangements

Whilst every business would prefer to be paid the whole of the sum due, the debtor may simply not be able to pay such monies in one lump sum, especially if they are experiencing their own cash-flow issues.

Companies may therefore want to give thought to entering into instalment arrangements, so that they get paid over a period of time. This could be with or without interest accruing on the unpaid sums. If the debt is for a large amount, you may also wish to consider taking some form of security over some or all of the debtors' assets (such as plant or machinery, or a charge over property) until such time as the debt is paid in full.

Such an arrangement may be preferable to getting no payment at all or incurring the time and effort of court proceedings or insolvency proceedings, when there remains a risk that they may still not get paid in the future.

Also, if the debtor is in serious financial difficulty, you may be able to recover at least part of the debt before the debtor goes into liquidation (where you may not recover anything).

Court proceedings

Court proceedings are seen by many to be the final step in trying to recover a debt from a customer.

Companies will have usually sent multiple chasing emails or letters to the debtor. Such letters and correspondence are often a good way to find out whether the debtor disputes the invoice or debt and if so, on what grounds. They allow the company to consider whether the goods or services they have provided have been up to standard and whether any discount should be made to the debtor in respect of the goods or services.

However, if the debtor still refuses to pay the debt (or any agreed amount) then the company has to consider whether they are going to issue court proceedings to recover the sums owed.

There are a number of considerations to think about prior to issuing a court claim:

The cost of the claim

With any debt claim, there will be a court fee to pay to get the claim issued at court. The amount of the fee depends on the level of the debt being pursued, with a maximum of a £10,000 fee for any debt over £200,000.

If the claim is substantial or complicated, you may wish to instruct solicitor or a third party to pursue the claim for you. However, as mentioned previously, depending on the value of your claim (if below £10,000), you may not be entitled to recover any legal costs you incur in pursuing your claim.

You also need to consider the possibility that if you are unsuccessful in your claim, you may be ordered to pay some or all of your opponent's legal costs.

Does the debtor have sufficient assets to pay any judgment or order?

Even if you issue proceedings and a court finds in your favour, there is still no guarantee that you will receive payment of the debt from the debtor. The Court will usually provide the debtor with a deadline by when to pay the debt. If the debtor fails to do so, then the company will need to enforce the debt in order to obtain payment.

There are many different methods of enforcement, each with varying costs, and each method should be considered to evaluate which is the most appropriate for your claim.

As mentioned earlier in this guide, it is often worth carrying out checks on the debtor prior to issuing proceedings to see if they are likely to have the assets to satisfy any judgment. If they do not, then you may wish to consider whether court proceedings are the correct approach, as even if you obtain a judgment, you may not get paid any monies by the debtor.

Prior to issuing the claim – the pre-action stage

Even though you may have sent several chaser emails or letters to the debtor asking when the debt is to be paid, before issuing a claim at Court, parties are encouraged to send a formal Letter Before Claim.

This will set out the basic details of your claim, how the debt arose, the amount due, when it was due to be paid and any interest that may be due. You should provide the debtor with one final deadline to pay the debt, failing which you will be issuing proceedings. There is no set deadline that you need to give to the debtor, although it is commonplace to give the debtor between seven and 14 days to pay the debt. In more urgent cases, you may give the debtor a shorter timeframe, especially in situations where they have been aware of the debt and its circumstances for some time.

(If your debtor is an individual sole trader, then you must give them at least 30 days to pay the debt in your Letter before Claim. There are also other documents which you need to provide to them with your Letter before Claim, including an income and expenses form for them to return).

Issuing the claim

If the debtor still fails to pay the debt or you are unable to reach an agreement for them to pay, then you may decide to issue formal court proceedings.

In order to start proceedings, you will need to complete a Claim Form, send it to the Court and pay the issue fee.

The Claim Form is self-explanatory and there are notes to assist parties in completing the form. If the claim is more complicated, then you should also send in a separate Particulars of Claim, which set out the details of the claim, how the debt has arisen etc, in a separate document. You should also include copies of any key documents, such as the invoice(s) under which you are seeking payment.

As part of your claim, you may also be entitled to claim either statutory or contractual interest. This will depend on your terms and conditions and how you contracted with the customer. If your terms and conditions contain an interest provision, then you can claim interest on the unpaid amount at the rate set out in your terms and conditions.

If your terms and conditions do not mention interest, then, as long as both parties are businesses, you may be entitled to claim late payment interest and compensation pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

Under the above Act, a business can recover interest and compensation for each invoice, which is paid late and outside of any agreed payment terms. As the interest and compensation is payable per invoice, this can add to up quite large additional sums of money, especially in cases where there are many invoices which have not been paid, or have been paid late, but outside of agreed payment terms.

Interest is payable at a fixed rate and is simple interest, not compound. The rate is set twice a year and is based on 8% above the Bank of England's base rate as at 30 June and 31 December. For example, for invoices where interest starts to run between 1 January and 30 June, the rate will be based on 8% above base rate as at 31 December, the previous year.

As soon as interest begins to run, a fixed sum is also payable on each invoice in addition to the interest on the debt. The amount of the fixed sum compensation, depends on the value of debt which is outstanding or which was paid late:

- £40 fixed sum for debts/invoices under £1,000;
- £70 fixed sum for debts/invoices of at least £1,000 but under £10,000;
- £100 fixed sum for debts/invoices of £10,000 or more.

The claim is issued by either completing the claim form (and paying the fee) online, or by sending the completed Claim Form (and fee) to the Civil National Business Centre in Northampton, who will issue the claim for you and send back confirmation that the claim has been issued.

As part of the claim, you can request that the Court serves the claim on the debtor, or you can ask the Court to return the Claim Form back to you, so that you can arrange for service yourself. As long as you have entered the correct address for the debtor (usually their registered office at Companies House) on the Claim Form, then it is easier and cheaper for the Court to serve the claim on the debtor.

Once the claim has been served on the debtor, they will have 14 days to acknowledge the claim and if they do this, then a further 14 days to file a defence to the claim.

If they file a defence, then the Court will then usually transfer the claim to the home court of the defendant and will set directions (essentially a timetable) for the next steps to be taken by the parties in the claim. If the claim is for less than £10,000, one of these steps will be a referral to the Small Claims Mediation Service for mediation as referred to earlier in this guide.

Default judgment

If the defendant fails to file an acknowledgment of service within 14 days of being served with the claim or file a defence within 28 days of being served with the claim, the claimant will be entitled to apply for a default judgment. This is done by completing a Request for Judgment form or completing an online request. If the Court accepts your request, they will then send you a county court judgment in the sum claimed, together with interest and any applicable legal costs (normally the issue fee)

The County Court Judgment will specify a date by when the debtor needs to pay the judgment. If they fail to do so, you will then need to enforce the judgment in order to receive payment.

Default judgments are fairly commonplace in court proceedings, with the Court issuing default judgments in respect of 92% of all issued money claims in 2023. This is due to the fact that defendants may not want to defend a claim or indeed have no defence to the claim and do not want to incur legal costs when they know they will ultimately lose the case.

Enforcement of judgments

There are a number of different options available to enforce a monetary judgment and you will need to consider which method is most appropriate in your case. In some cases, it may be advisable to seek legal help to assist you with the enforcement.

Taking control of goods

This is possibly the quickest and most popular method of enforcement. Once a debtor has failed to pay a judgment by the due date, you can then instruct a court official to attend the debtor's premises and to seize control of goods, which the court official will then sell to raise funds to satisfy your judgment. In the High Court, this is usually done by a High Court Enforcement Officer (via a Writ of Control) and in the County Court, by a county court bailiff under a Warrant of Control. The enforcement officer will usually recover their costs from the debtor too.

- If the debt is less than £600.00, then the enforcement has to remain with the County Court bailiff;
- Any debts of over £600.00 may be transferred to the High Court for enforcement by the High Court Enforcement Officers, who are often seen as more effective (and less busy) than the County Court bailiffs;
- If the judgment is over £5,000, then it must be transferred to the High Court for enforcement.

Third party debt order

If you are aware that there is a third-party holding money on behalf of a debtor, then it is possible to apply to the court to request that that those monies are frozen and, if a final order is made, that the third party is ordered to pay the judgment sum to you from those frozen funds.

Third party debt orders are not that popular as you need evidence that the debtor has funds available with a third party, but if you are aware that the debtor has a bank account and there are sufficient funds in that bank account to be able to repay you, then they could be considered as a method of enforcement. For example, if you are aware that the debtor receives payment into a particular bank account, then this could be a way of recovering monies owed to you.

Alternatively, it could be that you are aware of a third party which owes money to your customer. You may be able to ask the Court to order that third party pay those monies (which it owes to your customer) to you (in satisfaction of the debt which the customer owes to you) as opposed to the customer.

Third party debt orders can be used to recover the whole or part of a judgment owed to a creditor. They can also be used alongside the other methods of enforcement set out in this note.

Charging orders

A charging order secures a judgment debt by imposing a charge over the debtor's interest in land or other assets. They are most commonly used where a debtor owns their own property, ideally free of any mortgage. This would only be relevant if the company owns its own property or part of a property.

Insolvency proceedings

Insolvency proceedings should not be used as a method of debt recovery. However, the threat of winding up a debtor's company can sometimes be enough to make the debtor pay what they owe or come to an arrangement with you to repay the sums owed.

Insolvency proceedings should be seen as a last resort for a creditor. Once the company is wound up, the company will no longer exist. An insolvency practitioner or the Official Receiver will be appointed to gather in any assets of the company and distribute them amongst its creditors.

However, as an unsecured creditor, you are very unlikely to recover all of the monies that are owed to you, as other secured creditors, such as banks (and the insolvency practitioner) will be paid first. Usually, the reason a company is wound up is because it is unable to pay its debts as and when they fall due and is essentially insolvent.

A company may be able to make other arrangements with an insolvency practitioner whereby they are able to save their business or pay creditors a certain percentage of what they owe to them. As a creditor, being repaid some of the monies owed to you may be preferable than not receiving any monies, which is a distinct possibility if the company is wound up.

Insolvency proceedings are only suitable where the debt is not disputed. Whilst you do not necessary have to have a court judgment against the debtor for the amount owed, many creditors obtain judgments first, so that the debtor is unable to argue that the debt is disputed.

The first stage of most insolvency proceedings is the service of a statutory demand on the debtor.

A statutory demand is a formal written document from an individual or company to an individual or company demanding payment of an outstanding debt from that individual or company within 21 days.

Statutory demands are not Court documents and you do not need to issue Court proceedings to serve a statutory demand on a debtor. Similarly, there is no court fee to pay to issue a statutory demand.

If a company which owes more than £750.00 fails to repay the debt within the 21-day period, then the creditor is then in a position to commence winding up proceedings against that company.

There is however no obligation on a creditor to commence winding up proceedings against the debtor if they have served a statutory demand. However, due to the relatively straightforward process of serving the statutory demand, most creditors will serve a statutory demand before commencing winding up proceedings.

Serving a statutory demand on a debtor is quite an aggressive step to take to recover a debt. It is perhaps advisable to serve a letter before action first on the debtor and if they fail to respond or pay, then the statutory demand can then be considered. However, if there is an ongoing commercial relationship with the debtor, then serving a statutory demand could affect such a relationship going forward.

Statutory demands should only be served where the debt is not disputed. If the debt is disputed, then the debtor company may seek to issue an application for an injunction to restrain the presentation or advertisement of a winding up petition (where it is served on a company). In these instances, if such an application is successful by the debtor, the creditor is likely to be ordered to pay the costs of the debtor's successful application.

Service of a statutory demand on a company

It is important that the statutory demand is served properly on the debtor and a record of that service taken, in order to prevent the debtor later raising arguments that they were not served correctly or not served at all.

Creditors will therefore often use a process server to serve statutory demands. Not only does this avoid the creditor having to serve the statutory demand themselves, but the process server will also usually provide a report or formal statement of service, which can then be provided to the Court in any later insolvency proceedings.

The statutory demand should be personally served by leaving it at the company's registered office as listed at Companies House (in the event the company is a limited company). If the company is not a limited company, then it should be served at their trading address or other address from their letterhead. Alternatively, it can be served on a director, secretary or manager of that company. Registered post can be used, if it can be shown that the company received the statutory demand and signed for the post.

Proof of service

Whichever way the statutory demand is served, the process server or creditor should make a note of the same and provide a statement of service, setting out the time, date and method of service and if possible, including photographs or other proof of service (i.e. placing it in the letterbox etc). The statement of service should be sworn by a statement of ruth, verifying the facts set out in the statement.

A debtor only has 21 days from the date they were served with the statutory demand to pay the debt set out in the statutory demand. If they dispute the debt, then they only have 18 days in which to make an application for an injunction to restrain the presentation of a winding up petition.

Debtors may choose to contact a company to see if a payment arrangement can be made, or may even pay some of the debt, so as to reduce the sum owed to less than £750.00, as a company cannot be wound up if they owe less than this amount.

If a company has failed to respond to a statutory demand or failed to pay the sums owed to you as set out in the statutory demand within 21 days of service, then a creditor will be in a position to issue a winding up petition against that company.

Whilst it is not a pre-requisite to serve a statutory demand (and wait 21 days for it to expire) in order to issue a winding up petition, most creditors tend to follow this route. This is because that if a company served with a statutory demand for a sum in excess of £750.00 fails to comply with the demand, then it is deemed unable to pay its debts. This is a ground upon which a court may make a winding up order. As such, creditors usually follow this route so that they can easily show the court that the debtor is unable to pay its debts.

What to do before issuing a winding up petition

- Check if there are any existing petitions against the debtor company.

If an existing petition already exists, the correct approach is for the creditor to support the original petition. They should make enquiries of the existing petitioner or their solicitors to check on the status of the petition and when any hearings may be taking place.

If they issue their own petition, they may be penalised by the court for costs for doing so.

To check for any existing petitions, you should contact the Central Registry of Winding Up Petitions at the High Court. You should also carry out a search at Companies House to see if the company is in any other insolvency process, such as administration or a Creditors Voluntary Arrangement. It is also advisable to check the London Gazette to see if any notices have been advertised against the company.

- Check if the debtor company disputes the debt or has a counterclaim.

If the debt is genuinely disputed on substantial grounds, it is likely that a Court will dismiss the winding up petition. Similarly, if a court determines that the debtor has a cross claim or set off which equals or exceeds the amount of the debt as set out in the petition, the Court is likely to dismiss the petition.

As such, before the petition is issued, the creditor should check that there is no such dispute by the debtor. Usually, a creditor will have served a statutory demand and the debtor would have had an opportunity to raise such a dispute in any applications for an injunction to restrain the presentation of a petition. If a creditor knows about a dispute, but proceeds to issue a petition anyway, then a court are likely to penalise the creditor in relation to costs either at the application for an injunction to restrain the advertisement of the petition or at any hearing where the petition is dismissed.

It is usually advisable to instruct legal advisers to assist with the drafting and service of a winding up petition. There is certain specific information that needs to be included on the petition and failure to include it may mean it is not issued by the Court.

Issuing a winding up petition

Most winding up petitions are issued in the High Court, Business and Property Courts. Some County Courts do have jurisdiction to hear winding up petitions, but certain criteria need to be fulfilled for the county court to be used. If in doubt, it is best to issue at the High Court.

In order to issue the petition you will need to send the original petition (plus a copy) for the Court and one copy for each person on whom the petition will be served) and a copy of the verification of the petition to the High Court. If the petition is based on a statutory demand, it is also advisable to attach a copy of the statutory demand and statement of service of the statutory demand to the petition too. You will also have to pay the Court fees for the petition. As at June 2024, these are as follows:

- £302.00 Issue fee;
- £2,600.00 Official Receivers deposit.

You should however check the up to date Court fees before you issue your petition in case they have changed from the above. If you are filing the petition at the Rolls Building in London (being the court where most petitions are heard), then you will need to use the Courts Electronic Filing System (known as CE-File). This is quicker than sending the documents by post.

Serving the winding up petition

Once a winding up petition is issued by the Court, the Court will allocate the petition with a claim number and will set a date for a hearing of the petition. This is usually around six to eight weeks after the petition was issued, depending on how busy the Courts are.

The petition then needs to be served on the debtor company. As with the statutory demand, it is advisable to instruct a process server to serve the winding up petition, so that they can also provide you with a statement confirming proof of service.

Advertisement of the petition

The winding up petition needs to be advertised in the London Gazette. This is to enable other creditors to become aware of the petition, so that they can either support or oppose the petition at the hearing.

However, the true effect of advertising the petition is that it is highly likely that the company's bank will become aware of the petition (if they have not already done so) and will look to freeze the company's bank account.

For this reason, some creditors decide to wait until the last possible day before advertising a petition, as once it is advertised and the bank become aware of the petition, it becomes very difficult for the company to then pay the debt owed.

Winding up petitions cannot be advertised until at least seven business days have expired after the petition was issued and must be advertised at least seven business days before the hearing date set out in the petition. As such, there is only a limited period in which to advertise the petition.

The London Gazette advertisement needs to set out certain information in order to notify other creditors about the petition and also to allow them to contact the petitioner to let them know if they wish to support or oppose the petition.

If another creditor wishes to support or oppose the petition, then they need to give notice to the petitioner (or their solicitors) by 4pm on the business day before the hearing is due to take place. This then allows the petitioner to inform the Court that there are supporting/opposing creditors and provides those creditors with an opportunity to address the court at the hearing if they wish to do so.

There is a fee to pay for the London Gazette advertisement and it is worth checking with them as to the level of this fee.

A copy of the London Gazette advert also needs to be provided to the Court as soon as it has been advertised, but in any event, not less than five business days before the hearing.

There are also a number of other procedural formalities which your legal representative will need to deal with prior to the hearing of the winding up petition.

Hearing of the winding up petition

Petitioning creditors will often instruct a barrister to attend the winding up petition on their behalf and to request the company is wound up. If the petition is opposed, then a representative of the debtor company (or their legal representatives) will be allowed to make their submissions.

The first hearing of a winding up petition will normally take place in the Rolls Building of the High Court in London. Hearings are heard on Wednesday mornings and each week, there are usually in excess of 100 petitions heard. As such, the Court does not have sufficient time to consider detailed submissions or legal arguments. If the petition is disputed, the Court will normally adjourn the hearing until another day when they have more time to hear the submissions from both the creditor and the debtor.

The Court will either grant a winding up order, dismiss the petition or adjourn the petition, although it does have power to make any other order it sees fit.

If a debtor pays the debt owed, but the petition is supported by another creditor, then the Court may allow the other creditor to be substituted in place of the original petitioner and they will then need to re-advertise the petition and obtain a new hearing date.

If a winding up order is made, the petitioning creditor will normally seek to recover their legal costs of the petition. However, these are usually paid out of any assets of the company and will be determined by the insolvency practitioner appointed on the company's behalf to manage its assets and pay creditors.

If the winding up petition is dismissed, then the debtor company will seek to recover their costs from the petitioner and the Court will usually order that the petitioner pays them. However, the court has a general discretion to make whatever costs order it sees fit.

After the hearing

If the debtor company is wound up, it ceases to exist. The Official Receiver, or an Insolvency Practitioner, will be appointed as liquidator for the company and will gather in any assets or monies owed to the company to then sell them and distribute them amongst any creditors of the company.

As an unsecured creditor with only a possible county court judgment against the debtor company, it is likely that you will rank lower than many other creditors of the company.

The liquidator also has the power to investigate other matters, such as the behaviour of the directors and other officers of the company and if they believe there has been some wrongdoing, they could bring personal claims against those individuals.

However, if the debtor company truly has limited or no assets, then the likelihood of recovering any money in respect of the unpaid invoice(s) is low.

How we can help

We hope that this guide has been of assistance to you and provided clarity on how to navigate issues relating to business debt and recovery. If you have any questions, or need further assistance, please feel free to contact our team, or complete our online enquiry form.