TWO
Preliminary planning

Introduction

Chapter 1 posed the question whether or not legal action should be taken and it explained some of the factors that should be considered in reaching the decision. It also explained some of the alternatives to legal action. This chapter moves on to some of the points that should be considered after an affirmative decision has been made and before the claim is issued.

It is a sound military axiom, reputedly first enunciated by the Duke of Wellington, that time spent on reconnaissance is seldom wasted. It makes sense for legal actions too. A few minutes thought may increase the chances of success. It is worth considering the issues raised in this chapter.

The importance of acting decisively

A customer that is having problems paying your invoices is probably also having problems paying other suppliers too. Your legal action may well put you into competition with these other suppliers and early decisive action may give you the advantage. This applies to issuing a claim, pursuing a claim through to obtaining judgment and to action to enforce the judgment.

It is widely believed that money obtained from a customer as the result of an enforcement measure goes pro rata to all claimants with outstanding judgments. This is not usually the case, and money is normally applied to the judgment creditors (as the successful claimants will usually then be called)

in the order in which they applied for the relevant enforcement measures. The following illustrates the principles:

- A Ltd issued a claim for £10,000 against X Ltd on 10th January and obtained judgment for this amount on 8th September;
- B Ltd issued a claim for £6,000 against X Ltd on 17th January and obtained judgment for this amount on 26th September;
- B Ltd applied for enforcement action by a county court bailiff on 28th September;
- A Ltd applied for enforcement action by the same county court bailiff on 29th September;
- The county court bailiff seized the assets of X Ltd and these were ultimately sold. After deducting fees and expenses the amount realised was £8,000;
- B Ltd gets £6,000 plus any properly claimed continuing interest and court fees. A Ltd gets whatever is left.

This shows exactly why it may be beneficial to act quickly and decisively, but even if there are no competitors, you will still want your money as soon as possible.

The final warning letter

You should almost always send an explicitly worded final warning letter before commencing legal proceedings and there are two sound reasons for doing so. The first and most important is that it often works and you could well get payment without resorting to the courts. The second reason is that it is expected, and a judge may be displeased and penalise you on costs if one has not been sent.

A good final warning letter should be short, not abusive, should state exactly what is going to happen and should state when it is going to happen. By definition there should only be one final warning letter. If you send two or

more, you were not serious the first time and it may adversely affect your reputation. The following is indicative of what might be sent:

Mrs L James
Company Secretary
Faltron Services Ltd
14 Kerry Drive
Aylesbury
Bucks HP18 1PR

11th May 2003

Dear Mrs James

Overdue Balance of £3,148.26

We notice with regret that the above balance is still outstanding. Although we wrote on 23rd April and 2nd May we have received neither payment nor a reason why payment should not be made.

We must now tell you that we expect payment to be made by 18th May. If payment has not been received by that date, we will pass the matter to our solicitors with instructions to commence proceedings. This will be done without further warning to you.

Yours sincerely,

P Jones
Credit Manager

What professional help will you employ?

The issue of a claim and perhaps fighting a case is well within the capabilities of most readers of this book, and so is enforcement action after judgment has been obtained. You should seriously consider the do it yourself route. This is encouraged, though not required, for claims up to £5,000 handled in the small claims track. Legal costs will not be awarded in the small claims track.

The second option is to employ a solicitor and this is a requirement for a company issuing a claim in the High Court. Solicitors are specialists likely to give good service and there are advantages in using specialists, even in doing things that we are able to do ourselves. The use of a solicitor is probably wise if the claim is large or not straightforward, and it may make sense if it is likely to be defended.

Thirdly, you could use one of the many credit agencies that offer services in this field. These will employ solicitors or use the services of solicitors as necessary. Credit agencies range from large organisations operating nationally or internationally, through to small businesses specialising in particular sectors of the market or areas. Experience and personal recommendation may well be factors in the choice of solicitor or credit agency, if one is used. Small firms of solicitors are likely to collect debts alongside many other sorts of work. Larger firms are likely to have specialist departments to handle debt collection. These specialist departments do have certain advantages.

The traditional way for a solicitor to charge for his services is on the basis of time expended plus reimbursement for expenses incurred. However, many solicitors and virtually all credit agencies offer some variation of 'NO WIN, NO FEE'. This sounds too good to be true, and of course it is because they are remunerated by a percentage of the money eventually recovered. The precise details are negotiated and the percentages are usually on a sliding scale. The solicitor or credit agency is banking on a spread of cases with the successful ones paying for the failures. It is a matter for negotiation but court fees and perhaps some other costs will probably be payable by the client regardless of the outcome. 'NO WIN, NO FEE' has obvious attrac-

tions, but of course solicitors and credit agencies normally make satisfactory annual profits and do not suffer. Do think carefully before handing over a straightforward claim for a large amount and with a good chance of success. This could be expensive.

Your relationship with your solicitor or credit agent

You may well have heard the advice that having appointed your credit agent or especially having appointed your solicitor, you should step back and let him get on with it, just speaking when spoken to and answering any questions that he may ask. They are after all, the experts. There may be some sense in this and in legal matters you should rarely challenge a solicitor's advice, but in some respects it does not have to be this way.

Most solicitors and credit agents press on remorselessly according to a preset pattern. This is a cost-effective approach and is most likely to achieve the maximum payment in the minimum time. It is exactly what is wanted by most clients. The client hands over the case, hopefully banks a cheque at the end and does not think much about it in between. This is probably right for you, but you can change your mind and you can ask questions. You can decide to accept a customer's proposal, and you can come to feel sorry for the customer and call the whole thing off. This does happen and not all slow payers are rogues. Some may be facing real personal tragedies. It is of course the solicitor's privilege to give you frank advice, perhaps including the advice that you are being silly. It is probably also the solicitor's privilege to charge for abortive work undertaken.

There may be a little scope for cutting back on your time commitment. Clients routinely photocopy all outstanding invoices for their solicitors and this can be a big job. It may be worth asking if it is really required in all cases. An acceptable substitute may be a list of the outstanding invoices showing the invoice numbers, amounts and invoice dates.

Choice of legal route

Right at the beginning you must choose between issuing a claim in the High Court or a county court, or presenting a winding up or bankruptcy petition. The issue of a claim is the route normally taken and most of this book is devoted to it. However, it is worth giving some thought to the other option, which is explained in more detail in Chapter 10.

Winding up applies to a company and bankruptcy applies to an individual or general partnership. In each case the amount owing must be at least £750 and you must be in a position to establish the case very clearly. Winding up and bankruptcy are available as a means of enforcement of judgment and this is explained in Chapter 9, but it is also possible to go straight for winding up or bankruptcy without issuing a claim and obtaining judgment first. The threat of a winding up or bankruptcy action can be extremely effective. It is virtually guaranteed to seriously annoy the customer and will probably end any chance of further business, but it is unlikely that you will want such business anyway. The prospect of the threat succeeding is the main attraction and actually doing it has disadvantages. Apart from anything else the person who does it does not get any priority when the assets are distributed, which may well take a long time.

If you issue a claim, which is by far the most common option taken, you must decide whether to do so in the High Court or in a county court. The limits on the choice are:

- A claim regulated by the Consumer Credit Act must be issued in a county court. You cannot choose the High Court.
- All claims may be issued in a county court. There are no minimum or maximum amounts.
- Only clams in excess of £15,000 may be issued in the High Court.

Since 1999 many of the differences between the High Court and the county courts have no longer applied, and the great majority of claims are issued in a county court. The High Court is more suited to really big cases involving difficult or involved points of law or fact and perhaps with large amounts at stake. Cases destined for the so-called 'small claims court' are issued in a county court in the same way as other claims.

Claim the maximum possible amount

Sometimes the amount that can be claimed is clear and obvious, being the sum total of all the outstanding invoices, though interest should be claimed as well and this is explained in the next chapter. Sometimes, though, it may be possible to raise further invoices ahead of the issue of a claim. Perhaps some things have been overlooked. Perhaps a few ancillary items have not been invoiced for reasons of goodwill, but at this stage goodwill should not be a factor. Have a close look and bill everything that can be billed.

It may even be possible to raise invoices in respect of matters not covered by the contracts against which the claim is being made. The Statute of Limitations specifies a limit of six years for England and Wales (five years for Scotland). Perhaps further charges can be made in respect of business done over this six year period. It may well not be possible and you may have effectively taken payments in full and final settlement. Legal advice on the point may be necessary.

The above suggestion might be considered unethical, though there is nothing ethical about a customer not paying money that is owing. Needless to say only amounts that may legally and legitimately be claimed should be considered.

The correct identification of the defendant

This sounds obvious and easy but a lot of mistakes are made. It is important and you should get it exactly right. Getting it nearly right may well not do.

A common fault is failing to recognise that the customer is a company, rather than a sole trader or a partnership. You may know the customer as Smith and Jones but if it is really Smith and Jones Ltd, this is what must be stated on the claim form. An interesting possibility arises if the reason that you do not know that the customer is a company is because this fact was not disclosed to you, and in particular if it was not disclosed on your customer's

company notepaper. In these circumstances one or more people may have taken on personal liability for the debt.

Another common mistake is confusing two companies in a group, perhaps with similar names. Each company is a separate legal entity and you must name the right one. Black and White (Midlands) Ltd is not the same as Black and White (North) Ltd, even if they are both owned by Mr Black and Mr White.

It is a legal requirement that a company must disclose on its notepaper its exact registered name, its registered number and place of registration, and the address of its registered office. Certain other types of organisation are also required to disclose specified information on their notepaper. It is an excellent idea to check a recent piece of notepaper or some other document issued by the customer. You may use the information yourself or you may send the document to your solicitor or credit agent. Be prepared for a call from them thanking you because they do not often get this level of help from their clients. An alternative source of information is Companies House whose main address in England and Wales is:

Companies House
Crown Way
Maindy
Cardiff CF14 3UZ

Tel: 0870 333 3636