

## **Recovering a Trade Debt**

This briefing highlights the advantages and disadvantages of the main options available to a business when trying to recover a fairly modest trade debt from a company.

### **Court proceedings**

There are a number of points the business should consider before starting court proceedings:

- The court is obliged to deal with matters justly and at proportionate cost.
- Conduct a cost to benefit analysis before initiating proceedings. Make sure the cost of enforcement is factored into the calculations. Work out whether it is worth pursuing the matter via the court?
- Check that the other party is good for the money – there is no point in incurring the cost of litigation if the business is unable to enforce the judgment. We can discuss in details various enforcement options against individuals and companies.
- Be cautious about starting proceedings if the business does not intend to see them through. The business will almost certainly be liable for the other party's costs if it discontinues the claim.
- Be careful about threatening to start formal proceedings if the business does not intend to do so.
- Recovery of costs will depend on:
  - who wins or loses;
  - a party's conduct and compliance with court rules and orders (for example, a failure to comply with a pre-action protocol can have cost consequences even for the party that wins);
  - when the matter is concluded (whether before or after proceedings have been commenced);
  - the financial value of the claim and consequently the track the claim is allocated; and
  - how the claim is concluded (whether by agreement or at trial).

### **Insolvency proceedings**

The business may be able to recover a debt from a company by either:

- Serving a statutory demand.
- Threatening compulsory liquidation (also known as winding-up) by the court.

### **What is a statutory demand?**

- A statutory demand is a written notice in a prescribed form demanding payment of a debt owed by a company to one of its creditors. If the debtor doesn't pay within three weeks, this may constitute grounds for presenting a petition for winding up.
- There are a number of advantages of serving a statutory demand:
  - preparing and serving a statutory demand is quick and inexpensive;

- the process does not involve the court; and
- if a creditor serves a statutory demand, they are not obliged subsequently to commence winding-up proceedings

### **What is a winding-up petition?**

- The threat of starting winding-up proceedings can put considerable pressure on a company to pay an outstanding debt promptly and the basic procedure is relatively inexpensive. However, these proceedings should generally be regarded as a last resort.
- The court requires a creditor to behave reasonably before starting winding-up proceedings and, in particular, to write to the company with details of the debt and demanding payment.
- It is an abuse of process to issue a winding-up petition if a debt is genuinely disputed.
- If a winding-up order is made, a liquidator will be appointed by the court to collect the assets of the company and distribute the value equally among the company's creditors. The petitioning creditor does not get any priority in this process (unless they have security over any company asset or they are one of a small group of preferential creditors). They may receive only a small percentage of their claim, or perhaps nothing at all, at the end of the liquidation process.

### **Reaching a settlement**

It almost always makes sense to consider informal methods of recovering a debt (for example, using negotiation or mediation) as they can provide the quickest and simplest solutions.

The court will expect the parties to have explored ways of settling the claim before they issue proceedings and may penalise a party in costs if they fail to do so.

We can assist you with drafting Tomlin Orders whereby if a party fails to pay you back via instalments or by a certain date, you can enforce the order with the court.

The business should also think about the disadvantages associated with litigation. For example:

- Litigation can be disproportionately expensive to the sums being argued about.
- The outcome of litigation is uncertain.
- The court is only able to offer a limited range of remedies.
- Litigation often destroys any prospect of the parties resuming a commercial relationship.
- Negotiation
- It might be possible to recover the debt, or agree an alternative future course of action by opening a negotiation with the debtor. This can be done verbally or in writing (for example, by e-mail).

### **Mediation**

Mediation is a flexible, voluntary and confidential form of dispute resolution in which a neutral third party helps parties to work towards a negotiated settlement of their dispute. The parties retain control of the decision whether or not to settle and on what terms.

### **The without prejudice rule**

Parties usually negotiate on a without prejudice basis. The without prejudice rule generally prevents statements made in a genuine attempt to settle an existing dispute from being used as evidence of admissions against the interest of the party which made them.

This rule means that, if the negotiation or mediation fails and the business then issues court proceedings, any statements that the parties made in a genuine attempt to settle the dispute (whether in writing or orally) will not be put before the court in the proceedings.

### **Doing nothing**

The business can always simply write off the sum that it is owed. Before taking this step, the business should consider the:

- Size of the debt.
- Likely cost of recovering the debt.
- Importance of the current relationship between the parties.
- Likelihood of maintaining an on going commercial relationship between the parties.

**For further information or advice please contact our Specialist Team on 0800 088 6004**