

SHOULD I ISSUE COURT PROCEEDINGS OR INSOLVENCY PROCEEDINGS?

IN BRIEF

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INTRODUCTION

Where a debtor owes you money you often have two options:

- to issue **court proceedings** for the sum owed, or
- to proceed straight to **insolvency proceedings** (bankruptcy for an individual or winding up for a company).

Here, we will set out when those options are available and the advantages and disadvantages of both options.

INSOLVENCY PROCEEDINGS

In general terms, a debtor who fails to comply with a statutory demand for a debt of more than £750 (for companies) or £5,000 (for individuals) for three weeks is at risk of having bankruptcy or winding up proceedings issued against it. For this reason, serving a statutory demand may be a means of exerting pressure on an individual or company to pay a debt.

If the debtor does not comply with the statutory demand you can present a bankruptcy or winding up petition against the debtor (an individual is made bankrupt, whilst a company is wound up – the two procedures are very similar). However, there is no obligation on a creditor who has served a statutory demand to commence insolvency proceedings against the debtor.

Advantages:

- The threat or commencement of bankruptcy or winding-up proceedings can result in the debt being recovered quickly.
- The basic procedure is relatively quick and inexpensive. It may be possible to obtain an order within about six weeks of presenting a petition. However, there are various ways in which the debtor may seek to frustrate or delay the proceedings.

Disadvantages:

- The bankruptcy/winding-up process is not appropriate if the debt is genuinely disputed or if the debtor has a genuine cross-claim or right of set-off.
- Bankruptcy/winding up is a class remedy. As a result, once a petition has been presented to the court, any other creditor may support the petition and seek an order even if the debtor pays the original petition debt.

Advantages:

- If the court grants an order, an insolvency practitioner will take control of all the debtor's assets, with wide-ranging powers to investigate the debtor's affairs. He may also bring legal proceedings in order to maximise the assets available for distribution amongst the debtor's creditors.

Disadvantages:

- The amount of the dividend paid to unsecured creditors will often be only a few pence for each pound of debt, and may in some cases be nothing at all.
- Even where there are assets available for distribution amongst the creditors, there is often a substantial delay between the order and the payment of a dividend to the creditors. This delay can be for a period of months or even years.

PROCEDURE

1. **Statutory demand:** A statutory demand is served on the debtor demanding payment. An individual should apply to set aside the statutory demand if the debt is disputed. If a company disputes the debt it should threaten an injunction if the demand is proceeded with. Please note that it is possible for a company debtor to apply for an injunction to prevent the presentation of a petition or to prevent the advertisement of the petition. The injunction will be granted if it appears that (1) the debtor has some prospect of defending the claim made against it; and (2) the debtor is solvent.
2. **Petition:** If the sum claimed in the statutory demand is not paid or disputed, a bankruptcy/winding up petition is issued which is listed for a hearing. If, by the date of the hearing, payment has not been received, the court should grant a bankruptcy/winding up order. An insolvency practitioner will then be appointed who will sell the debtor's assets and distribute any monies realised (after paying the insolvency practitioner's fees) equally amongst the debtor's creditors.

COST

Our fees for dealing with the matter from preparing the statutory demand, preparing the petition for issue and up to but not including the hearing will be in the region of £750 - £1,250 plus VAT, the standard charge and disbursements (depending upon the circumstances of the case). Negotiations and disputed debts can increase the costs beyond this, but we will advise you of this.

Once the petition is served, the debtor will be liable to pay your costs unless there is a good reason why the petition cannot proceed (e.g. the debt is not due). The anticipated costs and expenses are as follows:

	Company (winding-up)	Individual (bankruptcy)
Serve statutory demand	£100 plus VAT (approx)	£100 plus VAT (approx)
Court issue fee	£280 (no VAT)	£280 (no VAT)
Official Receiver's deposit	£1,600 (no VAT)	£990 (no VAT)
Serve petition	£100 plus VAT (approx)	£100 plus VAT (approx)
Advertisement Fee	£92 (inc VAT)	n/a
Barrister's fee	£200 plus VAT (approx.)	£200 plus VAT
Our costs (approximate)	£750 to £1,250 plus VAT	£750 to £1,250 plus VAT
Approximate total	£3,122 to 3,622 plus VAT as applicable	£2,420 to 2,920 plus VAT as applicable

COURT PROCEEDINGS

Court proceedings can be issued for debt of any amount. You can claim the full amount of your debt together with costs and interest. The aim with court proceedings is to obtain an order which can then be enforced against the debtor.

Advantages:

- The time and costs involved in proceedings may be limited by seeking early determination of the claim. If no Defence is entered, then a default judgement will be made without the matter progressing further.
- If the debt is disputed, the court will eventually give a judgment resolving the dispute. Once the court has made a judgment in your favour the debtor can no longer dispute the debt in an attempt to defeat a winding up or bankruptcy petition.
- Whilst the litigation is ongoing, a debtor company will be able to continue to trade and the existence of litigation is unlikely to affect the debtor's business reputation significantly (unlike winding up proceedings against a company). This may increase the prospects of you recovering the debt owed by the debtor in full.

Disadvantages:

- You are likely to incur significant legal costs that may not be recoverable in full from the debtor (especially if the claim is allocated to the small claims track, where you will only recover modest fixed costs) even if your claim is ultimately successful.
- Court proceedings are likely to take longer and involve greater expense than insolvency proceedings. The former will involve the production of statements of case and witness statements and the disclosure of documents by both you and the company. A trial will usually require oral evidence and the cross-examination of witnesses.
- The court will expect the parties to attempt to resolve any dispute between them through Alternative Dispute Resolution, and may penalise the parties in costs if they fail to do so.
- If the claim is not successful you will be ordered to pay the debtor's legal costs (unless the claim is allocated to the small claims track).

PROCEDURE

- 1. Issue claim:** The proceedings are issued by filing a Claim Form and Particulars of Claim with the Court.
- 2. Debtor files Defence:** The debtor will then have the opportunity to file either an Acknowledgement of Service or a Defence within 14 days of receiving the Claim Form. If an Acknowledgement of Service is filed, the debtor will have a further 14 days in which to file a Defence. If the debtor does not file a Defence within the appropriate time then you will be entitled to judgment in the sum claimed, together with interest, the court issue fee and a fixed sum for your legal costs.
- 3. Proceed to final hearing:** If a Defence is filed then the court will give directions to a final hearing. The directions will vary from case to case, but will usually include exchanging relevant documents and written statements for any witnesses. The final hearing will be several months after the proceedings are issued, depending on the complexity of the issues in dispute. You may be able to reach a settlement with the debtor before the final hearing.

4. Enforce judgment: once you have a judgment in your favour, you will need to enforce it. Methods of enforcement include the insolvency proceedings outlined above, but there are also other methods available including attachment of earnings orders and charging orders (which secure the debt on property owned by the debtor).

COST

The costs for dealing with the matter from issue up to the final hearing will vary hugely from case to case depending upon the directions required and the number of documents and witnesses. The costs could be between £1,000 to £100,000 or more, depending upon the value of the claim, complexity of the matter and time that will need to be spent on it.

Claims of or below £10,000 will be allocated to the small claims track. On the small claims track only court fees and a small amount of your legal costs (£70 to £100) are recoverable if you win the case. As cases on the small claims track (i.e. claims of £10,000 or less) are expected to be conducted without solicitors, the table below allows for £2,000 in costs assisting with the case, but not full conduct. The procedural rules are more relaxed, which helps reduce the costs.

In claims above £10,000 the unsuccessful party is usually required to pay a contribution towards the costs of the successful party. The amount of costs can vary significantly but will usually be in a range of about £50,000 to £100,000. We will advise you specifically in respect of the likely costs of your matter.

Value of debt/£	Issue fee (no VAT)/£	Other likely court fees to final hearing/£	Barrister's fee (excluding VAT, estimated)/£	Costs to final hearing (excluding VAT, est.)/£	Total (excluding VAT, est.)/£
300	35	25		2,000	2,060
301 – 500	50	55		2,000	2,105
501 – 1,000	70	80		2,000	2,150
1,001 – 1,500	80	115		2,000	2,195
1,501 – 3,000	115	170		2,000	2,285
3,001 – 5,000	205	335		2,000	2,540
5,001 – 10,000	455	335		2,000	2,790
10,001 – 25,000	5% of claim	545	5,000 – 7,000+	5,000 – 20,000+	11,045+
25,001+	5% of claim	1,090	8,000 – 15,000+	8,000 – 50,000+	18,340+

The estimated costs above are for illustrative purposes only, based upon an average case. Values are in pounds.

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