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United Kingdom

Late Payment of Interest Act

This Act sets out to assist businesses faced with late payment problems. It does this by adding a number of rules to contracts between businesses. It is important to realise that this legislation only applies to a commercial debt. It does not apply when one of the parties is not acting as a business, for example sales to a private individual/consumer. The debt should be one that has arisen in the course of business.

Both parties should be businesses, commercial entities or public sector organisations. Interest is claimed at the Bank of England rate plus 8%. The rate is listed as the UK clearing bank base lending rate in the Financial Times. It is also sometimes known as the repo-rate. The rate that applies is the rate in force at the end of the day on which the payment was due. In addition to this for contracts formed on or after the 7th August 2002, in addition to interest the supplier may also charge an amount to compensate for the costs of collecting late payments. The amount of compensation that can be claimed is determined by the amount outstanding as follows:

Amount Owed Compensation

up to GBP 999 = GBP 40

GBP 1,000 to 9,999 = GBP 70

GBP 10,000 and over = GBP 100

The Limitations Act 1980

Outlines the time limit within which a creditor can chase a debtor for outstanding debts. The Limitations Act 1980 only applies when no contact has been made between the creditor and the debtor within the given time limit and only applies to residents of England and Wales. Creditors are given a fixed period of time to chase their debtors, which is outlined in the Limitations Act 1980. This is 6 years, after this time it is no longer possible to pursue their debt.

Legal Actions

Within the United Kingdom there are several different and separate legal jurisdictions:

England and Wales; Scotland and Northern Ireland. While in general you can take the same actions in each country, these are the following differences:

â€¢ Different solicitors

â€¢ Different time scales

â€¢ Different costs.

Generally speaking, the first stage of legal action in every jurisdiction is the issuing of a Letter Before Action (LBA). This is a letter sent to the debtor from the solicitor informing them that should they not make payment in full, legal proceedings will be issued. If the LBA is not successful there are three main options:

â€¢ County Court Judgement (CCJ)

â€¢ Full Court Proceedings, generally a trial

â€¢ Making a company insolvent, often called winding them up. However, in the last option, there is no guarantee that making a company insolvent will recoup your money in full or at all. There are two steps to successfully recover your monies in the UK by taking legal action. The first is obtaining the judgement and then the second is the enforcing of that judgement.

Depending upon whether your debt is insured or un-insured will affect the initial stages of legal action. If your debt is insured and you have complied with all obligations under your policy then in most cases the Credit Insurance will contribute towards legal costs. You will still be consulted about the legal action but where a claim has been paid then Credit Insurance will direct such action. If Credit Insurance does not cover your debt then we will require you to agree legal action and costs in writing prior to commencement of litigation. We will also ask you to make payment on account for legal action, particularly if the case is defended.

Court Process For Obtaining a Judgement in England and Wales

Claim issued and Served on Defendant 14 days

Defendant files Acknowledgement of Service No Possibly check with Court 14 days Yes Enter judgment in Default Defendant files a Defence? No . Whole/part/accept all Yes Allocation Questionnaire filed? No

Yes Case stayed (on hold/struck out) subject to Judges decision

Enforcement of Judgement

There are two steps to successfully recovering your monies, in the UK the first is obtaining the judgement and then the second is the enforcing of that judgement. There are several options for enforcement but the most common is via an Enforcement officer or Sheriff

Once a judgement is obtained, then enforcement action can be taken. A judgement does not necessarily lead to a successful collection. The enforcement officer will visit the premises to try and collect the monies. On the other hand, this can be a lengthy process over several months and reports from these officers are not issued on a regular basis.

Power of Attorney

This is not a requirement for the UK, nevertheless for cases in Northern Ireland, if the debtor files a notice of appearance then they intend to attend court, we require an affidavit of debt. This must be signed by someone at the client company who is aware of the debt details and has some level of authority. The affidavit is issued by our solicitor and must be returned to them.

Legal Costs

These will differ greatly depending upon the type of legal action necessary and the jurisdiction in which we are taking action. In any case, our experienced collectors will have a full discussion with you regarding costs and time scales before legal action is commenced.

Certain legal costs can be charged to the debtor, e.g. some court costs. The decision to allocate costs lies with the judge but in most cases approximately 60 - 70% of all costs are for the debtor's account after successful judgement

Insolvency

If we establish that your debtor has become insolvent we will advise you whether there is any hope of a payment from your debtor. We will also register your debt with the insolvency practitioner. If it is judged that there will be dividends at some point in the future, we can monitor the debtor to claim the dividends when appropriate.

Scotland

Generally all straightforward debt actions will be taken in the Sheriff Court of the defender's residence or the court where the defender trades.

Summary Cause Actions

A court action is commenced by the claimant preparing a summons on a pre-printed form. Supporting invoices or a statement of account should be produced to the court along with the summons.

A copy of the summons will require to be served (issued) on the defender. This is done by the claimant's lawyer - usually by recorded delivery post - and thereafter by sheriff officer if postal service is unsuccessful.

With any summons there will be two critical dates - the return date and calling date. Generally the return date is the day when the defender must return any document to the court whilst the calling date (always 7 days after the return date) is the date the case will call in court for a hearing.

What happens if the claim is undisputed?

If in response to the summons the defender does nothing the pursuer can ask for judgment (known as minuting for decree) by completing a pre-printed form. Judgment will be granted at the -calling date-. The court takes about three weeks to send the judgment to the claimant's lawyer.

However, where appropriate (in cases where the defender is an individual or small trader) the defender may admit liability and offer to make payment of the debt by instalments or by a deferred lump sum – known as a Time to Pay Direction or Time to Pay Order.

Ordinary Actions

Unlike summary cause there are no pre-printed forms. The writ will be drafted and forwarded to the court. The defender has 21 days after service of the writ to decide what action to take.

Defender's responses

There are various ways the defender can respond to the service copy writ. The defender does nothing – the claimant can, on the expiry of 21 days, move for decree. If the defender admits the claim and makes a payment offer the claimant completes an appropriate form and sends it to the court. If the offer is unacceptable the case will call in court and the court will decide if the application should be granted. The court takes about three weeks to send the judgment to the claimant's lawyer.

Enforcement of Decrees

The responsibility for enforcing sheriff court decrees falls on sheriff officers. The generic term for Scottish enforcement is known as "diligence". Different measures are employed depending on whether the defender's moveable property is situated either outwith or within a dwellinghouse. The effectiveness of diligence can best be described as a "filtering process" with the slow payers settling earlier on in the enforcement regime. Judgement enforcement in Scotland was radically reformed by the Debt Arrangement and Attachment (Scotland) Act 2002 and will be enhanced following implementation of the Bankruptcy and Diligence (Scotland) Act 2007. The legislation deals more sympathetically with individual consumer debtors. Commercial debtors have less protection.

The Debt Arrangement Scheme

A central feature of the 2002 Act is the Debt Arrangement Scheme available to individuals and sole traders, allowing them the opportunity of repaying their debts in a managed way over a given period of time without the threat of enforcement. Such individuals should have surplus income to repay their debt by instalments. During the existence of a DAS judgement enforcement and applications for the debtor's bankruptcy will be prohibited. Also, it will be incompetent to carry out judgement enforcement whilst an application is being considered.

Charge for Payment

Before commencing judgement enforcement the sheriff officer serves a charge, which is a formal written request, on the defender. It requests payment of the principal debt, interest and charges. It requires that the debt be paid within 14 days.

Detailed Examination Of Attachment Orders

Attachment orders will most often be used for business-to-business debts where it is obvious goods are outwith a dwellinghouse.

How does the Act define dwellinghouse?

There is no definition of "dwellinghouse" but it does not include:

- a garage, even although it forms part of the structure or building which consists of or includes the dwellinghouse, or other structures or buildings used in connection with the dwellinghouse.

The effect of this is that all items stored within a garage, including a car, can be attached by an attachment order even although it is obvious the debt may be consumer.

How does the sheriff officer carry out the attachment?

Entry and valuation

Basically the officer enters the property and values the articles being attached at a price which they are likely to fetch if sold on the open market.

Reporting the attachment

The attachment must then be reported to the court within 14 days (s.18).

Removal and auction of attached articles

Once the report of the attachment has been received by the sheriff, arrangement can then be made for the removal and sale of the

articles. The officer gives seven days notice to the debtor of the date specified for the articles removal and may open shut and lockfast places for this purpose.

Any articles which were attached but not removed will no longer be subject to the attachment order. The auction of the removed articles shall not take place until at least seven days after the articles have been removed. There are various actions in relation to the attached articles, which are unlawful after their attachment and prior to their removal such as their removal, their gift, damage or destruction. In these circumstances a further attachment may be competent.

Can a debtor stop the process?

The debtor can make an application to the sheriff requesting the attachment should be lifted on the grounds the aggregate value of the attached articles is substantially below the aggregate of the prices they are likely to fetch if sold at auction.

How To Attach Articles Kept In Dwellinghouses.

To provide improved debtor protection, the Act has introduced the Exceptional Attachment Order.

However, if granted, an exceptional attachment order will still allow for the debtor's goods being valued and attached by the order which can thereafter be removed for auction and subsequent sale.

Examination Of Exceptional Attachment Orders

Unlike attachment orders which, in effect, will be available to creditors on demand on all occasions (although subject to conditions) an exceptional attachment order will only be granted on specific application being made by the creditor to the sheriff.

Creditors should note a whole host of items are exempt leaving only "luxury" items being capable of attachment.

Before commencing the procedure a charge for payment has to be served.

How is an application for an exceptional attachment order made?

An Exceptional Attachment Order will only be granted on application by the creditor which the sheriff may grant on being satisfied certain matters exist and also that there are exceptional circumstances.

In the event these exceptional circumstances exist the sheriff will grant the order.

However, the order will only apply to "non-essential" assets of the debtor kept in any dwellinghouse specified in the application.

What are the exceptional circumstances?

The exceptional circumstances which must exist before granting an exceptional attachment order are an effort to encourage less intrusive enforcement. They include negotiations, arrestment and earnings arrestment (attachment of earnings) which should be first attempted. Also the sheriff will require to be satisfied that there is a reasonable prospect the sum recovered from an auction of the debtor's non-essential assets would be at least aggregate to the following:

-a reasonable estimate of any chargeable expense, and -£100.

Subject to exceptional circumstances existing, what matters will the sheriff take into account in deciding whether to make the order? These include:

1. The nature of the debt (and in particular, whether the debt incurred relates to any tax or duty or any trade or business carried on by the debtor).
2. Whether the debtor resides in the dwellinghouse specified in the application.
3. Whether the debtor carries on a trade or business in that dwellinghouse.
4. Whether money advice has been given to the debtor.
5. Any agreement between the debtor and creditor for the settlement of the debt; and whether a time to pay direction or time to pay order has been entered into but not adhered to.

So subject to the conditions of the Act being fulfilled, the sheriff may more readily grant an exceptional attachment order in relation to the jobbing builder who carried on business from his house (essentially a commercial debt) as opposed to a consumer who has fallen into arrears with credit card repayments.

What is the effect of an exceptional attachment order?

The exceptional attachment order shall have the following effect:

1. Authorise the attachment, removal and auction of the debtor's non-essential assets kept in any dwellinghouse specified in the application.
2. Specify a period during which the order is executed.
3. Empower the officer to open shut and lockfast places for the purposes of executing the order. The officer must be satisfied there is a person in the house not younger than 16 and capable of understanding the procedures being carried out. Failing this forced entry can still be taken subject to four days notice being given.

Does the sheriff have any other powers?

Before deciding whether to make an exceptional attachment order the sheriff may make an order for a visit to the debtor by a person specified for the purpose of giving money advice to the debtor; or such other order as the sheriff may think fit.

When are the attached articles removed?

The sheriff officer shall "unless it is impractical to do so immediately remove any article attached by an exceptional attachment order from the dwellinghouse".

Where however, it is impractical to remove the articles immediately then the sheriff officer shall give more notice to the debtor for the date arranged for their removal.

When can the articles be sold and can the debtor redeem them?

Articles cannot be auctioned until seven days have passed since their removal from the dwellinghouse.

Within the seven-day period the debtor can redeem the goods at the value fixed by the sheriff officer, the consequences being that once

so redeemed the article will cease to be attached.

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