Why dealing with small claims cases need not be a tactical and commercial nightmare!

With Halloween just around the corner I could not miss the opportunity to tackle the dilemma that many of our clients find more daunting than spending an evening alone in an abandoned house with only Freddy Krueger (Nightmare on Elm Street) Michael Myers (from the many Halloween films) and Jason (Friday 13th) for company.

The nightmare dilemma I am of course referring to is how to deal with claims which fall within the small claims track. However, in reality this perceived nightmare need not trouble you.

Before we get into the cut and thrust of small claims litigation, as with all good horror plots, it is necessary to set the scene.

The Small Claims Track – The Scary Bits!

In our horror plot there are three terrifying problems:

Small Claim does not mean the debt is insignificant

When managing court claims generally the court allocates each case onto one of its three tracks. These are aptly named the Small Claims Track, Fast Track and Multi-Track. The Small Claims Track is supposed to deal with claims of low value and which do not have a great deal of complexity. In April 2013 the value threshold for the Small Claims Track was increased from £5,000 to £10,000. The great difficulty is although a claim of £5,000 or even £10,000 may seem like a low value claim to the court, for a small business a debt of £10,000 can be significant. Similarly, if a large company has a vast number of clients who each owe them just under £10,000 the collective value of such claims could be a significant proportion of its turnover.

The first problem is a "small" claim does not mean it is an insignificant debt. For many the option of not taking action simply doesn't exist because not only is the financial implication of writing off such debts insupportable, but also because taking that approach on a large scale basis is likely to lead to further credit control issues as debtors realise there are no consequences of not paying.

This issue is likely to become even more acute in the future. At the time of increasing the limit to £10,000 the longer term aim was to increase the limit further to £15,000. It seems likely the government will revisit this issue as it continues its reform. Such an increase is only going to bring more claims into the small claims track umbrella.

No Cost Regime

The view that cases on the small claims track are simple and low value has led to the opinion that it is essentially a no cost regime. In reality, certain fixed costs are recoverable, however it is right to say in general terms beyond the designated fixed costs a winning party cannot recover its legal costs of dealing with proceedings. Arguably, in order to deal effectively with these cases costs will always be incurred whether they are solicitors costs, barristers costs or indeed even where the client decides to deal with a matter themselves the internal time and resource cost they expend in doing so.

Despite the increase in the limit on the small claims track and the impact this has had on proportionality there has been no real increase in the costs which can be recovered on these matters. Naturally what is proportionate on a £10,000 claim is different from what is proportionate on a claim of £500.

The inability to recover costs is viewed by many as a nightmare.

It is just not that simple!

Small claims cases are often not as straightforward as one might think. Although, in theory the small claims track is supposed to be less formal and cases are said to proceed without the usual rigours of Fast and Multi-Track claims, the reality is these matters can be extremely contentious. When a claim becomes defended, there is still the need to get the legal arguments right, witness statements still have to be effectively prepared, filed and served. There is an undoubted skill in being able to effectively negotiate a settlement on these cases whether you are dealing with a solicitor on the other side or a litigant in person. Ultimately those cases that do not settle will still proceed to a final hearing. The process takes time and is not easy and for many clients this is time they do not have or time they would rightly prefer to spend running their organisation, finding new clients or delivering a high quality service to clients who do pay.

So here we are, faced with the fact that in truth that despite being labelled a "small" claim creditors can rarely justify simply writing the debt off. Creditors are often forced to proceed with action knowing that their ability to recover costs will be limited and the process can be time consuming and challenging with no guarantee of success.

The problems may seem insurmountable but of course this nightmare dilemma does have a solution and there is more than one.

The Solutions

Don't be afraid to take action!

For some debtors a robust collection process both internal and external will be enough to compel them to pay a debt. For others the eventual threat of litigation will encourage them to engage. However, there will always be a constituent of debtors who simply refuse to pay. Even where the sums outstanding are under £10,000 you should not be put off from taking action. The key is to take action in a cost effective manner and with the assistance of advisors who can ensure you maximise any tactical advantage you have to ensure a recovery is made quickly.

Instruct a firm of solicitors who take a shared risk approach to pricing and claim what you can!

The limitations placed on cost recovery on the small claims track are most keenly felt where clients instruct solicitors who charge for their time based on hourly rates. On small claims such an approach will quickly lead to any action being disproportionate. It is vital to find a firm to assist you that is prepared to share the risk of action with you. At J&P Credit Solutions we do just that. We have worked small claims cases for many years. Our advanced case management system, coupled with our team of experienced paralegals and legal executives, means we are confident enough in our processes to offer our clients fixed fee pricing for dealing with defended small claims matters. Our

fixed fees are scaled depending on the value of the debt which allows us to ensure that a client can proceed with action safe in the knowledge that the legal costs incurred will be proportionate to the debt.

We also work with clients to consider and ensure they maximise what they are entitled to recover from a debtor. For example, where our commercial clients are entitled to do so, we claim both late payment interest and late payment charges pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

This approach goes a long way in mitigating the costs dilemma on small claims cases.

Don't forget the tactics!

Just because a claim falls within the small claims track it does not mean you shouldn't consider what your tactical strategy should be in advance.

Early Planning

A successful small claim matter starts with effective planning, including identifying the weaknesses as well as the strengths of your case. This planning should not start when a defence is received. In truth the planning and preparation should start with the client internally by ensuring that they have retained the necessary documentation before the debtor even falls into arrears e.g. the contract, communication between the parties, clear payment records etc. Having this information easily available will ensure that if your case does become disputed you are in a position to support it. This is critical not just for a final hearing, but for presenting a strong case well before the matter even gets to court, which will increase the prospect of a debtor agreeing to settle.

Planning how you will actually get paid

Further it is important to determine just how you are going to get to your end goal i.e. achieving payment. It is vital to plan for the prospect that a stubborn debtor may not even be willing to pay after the court awards you a judgment. As such we work with our clients from the early stages of action to determine what our enforcement strategy would be in identifying whether a debtor owns particular assets e.g. property, which may have to be pursued, whether they have a regular employment income, whether a company we are pursuing is in a strong financial position or whether there is a risk the company might fail even before our action has concluded. Considering these issues from the outset will ensure a successful claim does not become a hollow victory because actual recovery is impossible.

Tactical approach on defended matters

The tactical approach taken to a defended matter is equally as important. It is vital to use all of the tactical tools presented by the civil procedure rules. One way to ensure that a small claim is cost-effective is to ensure it does not drag on for any longer than it has to. If a defendant fails to set out his or her case effectively it is vital to act quickly to encourage the court to disallow the defence of the case to proceed. This might mean reminding the court of its inherent case management powers and ability to strike out a defence, which actually is nothing more than a bare denial. Alternatively, this might mean taking more pro-active steps by making an actual application to strike out the

defence or even for summary judgment. A summary judgment application can be made if there is sufficient evidence to support the position that the defendant has no real prospect of succeeding at trial and there is no other compelling reason why the case should be disposed of at trial. Although there may be costs in making such an application it could lead to the quick resolution of a case and may well reduce the overall costs that would otherwise be incurred.

It is vital that all parties comply with court directions, where the opposing side fails to do so and that failure threatens to cause delays it is critical to ensure the court imposes the appropriate sanctions on the side who does not comply. Those sanctions might include the court issuing an unless order and ultimately striking out the defence.

Further, you can gain a clear tactical advantage if the defendant does not comply with key deadlines and directions but you do.

Each case will have its own unique facts and also legal issues which need to be considered. Depending on the same it is important to develop the appropriate legal strategy to take. This will include formulating from the earliest stages the legal basis for your claim as well as arguments for why any defence filed should not succeed.

Getting the tactics right on these cases will not only make the difference between winning and losing, it will also dictate how quickly a case can be resolved thereby impacting on how quickly and whether you get paid. The longer a case drags on the greater the risk that even if you do win a defendant will be financially unable to settle the debt owed.

Although you may be reluctant, you must consider your settlement options!

One of the most important considerations to make on all litigation cases is whether there are prospects for resolving a dispute by alternative dispute resolution. Even when you have taken the decision to issue proceedings it is vital to consider whether a case can be resolved without having to go to a final hearing. This is not only something that the courts increasingly require, but also given the costs of going to a final hearing it makes sense to think about your settlement options.

On the small claims track settlement options are even more relevant given the current no cost regime.

Mediation

The Small Claims Mediation Service offers a free one hour mediation appointment, conducted via telephone. Both parties must agree to take part. The mediator is neutral and will not seek to determine the merits of each party's case. However, he or she will seek to bring the parties closer together and encourage a settlement. The service works well and can be an effective tool in resolving a matter. However, like all elements of the process there is a skill and art to successfully handling mediation. Effective planning and developing a clear strategy is key. Our trained team deal with several mediations each week and have built up extensive experience in getting the best out of them.

Settlement Offers

Whether or not mediation takes place it is always worth considering whether you are prepared to make any offer of settlement. The key making an offer is to ensure it is presented in the right way. This will often mean preparing a carefully drafted letter or email which seeks to clearly present to the defendant why the offer is fair and reasonable given both the strengths of your case and the broad risks of litigation.

Without Prejudice Meetings

For some small claims cases it may be worthwhile for the parties to agree to meet face-to-face in order to overcome barriers to settlement. It is of course important to consider the proportionality of such meetings.

It is vital to consider your options to resolving a claim however there is always a fine balance to be struck between what is a reasonable settlement and when it is appropriate to press on with litigation and to take the risk. We help our clients to determine where their cases are in that balancing act.

Settling a case at the right level can help to overcome both the risk of litigation as well as ensuring cases are resolved quickly.

Summary

There are undoubtedly concerns which arise when considering whether to pursue a small claims matter. However, it is also clear that there are many ways of overcoming these obstacles. The problems of small claims matters will only become more apparent if and when the limit is further increased. As such, it is vital to be prepared to tackle the issues head on. Don't be afraid to take action, issue proceedings and deal with a disputed case where necessary. It is simply not sustainable to decide not to pursue these debts. The key is to take action in a cost-effective and efficient way.

Although I cannot promise to keep you safe from the likes of Freddy Krueger, Michael Myers and Jason, the scream films provided some classic rules for surviving a horror movie. I like to think that if you apply some of the solutions I have outlined above you will be able to successfully traverse the nightmare that can be small claims cases.

Small claims matters are not always simple and straightforward, they often require considerable attention, planning and tactical management. We are experts at dealing with them, if you would like to discuss how we can help you with such cases please contact Andrew Lloyd on 020 8290 7096.