

A GUIDE TO RECOVERING PROBLEM FEES December 2008

INTRODUCTION

There is no way of ensuring recovery of fees – some are more difficult to recover than others.

This is a practical guide to what you can do to improve your chances of recovering problem fees. The idea is that it can be used as the starting point for the management and efficient recovery of those fees.

It focuses on the information and management decisions needed at the 'pre-legal' stage (ie before solicitors are instructed).¹

It breaks down into three parts:

- (a) A note on business strategy for problem fees – at the risk of 'teaching grandmothers to suck eggs', it is useful to have an overall plan for problem fees.
- (b) A checklist of the information needed in order to recover problem fees. This checklist is designed so that a copy of it can be filled out in respect of every problem fee so that you should have all the information you need to make an informed decision. If you do end up going to a solicitor, this is the information that you will be asked for. It can be edited to meet your specific needs.
- (c) A flow chart of recovery options, which should help guide you through the options of last resort.

STRATEGY FOR PROBLEM FEES

Each problem fee has its own peculiarities. However, it is important to have an overall strategy against which to measure results and to guard against uneconomic decision-making.

A fee recovery strategy should:

- (a) optimise the balance between the cost of recovering fees and the overall percentage recovered; and
- (b) provide guidance when making decisions in respect of any individual case.

Some factors to consider when setting a strategy are:

- Who is the problem fee-Tsar with responsibility for driving the strategy?
- What is the procedure - eg timetable, progress reporting requirements, information-gathering plan, etc?
- What is the trigger point at which an outstanding fee is passed from credit control to the commercial manager with responsibility for that project?
- What discount should a commercial manager be prepared to accept to achieve payment by negotiation (eg an average of 15% - in other words, between 5% and 25% depending on the specific circumstances)?

¹ Disclaimer

This note, including the checklist and flow chart, reflects the law in England & Wales and is a rough guide only. Beale and Company Solicitors LLP accepts no responsibility for the validity or accuracy of this note. Take legal advice before taking any legal action.

- How much, as a percentage, is the business prepared to spend on fee recovery? This could be a percentage of total fee income or a percentage of 'problem fees' only.

FEE INFORMATION CHECKLIST

(Answer the following questions and gather the following information in respect of each problem fee.)

1. Basic details

- (a) Matter/project description:
- (b) Who owes the fees?
- (c) Person completing this checklist:

2. The outstanding fee²

- (a) How much is outstanding?
- (b) What are the outstanding fees for (eg basic services, additional works, etc)?
- (c) How many invoices? Give the invoice numbers and dates.
- (d) Do you have copies of all the invoices? Give details if any invoices are missing.
- (e) When were the invoices issued?
- (f) When was payment due under the contract? Give the date(s).
- (g) Has payment been chased up? If so, give details.
- (h) Do you have records (eg, letters, emails, file notes) of chasing payment?

3. The contract

The Basics

- (a) Is there a written contract? If not, which individuals made the agreement?
- (b) What form of contract (eg standard, exchange of letters / emails, etc)? If standard, what type?
- (c) Do you have a copy of the contract? Give details if any parts are missing.
- (d) Is it a 'construction contract'?³

The Fee Entitlement Terms

- (e) How is the fee calculated (eg lump sum, time, pain-share / gain-share, etc)?
- (f) What is the basis of entitlement to additional fees?
- (g) What is the time for payment?

² This section assumes the unpaid fees are basic fees or additional fees properly agreed under the contract.

³ 'Construction contract' is defined in s104 of the Housing Grants, Construction and Regeneration Act 1996 ("Construction Act").

- (h) What is the basis of entitlement to interest for late payment?⁴
- (i) Is there a Withholding Notice procedure? If so, what is it?⁵ Are there other contractual bars, which prevent fees from becoming due?

The Remedies

- (j) What is the governing law?
- (k) Can work be suspended for non-payment? If so, what is the process?⁶
- (l) Does the contract have a dispute resolution mechanism?⁷ If so, what does it say?
- (m) Can you adjudicate?⁸ Can you terminate? If so, what is the process?

4. Reasons for non-payment

If fees go unpaid it is important to know whether they are disputed and, if so, the reason(s) why as it may affect your options and possibly your decision to pursue recovery at all.

For disputed fees, note the difference between a denial that the fees are due (eg the client denies that the work for which the fee is claimed has been carried out or asserts that a condition precedent to payment has not been satisfied) and an argument that, even if due, the fees are not payable for some other reason (eg the client puts forward the defence of set-off by counterclaim that you have caused the client loss).

Consider the following if the outstanding fees are disputed, although there may be other factors to take into account in individual cases.

- (a) Does the paying party dispute that the fee is due? If so, on what grounds?
- (b) For fees that are due, if it is a 'construction contract', has a Withholding Notice been validly issued? For other contracts, has the client raised any objections to payment?
- (c) Are the objections justified? Give outline reasons.
- (d) Can the objections be addressed easily and immediately by curing some procedural or technical defect (eg sending an amended invoice)? If so, give reasons.
- (e) Have you tried to negotiate a resolution? If so, give details.

5. Commercial considerations

In addition to legal rights and risks, it's also important to weigh up commercial considerations. This is true for any steps taken in relation to fee recovery - from challenging a withholding notice, to suspending work, to pursuing recovery through the courts.

Some commercial factors to consider are:

- The financial situation is changing all the time – is immediate action required?

⁴ NB: Late Payment of Commercial Debts (Interest) Act 1998 and/or contractual.

⁵ With 'construction contracts' a "Notice of intention to withhold payment" must be validly issued in accordance with s111.

⁶ With 'construction contracts', see the right to suspend under Section 112.

⁷ Also, check effect on IP rights and all other relevant provisions.

⁸ With 'construction contracts', a party can refer disputes (including disputes about unpaid fees) to adjudication regardless of whether this is specified in the contract. For all other contracts, there must be an express right to adjudicate in the contract.

- Do you still have work to complete on the project? You cannot just stop work without risking repudiatory breach.
- Value of the unpaid fees versus costs and likelihood of recovery.
- Is the client solvent or at risk of becoming insolvent? What assets does it have? Is it worth a credit check? Is there a funder with step-in rights?
- If the client became insolvent, it is unlikely that you would be a secured creditor.
- Is the project overseas? If so, even if the contract is subject to English law and you managed to obtain a Judgment, would it be enforceable in practice?
- Is there a risk of counterclaims? If so, what is their likely value and do they have merit?
- What is the risk to relationships / future work opportunities / reputation?
- What about other rights in the contract (eg right to terminate for material breach/insolvency)?

FEE RECOVERY OPTIONS

A. Negotiations: What position has been reached? What is the negotiation plan?



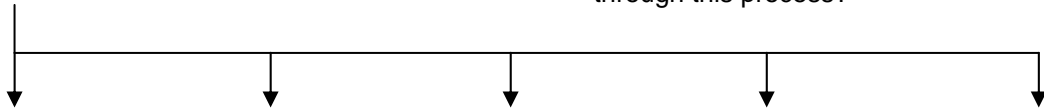
B. Legal options: Does the contract specify a dispute resolution mechanism? Also, check any Collateral Warranties and any Third Party Rights to see if they affect your rights.



Decide which option is best.



Is it worthwhile pursuing recovery through this process?



Statutory Demand:

If the debt is not disputed, a Statutory Demand can be quick, cheap and effective, but is very aggressive and can only be used where a debt is not contested.

Litigation:

If your claim is successful or is not defended, you should obtain a judgment, which can be enforced against the debtor. You can recover most of your legal costs, but there is a risk of counter-claims. This is the most common debt recovery action, but the County Court can be inefficient.

Adjudication:

You must be able to adjudicate. You will get a decision quickly, but, under a Construction Act adjudication, you cannot recover your costs. (Beale and Company offer a fixed fee option in some cases).

Arbitration:

If the contract stipulates arbitration, there will be no choice unless agreed otherwise.

Suspension:

You must have a right to suspend work and must do so validly otherwise you risk unlawful suspension and a claim for delay and other damages. Suspension may encourage payment but it is not a means of enforcement. (Also, consider revoking / suspending IP Licence, if permitted.)

C. Enforcement: How do you enforce payment of the outstanding fees?



Statutory Demand:

If the 21 days passes without payment, start insolvency proceedings. The prospect of this is often enough to encourage payment.



Litigation:

(a) Execution: Court Sheriff seizes and sells goods (excluding trade tools).
 (b) Third party debt order: Freezes bank account to the amount of the debt.
 (c) Attachment of earnings order: Probably irrelevant to a fee claim.
 (d) Charging order over land or securities: Not strictly an enforcement method but you are entitled to payment from sale proceeds if the land or securities are sold.
 (e) Oral examination: The debtor must attend Court and answer questions about their finances.
 (f) Statutory Demand



Adjudication:

Adjudicator's decisions are enforceable by Court proceedings, arbitration (if stipulated in the contract) and/or agreement. Court is the normal course, in which case a claim must be made and any judgment enforced. Summary judgment or a fast track procedure may be available.



Arbitration:

Arbitration awards are enforceable by the Court, but there may be inter-jurisdictional issues to address if the debtor or project is overseas.



Suspension:

Suspension of works provides no legal means of enforcing payment, but may encourage payment if the project is not yet complete.

Further information

HMCS has a 'Guide to Debt Recover through a County Court for Small Businesses', which may be useful for simple claims below £50,000: www.hmcs-service.gov.uk/courtfinder/forms/ex350_0406.pdf