

# Debt Recovery Service Manual

(4th Edition)



Representing the best in electrical  
engineering and building services

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Collect debt the effective way

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## SCOPE

The contents of this manual apply to debt recovery in England and Wales. Procedures in Northern Ireland are different and appropriate advice must be sought by those members operating in Northern Ireland.

## INTRODUCTION TO PROCEDURES

In the Debt Recovery arena a formal warning may well produce the desired result. A “*letter before action*” is the conventional means of delivering such a warning.

However, a letter before action is no longer a sufficient prerequisite for the purposes of issuing Court proceedings. There is now a requirement to follow pre-action protocols. Such protocols exist in regard to certain types of actions and although, as yet, there are no pre-action protocols on simple debt recovery, even where there are no protocols, the Court requires the parties to follow the spirit of pre-action protocols. However, the Court has brought in pre-action protocols for the conduct of Construction and Engineering Disputes, into which the majority of claims by ECA members fall. This means that the parties to any action must co-operate and hence, a member, prior to issuing proceedings, must supply enough information to ensure that the claim is quite clear, and follow the requirements of the pre-action protocol.

## WHAT IS A DEBT?

A debt is a sum of money that is due and owed to the member, in respect of which there is no known defence, or no dispute has been raised.

If there are any queries on this point, then the member can telephone Effective on 0870 112 5310.

## LETTER BEFORE ACTION

Where a debt exists, a formal warning may well produce results. If the member wishes to issue such a warning then he should complete the “*Instructions to Effective to send letter before action*” form on the website and forward it to Effective.

Effective will then forward a letter before action to the debtor requiring payment within seven days. The time limit on the letter before action can be changed by giving specific instructions to Effective.

Any response to the letter before action received by Effective will be notified to the member. If the debtor disputes the claim, Effective will advise the member accordingly. The member should then advise Effective of the action he wishes to take. If there is payment, cheques payable to the member will be sent direct to them; those payable to Effective will be banked and payment made to the member when cleared by the bank.

If there is no response to the letter sent to the debtor, Effective will send to the member a letter, indicating the options available. The letter, read in conjunction with this manual, sets out in detail what is involved with such options.

**Should the member instruct Effective to continue acting on their behalf at this stage, then from this time on, the member will be responsible for any costs or fees incurred. *The costs are as detailed in the Schedule of Charges contained on the ECA website. The fixed charges will operate in respect of claims which are undisputed or undefended. However, if the matter is disputed or defended, the work will be carried out on a work done basis at the hourly rates as set out in the Schedule of Charges.***

## PRE-ACTION PROTOCOLS

If the debtor disputes the claim or does not respond to a letter before action and in consequence the member wishes Effective to represent them in pursuing the debt by issuing proceedings, a pre-action protocol letter must first be sent to the debtor. In cases which come under the Construction and Engineering Disputes, details of which appear below, the protocols must be followed. ***Failure to do so, may result in subsequent costs penalties against the member.*** The letter must be accompanied by copies of the contract document and other related documents.

If there is any urgency in regard to the recovery of the debt, Effective should be notified so that a pre-action protocol letter can be sent in place of the

normal letter before action. In such circumstances, the cost of issue of a letter before action would be credited against Effective's charges. Details of the cost are in the Schedule of Charges contained in the Debt Recovery package. If there is no response to the pre-action protocol letter, proceedings can then be commenced.

## CONSTRUCTION PRE-ACTION PROTOCOLS

Pre-action Protocols provide the 'rules of engagement' for parties in dispute to follow before they involve the Court. This particular protocol has been extended to all Construction and Engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors. The majority of contracts involving ECA members come under this protocol.

The aim is to encourage the early exchange of full information about the potential claim to enable the parties to avoid litigation by settling the dispute or reducing its scope before involving the court.

One important development brought in by the Protocol is the requirement of the parties to have met formally on at least one occasion with a view to defining and agreeing the issues between them and exploring possible ways in which the claim can be resolved. However, if proceedings prove to be unavoidable the Protocol should assist in the smooth and efficient running of the claim through the courts.

### Requirements of the Protocol

The Protocol provides instructions for the parties at three key stages prior to the issues of proceedings. These are:-

#### 1. The letter of claim

Prior to commencing proceedings the claimant or his solicitor must send to each proposed defendant a letter of claim which **must** include certain information. As well as the full name and address of the claimant and each of the proposed defendants the letter must contain a clear summary of the facts on which the claim is based.

The letter must also identify the basis of the claim, namely the contractual terms or statutory provisions relied on, and the relief sought, such as damages or an extension of time. Any relief sought must be broken down to show how it is calculated and for a claim for extension of time, the period claimed must be clear.

Where a claim has been made previously but rejected by the defendant, the claimant must explain its ground for believing the claim to have been wrongly rejected. The names of any experts engaged by the claimant on whose evidence the claimant is going to rely must also appear, identifying the issues on which the expert is to give evidence.

#### 2. The defendant's response

The defendant should acknowledge receipt of the letter of claim within 14 calendar days of receipt. If the defendant does not do so, the claimant is entitled to commence proceedings without further recourse to the Protocol.

Objections to the claim by the defendant because the court lacks jurisdiction or the matter should be referred to arbitration or because the named defendant is the wrong defendant, should be raised by letter by the defendant within 28 days of receipt of the letter of claim. Any letter of objection should specify the parts of claim objected to and the grounds relied on, or identify the correct defendant.

If there is no letter of objection, or the letter of objection is withdrawn, the defendant must respond to the claimant's letter of claim within 28 days of receipt of the letter of claim. It is possible to extend the time for the defendant's response by agreement but it cannot exceed 4 months. If the defendant does not respond, the claimant is entitled to commence proceedings without further recourse to the Protocol.

The response **must** include certain information. It must state the facts agreed in the letter of claim and, if not agreed, the basis of the disagreement. It must detail the claims accepted and those rejected, again with an explanation of the basis of the rejection and where a claim is accepted in whole or in part,

whether the relief claimed is accepted and if not, the basis of the rejection.

The defendant must also state whether any contributory negligence is alleged against the claimant and any facts which support that claim as well as indicating whether or not there is to be a counterclaim. In the event that there is a counterclaim, the defendant must give the information required for the letter of claim and the claimant must respond within an equivalent time to that given to the defendant to respond to the claim. Again, the details of any experts already engaged and the issues on which the expert is to give evidence must be identified.

### 3. Pre-action meeting

The parties should meet as soon as possible after the defendant's response is received by the claimant. The aim of the meeting is to establish the main issues and the points of disagreement and to establish how matters can be resolved without litigation or, if litigation is unavoidable, the steps which should be taken to ensure that the matter is conducted in accordance with the Civil Procedure Rules.

As well as the representatives of the parties involved, legal representatives can attend the meeting. Where the existence of insurance has been disclosed, a representative of the insurer can also attend.

At the meeting the parties should discuss whether some form of alternative dispute resolution procedure can be attempted and, if so, which. If there is no agreement to the use of ADR the parties should discuss whether a joint expert can be appointed and who that should be. The parties should also discuss the future conduct of the litigation and extent of disclosure of documents with a view to saving time and money.

The meeting is on a without prejudice basis although the court is entitled to know that the meeting took place and when and who attended. Similarly, the court is entitled to know if anyone refused to attend and why and, if the meeting did not take place, why it did not take place.

### Enforcement of the Protocol by the Court

Once proceedings are commenced, the Court will regard the standards set in the Protocol as the normal and reasonable approach to conduct between the parties prior to the issue of proceedings. If a question arises over the compliance or otherwise of a party the Court will be concerned that there has been substantial compliance with the Protocol, but will not usually be concerned by minor departures.

### Sanctions for non-compliance

The Protocol does not affect the parties' substantive rights but may affect what costs orders the court makes and failure to comply can have significant costs consequences. If the court thinks that a failure to comply led to proceedings being commenced or costs incurred which would otherwise have been avoided, the court can order that the party at fault pay the costs of the proceedings, or a part of them, on an indemnity basis.

If the party at fault is the claimant and the claimant has been awarded damages or some other sum, the court can also deprive the claimant of interest which would otherwise be due or award it at a lower rate than would otherwise have been paid. If the party at fault is the defendant but the claimant has been awarded damages or some other sum, the court can award the claimant interest at up to 10% above base rate.

As costs orders are often a significant issue by the end of construction litigation, compliance with the Protocol is essential.

### Exceptions

There are four exceptions to the requirement to follow the protocol:-

1. If the proposed proceedings relate to the enforcement of a decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Construction Act 1996;

2. If the proceedings include a claim for interim injunctive relief;
3. If the proceedings will be the subject of a claim for summary judgment; or
4. If the proceedings relate to the same or substantially the same issue which have been subject to a recent adjudication under the 1996 Act or to some other formal alternative dispute resolution procedure.

## ALTERNATIVE DISPUTE RESOLUTION

One of the Court's requirements is that the issue of proceedings through the Courts should be regarded as the final option and the parties should look at other possible methods of resolving any dispute between them.

Many contracts have arbitration clauses and therefore should not be the subject of Court proceedings, in any event. There are, however, other alternatives available, but these clearly need the co-operation of both parties in regard to pursuing them. However, if the member thinks that there is a possibility of resolution without the issue of Court proceedings, then consideration should be given to that. The options available are as follows:-

### Arbitration

This is the time honoured system of settling disputes and is, in essence, the situation where two parties who are in dispute about something agree between themselves to ask an independent third party to settle the matter between them and they agree to abide by his decision. An arbitration clause in an agreement has the effect of preventing litigation being commenced since, under Section 9 the Arbitration Act 1996, there is a mandatory obligation upon the Courts to stay any proceedings issued where a valid and operable arbitration agreement exists. The main advantage of arbitration over litigation in the Courts is privacy. No one but those immediately involved need know the details of the dispute and the arbitrator's decision. Another advantage is that the parties can choose an arbitrator with technical knowledge who understands, better than a Judge, the day to day

problems of the construction industry. Arbitration can be quicker than litigation provided both parties are anxious to proceed. If there is to be a hearing it can be arranged in a time and at a place to suit both parties.

### Adjudication

This is the construction industry's own dispute resolution procedure. Notice of adjudication can be given at any time and the adjudicator is required to make a decision within 28 days of a dispute being referred to him. The adjudicator's decision is binding until otherwise agreed by the parties or until the matter is referred to arbitration or litigation (if there is no arbitration agreement). The time limits within the process also have the effect of limiting the amount of costs which can be incurred during the process and it is possible for the adjudicator to make an award with regard to costs.

### Mediation

This is different to arbitration or adjudication. Whereas an arbitrator makes a decision, which is binding, after having heard from both sides, a mediator tries to bring the parties together by negotiation, so that together they reach a settlement which is acceptable to both. Any settlement is not immediately binding and hence, to avoid one of the parties reneging, any settlement arrived at should be enshrined in an agreement. In mediation the parties agree to pay jointly the cost of the mediator. It will be seen that this method will only be successful if the parties are willing to try and negotiate. In those cases where the matter is purely debt recovery, that is payment has not been made and there are no grounds for defending, then this is probably not an appropriate mechanism, but the member should still consider it before deciding to issue Court proceedings.

## ISSUING PROCEEDINGS - OPTIONS

If there is no response to the letter before action and the member wishes to pursue the debtor through the Court, then the member can instruct Effective accordingly by returning the form 'Instructions to

Effective to Send Letter Before Action', duly completed. There are two options which can be pursued and these are:

- ◆ **Option 1**                    **Court proceedings**
- ◆ **Option 2**                    **Insolvency proceedings**

To aid in the decision process the member will receive a recommendation from Effective or alternatively the member should refer to the manual in making their own decision.

## OPTION 1

### COURT PROCEEDINGS

#### HIGH OR COUNTY COURT PROCEEDINGS

Proceedings can be issued in the High or County Court. However, as the procedure is now exactly the same, the decision is based only on the value or complexity of the case. In debt recovery matters, it would only be if the debt is over £50,000 that High Court proceedings would be taken. Any claim over £15,000 can be issued in the High Court, but if there was a defence it would be transferred to the County Court unless the value of the claim was over £50,000.

#### THE CLAIM FORM

##### Preparation of the Claim form

Effective will prepare the Claim form (which was formerly known as the Summons), which will then be sent to the member for signature. Under the Court rules, the Claim form will contain a statement of truth. This states that the signatory believes that the contents of the document they are signing are true. If that is signed knowing there is a false statement within the document, then the Court can bring proceedings against the member for contempt of court. Contempt of court is punishable by a fine and/or a term of imprisonment. It is therefore vital to ensure that the content of the Claim form is correct before it is signed and returned to Effective for issuing.

If the member is a sole trader, the member signs the document. In the case of a partnership, it can be signed by one of the partners. If the member is a company, then an officer of the company must sign the documentation and that includes a director, company secretary, treasurer or chief executive of the company.

##### Issuing the Claim form

The Claim form will be sent to the Court, who will issue the same and then serve it by post upon the debtor. The Claim form sets out brief details to show how the money has become due - although it need not be in any great detail, it must show that there was an agreement, that the member has carried out work and/or supplied materials and that the debtor is in breach by failing to make payment.

##### Claiming interest on the claim

**Statutory Court Interest/Contractual Interest** - A claim is also made against the debtor to pay interest. If there is no clause within the contract entitling the member to claim interest it can be claimed pursuant to the County Courts Act 1984 or alternatively pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 (under this Act an additional amount of compensation towards costs can also be claimed.) A claim will also be made in regard to recovery of the fee paid to the Court on issue and a proportion of the legal costs incurred. These costs are fixed by the Court and are less than the amount that it actually costs to carry out the work. Details appear in the current Schedule of Charges showing the member's liability if such costs are recovered from the debtor.

##### Service of the Claim form

The debtor will have a total of 16 days in which to respond to the Claim form. The Court will send out the Claim form with three forms for the debtor to complete. The first will be a form of acknowledgement which if the debtor files the same, will then extend the time for service of the defence for an additional 14 days on top of the 16 days allowed initially.

The second will be a form of admission, whereby the debtor can admit the debt and put forward an offer to pay by instalments, which must be backed up by financial information as to income and outgoings. This is more used by individuals than companies. Thirdly, a blank form of defence and counterclaim is sent, which gives the debtor an opportunity of putting in a defence and also, possibly, counterclaiming.

### No Reply

If there is no reply to the Claim form within the time limit given, then provided that no payment has been made in the interim to the member or to Effective, an application will be made to the Court by Effective at the end of the 16 days for Judgment to be entered against the debtor. The request will be for payment under the Judgment to be made immediately, i.e. the money is due the same day as the date judgment is entered.

### Admission

If the debtor files the form of admission, then the member will have an opportunity of considering that offer. If the member refuses the offer, then a request will go to the Court for Judgment, explaining why the offer is not acceptable and asking the Court to make an Order for higher instalments. The Court will enter Judgment and order that it be repaid at a rate that the Court considers appropriate.

### Part Admission

The debtor can also complete the admission form admitting part of the debt, but disputing the rest. If the member accepts that amount, then Judgment will be entered for the admitted amount, and either voluntary payment will be made by instalments or, if necessary, enforcement action taken. If the member rejects that offered by way of admission, then the Court will be notified and the matter will be treated as defended and proceed in accordance with the following paragraph.

### Defence and/or Counterclaim

If the debtor files the form of defence and/or counterclaim, then the Court will forward to

Effective an allocation questionnaire. That will give a very limited time in which the form must be completed and returned to the Court indicating how the member wishes to deal with the matter and under which track. The matter will be designated to a track, i.e. small claims (under £5,000), fast-track (claims between £5,000 - £15,000) or multi-track (over £15,000 and complex).

There is a fee to be paid, as per the Schedule of Charges, on the lodging of the allocation questionnaire for any claim over £1,000 and if the questionnaire is not completed and the fee not paid, then the case is likely to be dismissed and the member could also be penalised in respect of costs. It is therefore vital that immediate steps are taken to deal with any defence.

In addition, if the claim is over £5,000 the member needs to decide whether they want to appoint their own solicitors, or one recommended by the ECA, rather than Effective continuing to act. Effective can continue a defended claim, but the member would have to represent themselves at the final court hearing, although all initial work will be carried out by Effective.

### Defences in the Small Claims Court

If the amount claimed (excluding interest and costs) is under £5,000.00, it will come within the jurisdiction of the Small Claims Court and will be dealt with by way of a Small Claims hearing, which is designed for litigants to act in person and it is a more informal way of dealing with the matter. The Court will deal with the matter with just the parties being in attendance and even if a party does have a Solicitor representing them, they will not be entitled to recover the costs for such representation. The member should consider whether or not they want Effective to continue representing them. Effective will prepare witness statements and deal with the production of documents but the member would have to attend Court in person to deal with the hearing. Effective's costs for carrying out this work would not be recoverable from the debtor.

If the member decides to withdraw from the action at this stage and only a defence has been filed and the claim is within the Small Claims limit, then no

further costs are incurred. If however the debtor has filed a counterclaim, that action must continue unless the debtor is also prepared to drop the counterclaim.

### Defences outside the Small Claims Limit

If the claim is over the Small Claims limit of £5,000.00, then the member can withdraw the proceedings at this stage, however a claim for legal costs against the member from the debtor's solicitors as well as Effective's costs would have to be met by the member. In pursuing any claim the member must ensure that it is a realistic and genuine claim.

## SUMMARY JUDGMENT

### Application

If a defence is filed and the member wishes to continue action, an Application for Summary Judgment can be made. This method is used when there are no grounds for defending the action or the defence raised is very weak. The criteria that the Court will look at is that there are no reasonable prospects of the defence succeeding. Each case must be assessed on these points before pursuing this option, for if the member loses the Application, they may end up with an Order that they should pay the costs of the debtor's solicitor on that Application.

### Procedure

An Application for Summary Judgment can be made to the Court either before or after the Allocation Questionnaire has been submitted. It is obviously preferable to lodge it with the Court prior to the Allocation Questionnaire (bearing in mind the deadlines there are) because then the Allocation Questionnaire fee does not have to be paid unless the Application fails. There is also a fee on the Application, as detailed in the Schedule of Charges. The application is based on a witness statement, which is supported by a Statement of Truth (see Preparation of Claim form), which is a document signed by the member setting out the facts as to how the claim became due and owing and answering any points raised in the defence. The matter will be dealt with at a short hearing and the debtor will have an opportunity of filing a Witness

Statement in reply. The Court will decide if Judgment will be entered at this stage or whether the matter will continue as a normal fully defended action. If the member loses the Application they may receive an Order to pay the debtor's costs on that Application.

## DEFENDED ACTION

The member must consider whether to use their own Solicitors, solicitors recommended by the ECA or Effective to continue with the action. However, if Effective continues to deal with the claim, the costs incurred are not normally recoverable from the debtor.

**Note** *Once a defence has been filed, the matter will be subject to very tight time tables in regard to filing of the Allocation Questionnaire and complying with any other orders the Court may make. Failure to comply may result in Costs Orders against the member or the claim being struck out by the Court. It is important that instructions are received from the member without delay, which may otherwise prejudice their case.*

## OPTION 2

### INSOLVENCY PROCEEDINGS

If a member is owed over £750.00, the option exists of pursuing Insolvency proceedings. If the debtor is an individual this is by way of Bankruptcy, if a limited company by Winding-Up proceedings. This procedure can be expensive and if the debtor is financially unstable, the member can incur costs, but find that nothing can be recovered. However, this is an option which can persuade individuals or limited companies to make payment quickly, so as to avoid the liquidation of their business or personal bankruptcy. If a debtor wishes to continue to trade then the debt due to the member will immediately reach the top of the list of debts to be paid. If a debtor pays a debt claimed in insolvency proceedings the liability will also extend to payment of the member's reasonable legal costs.

The procedure is divided into two parts. The first is the service of a Statutory Demand, which is

relatively inexpensive; the second, where the major expense is incurred, is the issue of the proceedings through the Court. Details of costs appear in the current Schedule of Charges. This route can only be taken if there is absolutely no suggestion of a defence or dispute. If action is taken and there is a dispute or defence, the insolvency proceedings would have to be abandoned with the member possibly having to meet the debtor's costs, Effective's costs and the Court fees. The matter would then have to be pursued as normal through the Courts.

### Statutory Demand

Served personally upon the debtor, it details the parties, the reasons for the claim, and the monies due and owing. An individual debtor will have 21 days from the date of service to make payment, or dispute the debt. If payment is not made, and no dispute is raised, within that period an Application can be made to the Court for the commencement of Bankruptcy proceedings. Service of a Statutory Demand upon an individual is required to be done personally, i.e. physically handed to the debtor, and if they do not accept that the money is due, then they can make an Application to the Court for the Statutory Demand to be set aside. If successful the member would have to pay the debtor's legal costs as well as their own.

It is not necessary to serve a statutory demand on a debtor company. The company only needs to be given notice of the intention to wind up the company, which can be done by letter giving them a limited time in which to settle the debt. If a company wishes to avoid winding up proceedings then it is incumbent upon them to seek an injunction preventing the issue of the Petition and/or advertisement of the contents of such a Petition

### Bankruptcy Proceedings

If there is no response to the Statutory Demand a Bankruptcy Petition may be sent to the County Court which has Bankruptcy jurisdiction for the debtor's address (or the High Court if the debtor resides or trades within the London area). The Court will issue the Petition and give it a hearing date, return it with a hearing date and thereafter

personal service of the Petition will have to be made at least 14 days before the hearing.

If the debtor does not make any payment before the hearing, or put forward satisfactory proposals, then the Court will make a Bankruptcy Order against the debtor. The Official Receiver will investigate the debtor's affairs and discover whether any monies are recoverable.

If there are assets within the estate of the debtor, then a Trustee in Bankruptcy may be appointed to sort out the affairs. If there are assets, then once the costs of the Official Receiver or Trustee in Bankruptcy together with all legal costs are settled, a dividend will be paid out to the creditors in the order of secured creditors first, followed by preferential creditors and unsecured creditors, of whom the member will normally be one. If there is little or no money within the estate, the member is unlikely to recover any money at all. The Crown, i.e. government bodies such as the Inland Revenue and Customs and Excise previously were deemed to be preferential creditors, but since the Enterprise Act their status as preferential creditors has diminished seeking to ensure that albeit a limited fund can be made available for unsecured creditors.

The debtor will remain bankrupt for a period of 1 year only under these new rules (unless the debtor has misbehaved), and then the Bankruptcy will be automatically discharged. In addition, once the Official Receiver has completed his investigation of the debtor's affairs, which must be done within 12 weeks, he can at that stage discharge the debtor from bankruptcy if there is no hope of recovery.

### Winding-Up Proceedings

A Petition is presented to the Court who will issue it and allocate a hearing date and return it for service. The Petition will then be personally served upon the registered office of the company and 7 days after service of the Petition, advertised in the London Gazette. This will give an opportunity for any other creditors to file a Notice in support of the Petition. The company's bank may also become aware of the Petition and freeze the company's bank account, thus avoiding any disposition of assets.

However, during the 7 day period before the Petition is advertised, the debtor has an opportunity of applying to the Court for an Injunction to prevent the Petition being advertised. This can only be done if the debtor can show to the Court that there is a dispute between the parties and that a Winding-Up Petition should not have been issued. The Court's view is that Insolvency proceedings should only be taken when there is absolutely no dispute over the debt and anything else is an abuse of the Court process. If the debtor succeeds in obtaining such an Injunction, the member would no doubt have to pay all of the costs of the Insolvency proceedings and the Injunction Application, which would be expensive, and still then have to revert back to pursuing the matter through the normal Court proceedings.

If there is no response to the Petition, the company will be wound-up and an Official Receiver will be appointed. A Liquidator may subsequently be appointed who will distribute any monies recovered from assets. The distribution will be the same as in Bankruptcy, but in the case of a company, there is no question of an automatic discharge.

## ISSUING - WHICH OPTION ?

There is now very little to choose between whether or not proceedings should be issued in the High Court or the County Court. The same procedure applies in regard to the issue and service of the Claim form with the same timescale. However, in cases under £15,000, there is no right of action in the High Court. Between £15,000 and £50,000 there is a dual right of issuing in either the High or the County Court. In the circumstances, Effective would recommend that claims under £50,000 should be taken in the County Court, rather than the High Court and claims of over £50,000, taken in the High Court.

Insolvency proceedings are not usually recommended for smaller debts incurred by individuals or for small limited companies which are in financial difficulty. If a Bankruptcy or

Winding-Up Order is obtained there would be substantial costs and yet there may be nothing recovered for the member. A Statutory Demand can be used as a threat, even with an individual or a smaller company, but if the decision is made not to pursue the Demand, then time is wasted when the matter has to revert back to a County Court or High Court Claim.

## ENFORCEMENT

In respect of Insolvency proceedings, once a Winding-Up or Bankruptcy Order has been made, the matter is at an end as far as taking any further action through the Court is concerned. With High Court or County Court proceedings, the obtaining of a Judgment is only the first stage, if there is no payment or agreement reached with the debtor. In the case where there is a Judgment, Effective will normally send a notice to the debtor advising of that Judgment and requesting payment or proposals for payment within 7 days.

At this stage a decision must be made as to how the Judgment is to be enforced if the debtor does not pay voluntarily. The member will receive from Effective notification that Judgment has been obtained and a form setting out the options of enforcement, which the member should consider in conjunction with this manual and return indicating which method they would prefer and supplying the necessary information as requested by Effective.

A Judgment can be set aside by Application by the debtor, but if no such step is taken, then enforcement action can be pursued. Details of the costs of pursuing enforcement action are as detailed in the current Schedule of Charges. There are various ways of dealing with this as detailed below.

### Warrant of Execution

This document instructs the County Court bailiffs to enforce the debt by attending the debtor's premises and levying on any goods that they find belonging to the debtor. Levying means that the debtor must not dispose of these goods and if the debtor does not subsequently come up with the money, then the bailiffs will return, remove those goods and sell

them by public auction to recover the debt. Unfortunately, this can be very slow and not very effective. Under the Court Rules, any County Court Judgment over £600.00 can actually be enforced by the High Court enforcement officers who normally deal with High Court Writs, by obtaining a Certificate from the County Court and lodging it with the High Court. Therefore for debts of over £600.00, if an option of enforcing against the debtor's goods is to be followed, the High Court enforcement (known as a Writ of Fi Fa) is recommended.

### Writ of Fi Fa

Equivalent to a Warrant of Execution, it is issued by the High Court to instruct the High Court enforcement officers (formerly known as Sheriff's officers) to levy on the debtor's goods. Once it is issued, it is then sent to the local enforcement officers for the debtor's address, who will attend at the debtor's premises and look for goods on which to levy. As they are paid on result, the High Court enforcement officers are more successful than the County Court bailiffs. However, should they fail, the member will have to pay their costs, normally not more than about £50 to £70, as well as the fees and charges as detailed in the current Schedule of Charges. If the enforcement officers manage to find goods on which to levy they will give notice to the debtor that if payment is not forthcoming, the goods will be removed and sold by public auction. By being sold by public auction they will not fetch their true value and therefore the debtor needs to have substantial goods to cover a debt of any size.

### Third Party Debt Order

This is an Application which requests the Court to make an Order that a third party should pay money, which the third party owes to the debtor, directly to the member. The usual situation where an order would be applicable, would be if a member was aware of details of the debtor's bank account and knew that there was money in that account. Where the account is overdrawn, it is not possible to apply for a Third Party Debt Order. In the case where the member has worked as a sub-contractor on site and the debtor is the main contractor, the member may know that a

customer owes money to the debtor. An Order can be obtained which requires the bank or the customer to pay the money directly to the member.

It should be noted that the money must be due to be paid to the debtor at the time that the Order is made and served on the Third Party. If the money is not due at that time, then the Order will not be effective, or alternatively if it is paid to the debtor before the Order is received by the customer or bank, then the application will fail. It therefore has to be very precise and not be a speculative application. A statement of truth has to be made showing that the money is actually owed and also the source of the information.

### Charging Order

A Charge is similar to obtaining a mortgage against a property. This is more likely to be applicable for work done for developers of a housing estate or individuals who own their homes. The property is charged with the Judgment debt and it will remain registered against the property until such time as the property is sold or re-mortgaged. If the seller is the debtor, it must be sold or re-mortgaged for sufficient monies to pay off any prior Charges, plus the money owed under the Judgment to the member. If for any reason the property is repossessed and the owners of an earlier Charge, for example a Bank or Building Society, sell the property and the amount of the proceeds of sale are insufficient to pay the Charge, then no monies will be recovered from it.

It is a useful way of securing the debt if there is no other way of enforcement against an individual. A threat can be made to sell the property in the hope that will persuade the debtor to come up with proposals to clear the debt in the interim. The Charge itself is registered with the Land Registry against the property and notice of it will come to the attention of any proposed purchaser of the property. It cannot be sold without the member becoming aware of the sale or the purchaser aware of the member's Charge.

### Attachment of Earnings Order

This only applies to individuals who are in employment. If they are self-employed, then an

Attachment of Earnings Order is not effective. The Court orders that the debtor's employer should make deductions from the debtor's earnings on a weekly or monthly basis and pay them to the Court.

The Court will look at the debtor's financial situation to decide the amount of the deductions and will set what is known as a protected earnings rate. This is calculated based on the Department of Social Security rates for the debtor, any family that is dependent and certain outgoings. Once the protected earnings rate is set, the debtor must earn over that amount before the employer will make any deductions. If the debtor is in a low paid job, or has a large family, then the Attachment may well fail. The rates of deduction are not normally very high, and it may take months or years before the debt is paid off, but whilst the debtor remains in employment, the instalments will continue.

### Application for Questioning of Defendant

This is made to the Court for either the debtor, if an individual, or a director of a company, to attend Court and answer questions on oath concerning either the debtor's or the company's financial situation. It will reveal information about the individual or the company which can be used for one of the other methods of enforcement and is useful in those cases where the member has no information at all concerning the debtor's financial situation.

The Court lists the matter for a hearing and notices are personally served on the debtor. If they do not attend the matter is relisted for a further hearing and a further notice is served, but it is endorsed with a Penal Notice. This states that if the debtor disobeys the Court Order and fails to attend Court, then the debtor is in contempt of Court and can go to prison for up to 14 days for such contempt. Again this document has to be personally served. The Court does not award the costs of service against the debtor, which means that the member will incur the agents' charges for personal service with no hope of recovery. Once served, the debtor must attend or the Court will make a Committal Order, whereby the debtor will be arrested and brought before the Court to answer the questions or they could go to prison for contempt.

### Trace/Means Reports

Occasionally a debtor may have disappeared. A trace agent can be instructed to try and locate the debtor. Limited enquiries are made by the agents, who use a "No find No fee" arrangement, to try and locate an address. If the whereabouts of a debtor is known but his financial situation is unclear, the agents can be requested to try and confirm his financial status, for example whether the debtor owns a property or whether he is working or in receipt of benefits. That information can then be used for deciding how best to enforce a debt, or whether or not to pursue proceedings in the first instance. The agent's charge is only applicable where information is provided.

## ENFORCEMENT - WHICH OPTION ?

The method of enforcement to be used should be considered in conjunction with the amount of the debt and the information available on the debtor.

If the debtor is an individual, one of the methods of enforcement available would be to obtain a Charge over any property he may own. Once a Charge has been secured, if the debtor fails to pay voluntarily, other methods of enforcement can be considered. For example, if the debtor is employed an Attachment of Earnings application can be issued. If no information concerning the debtor's financial circumstances is known, an Application for Questioning or a means report can be considered.

Should the debtor be a company, consideration should be given to whether a Third Party Debt Order can be issued. If not, then for any debt over £600.00, whether a County Court or High Court Judgment, the Enforcement Officers should be instructed or if under £600.00, then a Warrant of Execution should be issued. If the member has any information concerning any assets that the company may own, which are not at the Company's office, for example plant, materials, etc., then that information obviously will assist in regard to enforcement.

## INTEREST

### Contractual Interest

Interest can only be claimed on a debt without the issue of Court proceedings if there is a clause in the terms of the contract, which entitles the member to claim interest against the debtor. That clause must be either in the terms and conditions of the contract document or constitute some part of a document which was seen by the debtor prior to, or at the time, that the member and the debtor entered into the contract. If the member does not have terms and conditions of trading, then legal advice should be sought in this regard. It is not sufficient merely to include a claim for interest on the invoice.

### Late Payment of Commercial Debts (Interest) Act 1998

On any contract entered into after the 1st November 1998 where the provisions of the Act apply, interest can be claimed under this Act at a rate of 8% above the base interest rate. This cannot be claimed on contracts entered into before the 1st November 1998.

In addition the Act was amended by the Late Payment of Commercial Debts Regulations 2002, to include provision to claim against the debtor an amount of compensation towards costs under the following scale:

<b>Debts under £1000.00</b>	<b>£40.00</b>
<b>Debts under £5,000.00</b>	<b>£70.00</b>
<b>Debts over £5,000.00</b>	<b>£100.00</b>

Interest under this Act can only be claimed against commercial debtors and not on consumer debts.

The interest is calculated from the date the invoice became due and is calculated up until payment is made. The interest and compensation can be claimed whether or not Court proceedings are issued.

### Statutory Interest

If there is no claim for contractual interest, then on the issue of proceedings in either the County Court or the High Court, the member is entitled to claim interest at the relevant statutory rate from the date the money became due.

On issuing a Claim interest is recoverable at the rate set by the Court or under the Act from the date the money became due up until the date that Judgment

is obtained. Once Judgment has been obtained, if the debt is under £5,000.00 interest cannot be recovered thereafter. Interest is, however, recoverable after Judgment on debts over £5,000.00, but not if payment is being made by instalments, and those payments are being maintained.

### Interest After Judgment

There is no interest on County Court Judgments under £5,000. However, if steps are taken to enforce a County Court Judgment for less than £5,000 through the High Court by means of obtaining a Certificate and issuing a Writ of Fi Fa, then interest will run on the amount of the County Court Judgment from the date of the Certificate being issued by the County Court until payment, but only in respect of action under the Writ of Fi Fa. If the matter then reverts back to the County Court for other enforcement action, interest will no longer be applicable, save as above.

For County Court Judgments over £5,000 and High Court Judgments, if there is no contractual rate, interest continues to accumulate on the amount of the judgement at a statutory rate (pursuant to the Judgments Act) until such time as payment is made.

### Interest in Insolvency Proceedings

Interest is only recoverable on debts being pursued through Insolvency proceedings if an interest clause constitutes part of the contract or if the Late Payment of Commercial Debts (Interest) Act 1998 applies, and can only be calculated up to the date of the issue of the bankruptcy or winding up petition.

## CONFLICT OF INTEREST

In the event that Effective already represents the debtor against whom the member wishes a letter before action to be sent, there will be a conflict of interest and Effective will not be able to act on behalf of the member. The member will be advised there is a conflict and that Effective is unable to assist further. In addition if the debtor is a member of the ECA it would not be possible to pursue the matter further. However in each case an initial letter can be sent advising that there is a claim and suggesting that the debtor should resolve the matter or that it is likely to be pursued further.

## ELECTRICAL CONTRACTORS ASSOCIATION EFFECTIVE DEBT RECOVERY SERVICE

### INSTRUCTIONS TO EFFECTIVE TO SEND LETTER BEFORE ACTION

Effective Credit Collections Ltd, Unit 3b The Courtyard, 27 Norfolk St, Peterborough PE1 2NP.  
Telephone 0870 112 5310 Fax 0870 112 5311

**Date:** .....

**From:** Name of Member .....  
(Limited Company/Firm/Sole Trader - delete as appropriate)

Member's Address .....

.....

Name of Contact .....

Telephone Number .....

Fax Number .....

Membership Number .....

### Letter Before Action to be sent to Debtor as follows:-

Name of Debtor .....  
(Limited Company/Firm/Individual - delete as appropriate)

Address .....

.....

Name of Contact (if known) .....

Order Reference/Project Title and/or address of property where work carried out .....

.....

Invoice Number .....

Invoice date .....

Date money became due .....

Amount Due £ .....

If member is a small business and wishes to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998 please tick here



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Tel 020 7313 4800 Fax 020 7221 7344  
Email [electricalcontractors@eca.co.uk](mailto:electricalcontractors@eca.co.uk) [www.eca.co.uk](http://www.eca.co.uk)