Who to sue – perfecting the process

TAYLOR WALTON SOLICITORS

Dealing with debts is part and parcel of any business operation. It is therefore essential that we know who our customer is - otherwise the debt recovery process is made unnecessarily complicated, before it even commences.

When a business acquires a new customer, the first step that should be undertaken is to identify precisely who that customer is. This may appear obvious, yet so often the debt recovery process is delayed by the need to establish who the customer actually is.

Know your client

Most businesses will have an established procedure for dealing with what is commonly referred to as Know Your Client ('KYC') information. This is important for a number of reasons, not least in knowing who to sue if things go wrong. All too often, businesses will attempt to pursue an unpaid/late invoice only to face a defence of "it wasn't me" before even dealing with any substantive dispute relating to why the invoice has not been paid.

In order to avoid any potential confusion, businesses must ensure that they perfect the process in respect of gathering KYC information from the outset of a trading relationship.

As a business, if you offer credit limits to your customers, it is not uncommon to get the customer to complete a credit application form or sign a contract. This will contain a number of questions that should accurately identify your customer e.g. there will often be a section that requests the customer to set out an individual's or business name.

In assessing the viability of a business and indeed making an informed decision as to whether you want them as a customer, this basic information gathering exercise is an absolute must.

What types of client exist?

In order to appreciate the importance of KYC information, it is imperative that we understand the different types of legal entity that exist and the legal implications associated with such.

In basic terms, there are three types of customer to consider;-

- A sole trader - who is liable in his/her personal capacity for the debts of the business;
- A partnership – who has two or more individuals and thereby jointly liable for debts;
- A company – who is a legal personality in its own right and is liable for the debts of the business, not necessarily the Directors (absent a personal guarantee).

Depending on which type of customer approaches you, there are varying issues and accompanying evidence that should be considered. For example, just because a customer states they are trading as company, it should never be taken at face value. Also, even if that company exists on paper– do you know if it is an "active" or "dormant" company? It is better to know the answer to this question from the outset, than to find out when you are owed several thousand pounds.

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Who owes the money?

A key issue to remember is that a business trading name is not necessarily indicative of who owns that business – further investigation is required. For example, a customer may state that his business name is "ABC Painting". However, this could translate as:

- Mr John Smith trading as ABC Painting; or
- Mr John Smith & Mrs Jane Smith trading as ABC Painting; or
- ABC Painting Limited trading as ABC Painting

If you fail to identify the correct legal entity then you run the risk of being unable to recover your unpaid invoices since you cannot simply sue "ABC Painting" in court proceedings.

So, what type of information should you be obtaining from a prospective customer? A sole trader is often an unknown quantity in terms of creditworthiness whereas a company is, in theory, more transparent, due to publicly available information on Companies House. As a bare minimum, you should ascertain their full name and current address, how long they have been trading and whether they have any trade references.

If you do not know who your customer is, then how can you subsequently sue them to recover monies owed? Obtaining a judgment is only half the battle; actually recovering the money under that judgment is winning the war. If you obtain a judgment against a legal entity that does not exist, then enforcement will prove to be a futile exercise. Indeed, it could be viewed as throwing good money after bad since you will struggle to enforce a judgment against a company that is technically insolvent or worse still, a company that does not exist.

Balancing risk and commerciality

It goes without saying that as a business you do not want to turn customers away. There is a fine balance between assuming risk and turning away potentially lucrative new business. Every customer is a new opportunity and a commercial decision must be reached as part of an overall risk assessment.

Risk assessment is an on-going exercise for a business. It must never be assumed that where due diligence was undertaken at the outset that it should not be re-assessed if, for example, an order outside the norm is received from a long standing customer. Businesses should be alert to out-of-the-ordinary changes to usual trading patterns of orders for goods or services.

The key lesson is to remember that if appropriate identification checks are not undertaken at the outset and kept under review, you are exposing your business to losing money without the prospect of ever recovering it.

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