

DEBT RECOVERY

OPTIONS FOR DEBT RECOVERY

1. It is an unfortunate reality of engaging in business that sometimes customers will fail to pay for goods or services provided to them.
2. There are various ways that a creditor may deal with debtors but the best pathway to follow will be affected by:
 - 2.1 whether the debt arises under clearly documented contractual terms, and what those terms say;
 - 2.2 whether the debtor is a company, and/or a person, partnership, trust or other entity;
 - 2.3 whether any genuine dispute could be or has been raised against the debt and whether the debtor might be insolvent; and
 - 2.4 the value of the debt and the maximum justifiable cost of pursuing it.

Agencies to assist with debt collection

3. The main agencies who can be called upon to assist in the collection of a debt are:
 - 3.1 debt collection agencies;
 - 3.2 lawyers; and/or
 - 3.3 the courts.

Debt Collection Agencies

4. There are many debt collection agencies who will act as an agent for a creditor in dealing with debtors. Debt collection agencies can send or personally deliver notices requesting a debt be paid and they can also register the debt on a publically accessible database. They will either charge a set fee, and/or a success fee as a percentage of money recovered.
5. Debt collection agencies can be effective in recovering simple debts, however the recovery of commercial or business debts is often more complex and requires legal assistance.

Lawyers

6. Commercial debts are generally of a greater value and involve negotiating with more sophisticated types of debtors over contractual trading terms which may be disputed. Also, there can be multiple parties and complex legal structures (such as guarantors and directors) which require more detailed knowledge and understanding to successfully and quickly recover debts.

7. A lawyer will first review the relevant contractual documentation, correspondence and background material to establish the strength of the creditor's claim for payment, the responsible party or parties, and the value of the claim. After determining that a sound claim exists, generally the first step a lawyer will take to recover a debt is to issue a letter of demand requiring payment. This may helpfully be preceded or followed up by telephone contact with the debtor or its own lawyers.

Statutory demand and liquidation

8. If the debt is above \$1,000 and the debtor:
 - 8.1 is a limited liability company;
 - 8.2 has not raised any genuine dispute regarding the debt; and
 - 8.3 might be insolvent, then a lawyer may issue a statutory demand under the Companies Act 1993 to recover the debt.
9. Once issued with a statutory demand, a debtor must within 15 working days either pay the Debt, enter into a creditors' compromise or give the creditor a charge over its property to secure payment of the debt.
10. If the debtor does not pay then it will be presumed unable to pay its debts and the creditor may apply to the High Court to have the debtor put into liquidation. This process involves public advertisement of the intention to liquidate, engagement of a liquidator, and one or more appearances by the lawyer in the High Court.
11. Once a liquidator is appointed, he or she has wide powers to examine the debtor company's affairs and directors/shareholders and can reverse certain transactions prior to liquidation which reduce the company's assets. The liquidator will ultimately gather all of the debtor company's assets and make payments of these to creditors in a specific order of priority with preference to the court costs of the creditor who placed the company into liquidation.
12. At any stage during the statutory demand or liquidation application procedures, up till the moment of liquidation, the debtor may offer to settle the debt to avoid liquidation.

Disputed debts

13. The statutory demand and liquidation procedures are not appropriate in a case where the debt is genuinely disputed. If a debt is disputed and negotiation is unsuccessful then further pursuit of the debt will need to take place in the Disputes Tribunal or the courts (see below).

Debts owed by non-corporates

14. Where the debt is not owed by a limited liability company, such as where it is owed by a trading trust or one or more individuals, then the statutory demand and liquidation procedures are also not available.
15. If the debt is over \$20,000 and is not disputed then the summary judgment procedure in the District Courts and High Court can be a cost effective method of obtaining a court judgment which can then be enforced against the debtor in a number of ways (see below).
16. Where a creditor has also obtained a personal guarantee of a company debt from its directors or other guarantors, then the debt can be sought from the guarantors through either negotiation or through the courts, separately to or in addition to any action taken against the underlying company.

Recovery of debts through the courts

17. If a debtor disputes that a debt is owed and/or negotiation has failed to achieve a solution, then the next step in recovering the debt is through the courts.
18. Usually a creditor has only six years to recover a debt within the court system. This time limit starts as soon as the debt is owed, unless the debtor acknowledges the debt or pays part of it, in which case the time limit is refreshed from the date of acknowledgement or last payment.
19. Court action can be taken to recover a debt in the following jurisdictions:
- 19.1 Disputes Tribunal – if the debt is \$15,000 or less (or between \$15,000 and \$20,000 if both sides agree to taking the issue to the Disputes Tribunal). A “Referee” will decide the case after hearing evidence from both sides. Lawyers may assist with preparation and paperwork but are

not permitted to be present at the hearing. Here there must be a “dispute” about whether the debt is owed. If the debtor simply refuses or is unable to pay then the Tribunal may decline to hear the claim.

- 19.2 District Courts – if the debt is not more than \$200,000. Unlike the Disputes Tribunal, here the successful party can claim a portion of its costs from the unsuccessful party.
- 19.3 High Court – for a debt of any amount. Pursuing a claim in the High Court is generally more expensive than the District Court, and a proportion of legal costs can also be awarded to the successful party.
20. The court or tribunal that will determine the claim will usually be the court nearest to the debtor’s (not the creditor’s) place of business.
21. Again, at any stage between the beginning of any court process and final judgment, the debtor may agree to settle the debt to avoid judgment and further costs. Settlement might be achieved by negotiation, including by mediation.

Enforcement of judgments

22. Once a creditor has obtained a court or tribunal judgment that the debt is owed the creditor can apply for an order to enforce the judgment in a number of ways, including:
- 22.1 bankruptcy, if the debtor is a person;
- 22.2 liquidation, if the debtor is a company; or in either case:
- 22.3 an attachment order over regular income of the debtor so that regular payments are taken automatically from the debtor’s wages or benefit and given directly to the creditor;
- 22.4 a warrant for a bailiff to seize and sell property belonging to the debtor, to pay the debt;
- 22.5 a charging order over real estate owned by the debtor which prevents a sale much like a caveat; or
- 22.6 a garnishee order which directs any money owed to the debtor, to be paid directly to the creditor instead.