

DEBT RECOVERY DO'S AND DON'TS

In the current economic climate, debt recovery is becoming more of a pressing issue. This is a quick reminder about some of the different processes, as well as some hints on what to do and what not to do.

Identifying the debtor and the creditor

This is often more difficult than it seems. Check who the money is owed to. What does the contract (if there is one) say about who the parties are? Who owns the property that the debt is related to?

Have there been name changes or assignments? Sending a letter of demand in the name of a creditor who the debtor has never heard of is the fastest way of having the letter ignored.

Even more importantly, check who owes the debt. Was the debt incurred in the name of a business, but before the company was incorporated? Do you have a personal guarantee? It is usually much better to chase individuals for payment of a debt rather than a company - most people are more willing to let a company go under than to go bankrupt themselves.

Do you have current contact details for the debtor?

In the case of a company, do a check to ensure that the company exists. Check for trusts, partnerships and trading names. Is the person instructing you or ordering goods or services authorised to do so? This can be an issue with trustees in particular, but also with company directors and officers.

After checking the identity of the debtor, check that the debtor is not already bankrupt or in liquidation. This information is available from the Companies Office on line and also from credit checking agencies.

If you are relying on terms and conditions, ensure you have a signed copy of the contract. The less room there is for argument over terms, the greater the potential savings in cost and time.

Letter of demand

The first step in debt recovery should always be to send a letter of demand. This should include:

- The amount owed;
- What the debt is owed for;
- Whether you are also claiming interest and costs, and if so, the basis for that;
- Any offer to accept a reduced amount (if this is included, always ensure that the offer is made on a without prejudice basis);
- Time for payment or response (this must be a reasonable time, usually at least two weeks); and
- The next step that will be taken.

A letter of demand serves to put a debtor on notice

and also means that you have to check your own paperwork to ensure it is in order and that the relevant contracts/correspondence are brought together. If this cannot easily be done, it will make any subsequent recovery steps more costly and time consuming.

Note: a letter of demand should never include a threat to go to the police if the debt is not paid, or a promise not to go to the police as long as the debt is paid. You may be entitled to do that if the case involves fraud or theft, but you will be breaching section 237 of the Crimes Act 1961* if you include that in a letter of demand.



* 237(1) Every one commits blackmail who threatens, expressly or by implication, to make any accusation against any person (whether living or dead), to disclose something about any person (whether living or dead), or to cause serious damage to property or endanger the safety of any person with intent-

(a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and

(b) to obtain any benefit or to cause loss to any other person.

Legal proceedings

If payment is not received after the letter of demand has been sent, the next step may be to issue proceedings in the appropriate Court. These can be either ordinary proceedings or summary judgment proceedings.

ORDINARY PROCEEDINGS

- Cheaper to issue proceedings, as only the notice of proceeding and statement of claim must be filed.
- If the defendant does not take any steps, can obtain judgment by default one month after serving the documents on the defendant.
- If the defendant files a statement of defence, each party must then complete discovery, by making a list of and providing copies of all relevant documents to the other party.
- Depending on the court, a judicial settlement conference can or will be allocated, either before or after discovery has been completed.
- If the proceeding does not settle, a hearing will be held. This will involve witnesses giving evidence and being cross-examined.
- Hearing dates could be any time from six months to many years after filing proceedings.

SUMMARY JUDGMENT

- More expensive to issue proceedings, as a notice of application for summary judgment and affidavits in support must be filed, along with the notice of proceeding and statement of claim.

- Can only be used where the defendant does not have an arguable defence.
- If the defendant does not take any steps, can obtain judgment at the first hearing, usually six weeks to two months after filing the documents (depending on court time).
- If the defendant opposes the summary judgment, the defendant will file a notice of opposition and affidavits in opposition. A hearing will then be held (usually within two to six months, depending on court availability). There will be no witnesses at the hearing, as all evidence is based on the affidavits (except in rare occasions when cross-examination is allowed).
- If the plaintiff is successful at the summary judgment hearing, the plaintiff obtains judgment. If the defendant is successful, the application for summary judgment is dismissed, and the statement of claim is transferred to the standard track (ordinary proceedings, as described above). Costs are payable by the unsuccessful applicant.

You should also consider where proceedings are filed. The general rule is that court proceedings must be filed, and therefore the hearing held, in the court registry closest to where the defendant lives. However, you might prefer to file the proceedings in a court closer to the plaintiff, particularly if other witnesses are based there. To do that, you need to file an affidavit as to where the cause of action arose. Practical issues such as this can have a major impact on the cost and time involved in pursuing a legal claim.

Enforcing the judgment

There are many different options for enforcing the judgment. Below are the two most common options, though charging orders over property or orders for examination may also be appropriate.

LIQUIDATION

A creditor can make an application to place a company into liquidation on the basis that the company is unable to pay its debts. The proof of insolvency is usually provided by an unpaid statutory demand.

The notice of proceeding for a liquidation application, statement of claim and affidavit in support are all filed in the court, and a hearing date is allocated (the hearing is usually about two months after filing). The documents are then served on the debtor. After serving the debtor, an advertisement for the liquidation must be published in both the New Zealand Gazette and a local newspaper. If you want a professional liquidator (as opposed to the Official Assignee), you must have a "consent to act as liquidator" form from them prior to the hearing.

Following secured creditors enforcing their security, the costs of the liquidation are paid in priority to any other debts, and then the order of priority is money owed to employees and Inland Revenue, then unsecured creditors. You do not get priority for payment of your debt just because the debtor was



liquidated on your application.

A creditor can join in support of another's application for liquidation, and can substitute if required and the original creditor is paid. It is not possible to liquidate a company more than once, nor to issue proceedings or continue proceedings against a company in liquidation without the leave of the Court.



BANKRUPTCY

Bankruptcy is a two-stage process. The first step is the bankruptcy notice, which is filed in the High Court and served on the debtor. The debtor has 10 working days to comply with the bankruptcy notice, either by paying the amount claimed, or by entering into an arrangement with the creditor. If the debtor does not comply with the bankruptcy notice within that time, he or she commits an "act of bankruptcy".

The second stage is the filing and service of a summons to debtor, creditor's application for bankruptcy, and an affidavit in support. These documents must be filed within three months of the date of the act of bankruptcy. A hearing is then allocated, and at the hearing the debtor is bankrupted (unless he or she pays the debt, or makes other arrangements with the creditor).

Often the debtor pays to avoid being made bankrupt.

If he or she doesn't pay, there is no guarantee that your debt will be paid. That will depend upon whether the Official Assignee (who administers the bankruptcy) has any funds to pay creditors, and how many creditors there are.

While the actions taken by the Official Assignee can vary, they do not usually sell any of a bankrupt's household assets. They will sometimes require a bankrupt to contribute part of his or her salary to repay creditors, but usually only where the salary is quite high.

Secured creditors exercise their security, then the costs of the bankruptcy are paid in priority to any other debts, and then the order of priority is Inland Revenue, the employees of any business run, then unsecured creditors. You do not get priority for payment of your debt just because the debtor was bankrupted on your application.

- *This article does not deal with protection of property rights issues, Construction Contracts or Statutory Demands, which are all topics in their own right.*

If you need advice in regard to debt recovery please contact us.

CHRISTCHURCH	NELSON	WELLINGTON	AUCKLAND	SYDNEY
Level 9, Clarendon Tower Cnr Worcester St & Oxford Tce PO Box 5 Christchurch 8140 Telephone: +64 3 379 2430 Facsimile: +64 3 379 7097 New Zealand	197 Bridge Street PO Box 827 Nelson 7040 Telephone: +64 3 546 6223 Facsimile: +64 3 546 6033 New Zealand	Level 4, The Bayleys Building Cnr Lambton Quay & Brandon Street PO Box 10-376 Wellington 6143 DX SP 23544 Telephone: +64 4 499 3280 Facsimile: +64 4 499 3308 New Zealand	Level 1, CPO Building 12 Queen Street PO Box 5326 Auckland 1141 Telephone: +64 9 309 1948 Facsimile: +64 9 309 8275 New Zealand	Level 13, Tattersalls Building 179 Elizabeth St NSW 2000 PO Box A168, Sydney South NSW 1235 DX753 Telephone: +61 2 8267 3800 Facsimile: +61 2 9261 2940 Australia