

Debt Recovery



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Debt Recovery

Is It Provable And Can It Be Recovered ?

An Individual should always be cautious about taking legal action to recover a debt. In order to recover the debt one must be able to prove it. Therefore it is of critical importance that this can be achieved.

- Is there is a contract?
- Does the contract properly set out the terms and conditions?
- Can the amount of the debt be proved satisfactorily?

If the answer is "yes" to the foregoing does the debtor have the means with which to pay the debt? There is no point in throwing good money after bad money. Face up to the answer to this question, you might have to make a hard decision.

If the answer remains "yes" one should then proceed to the next stage.

The Next Stage

Step 1

In considering going to the next stage one must realise that there is a substantial difference between suing an individual and suing a company. If the proceedings are successful against the individual and the individual continues to decline to pay off the debt, then the individual can be made a bankrupt. If on the other hand the debtor is a company then the company may be put into liquidation. In some cases directors can be held liable for company debts. In the case of a company, one can conduct a search in the Companies office to see how strong the company is. In both cases one can conduct a search on the Register of Judgements to see if any other Judgements have been obtained against the debtor. All of this is relevant.

Sometimes one might suspect that the debtor is going to dissipate his assets or behave in such a way that would defeat a future Judgement. In these circumstances one can obtain a Mareva Injunction. Such an injunction, if successful, will lead to the Court granting an Order providing that a specific asset cannot be sold or prohibiting a debtor from reducing his/her assets below a certain level.

The first stage in recovering a debt due from a legal person be it a company or an individual, is to issue a demand requesting payment within a reasonable time, which in the present environment would be seven days. This letter is critical. It will provide that if payment is not made then proceedings will be instituted and costs of the proceedings will be applied for.

If the payment is not made within the time stipulated then the next step is to institute the proceedings.

The Court Stage

Step 2

The proceedings claim that the debt is due but the amount of the debt influences the Court in which the proceedings are to be taken. That is, is it the District, Circuit or High Court?

The proceedings are issued out of the Court Office and are then served on the debtor.

They are served by registered post on an individual and by ordinary post on the secretary of a company.

If a debtor is evading service then an application must be made to the Court seeking an Order for what is known as "substituted service". The Judge considers all of the facts and then directs a method of service. Each decision depends upon each set of facts but it must be understood that the Court will insist upon the Defendant having notice of the existence of the Court proceedings.

For contracts entered into after 8th August 2002, European Regulations allow for interest to be charged on all late payments, that is after thirty days have elapsed, at a rate of interest linked to the ECB base rate. After Judgement has been awarded interest is automatically applied to the Judgement debt at the statutory rate.

When the proceedings have been served the debtor has a limited time in which to defend the proceedings. If the debtor defends the proceedings then the debt will have to be proved in the Court before the Judge and if the Judge is satisfied then the Judge will issue an Order for the amount that the Judge believes to be true and in that case costs are almost universally awarded to the creditor.

There are some occasions that debtors walk away from. In other words they do not react to the Summons. In these cases the creditor can complete an Affidavit setting out the amount of the debt and in these cases the Court Registrar will issue the Judgement in the creditors favour together with costs. Note, it does not have to go to a full hearing.

After the Court Stage

Step 3

After Judgement has been obtained either through the Court or in the office there are a wide variety of options open to the creditor.

The creditor can register the Judgement in the Central Office of the High Court. This inhibits the debtor in carrying on business, if in business. The Judgements are published and they come to the attention of the public. This has a very serious

knock-on effect for the debtor. It will almost certainly come to the attention of the bank and if in business to the business community. If he is not in business it will affect the debtor because his credit worthiness has been reduced.

The Judgement can be sent to the Sheriff. The Sheriff can be directed to seize the debtor's assets. The assets will be sold and the proceeds will be used to repay the debt.

If the debtor is an individual and not a company then proceedings can be brought in the District Court to have the debtor's means examined by the Judge. Following this the Judge will make an appropriate Order. This will obviously be influenced by the debtor's means. It will be to make payments on a regular basis until the debt is discharged. It has advantages for the creditor because the creditor is repaid. It has advantages for the debtor because on the payment of the last instalment and of the cost, the debtor can have the Judgement removed off the Judgements Register if it was registered.

It is always dangerous for a debtor to default. Strictly speaking a default is contempt of Court. Again strictly speaking because of the contempt the debtor can be arrested and imprisoned but this is extremely rare.

If a debtor has property then the creditor can have a Judgement Mortgage registered against the property. There is two sides to this. The "Judgement Mortgagee", like any mortgagee has the power of sale and can sell the debtor's property. The purpose of this is to recover the debt. On the other hand if the debtor, now call the "Judgement Mortgagor" tries to sell the property within a period of twelve years the purchaser will insist upon the debt being repaid in full and the Judgement Mortgage being vacated on the Register. Here once again each case depends upon its own circumstances.

Bankruptcy

Proceedings to have an individual declared a Bankrupt are cumbersome. The outcome of the proceedings is all assets vest in the official assignee and are shared out amongst the creditors. Once again there are no hard and fast rules in relation to bankruptcy. Each case depends upon its own merits. In this jurisdiction bankruptcy puts the debtor outside of the business community. The Bankrupt is really unable to trade and so cannot carry on business. It is extremely hard to return from this.

Liquidation

Most of what has been set out above relates to individuals. As already stated, where the debtor is a company, the remedy open to the creditor is to have the company wound up by a liquidator and the assets distributed in order to satisfy the debts. However beware. There is an order of preference and very often an unsecured creditor only receives a portion of the debt.

Finally we would like to state that the small claims Court does not deal with debts and for that matter leasing or hire purchase agreements so that avenue of opportunity is not available.

INSTALMENT ORDER

JUDGEMENT MORTGAGE

ORDER FOR SALE

BANKRUPTCY

LIQUIDATION

EXAMINATION OF COMPANY DIRECTORS

SMALL CLAIMS COURT