

A Practical Guide to Debt Recovery

There is no goodwill in a bad debt

With some planning and care many of the problems businesses face with debtors can be avoided.

- Careful drafting of documents
- Obvious signage outlining terms of trade
- Care in pre-contractual discussions
- Confirmatory letters

Matters of relevance at the outset include the parties obligations in respect of:

- dates
- mode of payment
- interest
- rights upon default
- indemnity for costs if default occurs.

Your legal advisors will be able to assist in drawing the documents and structuring.

When does a contractual Obligation to pay become a "debt"?

A creditor is entitled to pursue a debtor at law immediately after the effluxion of the contractual period for payment. Accordingly, it is appropriate and generally agreed to be prudent business management to make a demand for payment as soon as the contractual period for payment has expired and there has been a failure to pay.

Letter of Demand

An appropriately worded letter ought to be forwarded to a debtor in default. Some businesses forward a "sweet" letter followed later by a "less sweet" letter should the first letter not precipitate payment. Care in drafting the letter of demand will assist should the issuing of proceedings become necessary.

Your legal advisors will be able to assist in drafting the letter of demand.

Resolving matters before suing

A vast array of arrangements, agreements, compromises, set offs and other solutions to satisfy a bad debt are possible and can be negotiated between the parties. These strategies however, will only be effective if they are binding and adhered to by the parties. Accordingly it is prudent to properly and adequately document the arrangements. It is also prudent and appropriate to ensure that the documents evidencing the arrangements are correctly drafted.

Your legal advisors will be able to assist in achieving these ends.

Still no payment - What happens next?

At this stage it will be necessary to engage a debt collection agency or a lawyer to assist you. Whoever you seek assistance from will require certain basic information thus the importance of accurate record keeping and orderly documentation of accounts.

Commencing proceedings

- Debts up to \$100,000.00 - Magistrates' Court
 - Debts over \$100,000.00 - County Court
1. Issue Complaint/Writ;
 2. Serve Complaint/Writ on debtor;
 3. **If no Defence filed** within statutory period, obtain Default Order. **If Defence filed**, interlocutory steps required to be followed.
 - Request for further particulars
 - Discovery
 - Interrogatories
 - Pre-hearing conference/Mediation
 - Trial

The steps referred to above require a knowledge of the law and a knowledge of the rules of evidence and procedure.

Your legal advisors will be able to assist you in obtaining an Order

What do I do now that I have obtained an Order?

The conversion of an Order to money is a task which the lawyers refer to as "enforcement". There are numerous enforcement strategies available. In the case of **individuals**, Court Orders can be enforced as follows:

- Warrant to Seize Property
- Attachment of Earnings Orders
- Attachment of Debt Orders
- Instalment Orders
- Fraud Orders
- Seizure and Sale of Real Estate
- Bankruptcy

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In the case of **companies** each of the above enforcement mechanisms is available and in addition it is possible to make application to wind-up a company. This means that if a statutory demand is served upon a company and the debt is not paid within 3 weeks, the creditor can have the company wound up.

Your legal advisors will be able to assist you in obtaining an Order

How do I decide which enforcement mechanism is appropriate?

- Reference to client information provided initially at pre contractual stage
- General information provided by creditor
- Summons for Oral Examination

Relevant Legislation

Judgment Debt Recovery Act 1984
Imprisonment of Fraudulent Debtors Act 1958

With whom are you dealing?

In the normal course of commercial enterprise dealings take place with:

- Individuals
- Partnerships
- Firms
- Businesses
- Companies
- Trusts
- Deceased Estates

Your legal advisors will be able to assist you in identifying the appropriate defendant.

How much will this cost?

The basic proposition is that the defaulting debtor should pay the creditor's costs. The reality is unfortunately that even where the debt recovery process is entirely effective and all funds are recoverable pursuant to an Order there will be a shortfall between the allowance for costs recovered from the debtor and what you are actually charged by your legal advisor or debt collection agent.

There is one contractual solution to avoiding that occurrence - include a full indemnity for costs clause.

Businesses and individuals cannot afford to fail to recover payment for work and services and goods

In an ever more complex and competitive commercial environment you need the assistance of competent, efficient advisors. Maddens Lawyers Commercial Litigation Team are ready willing and able to assist. We will attend to your problems promptly and ensure that your decisions in respect of pursuit of debts are based upon carefully considered and appropriate legal advice

Email the Litigation Department for more information.

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