McKEANPARK LAWYERS

Debt recovery talk

In these uncertain economic times, it is very important that businesses make sure that their credit control is properly organised and enforced.

Failure to do this will result in substantial cash flow difficulties which, with recent changes to the laws in relation to payment of withholding tax and superannuation guarantee fund contributions, could have significant affects not only on the company, but on the personal liability of Directors.

This article will look at a number of matters affecting the credit control of companies; including:-

- the various jurisdictions and options available in relation to bringing proceedings to recover monies owed to you,
- the advantages and disadvantages of the various jurisdictions, a brief overview of the procedures in those jurisdictions,
- the means of enforcing any judgement or order that may be obtained ,
- the costs aspect (which is clearly very important and must be borne in mind at all times),
- the means of (hopefully) minimising your costs, and
- steps that can be taken by you to increase the prospects of a successful outcome.

This article considers effectively **trading debts**, and assumes that the majority of those debts under are **$100,000**. It does not consider the various aspects of general commercial litigation, which might relate to contractual disputes, partnership breakdowns, etc.

The first thing that you as a creditor will have to consider when seeking to recover funds is in **which jurisdiction proceedings are to be issued or, in fact, whether proceedings are to be issued at all**.

In this regard, you have a number of options, including:

- **Self – help**. But beware of the ACCC.
- **Engage a mercantile agent (debt collector)**. A mercantile agent effectively seeks to recover the debt by constantly contacting the debtor, and if the debt is recovered the mercantile agent will charge you a percentage of the debt recovered as a fee for his services. If he does not recover the debt, there is normally no charge.

However, a debt collector is not a lawyer, and therefore, if he is unable to recover the debt simply by regular phone calls and effectively harassment, then, should you wish to proceed further, legal proceedings would have to be issued and a lawyer would have to be engaged.

At that stage, the lawyer will charge you the same as any other lawyer, and therefore a mercantile agent or debt collector is best used in a situation where there are a large number of small debts, and it is therefore not economically sensible to issue separate proceedings in relation to each debt. A debt collector can try can recover the money, and if he is successful you receive a return on it, but if he is unsuccessful you are not incurring further costs.

If you are going to sue, go straight to a solicitor – that will probably save the fee that the mercantile agent will charge you for the recovery, additional to the legal costs.

A Statutory Demand. You can issue a Statutory Demand under the Corporations Act. A Statutory Demand is the first step in winding up a company and if the debt is **more than $2,000** that can be issued against the company which owes you the money. However, for various reasons, this is not a procedure that should be used if it is likely that the debt will in fact be disputed. However, if there is no genuine dispute regarding the existence of the debt, then issuing a Statutory Demand can often cause the company to attend to payment of the debt rather than risk being placed into liquidation. The cost on preparing a Statutory Demand and serving it is approximately $500. Assuming the debt is not paid, if you then want to proceed to wind up the company, you can do so for approximately another $4,500 - $5,000, but you are not obliged to. There are other aspects of Statutory Demands which should be borne in mind, but the main one is that if the debtor pays the amount, he does not have to pay any costs in relation to it, so once it’s done, it is going to cost you approximately $500.00 regardless of whether the debtor pays or not.

- **Magistrates' Court**. The most common place in which proceedings are issued is the Magistrates' Court of Victoria which has jurisdiction up to $100,000. The following is a brief overview of the procedures in the Magistrates' Court).

Disclaimer: This update provides a summary only of the subject mater covered and is only meant as a guide. No person should rely on the contents as a substitute for legal or other professional advice. Recipients should take steps to inform themselves before acting on any information in this document.

Claims under $10,000 are dealt with under a procedure called Arbitration, which has certain differences between the standard manner in which proceedings in which proceedings are conducted, which will be dealt with shortly.

When you issue proceedings in the Magistrates' Court that is done by way of a Form 5A Complaint. The Complaint sets out the details of the parties, namely yourself, to whom the money is owed (you are known as the Plaintiff), and the debtor, who owes you the money (the Defendant).

It is very important to make sure you know the identity of the person you are suing. On the face of it, it seems like a fairly straight forward matter, but sometimes it is unclear whether you are dealing with a natural person, a company, an associated incorporation, etc. Sometimes a debtor will be acting in the capacity of a Trustee, and will effectively try and deal with you as the Trust. The Trust is not an official legal body, and therefore, you cannot sue a Trust. You have to sue the Trustee of the Trust. Therefore, when entering into any business arrangements, make certain that you do find out at the beginning the exact identity of the person or company you are dealing with.

If the Defendant is in business, then you can get an ABN and look up the ABN Lookup website (**http://www.abr.business.gov.au/Index.aspx**), and that will give you some details of the entity that actually owns that particular ABN.

Once proceedings have been issued then they are served upon the Defendant. In the case of a company that can be done by post, and where it is a natural person it has to be personally served but there are a number of options for the manner in which personal service can be effected.

The Complaint must also set out details as to the basis of the claim against the Defendant. It must contain sufficient particulars of the claim to enable the Defendant to properly identify the issues in dispute, and to respond to them to give a proper indication of what his or its defence to the claim is. Once the Complaint has been served, the Defendant has 21 days in which to lodge a Notice of Defence. If it does not do that, then you, as Plaintiff, can apply to the Court to enter judgement by default.

If the Defendant does lodge a defence, it should set out in some detail exactly what are the issues in your Statement of Claim that it disagrees with.

Both parties have the opportunity to request further and better particulars of each other's Statement of Claim or Defence, in order that, if they are not very detailed, both sides can obtain all necessary information to enable the matter to proceed in a proper manner. Discovery then occurs, which is a process by which the parties exchange lists of documents, which are relevant to the proceedings even if they may not necessarily be favourable to the person disclosing the existence of the documents. The courts take the duty to fully disclose documents in the process of discovery very seriously, and there was in fact fairly recently a Solicitor who lost his practising certificate as a result of a case in which he was involved, acting on his own behalf, where he failed to disclose a particularly important document. The Court not only found against him in those proceedings, but reported the matter to the Legal Services Board and he was struck-off for improper conduct. So it is clear that the courts do take the obligation to provide proper discovery very seriously.

Following discovery the matter will go to mediation. For those that have not been to mediation, mediation is simply a means of forcing the parties to enter into negotiations. The mediation is normally conducted at the Magistrates' Court, where the proceedings are issued, and is conducted by a Registrar of the Magistrates' Court.

Disclaimer: This update provides a summary only of the subject mater covered and is only meant as a guide. No person should rely on the contents as a substitute for legal or other professional advice. Recipients should take steps to inform themselves before acting on any information in this document.

Debt recovery talk *(...continued)*

The Registrar does not have the power to make any decisions binding upon the parties. He can make certain procedural orders, but his main function is simply to get the parties to negotiate with each and attempt to resolve the dispute before the costs get out of hand.

If the matter is not resolved in a pre-Hearing conference, the Court will then list the matter for a hearing and the Hearing will ultimately come up and you will either win or lose the claim.

As stated above, claims under $10,000 are normally heard as an Arbitration in accordance with the Magistrates' Court Act. The procedures are fairly similar, except that in Arbitration:

1. There are no interlocutory steps available. In other words, you do not have the ability to require further and better particulars of the other party, regardless of how bad their Statement of Claim or Defence is.
2. You do not have the process of discovery. In other words, you go to Court without having the opportunity to see all of the documents that the other side might have.
3. There is a costs cap in relation to arbitration. Although the Magistrates' Court has a scale of costs, the amount that is awarded by courts in arbitration is limited, quite substantially, by the effect of the arbitration costs regulations.

The Plaintiff has the option to apply for what is called a Summary Judgement against the Defendant. In other words, once the Defendant puts in his defence, if the Plaintiff believes that the defence does not disclose any real dispute, an application can be made, supported by an affidavit, to the court for an order that the defence be struck out and judgement be awarded against the Defendant forthwith on the basis that there is no defence to the proceedings. If successful, you save considerable time and cost. Even if not successful, it is sometimes useful to pursue this course because the Defendant, in his affidavit material, is required to set out in reasonable detail exactly what his defence is – usually giving you more information than is contained in the Defence itself.

The court is normally reluctant to do this, but in some cases where the matter is clear-cut it will do so. The court will, when considering an application for summary judgement, look at the defence and, for the sake of deciding the application for summary judgement, act on the basis that everything that is said in the defence is correct. If, on that assumption, the Defendant has demonstrated that he or she is not liable to pay the money being sought, then the application for summary judgement will be dismissed. If however, as sometimes occurs, even accepting everything said by the Defendant there is still no defence to the proceedings, then the court will set aside the defence and enter judgement.

Whilst the court will normally assume that what is in the defence is true, for the sake of considering these applications, it is extremely useful if you are able to produce to the court documents which contradict the matters which are in the defence. In other words, if the Defendant states that there is a dispute regarding the quality of the goods supplied and that he has been disputing the bill for a considerable period, emails or letters from the Defendant which seek to make arrangements to pay the debt, or make promises to pay the debt, would clearly go a long way in indicating to the court that the Defendant is not acting bona fide, and that he or she is simply attempting to delay the matter.

Therefore, although a summary judgement is usually difficult to obtain, it is worth considering when you have the appropriate paper trail effectively admitting the debt.

The various methods of enforcing judgements against debtors are as follows:

4. **The Sheriff**. A Warrant to Seize Property can be issued by the Plaintiff, which effectively instructs the Sheriff of the Supreme Court to attend the premises of the debtor, seek entry to the premises, and to seize and sell goods of the debtor to enable the judgement debt to be paid.

   On the face of it, this seems like a very good way to proceed, as the cost is comparatively minimal ($200 to $300 including the issuing fee).

Disclaimer: This update provides a summary only of the subject mater covered and is only meant as a guide. No person should rely on the contents as a substitute for legal or other professional advice. Recipients should take steps to inform themselves before acting on any information in this document.

However, there are substantial limitations on the ability of the Sheriff to recover property. In the first place, if the person refuses to let a Sheriff enter into his property, the Sheriff is not entitled to do so. There is no obligation upon a judgement debtor to open the front door to a Sheriff or to grant him access to his house. Having said that, however, once the judgement debtor has let the Sheriff into his house, the Sheriff is entitled to return and gain access at any time.

Another difficulty with the Sheriff is that there are certain categories of goods which are exempt from seizure and sale. These are effectively household goods of a normal domestic nature. In other words, the Sheriff will not be able to seize the beds, the couches, the TV, the stereo, the computer, the DVD player, the fridge, etc. of the debtor. If the debtor has expensive antique furniture, or a very expensive collectable home theatre system, or a wine collection, then they will be able to be seized. However, if the debtor lives a normal, inexpensive life with no flash fittings or possessions, then there is little that the Sheriff can take.

He can seize motor vehicles, but only if they are less than $7,000 (that is the approximate current amount relating to the value of the car – it does increase by CPI from time to time which is why that is not an exact figure).

5. The next option to enforce the judgement is to issue a **Summons for Oral Examination**. This is a means by which the debtor, or a Director of the debtor company, is summoned to appear before the Court (normally a Registrar), to be examined as to his means and ability to pay the judgement debt. The debtor has to provide financial information as to his assets and liabilities and income and expenditure.

   In the event that the Defendant fails to attend the summons for oral examination, a warrant can, and usually is, be issued for the arrest of the debtor. The debtor is then arrested, brought before the court, and the examination undertaken.

   This procedure is quite cheap, once again approximately $200 to $300. However, the difficulty is that once you have ascertained whether the Defendant has any goods or assets, you then still have to realise those assets.

6. Another way of enforcing the judgement debt, is by way of **bankruptcy or liquidation proceedings**. As you have a judgement, you can commence bankruptcy proceedings against individuals, but unless and until you have a judgement, you cannot do so. You do not require a judgement to wind up a company, however, but you do to bankrupt a person.

   The courts have over a period of time emphasised that bankruptcy and liquidation are not debt collection proceedings. That, with respect, is not particularly realistic. Accordingly, if you believe that the debtor has money, is able to get money, and wishes to avoid bankruptcy or avoid liquidation, then issuing a bankruptcy notice or a Statutory Demand (which are the first stages of bankruptcy and liquidation respectively) can often have the effect of prompting payment of the amount due.

   If the amount owed is substantial you may then wish to issue bankruptcy proceedings or winding up proceedings. In the event that the bankruptcy notice or Statutory Demand has not been complied with, it is quite common for monies to be paid effectively on the door of the court of the bankruptcy or liquidation proceedings.

   Because of the costs of bankruptcy and liquidation (bankruptcy will cost you approximately $5,000, and liquidation $4,500 to $5,000), it is best to use this procedure in a situation where the debt is reasonably substantial and the person who owes the money is anxious to stay in business.

   Otherwise, if the business has stopped trading, and the person has no assets, then it is likely that the debtor will allow bankruptcy to occur, or go into liquidation, in which case, if there are no assets, you still will not recover anything. The old adage "you can't get blood out of a stone" remains equally true today in a legal sense as it ever did.

Disclaimer: This update provides a summary only of the subject mater covered and is only meant as a guide. No person should rely on the contents as a substitute for legal or other professional advice. Recipients should take steps to inform themselves before acting on any information in this document.

Debt recovery talk *(...continued)*

But what can you, as creditors, do to assist in making proceedings more effective, and to increase your prospect of success? Debtors invariably think of all sorts of reasons as to why they should not pay you. No doubt you've been slow, no doubt you've caused unnecessary delays, no doubt the goods that you sold or delivered were faulty and not in accordance with a sample provided by you.

However, as you also know, in the vast majority of cases those are simply excuses that subsequently put forward to avoid paying monies owed to you.

There are a number of quick things that you can do to make sure that you can beat these arguments at an early stage, and hopefully lead to a summary judgement application.

1. As indicated above, make sure that you know who it is that you're actually dealing with. That will avoid the defence, which is reasonably common, and sometimes very effective, that you have in fact sued the wrong party. That can be corrected, but it will normally result in costs being awarded against you to some extent, which may render the whole point of the exercise fairly pointless.
2. Make sure that you have standard procedures and standard documents in place for dealing with your customers, and follow them. For example, if your system is that you provide a quote, then obtain a purchase order and then provide the services or deliver the goods, that should be undertaken in each matter. You should ensure that you do not provide goods or services unless you have a signed purchase order, signed by an appropriate person acting at the debtor company, in your possession. Similarly, any variations to that purchase order ought to be confirmed in writing.

   The standard procedure should be something that covers every aspect of your dealings – make sure that you have a:

- Credit application form, properly completed
- Details, including if possible home addresses of the directors if dealing with a company
- Personal guarantees from directors of a company

It is probably also a good idea, if you are entering into a reasonable size transaction, to do a company search, and also, possibly, whether dealing with an individual or the directors of a company, an index search at the Titles Office to see whether the other person has any real estate. These steps are very important because as you know, the ability to rely on retention of title clauses in credit applications has been altered by the PPSA.

3. Confirm discussions, etc. in relation to outstanding accounts by email, send account rendered, get on the phone and contact the debtor, and if the debtor makes any comment or commitment to pay or acknowledgment of the debt, confirm that in an email straight away.

   Similarly, in those emails, you should seek that the debtor confirms the discussions in writing.

   If text messages are sent to you, they should similarly be save so make sure that you have the facility to do that. These admissions and acknowledgements and arrangements are the matters that will assist you in bringing an application for summary judgement, or ensuring that no defence is lodged when you issue the proceedings in the first place. The courts sensibly take the view that if a person really has a complaint about the services or the charges, it is unlikely that the person will acknowledge the debt, or enter into arrangements to pay it. That is the best evidence that you can have.
4. Keep careful eye on the level of debt. In many instances, you have no real indication as to whether the person you're dealing with has any assets to back up monies owed to you or otherwise. Therefore, you want to ensure that the level of debt that you are carrying is, as far as possible, one which is acceptable to your cash flow requirements.

Disclaimer: This update provides a summary only of the subject mater covered and is only meant as a guide. No person should rely on the contents as a substitute for legal or other professional advice. Recipients should take steps to inform themselves before acting on any information in this document.

Debt recovery talk *(...continued)*

5. If a debtor is continually late in making payments and continually entering into arrangements to make payments, etc., put them on a cash on delivery basis. Although they may not owe you any money at the time you enter into this cash on delivery arrangement, it may save you difficulties at a later stage. Regular entry into payment arrangements, bounced cheques or delayed payments are common indicators of insolvency. In that situation, therefore, a debtor may well be on the brink of insolvency, and if the debtor makes payments to you other than in the normal course of business and other than in accordance with your normal terms of trade, and subsequently gets placed into bankruptcy or liquidation, the monies received by you for a certain period prior to that bankruptcy or liquidation may be recovered from you as a preferential payment. If, however, you are dealing on a cash on delivery basis, that situation is avoided. Therefore, if and when you believe that the other party is in any financial difficulty whatsoever, or you have to issue proceedings, or you have to enter into payment arrangements which are not then honoured, you should very quickly change to a cash on delivery basis.
6. Don't throw good money after bad. In many instances, small debts are simply not worth recovering. Whilst it is annoying, you are better to lose $500 on a debt, rather than obtain an order for the $500, plus an order for costs of approximately $1,500, and yet have to pay your solicitor $2,000 to $3,000. That is a no-win situation, even assuming you manage to recover the amount of the order and the debt in the first place, and that is by no means always the case.

As you know, solicitors charge either on time basis or on a scale basis. Normally we charge on a time basis. Therefore, any matters that you can undertake that reduce the amount of time that we have to spend on a file are greatly beneficial to you.

Some of the things that would help reduce the time that we spend on a file would include:

1. Preparing documents in a straightforward, chronological and logical order. This will avoid us having to spend 3 or 4 hours simply sorting the documents, at some hundreds of dollars per hour.
2. Make sure all documents that are relevant are provided to us at an early stage.
3. When phoning us, or contacting us, try and make sure that all of the matters of concern to you are dealt with in that phone call, rather than making 2 or 3 phone calls which are obviously a more expensive proposition.
4. Provide further information to us promptly as and when required by us. The more often we have to "chase you" for information, the more costly for you from your point of view.

There are a number of other suggestions which will help minimise the time spent by us on your file, without diminishing the quality of the services provided. These will, however, hopefully diminish the cost incurred by you.

There are a number of aspects of debt collecting. We are more than happy to discuss any or all of them in more depth with you. If you would like to either come in a visit us or wish us to come out and visit you and your staff – we are more than happy to do so.

David Brett
Consultant Lawyer

Disclaimer: This update provides a summary only of the subject mater covered and is only meant as a guide. No person should rely on the contents as a substitute for legal or other professional advice. Recipients should take steps to inform themselves before acting on any information in this document.