DUE DATE – DEBT COLLECTION AFTER THE TIGER HAS BOLTED

By Niamh Loughran and Sean Carr

“Neither a borrower, nor a lender be;
For loan oft loses both itself and friend”

As Shakespeare’s familiar line from Hamlet shows, difficulties with monies loaned or owed are not a new phenomenon. Even in the 1590s, Elizabethan England was all too aware of the pitfalls of owing or being owed money.

In the era of the once-mighty Celtic Tiger, one might have been forgiven for allowing instances of debts to build up around one’s practice, given the volume of work being contended with. However, the recent downturn in the Irish economy has led every business to entirely depend on its cash flow for survival and now Polonius’s lesson is being harshly learnt again.

It is more important than ever for every business to ensure that prompt payment of invoices is made. It is vitally important that your organisation sets out clear terms for customers or clients once an invoice is raised as to when payment must be made and the procedure that will apply in the event payment is not made promptly.

Initial considerations

Once an invoice falls due for payment it is open to you to commence an action for recovery of this sum. The fact of a debt usually arises under contract and this will always be the starting point in any action for recovery of monies owing. The important preliminary questions which arise for consideration are:

- Is there a contract in existence? This can be either oral or in writing.
- Have you performed your obligations under the contract?
- Is the debt actually owed?
- How much is owed?
- Are there any potential disputes over the existence or amount of the debt?
- Are there any interest provisions and are these sums calculated correctly?
- Who owes the debt?
- Are there contractual provisions specifying the procedures to adopt in the event of non-payment?
- Is the debtor in a position to pay?

The most important initial investigation in any debt recovery action is to ensure that a debt is actually due and owing. As simple as this step is, it should never be overlooked as it is a pointless exercise attempting to recover something to which you have no legal right.

Once you have established that a debt exists, you will then need to determine from whom the debt is owed and the amount of the debt. You must ensure that you are seeking to recover from the correct person and that any applicable interest rate is correctly calculated. If the contract is silent on the issue of interest there are rates specified by statute which may be open to you. The threat of claiming interest on a debt can be a useful negotiating tool in obtaining payment.

The next step is to determine whether any specific contractual terms exist in relation to the forum for resolution of the dispute. A contract may stipulate that the dispute between the parties is referred to some form of Alternative Dispute Resolution (ADR) process such as mediation, arbitration and/or conciliation in the first instance and you must comply with such a term if it exists.
Before you start incurring costs in seeking to recover a debt owed, the appropriate investigations should be undertaken to determine whether the debtor is in a position to pay the debt. Any other approach could result in you effectively throwing good money after bad. When you have assessed the steps as outlined above and ADR has not been successful or not adopted, you can then proceed through the traditional courts process. There are many options open to you depending on the specific circumstances such as:

- seeking a judgment of the court that a debt is due and owing and then seeking enforcement of that judgment, the appropriate court depends on the level of the debt owed;
- initiating bankruptcy proceedings (individual debtor); and,
- initiating winding up proceedings (company debtor).

**Court judgment and enforcement**

If you opt to seek a judgment from the court that a debt is due and owing, the procedure varies depending on whether the debtor disputes the debt or not and a disputed debt will lead to additional costs in the application. Obtaining the judgment does not, unfortunately guarantee immediate payment from the debtor as they may not engage in the process. The judgment does however certify beyond doubt that the debt is due and owing and there are many methods of seeking to enforce it, the selection of which will depend on the circumstances of each specific case.

**Winding up and bankruptcy**

The threat of bankruptcy or winding up proceedings is often a useful tactic in encouraging debtors to pay up but may not be suitable in every situation. Each petition to wind up a company needs to be accompanied by an affidavit verifying the circumstances of the debt and that the debt is not and cannot be disputed.

It should be borne in mind that the court will not entertain a winding up petition, if it considers that the debt is genuinely disputed. Also, it should be noted that knowingly swearing an inaccurate Affidavit of Verification constitutes contempt of court and can have severe repercussions. Where the debtor is an individual, bankruptcy proceedings can be initiated by serving a document known as a Bankruptcy Summons on the debtor requesting payment of the debt within 14 days. If payment of the sum referred to therein is not made within this time period then you can apply to the court to have the individual adjudicated a bankrupt.

**Advantages and disadvantages of winding up**

In the event that the debt is not disputed by a company, or at least not ‘genuinely’ disputed, then winding up proceedings can be much quicker and more cost effective than issuing court proceedings; however there are potential disadvantages in winding up a corporate debtor. The petitioning creditor does not obtain any greater entitlement to return of their debt than they originally had. Once all of the assets of the corporate debtor have been realised, they are then paid out on a priority basis to statutorily defined groupings with unsecured creditors being the last grouping to be paid. If all of the funds are dissipated before the unsecured creditors grouping is reached, you will get nothing and the costs spent on winding up the corporate debtor will be wasted.

As soon as a debtor is declared insolvent, then a liquidator will be appointed to realise the debtor’s assets for the benefit of all creditors of the company, and not just the petitioning creditor pursuing the winding up proceedings. Furthermore, secured creditors will be paid off before unsecured creditors. Therefore, unless the petitioning creditor is a secured creditor, it will have expended a great deal of time and money in bringing about the winding up of the debtor for the benefit of all other creditors, and not necessarily itself.
Advantages and disadvantages of bankruptcy

As with a winding up of a corporate debtor, the threat of bankruptcy proceedings is a very useful negotiating tool in the process of recovering sums due from a client as it results in very severe restrictions to the bankrupt individual for a period of 12 years. Proceedings must be initiated in the High Court to have an individual adjudicated a bankrupt and, therefore, the debt must be significant to consider this option. Otherwise, the legal costs of the bankruptcy could exceed the sums actually due.

If you succeed in having an individual adjudicated a bankrupt your court expenses will be one of the first debts to be repaid. Thereafter, each creditor will be treated similarly and the debtor will have 12 years within which to repay each debt in full or arrange with a majority of the creditors to accept a lesser sum on a pro rata basis. It can, therefore, be a very slow process for recovery of a debt.

The Insolvency Journal recently reported that 1,525 companies became insolvent in 2010. Of those companies, 472 were construction-related. More than ever, the recovery of contract debts is vital for the survival of your business.

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