

RAINEY COLLINS

LAWYERS

Debt Collection

Debt Prevention

- The best way to deal with bad debts is to have no debts at all, however this can be hard to achieve.
- There are ways you can reduce the number or amount of bad debts you may have, and increase the chances of getting your money into your bank account, where it belongs.

1. Credit check

- **A credit check is looking at a person's debt history.**
- **This may be appropriate where you are providing high value services to someone on an ongoing basis, for example if you are supplying builders with building material and invoicing them every month.**
- It will include any unpaid debts they have, or have had, in the last five years if the amount of the debt was \$100 or more, the debt was more than 30 days overdue and the creditor took steps to recover the money.
- It will also include whether they have been insolvent, which means they were previously unable to pay creditors, and any information on their repayment history from the last 24 months (even if they have not missed any repayments).
- A credit record also includes any court judgments relating to the debtor.
- Credit checks can be obtained for a fee from any major credit company in New Zealand.
- You may be required to get the person's consent before you do a credit check.
- If the person does not agree to the credit check then this would be a 'red flag'.

2. References

- It may also be useful for you to do a reference check to find out whether the person has been reliable at paying invoices previously. You should ask for Trade references from organisations they have dealt with. Follow up those referees to see if there have been any problems getting paid etc

3. It may also be appropriate to search the Personal Property Security Register or Land Online

- Searching the register or Land Online can also help to show whether a person is already up to their eyeballs in debts secured against their personal property (like cars, TVs, machinery) or debts secured against their real estate (mortgages, or charges).
- If they are, it might be a '**red flag**' that your invoices could eventually end up unpaid!
- You can ask a lawyer to do these checks for you.
- **It does cost to do this so it is not economical for small amounts.**

4. Company Search

- It may also be useful to do a Company Search to find out whether the company is in the process of being liquidated.
- You can also search to see what other companies they have been involved with. Have any of those been liquidated etc?

5. New Zealand Gazette.



- The New Zealand Gazette is where liquidations of company's or bankruptcies are posted.
- It can also tell you if someone has previously tried to liquidate the company, but it didn't happen (they may have paid back their debt).
- This may be helpful in determining whether they will be a reliable client/ customer.
- You can have a look through to find out whether the company you are doing business with is in liquidation or if the person you are doing business with is actually bankrupt.

6. Deposit

- Requiring a deposit is one of the best ways that you can prevent bad debt.
- It means that the money is already in your bank account and you can rest easy knowing that you will not need to chase it.
- It also indicates that if the person is not willing to pay the deposit up front, that they are unlikely to pay for the work done.
- It is better for you to know this now, before you have done the work or provided the goods then later down the track.
- You should also get top-up deposits from the person along the way if you are doing any future work, so that their account can stay in credit for as long as possible.

7. And you should not forget to listen to your gut feeling

- When someone approaches you about doing some work for them, often you get an instant gut feeling about that person and how reliable you think they will be.
- Often your gut is correct and it may pay at this point to do a bit of investigation or digging around to see whether they are someone you want to do business with.

Once you decide that you are happy to do business with the person it is extremely important that you put in place a contract which is sometimes known as a terms of trade which clearly sets out how the relationship will work and protects you against bad debt before you do any work.

1. Correctly identify the parties to the agreement

- A terms of trade should be in writing and should correctly identify the parties to it, for example if you are entering into a business relationship with a person, a Company, a Trust, a Charity or Organisation.
- Likewise it is important that if you are operating a business that you ensure the contract is in the company's name, not your own or the trading name. There is no point in having a limited liability company and incurring debt in your own name.

2. Set out the scope of the business relationship

- The contract should also clearly describe the scope of the business relationship – that being what each party's obligations are.

3. Set out the cost

- The main cause for dispute between people is money.
- Before providing services, you should be clear about how much it will cost.
- This may be an agreed quote or estimate, or some other method for determining cost, such as the market rate.
- Whatever the agreement, it should be recorded in the terms of trade, so that there can be no dispute later on.
- **If there is ever any variation to the cost, this should be recorded in writing and the variation should be signed by both parties.**

4. Set out payment terms

- It is also important that you include payment terms.
- The terms of trade should identify when invoices will be issued, and when they will become due, so that it is clear to both parties when the debt must be paid by.

5. Interest clause

- The terms of trade should also include an interest clause setting out that interest will accrue on any amount once it becomes overdue.
- The amount of interest claimed must be reasonable. (Commerce Commission assesses reasonableness of terms of trade).
- If you don't include such a clause, your ability to claim interest is very limited and only arises where you file proceedings to recover the debt.
- Even then, the amount of interest you can claim and the period you can claim it for is limited.

6. Default clause

- You should also include in the contract a default clause.
- A default clause allows you to recover the debt against the person should they fail to make payment on time.
- It is also vital to include in the clause that any amount you have spent in trying to recover the debt is recoverable, as it means that where the debt is not large you can have confidence to initiate debt recovery proceedings, knowing that you are likely to get your costs in seeking to recover the debt back.
- The clause should also clearly set out that your costs for recovering the debt also include your legal costs.

7. Personal guarantee

- In some cases it may be appropriate to include a personal guarantee clause.
- A personal guarantee clause will enable you, in the event of the person defaulting on their obligations to pay under the terms of trade, to claim against the individuals who guaranteed the debt – this may be a friend or family member.
- If you are entering into an agreement with a company then you can get the director of the company who you are dealing with to sign a personal guarantee, so that they will be personally liable for the debt if the company defaults.
- There are particular requirements for a guarantee to be valid, including that the guarantee's signature must be independently witnessed.
- It is important that if you do include a guarantee clause in your contract that you seek legal advice to ensure that the clause meets all the legal standards.

8. Sign two copies of the contract

- Once the Contract/ terms of trade is complete, it is important that you and the debtor sign it.
- **Although this seems very simple, you would be surprised at the amount of unsigned contracts Rainey Collins has seen over the years.**
- You should make sure that there are two signed copies of the contract, one for yourself and one for the other person.
- You should keep a copy of the contract safe, so that if you ever need to refer to it you have a copy on record.

Debt Management

- It is important to keep **good records** of all invoices issued and payments made by the debtor.
- It is also good to keep up to date records of the debtor's contact details, so that, should they fail to pay your invoices, you are able to contact them (this also is very important later on if you need to recover the debt).
- Contact details you need are:
 - o Name – correctly spelled
 - o Phone numbers
 - o Email address
 - o Physical address/ company address
 - o Employer details
 - o Photograph
 - o Birthday
- It can be useful to take a copy of the person's drivers licence at the beginning, as this will include the correct spelling of the person's name, birthday and photograph.
- If the debtor fails to make payment, it is important that you have a good process in place for following up on debts once they become due.
- You do not want to forget about the debt and keep doing work for the debtor, all the while not receiving any payment.
- The first step if there is an overdue invoice is to get in contact with the debtor.
- The debtor may be able to explain why payment was not made – for example they may have forgotten, or they may have noticed a discrepancy in the invoice

What are some excuses for not paying a debt?

- We have all heard the excuse – “the cheque is in the mail”. Luckily these days they cannot use that one anymore.
 - I didn't get the invoice
 - I've been in hospital/ sick and couldn't pay
 - There was a muck up with my pay
 - I thought I had paid / my spouse had paid
 - A family member/ child has been seriously ill
 - I forgot, I'll do it now
 - I have paid – can you check
 - I've been away on holiday and didn't have access to my emails
 - Death in the family and had to urgently deal with that
 - I'm just waiting for the money to come in from somewhere else
- Making contact may be all it takes to get the debtor to pay the invoice.
- We recommend telephoning the debtor, as it is far harder to ignore a telephone call than an email.
- It is important that when you make the telephone call you keep a good file note. The file note should record the day and time, as well as what was discussed during the phone call.
- It is also important to keep a copy of all emails/ text messages you have sent chasing up the debt on record and any responses given by the debtor, so you can use this as evidence later on if needed
- If the debtor says they are going to pay, it is useful to ask what day they will make payment. If the debtor is not going to pay the invoice they will not usually be inclined to give a date. This will be a good indication to you as to whether you need to keep a closer eye on the person or take immediate recovery action.

- It is often good to send a couple of reminders to a debtor before turning your mind to the debt recovery process.
- If you get no response from the debtor or the debtor promises payment and never makes good on their promises then **you should take immediate action to give yourself the best chance of getting your money back.**

Recovering debt

1. Letter of Demand

- The first step in recovering a debt is to send the debtor a letter of demand.
- The letter of demand should set out the following:
 - o The full details of the debt;
 - o The terms of the contract including interest clauses, and default clauses;
 - o Notice that unless the debt is paid in full within a certain period of time that court action will be initiated to recover the debt without further notice to the debtor; and
 - o Payment details .
- The benefits of instructing a lawyer to draft this letter is that receiving a letter from a lawyer carries with it a lot of authority and people often take the matter more seriously once they know a lawyer is involved.
- It may encourage the debtor to pay the debt without any further steps needing to be taken.

2. Disputes Tribunal

- You can apply to the Disputes Tribunal only if the debtor disputes the debt eg they have already paid, or they were charged more than what was agreed or the services were not properly provided etc.
- you can make a Disputes Tribunal claim if the debt is up to \$30,000. For a larger debt you can write off the balance to bring the claim within the \$30,000 limit but you cannot split a claim into several parts to bring multiple claims.
- The benefits for you in making a Disputes Tribunal claim is that the process is a lot quicker and cheaper than going to court.
- The Disputes Tribunal is a less formal process and lawyers cannot appear to represent a party. However we can assist you with drafting your application to ensure all the right information and evidence is included.
- Once your application is filed, notice is given to the other party.
- It is important that you have up-to-date contact details for the debtor as the Disputes Tribunal is responsible for serving the debtor with your claim. If they cannot find the debtor, then you may not be able to recover the money owing.
- No defence/ reply is required to be filed but the debtor can put in their response to the claim and make a counter claim if they wish to.
- Once notice is given the referee will hear oral evidence from both sides and make a decision. You need to take any witnesses with you to the hearing. If the hearing is by telephone you need to have your witnesses available to give evidence.
- A claim can be made by completing and filing a claim form which you can find online.
- A decision of the Tribunal can be enforced through the District Court, if the debtor still does not pay.

3. Court

- Which court you apply to will depend on the value of the dispute – if the debt is less than **\$350,000**, then the claim can be made in the District Court. If the value of the dispute is more than **\$350,000** it must be made in the High Court.
- The District Court process is usually less costly than a High Court process.
- The District and High Court processes will be started by filing with the relevant court and serving on the other party, a Statement of Claim (the facts on which you claim you are owed money), and a Notice of Proceeding.
- In the District Court, you also need to file and serve a list of documents (the documents you rely on in your claim).
- **In the High Court you do not need to file a list of documents at the start, but you will eventually need to provide copies of all relevant documents along with a formal list of those documents.**

Summary Judgment

- If you believe there is no valid dispute and that the debtor will not raise or does not have a defense, then you can apply to the court for Summary Judgment.
- This means that, instead of going through the usual lengthy processes, you can ask the Court to fast-track your claim.
- Filing a Summary Judgment claim requires two additional documents –an affidavit which is evidence given on oath in support of the facts that form the basis of your claim and an interlocutory application for Summary Judgment (**the facts on which you claim there is no defence**).
- If you want to make use of the Summary Judgment process, it is important that you get all of the right information filed at the beginning.
- **If the Court thinks that there might be a defence, or if you have missed something in your documents, the claim can be put back onto the normal track and be dealt with as if there were a defence to it.**
- It pays to get legal advice and assistance at the beginning especially with drafting the documents.
- If you have a well drafted contract with a clause allowing for recovery of legal costs, then any legal fees will be recoverable against the debtor along with the filing fees for filing the relevant documents.

Service

- Once the documents have been filed and processed by the Court, they must be served on the debtor personally or at a company's registered office.
- You can do this yourself or ask a service agent to do it for you.
- This is why it is important to have the physical address of the debtor or other contact details such as an email or their telephone number so that you can organize a place to meet in order to serve the documents, or apply to serve them by email if they are avoiding being served personally.
- Alternatively, if both of those options fail you could contact them at their place of employment. A person will likely agree to meet up with you to receive the documents rather than have you turn up at their place of employment in front of their colleagues.

However, what can you do if your contact details are out of date?

- If the debtor has disappeared you may have to hire a private investigator to find them.

You may then have to apply to the Court for **substituted service**

- This is a formal application and can be done through a lawyer
- Just remember that your costs will be recoverable

- Substituted service can be by email, Facebook, a family member etc
- After the documents have been served you will need to file an affidavit of service letting the Court know that you have served the documents on the debtor and that they are aware of the proceedings. There are some formal requirements that need to be met when filing an affidavit of service, so it is good to either have a lawyer draft this document for you or to get a lawyer to review it.
- **It is important that if you serve the person yourself that you record the time and day of service and the location of service, and that the debtor acknowledged receipt.**
- This is why it is important to keep up to date records of the debtor's details, including their address.

Once the documents have been served the matter will then proceed through various steps before you get to a hearing.

- **If the Court gives judgment in your favour, you should contact the debtor immediately to require payment.**

8. Enforcing Orders

- If payment is still not received, it is important to take action as soon as possible to enforce the judgment and get your money.
- The first step could be to find out as much about the debtor's finances as you can.
- The first port of call is usually to apply to the Court for an order of examination of the debtor.
- An examination requires the debtor, on oath, to provide the Court with details of their **income, outgoings, assets, and liabilities.**
- Once you are satisfied that you have enough information about the debtor, you can look at the best enforcement option.

Options

- Garnishee orders are useful where the debtor has cash held by third parties like banks, or is owed money by someone else. A garnishee order can be used to require the bank to release the funds to you to satisfy the judgment.
- Attachment orders are useful where a debtor is asset poor, but has several or regular streams of income. Income is not limited to wages, it can include any rent or regular source of incoming money. An attachment order attaches to a source of income and makes automatic deductions from it and pays those to you.
- Sale orders are useful where a debtor is cash poor, but asset rich. You can obtain orders to sell any personal property or real estate owned by the debtor. Only the High Court can order the sale of land, however.
- Bankruptcy is also another option to consider.
- As with any recovery process, there are pros and cons.
- Once you have a judgment for over \$1,000 however, you can use that judgment as the basis for an application to bankrupt a person.
- All of the debtor's assets will be realized and any creditors will be repaid from any available funds.
- A bank with a mortgage over a debtor's real estate, for example, is going to have a stronger claim than you, even with your court judgment.
- Liquidation – you can apply to have a company liquidated and its assets divided amongst creditors in the High Court if the amount owing is over \$1,000. Before you do this though you may be required to serve a statutory demand on the company. Once the company has

failed to comply with the demand then the company will be deemed to be insolvent and that is when you can file proceedings.

Conclusion

Having good terms of trade, getting full and accurate details of the debtor and acting quickly to chase up debts are all really important to help you get paid what you are owed.

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