DEBT

Law guide - Debt recovery (District Court)

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Debt recovery

Often in business or one's personal life, individuals or businesses will owe each other money – the party owing the money is called a 'debtor' and the party to which the money is owed is called a 'creditor'. Debtors can be slow in their payment of what they owe. If they are trying to avoid paying up there are a number of steps a creditor can take to ensure that the debt is recovered.

Steps to collect a debt

Firstly, the debtor should be sent one or more letters that detail all the facts surrounding the debt and the actions that will be taken if the funds are not repaid immediately. If payment is not forthcoming then a creditor can inform the debtor by letter that legal action may be taken if the money is not repaid within a certain period.

Hopefully the debtor will pay off the debt after a creditor takes these initial steps. However, if a creditor does have to begin legal proceedings to recover the money owed, it is important that the creditor has sent at least one letter to the debtor, outlining the particulars of the amount owed and informing them that legal action could follow if the debt remains unpaid.

In the event that the matter goes as far as a court hearing, and if these steps are not taken, the court may find that the creditor acted unreasonably and the claim may be unsuccessful.

For debts greater than €20,000, it is possible for a creditor to petition for the bankruptcy of a debtor if the latter is an individual or partnership, or for its liquidation if it is a company. The first stage in this process is to send a statutory demand rather than this letter.

Mediation

If the debtor fails to settle the debt after they have been written to, or if they dispute the debt, there are still options a creditor should try before beginning legal proceedings. A creditor can attempt some form of alternate dispute resolution with the debtor such as part-payment. This option can also be inserted in one's terms of business provided to debtors, saving time and money should a dispute subsequently arise given the prior agreement to do so.

Beginning legal proceedings

If the matter cannot be settled in any other way, a creditor has the option of making a claim for the amount owed in the District Court which may or may not result in the eventual need for a court hearing. There are a number of possible outcomes if a creditor proceeds with such a claim:

1. The debtor settles immediately when faced with the possibility of a court judgment being issued against them.

2. There is no response from the debtor, or a response is received but no attempt is made to settle the outstanding amount.
3. The debtor notifies the creditor of their intention to defend the claim.

Should the debtor fail to respond or fail to settle the amount outstanding in full the creditor is then free to apply to the District Court for a judgment against the debtor for the amount claimed. See the chapter 'Beginning legal proceedings' for details on how to file the initial claim with the court and then apply for judgment.

Should the debtor decide to defend the claim then the matter will have to be dealt with at a court hearing. In this event the creditor needs to decide whether they still wish to proceed. See the chapter 'Defended cases' for further details.

Statute of limitations

There are time limits for taking most types of legal action. The law in relation to time limits is complex but, in general, the time limit for taking actions for breach of contract (for example, failure to pay for goods or services provided), for debt judgments and for non-payment of charges such as rent is six years. This means that if a creditor does not start legal proceedings within six years of the debt being due, the action is 'statute-barred'. Effectively, this means that, in these circumstances, a debtor cannot be forced to pay the debt.

This limitation is only relevant if the matter proceeds to a court hearing. These limits do not, however, prevent a creditor from attempting to get payment from the debtor outside of a court hearing.

It is very important that care is exercised when determining the limitation period applicable. Once a legal action is commenced the clock stops in terms of the time limit left to take such an action.

Initial steps before legal proceedings

The reminder letter

The debtor should always be made aware of the debt and be advised of any impending legal action by a creditor. For this reason, the first step in a typical debt recovery action is the issue of this type of letter. It normally states that the debtor is being put on notice of a claim for a debt which must be paid within a specified timeframe (usually seven days) and that failure to do so could result in the issue of legal proceedings without further notice to the debtor. It should further warn that costs, and possibly interest if appropriate, will be claimed if such legal action becomes necessary.

It is not a legal requirement that such a letter be sent but it is recommended to do so, particularly should the matter eventually require a court hearing.

In the absence of this letter, where the matter eventually proceeds to a court hearing, the court may regard the creditor as being unreasonable in commencing legal proceedings without such a letter being given to the debtor.

Claiming late payment interest and recovery costs

Late payment interest

A claim to recover a debt can include interest due on two grounds - where it is provided for under the creditor's terms and conditions as previously advised to the debtor or under the EU (Late Payments in Commercial Transactions) Regulations 2012.

Under these regulations it is an implied term of every commercial transaction for the supply of goods or services by one 'undertaking' to another, e.g. sole trader, professional practitioner, partnership, company etc., that where the purchaser does not pay for the goods or services concerned by the 'relevant payment date', the supplier is entitled to interest (called 'late payment interest') on the amount outstanding under the contract concerned at the rate specified below. These regulations apply to both the private and public sectors.

The relevant payment date is defined as 30 days from the receipt of the invoice unless specified to be otherwise in the contract. It is possible, if both parties agree, to extend payment terms up to 60 days. The period may be extended beyond 60 days only if 'expressly agreed' by the parties in the contract and provided that this extension is not grossly unfair to the supplier.

A creditor is entitled to late payment interest for the period beginning on the day after the relevant payment date and ending on the date on which the payment of the amount due is made.

Unless otherwise specified in the contract concerned, the late payment interest payable under the EU regulations is the sum of the European Central Bank (ECB) rate - known as the main refinancing operations rate, as published in the Official Journal of the European Communities and on its website - plus eight percentage points (i.e. plus 8%).

The ECB rate in force on 1st January and 1st July applies for the period ending 30th June and 31st December, respectively, in each year.

Any clause in a contract which seeks to exclude interest for late payment or compensation is held to be grossly unfair and the regulations provide that such a clause is either unenforceable or gives a rise to a claim to damages.

Recovery costs

Under these same regulations it is an implied term of every commercial transaction that where late payment interest becomes payable, the creditor shall be entitled, without the necessity of a reminder and in addition to the statutory late payment interest, to the amount specified below as compensation towards the relevant recovery costs incurred by the creditor as a consequence of late payment.

Size of unpaid debt	**Compensation entitlement**

Up to €1000.00	€40.00
Exceeding €1,000.00 and up to €10,000.00	€70.00
Exceeding €10,000.00	€100.00

The creditor is not required to produce evidence of having incurred these costs. The creditor is also, in addition to the fixed sum referred to above, entitled to obtain 'reasonable' compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor's late payment. This may include expenses incurred, amongst others, in instructing a lawyer or employing a debt collection agency. The legislation does not, however, define what is considered to be 'reasonable'.

While lawyers' fees can be included this is only up to the point that the creditor, possibly, decides to initiate legal proceedings against the debtor. In this event subsequent lawyers' fees (up to a defined amount) are recoverable through the court process itself.

Beginning legal proceedings

As a last resort in a dispute it may be the best option to make a claim via the District Court to seek a resolution. Which court to use – District, Circuit or High Court – depends on how much money is involved.

Small Claims Registrar (District Court)

Claims up to €2,000 can be made via the Small Claims Registrar who operates within the District Court. This small claims service aims to provide a fast and inexpensive way for individuals and businesses to resolve certain categories of disputes. This process can be used to make an application to the Small Claims Registrar to recover money owed for faulty goods bought by, or for inadequate services provided to, the claimant, minor damage to property or the non-return of a rent deposit on certain kinds of rented properties.

District Court

Claims for any amount up to €15,000 must be made in the District Court. The preparation of a claim notice is the first step to be taken. In broad terms the claim notice must include the District Court area, district number, full names and other details of the parties involved, the amount claimed and a statement outlining the relevant details and the reason it falls due. It must also make clear the timeframe within which the debtor must respond.

Circuit Court

Claims for any amounts above €15,000 and up to €75,000 must be made via the Circuit Court. The preparation of an ordinary civil bill is the first step to be taken. The civil bill must identify the circuit and county in which the proceedings are taken, the names of the parties and their addresses. It should also set out the amount being claimed and confirm that the debtor has been called upon to pay the outstanding debt, but was not willing to do so.

High Court

The High Court is the relevant court for all claims over €75,000. In this court the first step is the preparation of a summary summons which should state specifically, and with all the necessary details, the amount claimed and the grounds for the claim. It should be noted that if a creditor is awarded less than €75,000 in damages in the High Court, they may be penalised in terms of the legal costs awarded against them.

In the event that the debtor ignores the claim notice (District Court), the ordinary civil bill (Circuit Court) or the summary summons (High Court), or a part of the debt remains unpaid, you can then apply to the court for a judgment against the debtor. See the next chapter 'Undefended cases – applying for judgment'.

Undefended case – applying for judgment

Debt recovery matters are unique in that they can be dealt with summarily by the courts. This means that if the debtor fails to respond within the timeframes specified in the claim notice, a creditor may apply to the court for a judgment without the need for any court hearing. The creditor has a year from the date the claim notice was served on, i.e. given to, the debtor to apply for this judgment to the District Court.

This is done by submitting four documents to the court which together are called the judgment set. An order for judgment in favour of a creditor where the debtor does not defend the claim is referred to as a summary judgment.

The judgment set consists of the following:

1. **Claim notice: debt claim not exceeding €15,000**: This document sets out the details of the claim and is served on, i.e. given to, the debtor;
2. **Statutory declaration of service**: The purpose of this document is to confirm to the court that the claim notice above was correctly and successfully served on the debtor;
3. **Affidavit of debt**: This document confirms the amount outstanding, taking account of any payments that the debtor may have made, and including any interest and recovery costs as appropriate;
4. **Judgment (decree) by default**: This document is essentially the application for the judgment against the debtor for the total amount claimed. Once signed by the County Registrar the creditor can then enforce this judgment.

The affidavit of debt can only be prepared once 28 days have elapsed since the claim notice was served on the debtor.

These documents are checked and, if all are in order, the District Court issues the judgment for the amount owed plus the costs involved in the proceedings. Having obtained the judgment, the creditor is entitled to enforce the judgment (see 'Enforcing judgments' below). Interest at a rate of 8% per annum begins to accrue on the amount of the judgment from the day the judgment is given.

If the debtor pays at any stage during the process, legal action can be stopped. If the debtor refuses to pay, legal action can continue until the debt and costs are paid in full, the creditor makes a settlement with the debtor or decides to end the legal action.

Defended cases

Every debtor has a right to defend a claim notice served on them. If this is their intention then the debtor is required, within 28 days of having received the claim notice, to notify the creditor, or their solicitor if legally represented, by providing what is called their ‘defence’.

The creditor, or their solicitor, will then need to review this document and reply to the debtor on any points if necessary. Once replies to any queries have been furnished, either party can apply to arrange the court hearing.

On the hearing date itself, both parties will be required to give evidence and then the creditor will be required to prove their case. For this reason, a creditor should always be satisfied that the claim being made is provable. Examples of the types of evidence of the debt required are order forms, invoices, delivery dockets signed by the debtor etc.

Before making a claim in court, however, it's important to remember that:

- If the case fails and the court rules against the creditor, they could be liable for the debtor's costs as well as their own.
- A court is unlikely to make a ruling in the creditor’s favour if the creditor cannot prove the facts of the case.
- If the debtor has filed for bankruptcy or has gone into liquidation, the debt will be more difficult to recover.

Enforcing judgments

When judgment is obtained and the debtor still refuses to pay the outstanding debt, there are several methods of enforcement possible which may be initiated at any time within twelve years of the judgment. Some enforcement methods are only available against individual debtors, including sole traders, while others are only used against companies. The choice of enforcement option should ideally be based on the debtor's specific circumstances.

Companies and individuals (including sole traders)

The following methods can be used to enforce a debt judgement against either a corporate entity, i.e. a company, or individuals including sole traders:

a) **Publication:** A judgment can be registered in the Central Office of the High Court. This leads to the publication of the debtor's name and the amount owed in trade gazettes. This could affect a debtor's credit rating;

b) **Execution by Sheriff:** A creditor can lodge the judgment order with the Sheriff in the area where the debtor lives or conducts business, thus requesting the Sheriff to seize goods and to sell them for the purpose of raising money to satisfy the debt. Other enforcement options may require the court being satisfied that the Sheriff has been unable to execute the judgment in this way. Where it is not viable to seize goods, the Sheriff will often enter into instalment arrangements with debtors or seek a lump sum;

c) **Judgment mortgages:** A judgment mortgage can be registered when there is a judgment against a debtor owning land or property. When a judgment is registered as a mortgage, it results in two main consequences:

   a. The debtor cannot sell the lands or property until the mortgage is discharged;

   b. The creditor can enforce the judgment mortgage by seeking a court order to sell the property and settle the debt.

d) **Garnishee orders:** Where a third party owes money to the debtor, the court can make a further order directing the third party to pay the sums due directly to the creditor.

e) **Receiver by way of equitable execution:** Where money is due to be paid to the debtor at certain future dates e.g. rent, a court may appoint an independent person to receive the money payable to the debtor and pay the creditor.

f) **Injunctions:** An injunction is a court order directing a party to do or to refrain from doing something. A court judgment is not necessary to apply for an injunction which can be sought by a creditor in the following circumstances:

   a. to prevent a debtor from disposing of or reducing assets below a certain value to avoid paying a debt

   b. to prevent the debtor leaving the jurisdiction

c. to prevent destruction or removal of evidence and used also to force the debtor to disclose the whereabouts of specific documents or items

Companies only

Judgment enforcement methods specific to corporate entities are as follows:

a) **Examination of directors:** Officers of the company can be examined before the court to assist in discovery and execution of the judgment. Any officer may be examined as to the assets of the company;

b) **Liquidation:** When a company is unable to pay its debts it is insolvent and a number of events may follow including voluntary or compulsory liquidation. The process of liquidation involves the sale or collection of all assets and distribution of any net proceeds (after deduction all costs) to creditors in order of priority, followed by the dissolution of the company.

Individuals (including sole traders) only

Judgment enforcement methods specific to individuals, including sole traders, are as follows:

a) **Examination order:** A debtor is served with a summons requiring the completion of a statement of means and to attend court to be cross examined. At the examination hearing, a Judge can make an instalment order (see below). If the debtor refuses to attend court, the judge may award an instalment order in his or her absence.

b) **Instalment order:** An instalment order compels a debtor to repay by instalments the amount of the debt and legal costs which are due. If the debtor fails to comply with the order, then a committal order (see below) can be sought from the court.

c) **Committal order:** This is an order which directs that the debtor be arrested and committed to prison for contempt of court for failure to comply with the terms of an instalment order. Typically, to secure such an order, the creditor would need to show that the debtor will not, as opposed to cannot, pay;

d) **Bankruptcy order:** Bankruptcy is a legal process for the benefit of creditors where the debtor is unable or unwilling to discharge his debts. To begin this enforcement action, the debtor must have committed an act of bankruptcy (e.g. a judgment returned by the Sheriff marked "No Goods/Nulla Bona" is an act of bankruptcy). Where a debtor is adjudicated a bankrupt by the High Court, the property of the debtor becomes vested in the Official Assignee (an officer of the High Court). The result is that the bankrupt loses his/her capacity to deal with the property. The debtor's property is then sold for the benefit of the creditors. Given the maximum debt amount handled by the District Court this unlikely to be an economically feasible route.

Non-payment of rent (residential)

Demand for rent

A tenant is obliged to pay rent under a lease or tenancy agreement, either oral or written. Where there are rent arrears in respect of a residential tenancy there is a set procedure by which rent may be formerly demanded.

Steps required when there are rent arrears

Where a landlord wants to either receive payment of rent arrears or else terminate a tenancy because the tenant has failed to pay rent, the following three-step procedure must be followed (note that where the tenant has been in the property up to six months or the tenancy agreement is for a fixed term, Step 1 is not required):

1. give the tenant notice that they have breached their obligation to pay rent
2. serve a 14-day warning notice for failure to pay rent
3. serve a 28-day notice of termination of the tenancy if arrears are not cleared

Step 1 - Notice of breach of obligation

The landlord must notify the tenant that:

- The tenant is in arrears of rent.
- The tenant is allowed a reasonable time to remedy this breach of obligation.
- The landlord is entitled to terminate the tenancy if the tenant fails to remedy this breach of obligation within the period specified.

This first notification does not need to be in writing. A landlord can give a tenant verbal notice of the rent arrears but must ensure that the tenant is aware that failure to pay the rent arrears within a reasonable time will result in the landlord terminating the tenancy. As a landlord may need to give evidence that this has been communicated to the tenant, it may be prudent to give this notice in writing.

The landlord must give the tenant a 'reasonable' time to pay the rent arrears. What is 'reasonable' can vary given the circumstances of the case and is not defined in the Residential Tenancies Act 2004.

Step 2 - 14 day warning notice
Following the notification in Step 1 for variable period tenancies of more than six months duration to-date, the landlord must then serve a written notice on the tenant informing him or her of the amount of rent that is due, giving the tenant 14 days to clear the arrears. Where the tenant has been in occupation for up to six months duration to-date this is the first notice given to the tenant, i.e. Step 1 is not required.

Step 3 - Notice of termination

If the tenant fails to pay the rent due within 14 days of receipt of the written notice at Step 2, the landlord may proceed to terminate the tenancy by serving a notice of termination giving notice of 28 days to vacate the property.

Proceedings against the tenant

If on the expiration of the 28 day notice period the tenant refuses to vacate, a landlord's only option is to refer a dispute to the PRTB on the grounds of rent arrears and over-holding. Even though all the notices have been validly served the landlord can never evict the tenant - this can only be carried out on foot of a court order and obtaining this is part of the enforcement procedure.

Bankruptcy and winding-up

If the sum owed exceeds €20,000, the landlord may consider serving a statutory demand on the tenant with a view to commencing bankruptcy proceedings against them. The petition must be brought within three months of the act of bankruptcy and the amount of debt must be set out in an affidavit. However, the landlord has to bear in mind that the bankruptcy of the tenant may reduce the chance of them getting paid in full since the landlord will become an ordinary unsecured creditor on the bankruptcy of the tenant.

Execution order

If the tenant fails to comply with the terms of the court order to deliver possession of the property and pay all sums owing, the landlord can apply to the Circuit Court Office for an execution order directing the Sheriff's Office to obtain vacant possession and to seize the tenant's goods to satisfy any sums due under the court order. The sheriff can seize any moveable property belonging to the tenant however, the sheriff cannot seize any necessary tools of the debtor's trade or basic living necessities.

Non-payment of rent (commercial)

A tenant is obliged to pay rent under a lease or tenancy agreement. There is no requirement that the landlord demands payment of the rent from the tenant. However, a demand for rent can serve as a useful reminder to ensure that the tenant pays the rent in full and on time.

A landlord may only take enforcement proceedings under a lease or tenancy agreement where there is a stated obligation to pay rent and payment of the rent has been formally demanded. There is a set procedure by which rent may be formerly demanded. It is also possible for the landlord to exclude the requirement to formerly demand rent.

A demand for rent letter should be sent to advise a tenant that the rent is due. The document should set out the way in which the tenant is to pay the rent to the landlord. It is becoming increasingly common to transfer money by bank transfer rather than to rely on the post to deliver cheques.

If the tenant fails to pay the rent, which they had promised or contracted to pay under the lease, the landlord can take the following actions.

Proceedings against the tenant

The landlord may commence court action against the tenant for recovery of rent, the court depending on the amount owed by the tenant. If it is less than €15,000 it will be by way of claim notice in the District Court. If it is between above €15,000 and up to €75,000 it will be by way civil bill in the Circuit Court. Any amount in excess of this means that proceedings will have to be taken in the High Court.

Bankruptcy and winding-up

If the sum owed exceeds €20,000 the landlord may consider serving a statutory demand on the tenant with a view to commencing bankruptcy proceedings against them. However, the landlord has to bear in mind that any arrears that arose prior to the liquidation will rank as unsecured claims and must participate in any dividend on a pro rata basis with other unsecured creditors.

Recovering rent arrears from a sub-tenant (if applicable)

If the premises have been sub-let, the head landlord can serve notice on the sub-tenant requiring them to pay their rent to the head landlord until the arrears are paid off. The sub-tenant must be given 14 clear days' notice of the requirement to pay the rent directly to the head landlord. There are some conditions that the head landlord must fulfil before doing this so legal advice is essential.

Forfeiture

'Forfeiture' means depriving a person of his or her property as a penalty for some act or omission and arises in one of three ways:

- by disclaimer, which arises where a tenant disputes the landlord's title. This generally arises only during ejectment proceedings where in its defence the tenant denies the landlord's title;
- by re-entry or ejectment for breach of a condition in the lease. Forfeiture can be affected in this situation even if there is no provision made for re-entry in the lease itself; and
- by re-entry or ejectment where there has been a breach of a covenant in the lease.

The latter is different from forfeiture for breach of condition. A lease may be forfeited for breach of a covenant only where a re-entry provision is included in the lease. All leases should contain comprehensive re-entry provision to ensure this option is available to the landlord.

The issue of forfeiture must be approached by both landlords and tenants with due care and attention to correct procedures, as failure to do so can result in the loss of the remedy itself or the loss of the relief against the remedy.

Forfeiture procedure

Where a landlord believes that the tenant is in breach of a covenant or condition in the lease, it must notify the tenant of this and give the tenant a reasonable opportunity to remedy the breach before the right to forfeiture will arise. The form of notice which must be served on the tenant is set out in section 14 of the Conveyancing Act 1881, as amended by Section 35 of the Landlord and Tenant (Ground Rents) Act 1967.

While there are exceptions to the requirement of serving notice on a tenant (e.g. for non-payment of rent) it is arguably prudent to furnish a section 14 notice in all situations.

Form of forfeiture notice

The legislation does not prescribe the form of notice to be provided to a tenant. However, there are certain issues which a forfeiture notice ought to cover. The notice should begin by setting out the relationship between the landlord and the tenant and the principal details of the lease itself. It should then detail the covenants or conditions in the lease of which the tenant is in breach and reasons why the landlord believes the tenant to be in breach of same. The notice should then request the tenant to make good these breaches within a reasonable but specified period of time.

While the term 'reasonable' is open to interpretation, common practice is to give between 14 and 28 days to remedy the breach, depending on the severity of the breach. The notice should then state that the landlord will re-enter and take possession of the property if the tenant fails to remedy the breach within the time specified. It is also standard practice to include a clause stating that the notice is served without prejudice to any right of action or remedy of the landlord in respect of any antecedent breach of any of the covenants by the tenant, and that any acceptance by the landlord or rent arrears does not constitute a waiver of the notice.

Peaceable re-entry

If the landlord serves a forfeiture notice on the tenant at the leased premises and at the tenant's registered office (if it has one), and the breach is not remedied within the time specified in the notice, then the landlord is entitled to take possession of the premises. If the landlord is entitled to do this, re-entry must be affected peaceably. To effect peaceable re- entry, regard must be had to such issues as timing (e.g. whether it should be by day or by night), whether keys are available and so on. In the event that the landlord encounters resistance by the tenant during an attempt to re-enter, the attempt must be abandoned.

If the landlord's re-entry is successful, it is likely that the tenant's possessions/stock will remain on the premises. In this event, it is of vital importance that a detailed inventory of all remaining items on the premises be prepared and a letter written to the tenant advising it that its belongings will be held for a specified period and stating the action which the landlord will take should they not be collected within the specified timeframe.

Ejectment civil bill

If the landlord is unsuccessful or it is not possible to re-enter peaceably, the remedy available to the landlord is to issue an ejectment civil bill based on forfeiture and to seek an order for possession by the court. The courts typically are quite reluctant to grant an order on first hearing and tend to give the tenant further time to remedy the breach before granting the order for possession.

Reliefs available to the tenant

There are two forms of relief available to a tenant when served with a forfeiture notice – statutory and equitable.

Statutory relief

Where a lessor is proceeding to enforce such a right of re- entry of forfeiture, the lessee may apply to the court for relief. Application to the court is possible only in the following limited circumstances:

- where no re-entry has occurred;
- where re-entry has occurred and the landlord re-entered other than on foot of an order for possession; or
- where the landlord has brought ejectment proceedings arising from the forfeiture and the tenant is entitled to claim relief either by an application to the court or by a counterclaim to the proceedings brought by the landlord.

Thus the court has great discretion in granting the relief. Of particular note in this regard is a recent tendency by the courts to grant relief to tenants in situations where the forfeiture notice is used as a mechanism to secure payment of rent where the delay in discharging the rent has in no way caused the landlord any great grievance.

Equitable Relief

Where the landlord has effected re-entry to the premises prior to the tenant applying to the court for statutory relief or has forfeited the lease on the grounds of non-payment of the rent, it is open to the tenant to apply to the court for relief on equitable grounds, e.g. an order requiring the landlord to leave the premises.

Recovering debt through third parties

Debt recovery agencies

Some companies specialise in debt recovery and will recover a debt on your behalf. They may charge a fee, take a percentage of the money they recover or request assignment of the debt. In legal terms, assignment amounts to the sale of the debt by you to the debt recovery company. This is normally for a nominal fee relative to the actual value of the debt and a condition of the sale would be that the company pays you an agreed proportion of the debt, if recovered.

If a debt is assigned, the debtor must be told of the assignment and to whom they should now pay the money. If they are not told about the assignment and pay the full amount to you, the debt will be discharged by the debtor, but you will be responsible for paying the debt recovery company in terms of your agreement. Typically, an agency does not take assignment of the debt. The agency will charge a fee or commission for amounts recovered; non-recovered debts will be returned to the creditor as un-collectable. Non-collected debts may subsequently be passed by the creditor to other agencies. This is referred to as secondary or tertiary placement. Again, a fee or commission will be charged; non-collected debts will again be returned to the creditor.

Notice of assignment

If your arrangement with the debt collection agency is one of assignment, other than telling the debtor that the debt has been assigned, there are no other formalities required. However, it is prudent to record the assignment in writing and give the notice by letter. It is also advisable to have the signature of the assignor witnessed by an independent witness who should add their name, address and occupation.

The money paid to the creditor should be an exact, defined amount; for example €1023.50 (i.e. not a percentage of a whole, or a vague value). However, if it is not a definite sum, the assignment will still be enforceable but the enforcement will be complicated by the debt recovery agency having to sue both the original creditor as well as the debtor.

The rule is that the assignee must find the debtor and tell them of the assignment or risk the debtor discharging the debt by paying the assignor. The letter telling the debtor of the assignment must be sent to their current address. The letter should be sent in duplicate with one copy containing a receipt for the debtor to sign and return. To assist the debtor, a stamped, addressed envelope ought to be enclosed. If the debtor does not acknowledge receipt of the letter telling them of the assignment, it may be that they have not received the letter. A useful precaution to ensure that the debtor has received the letter is to send it by recorded delivery post and request a receipt.

Guarantees

Debtors may also transfer their debt and can do so by entering into a 'guarantee' agreement with another party. A guarantee is a contract whereby one person ('the guarantor') agrees

to be responsible for the debts, or a particular debt, of someone else. This responsibility will always be specifically to the original creditor and is a contractual relationship, i.e. the guarantor has a contractual duty to stand in the shoes of the debtor. So, if there is a guarantee agreement, a creditor can recover their money from the guarantor.

The guarantor will have a personal liability to the creditor if the debtor doesn't pay his debts that the guarantor guaranteed. The liability of the guarantor is in addition to, not in substitution for, that of the debtor. This does not mean that the creditor can ask for double his money, only that he is entitled to seek the entire sum, or any portion of it from either the debtor or guarantor.

Under section two of the Statute of Frauds (Ireland) Act a guarantee is unenforceable unless it is made in writing (or there is a written memorandum or note of it) and the guarantor signs it.

What is a power of attorney to collect debts?

A power of attorney to collect debts is used by one person, called the donor, to give another, called the attorney, the power to act on their behalf, specifically to collect the donor's debts. However, it cannot be used to perform any function in respect of property or an asset where the donor is a co-owner. In such cases a trustee power must be used.

The law states that the donor must execute the document creating the power of attorney as a deed. Traditionally a deed was a document that was signed, sealed and delivered. It is now no longer necessary to seal a document. If the document is signed and dated by the donor and the language clearly indicates that the document is signed as a deed, delivery is not required. Otherwise, it will not be treated as a power of attorney. At least one witness must also sign the document. The formalities required to execute the power of attorney are slightly different when signing on behalf of a company, i.e. where it is intended to appoint an attorney to act for the company.

Where a person gives a power of attorney and subsequently becomes mentally ill so that they are incapable of managing their affairs, the power of attorney will automatically be brought to an end. Anything done subsequently under the power of attorney will not be valid. It is worth mentioning that there is a special power of attorney which can be drawn up to deal with this situation, known as an enduring power of attorney.

Proving power of attorney

To prove that a person has been given a power of attorney, they will either produce the original or else a certified copy of the original. Photocopying the original power of attorney and certifying that it is a true copy of the original makes a certified copy. Photocopying can include any other means of duplicating the original power of attorney.

The copy must be certified as being a true and complete copy of the original. If the copy consists of more than one page, one should write on each page of the copy the words 'This is a true and complete copy of the corresponding page of the original'. If the copy consists of one page, the words 'This is a true and complete copy of the original' should be written. The

donor should sign the certified copy but if they are not available for any reason, a solicitor can do so.

When dealing with an attorney one should always ensure:

- the identity of the attorney is clear
- the power is still in force
- the attorney is acting within the scope of his or her authority

