

# **DEBT RECOVERY**

**O'BRIEN REDMOND SOLICITORS**

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## DEBT RECOVERY

The legal system for recovery of debts is poorly used. Often companies go legal as a last resort resulting in a poor rate of recovery. We hope this guide will assist you understanding both the legal procedures and the Court structures involved in debt recovery. The greater your understanding of the legal process, the more efficiently you can use the system to ensure a higher success rate in recovering your debts.

Unlike many debt recovery agencies, we are not restricted by rigid systems and debt recovery instructions can be processed to suit the requirements of each client. We only require the identity of the debtor and details of the debt (for example, copy invoices) to commence the recovery process. Because of our proximity to the Courts instructions can be assessed and processed immediately. You have the reassurance that the recovery process is personally supervised by Brian O'Brien who is also available to deal with any enquiries that may arise. As a result all debts are processed in the most efficient and appropriate manner.

## THE DEBT

Once the account is gone over 90 days it becomes a potential debt and should be placed with us without delay. Get a reputation for chasing all debtors, no matter how small. Debtors often do what creditors lead them to believe they can get away with.

## THE INITIAL LETTER

Before we issue proceedings we send an initial letter. This letter is short and sharp and serves many purposes:-

1. If the debtor pays, legal fees are reduced.
2. When proceedings are issued the debtor has no Defence to a claim for costs. Some Judges take the view that without this letter, if a debtor pays the full amount due on receipt of a Summons or Writ, he need not pay costs.
3. A response may be received setting out an offer of payment or a defence, genuine or otherwise put forward by the debtor. If a serious complaint is put forward this can be resolved without Court proceedings.
4. It may help to establish whether the debtor is at the given address.

Actions for the recovery of debts are brought in one of three Courts – The District Court, Circuit Court or High Court. The amount of the debt determines the Court.

## THE DEBTOR

To assist us and minimise your costs accurate information must be given on the debt amount figure and the identity of the debtor. Court fees and legal fees can be expensive, especially for small debts, so ensure that you have the correct title and address of your debtor. Run a full credit check before opening any account. Is it Joe Soap trading as ABC or is it ABC Limited? Is the trading address different to the registered office? Send us details such as your credit application form, debtors letterhead, order form, business card or cheque. If it's a

company we run a companies office search to check the status of the company. Many companies have been struck off the register for failure to file annual returns.

If your customer is a limited company you should obtain a Personal Guarantee, if possible.

If no response is received to our letter of demand within 7 days a Summons/Writ is issued without delay and served on the debtor. We will advise you as to whether or not we consider it is worthwhile to issue these proceedings in the first place.

## INTEREST

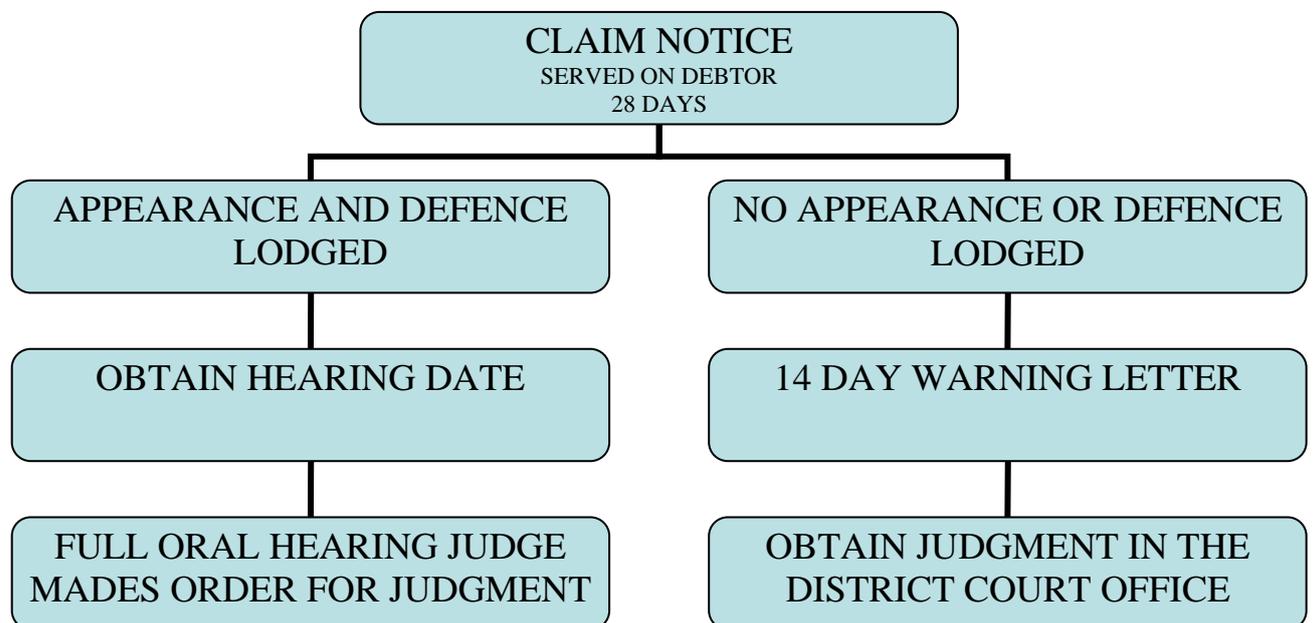
Interest is payable on all Judgments debts at 8% per annum from the date of Judgment. Pre-Judgment interest can be obtained but in most cases, for the sake of speed, we recommend waiving this pre-Judgment interest. The priority is to obtain a Judgment as quickly as possible. If a case is defended and goes to an oral hearing before a Judge (which is rare) then we can apply for interest from the date of the invoice.

## **DISTRICT COURT (UP TO €15,000.00)**

A Claim Notice is issued and served on the debtor. The Debtor has 28 days from the date of Service to file an appearance and defence with the District Court Office. If no appearance and defence is lodged on the expiration of 28 days a further 14 day warning letter must be sent to the debtor informing them that unless an appearance and defence is lodged Judgment will be obtained against them.

Judgment in default of Appearance/ Defence: If no appearance or defence is lodged by the debtor an Affidavit of debt will be sent to you which you must have sworn before a Practising Solicitor verifying the amount outstanding. The Affidavit together with other Judgment papers are then lodged by us in the Court Office and Judgment is obtained without any actual appearance before a Judge. This is known as getting Judgment “in the office” or a “default Judgment”.

Hearing Date: If an Appearance and Defence is lodged we will then obtain a hearing date and the matter will proceed to a full oral hearing before the Judge in the District Court. You will be required to attend Court with proof of debt and give evidence to prove the debt – order, delivery and non-payment. The Court then awards Judgment.

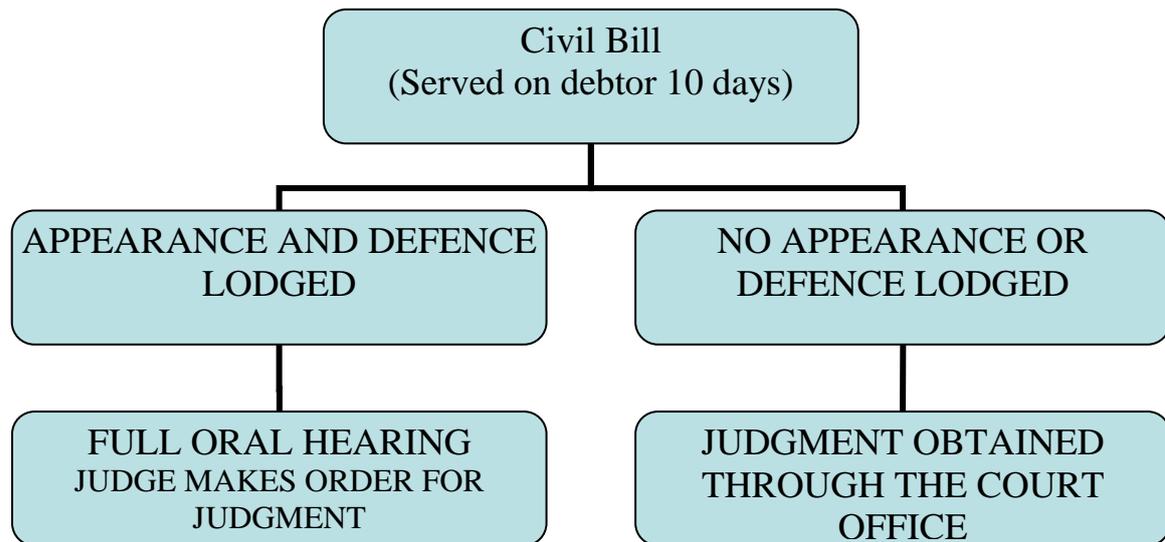


### **CIRCUIT COURT (€15,000.00 – €75,000.00)**

The originating Summons (or Writ) in the Circuit Court is known as a Civil Bill. This is issued in the local Circuit Court Office and a copy served on the Defendant. If no Appearance is received within ten days a 14 day warning letter is sent to the Debtor. If no Appearance is received an Affidavit of Debt is sent to you for swearing before a Practising Solicitor. The Affidavit together with other Judgment papers are lodged in the Court Office and Judgment is obtained.

If an Appearance is filed by the Defendant he has a further ten days to file his Defence. If he fails to do so, the papers as above including the Affidavit of Debt are lodged in the Court Office to have Judgment marked in default.

If a Defence is filed the matter must be set down for a full oral hearing by way of Notice of Trial. The hearing takes place before a Circuit Court Judge on oral evidence when the order, delivery and non-payment must be proven to the Court.



## **HIGH COURT (OVER €75,000.00)**

The originating Summons (or Writ) in the High Court is known as a Summary Summons. This is issued in the High Court Central Office and a copy is served on the Defendant personally in the case of an individual or by ordinary post where the Defendant is a company.

If no Appearance is filed within eight days an Affidavit of Debt is sworn before a Practising Solicitor and the Affidavit together with the Judgment papers are lodged in the Central Office of the High Court. Judgment will then issue some weeks later.

If an Appearance is entered we issue a Notice of Motion seeking Liberty to enter Judgment before the Master of the High Court. An Affidavit of Debt is sworn by you at the time of issue of the Notice of Motion and the Defendant may put in a Replying Affidavit giving reasons why Judgment should not be given without a full hearing e.g. if he has a counterclaim for faulty goods or services. The evidence before the Master is by way of Affidavit only as opposed to oral evidence.

The Master cannot decide on matters which are in dispute and he will either put the matter in for full Plenary Hearing in the High Court or into the Judge's List for Hearing before a Judge on a Monday following the Master's Hearing.

If the Master is of the view that the Plaintiff is entitled to Judgment he will grant liberty to enter final Judgment and the Plaintiff can obtain Judgment in the Central Office of the High Court on foot of this order.

The majority of claims are dealt with by way of Judgment obtained in the office and are known as Default Judgment.

If Judgment is not obtained in the office you are faced with a full Trial. Defended actions vary considerably from one case to the other. You will be advised by us on the merits of your case and the potential costs involved. We will keep you advised of the progress of the case throughout and prepare you for the actual hearing. Once you have a Judgment the enforcement procedure is the same. The Judgment will include your debt, interest on the debt and the costs recoverable from the debtor, which vary. There is a variable scale depending on the amount of the debt for a default Judgment. These scale costs are set by the Government. The costs following a successful Oral Hearing are either agreed or taxed by the Taxing Master in default of Agreement.

## **ENFORCEMENT OF THE JUDGMENT**

Having a Judgment does not guarantee payment. However once Judgment is obtained many options are available to assist in recovery of the Judgment debt. This is why our policy is always to obtain Judgment as quickly as possible. The aim of enforcement proceedings is to EXTRACT payment from the debtor. If payment is not made on foot of the Judgment there are a number of different ways to proceed to enforce the Judgment. The options available to you are as follows:

1. **Lodgement with Sheriff** – The Sheriff can go to the debtor’s premises and seize sufficient goods to satisfy you debts and costs. If a Sheriff makes a return of “No Goods” it means the goods the debtor has are not worth selling or they are the subject of a Lease or Hire Purchase Agreement or he has left the address. Please make sure we have the debtor’s correct and current home and trading address.
2. **Registration of the Judgment** – When a Judgment is registered in the Central Office of the High Court it is automatically picked up and published by the I.T.P.A. and Stubbs Trade Gazettes. The Sunday Business Post also publishes some of the Judgments. It will also turn up on any Judgment Search carried out against the debtor. His credit rating is therefore affected.
3. **a) Examination of debtor as to his means** – Summons for Attendance of Debtor only applies where the debtor is an individual. Where the debtor is a Company see paragraph 8. A Summons is issued and served on the debtor. You swear a grounding Affidavit and papers are lodged in Court. The debtor is requested to file a Statement of Means and to appear in Court to explain his circumstances. He is cross-examined in Court on his assets and liabilities and ability to pay the debt. This examination is always held in the debtors local District Court.  
**b) Instalment Order** – At the hearing on foot of the Summons the Judge will consider the circumstances of a debtor and will grant an Instalment Order. The Judge may decide that the Judgment debt should be paid in one lump sum or by weekly or monthly instalments. The evidence obtained can also be helpful in establishing whether there are assets to be seized, property on which to register a Judgment Mortgage or debts owing to the debtor will enable us to apply for a Garnishee Order (See 6 below).
4. **Committal Order** – If the debtor does not pay the instalments as they fall due you can issue a Summons for the arrest and imprisonment of the debtor. At the Court Hearing you must attend and prove that instalments have not been paid. This is one occasion when you must attend in person to give evidence. If the Judge makes an Order, we prepare a Warrant for Arrest and Imprisonment and send it to the District Court Clerk for issue to the Gardai. The debtor must either pay the Gardai the full amount due for arrears of instalments or face a term of imprisonment. He is sent to prison for failing to comply with a Court Order and not for failing to pay the debt. Debtors prisons went out with Dickens.

5. **Application for an order varying an instalment order** – An Instalment Order can be varied by way of an application by the debtor to the Court where he gives evidence that his circumstances are such he cannot maintain the instalment payments ordered and requests a variation. Likewise if the debtor's circumstances change you can apply to increase the payments.
6. **Garnishee Order (Attachment)** – Where a third party owes the Judgment debtor money you may apply Ex Parte (without notice to anybody) to the Court for an Order directing the third party to pay direct to you a sum sufficient to satisfy the Judgment debt together with costs plus interest. If your debtor is owed money by a third party you can attach that debt so that the third party pays you and not the debtor. First, however, you must find your third party – that third party is called a Garnishee. The Garnishee may be:

A Bank, a Trade Creditor, a Solicitor or Auctioneer holding funds, the National Lottery, Local Authority etc.

Notice of the conditional Order is served and the funds are frozen. On the return date the Court hears all parties and may make absolute the Order and the funds must then be paid to the Judgment Creditor.

7. **Judgment Mortgage** – If the debtor has land or property a Judgment Mortgage may be registered against it for the amount of the Judgment debt and costs. The debtor will not be able to sell or mortgage the land without discharging the debt provided there is sufficient equity. For a period of twelve years after registration the Judgment Mortgage can be enforced by way of an application to Court to have the Judgment Mortgage deemed Well Charged and for an Order for Sale of the debtor's property.

Once Judgment has been obtained you can register a Judgment Mortgage. If you are unaware of any lands owned by the debtor we can carry out our own searches.

An Affidavit is sworn by you to register a Judgment Mortgage (or in the case of a Company by the Secretary) before a Practising Solicitor. We send it, together with a copy, to the Court Office where the Judgment issued, for attestation and then lodge papers, with the registration fees in the Land Registry.

A Judgment Mortgage will rank in priority after all prior listed burdens e.g. a Bank Mortgage, County Council Loan, or other existing Judgment Mortgages.

8. **Oral Examination of Company Officers** – This is a procedure to aid in the execution of a Judgment against a Company under the Debtors (Ireland) Act 1872. Application can be made to the Circuit Court or the High Court for an Order that any officer of the Company or any other person be orally examined as to what debts are owed to the Company and whether the Company has any property or means of satisfying the Judgment. The Court can also make an Order for the production of any books or documents of the company. Whilst the Examination itself does not ensure payment of the debt, the potential publicity of Cross-Examination on Oath in open

Court can often have the desired effect. The evidence obtained can also be helpful in establishing whether it is worthwhile pursuing the Directors and/or officers for fraudulent or reckless trading or obtaining a garnishee order or a Judgment Mortgage.

9. **Winding Up** – You may instruct us to send a 21 day notice under the Companies Act 1963 to the debtor threatening that unless payment of the debt is made within twenty-one days a Petition will be presented to the High Court to have the Company wound up. We recommend that Judgment be obtained first.
10. **Bankruptcy** – You may apply to the High Court to have a debtor adjudicated a Bankrupt. This is the personal equivalent of a company liquidation. The bankrupt's assets are realised by a Court Officer (or Official Assignee) and the proceeds distributed amongst the creditors.
11. **Injunctions** – An injunction is an Order of the Court requiring a party to do or to refrain from doing specific acts, when these acts are contrary to Law or are in breach of another person's rights. A full discussion of injunctions is outside the scope of this booklet. However, it may be useful to know of some of the types of injunctions that are available. e.g. MAREVA INJUNCTION (Freezing of Debtor's assets) This is an order against a debtor preventing the disposal or dissipation of assets up to the value of the debt pending the trial of the action or pending payment of the Judgment debt. For example if a debtor is selling his house or business which is his only asset and there is evidence that he may try and put these beyond reach of a creditor, a Court may grant such an injunction.

The majority of cases will not advance through all the stages outlined here. However an understanding of the various methods of recovery will increase your chances of success. If information is not to hand we can employ our enquiry agent to ascertain details of the debtor's whereabouts and/or assets.

To find out more about recovery of your debts please telephone O'Brien Redmond Solicitors.