

The Debt Collection Legal Process - Republic of Ireland and Northern Ireland

Brian Morgan, Partner in Morgan McManus Solicitors, who holds Practising Certificates in both the Republic of Ireland and Northern Ireland, outlines the steps which apply in the Debt Collection process in both Jurisdictions.

Because we act for clients who have debtors in both the Republic of Ireland and Northern Ireland we are often asked to explain the different processes which apply in each Jurisdiction. The Debt Collection process is, by reason of the fact that it bound to Court dates and time limits, slow and, in the reasonable view of the client Creditor (the person who is owed the money), frustrating. This frustration is made worse where the Creditor finds that he has reached another stage in the process against the Debtor (the person who owes the money) only to find that there are a number of further stages yet to be undertaken. Many of these stages involve payment of fees to the various state agencies where the Creditor is often left worrying whether he is “throwing good money after bad”. Where a Creditor, familiar with the process in one Jurisdiction, comes for the first time to collect money from a Debtor in another Jurisdiction, lack of knowledge of the processes which apply in that other Jurisdiction or, indeed, failure to issue Proceedings in the correct Jurisdiction can lead to costly mistakes.

The Debtor can be sued where the Debtor resides / carries on business or where the original Contract occurred. This can often give a choice to the Creditor in the Border area as to whether he issues proceedings in the Republic of Ireland or Northern Ireland. For instance, the Contract may have been made in the Republic of Ireland where the Creditor undertakes his business but the Debtor resides in Northern Ireland and all his assets / income are based in Northern Ireland.

As both the Republic of Ireland and Northern Ireland are member states of the European Union, Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels 1 Regulation”) now governs the location and nature of proceedings started in the member states of the European Union (the “EU”). Under the Brussels 1 Regulation, in the normal course a plaintiff must sue a defendant in the jurisdiction where the defendant resides. There are however certain exceptions to this rule.

Article 5 (1) of the Regulation relates to contractual disputes and is one such exception. It provides that when a person domiciled in a member state is sued in matters relating to a contract, he may be sued in the courts for the place of performance of the obligation in question. The place of the performance of the obligation is:

“ -in the case of the sale of goods, the place in the Member State, where, under the contract, the goods were delivered or should have been delivered,

“-in the case of the provision of services, the place in the Member State, where, under the contract, the services were provided or should have been provided”

This generally therefore means that the debtor can be sued by the creditor either where the debtor resides or where the contract was performed. What is important in consideration of where to issue proceedings is whether the debtor is likely to dispute liability and the proofs which will be required by the creditor in obtaining judgment. For instance, if the Creditor chooses to issue proceedings against a debtor in Northern Ireland but where the contract was performed in the Republic of Ireland, there is every likelihood that the Creditor will run into difficulty in proving his case in Northern Ireland because he will not be able to secure the attendance of witnesses in Northern Ireland where those witnesses refuse to attend from the Republic of Ireland. There are some limited instances where a Northern Ireland Court can compel a witness from the Republic of Ireland to attend the Northern Ireland Court but this could not always be guaranteed at the commencement of the Proceedings.

The temptation in the past would have been to issue proceedings in the jurisdiction where the judgment is likely to be enforced. This was because it was more difficult and onerous to enforce a foreign judgment in another jurisdiction. This was because it was necessary to apply to the court in that jurisdiction for recognition of the foreign decree. Such a court application is however no longer necessary in view of the introduction of regulation number 805/2004 by the European Parliament both in the Republic of Ireland and Northern Ireland. There is now a document known as "European Enforcement Order" ("EEO") which can now be sought by way of a more simple application made ex-parte to a judge who issues the "EEO" which can in turn be enforced in the foreign jurisdiction.

These are issues which must be considered by the Creditor **before** issuing Proceedings and not after he has obtained Judgment against the Debtor. At Morgan McManus, because of our knowledge and experience of the systems which apply in both Jurisdictions, we ensure to advise the Creditor on whether his Proceedings should be issued in the Republic of Ireland or Northern Ireland. Where that client at least understands the processes which apply on either side of the Border that understanding can assist the client in coming to some assessment at the start as to how he should proceed. To assist in that understanding, I have set out below the various steps which apply in both Jurisdictions.

Initial demand letter to debtor

This letter to the Debtor will threaten legal proceedings unless payment is received within ten days.

Issuing legal proceedings

If a satisfactory response hasn't been received from the Debtor in that period, proceedings are issued in the Republic of Ireland in the Small Claims Court, the District, Circuit or High Court, depending on the amount of the debt which is due. Proceedings are issued in Northern Ireland in the Small Claims Court, the County Court or the High Court, likewise depending on the amount of the debt which is due. The Debtor has more time to respond and will either pay up, ignore the notice or decide to fight the case.

Judgement

If no response is given either way, then a Judgment (a sworn statement outlining the debt owed and by whom) against the debtor is issued.

There are several options for enforcing this Judgment :

Republic of Ireland

Instalment Order

Depending on the financial circumstances of the Debtor a Court Order can rule that a debt maybe paid off in instalments. Procedures involved are the Examination Order, the Instalment Order and in turn the Order for Imprisonment of the Debtor.

A Garnishee Order

This is an Order against a third party who holds money owed to or belonging to the Debtor and ordering that Third Party to pay the Creditor out of that money.

Judgment Mortgage

This Judgment can be registered as a mortgage over any land or property owned or part owned by the Debtor. It prevents the property being sold and the Creditor has the right to have the property sold off and the proceeds used to pay the debt.

Lodgement of Judgement with Sheriff

The Sheriff will attempt to seize debtor's assets. Proceeds from the sale of assets to cover the money owed will go to the Creditor via his solicitor.

Bankruptcy

This applies only when the Debtor is an individual and the debt is very large. It usually means that the Debtor will lose everything he/she owns.

Liquidation / Winding Up

This applies where the Debtor is a limited liability company leading to the assets of the company becomg vested in the Receiver/liquidator who is required to sell the same and pay off all the Creditors.

Some of these procedures are described in greater detail in the next section on enforcement of judgements in Northern Ireland.

Northern Ireland

Once the Creditor has obtained Judgment, he has two options. They are

- (1) Enforcement of the Judgment through the *Judgments Enforcement Office*
- (2) Bankruptcy proceedings

What the *Enforcement of Judgments Office* does

The *Enforcement of Judgments Office* (the EJO) is a branch of the Courts Service responsible for enforcing all judgments in Northern Ireland in all ways except through Bankruptcy proceedings. Once a Judgment is registered with the EJO, an officer is specifically assigned to enforce the debt. Initially, that officer will make an investigation into the Debtor's means. As part of their investigatory powers, the EJO can summons a Debtor to the Magistrates' Court to provide evidence about his means. Failure to answer that summons can result in the debtor going to prison.

Once the officer has enough information about the Debtor, he will decide which method of enforcing the Judgment is appropriate. He can do any of the following:

(a) **Warrant of Execution**

By this method, a Bailiff is ordered to seize all goods and chattels belonging to the Debtor. The Bailiff then sells them and the proceeds are applied towards the Judgment debt. The only items, which cannot be seized, are the tools of a person's trade and their bedding and clothing.

(b) **A Charging Order on land followed by an Order for Sale**

This is a two-stage process. Stage 1 - obtaining a Charging Order - is an end in itself, because it virtually guarantees payment of the debt at some time in the future. A Charging Order is an order that the land is charged is like a mortgage. The Charging Order will not take priority over an existing mortgage or charge but will take priority over any later charges. The house or land cannot be sold with a good title until the charge is paid. A solicitor acting for a buyer would find out about the Charging Order by making a Registry of Deeds or Land Registry search during the conveyancing process. Stage 2 - obtaining an Order for Sale is not guaranteed. This is at the discretion of the court and does not always succeed. It usually depends very much on the size of the debt as compared to the value of the house or land and whether there is a family living there. If there are children living there, there is less likelihood of an order for sale.

(c) **A Garnishee Order**

This is an Order against a third party who holds money which is owed to or belonging to the Debtor and ordering that person to pay Creditor out of that money. Garnishee Orders are usually made against banks or building societies.

(d) **An Attachment of Earnings Order**

This is an order against an Employer of the Debtor to make payments of a certain amount out of the salary of his employee and pay this direct to the Creditor.

Bankruptcy Proceedings (or liquidation of a company)

All assets become vested in the Receiver/liquidator who is required to sell the same and pay off all the Creditors. Bankruptcy proceedings against an individual or winding up proceedings against a company are class actions and so there is no priority given to the Creditor who makes a Debtor bankrupt. If the debts, after receiver's commission etc, exceed assets, then a dividend is made of so much in the pound and the creditor gets a proportion of his money back. Bankruptcy/Winding up proceedings are a powerful weapon because a Debtor has no choice but to pay off the debt to save him/itself.

How fast is each method of enforcement?

If you are issuing Bankruptcy proceedings, it usually takes about 5 months from the time that a statutory demand is served until a final Bankruptcy Order.

In the case of enforcement through the EJO, it can be very slow. Some cases can take more than one year to reach a conclusion.

Which method of enforcement should be used?

Before the Creditor makes a decision as to which way he wants to enforce the Judgment, it is recommended that the Creditor gathers as much information about the Debtor as he can. In particular, attempts should be made to ascertain the following:

- (1) Whether the Debtor owns their own house and what, if any, mortgages are on it?
- (2) How financially viable is their business?
- (3) Does the Debtor have a job?
- (4) Does the Debtor have any other assets?
- (5) What would be the impact on their business (and consequently their ability to pay you) if the Creditor obtained a garnishee order against their bank?

The advantage of using the EJO is that this office makes that investigation for the Creditor. Unfortunately however, the EJO does not have the resources to act as swiftly as the Creditor might expect and the Creditor might, in that instance, consider using a private detective / credit agency to gather information. Occasionally, Bankruptcy proceedings are the better option. For example, if the Creditor discovers that the Debtor previously owned property and transferred all of it to his/her spouse or children, Bankruptcy proceedings are the better option because the Receiver can claw the gift back into the Bankrupt's estate.

Before either method of enforcement is chosen, it is recommended that the Creditor firstly carries out a Bankruptcy search against the Debtor to see if any Bankruptcy / Winding Up proceedings have already been instituted.

A lot of these considerations also apply to the enforcement process in the Republic of Ireland. It is however important to bear in mind that, whereas in Northern Ireland the enforcement process remains under the control of the EJO, in the Republic of Ireland the Creditor, through his Solicitor, must be more actively involved in commencing / pursuing each stage of the enforcement process.

Other methods of Enforcement applying in both Jurisdictions :

- Judgment registered in the Registry of Judgements

All judgements will then appear accordingly in the Gazettes of the *Dun & Bradstreet (Stubb's)* and *Experian Ireland* (previously the ITPA).

An informed Creditor can make a better assessment as to how to proceed where he understands the processes which apply. The Creditor should take a more active part in deciding which means of enforcement is applied against the Debtor. This Article will at least have gone some way in increasing the Creditor`s understanding.

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