

judgment at a relatively early stage without the need to go through the usual processes leading up to a full hearing may also be sought at this stage. Such applications are likely to be suitable in the Debt Collection Proceedings. Only those cases that are not suitable for either a Simplified Trial or a Summary Judgment Application will proceed to a full hearing, which will proceed in the same manner as ordinary civil proceedings in the High Court.

9 What are the Procedures if Proceedings are Issued in the High Court?

Proceedings issued in the High Court at commenced by the filing of a Statement of Claim and Notice of Proceeding and serving the same on the Defendant. The Defendant has 30 days to file a Statement of Defence failing which Judgment may be entered by default. If a Statement of Defence is filed, the parties will proceed through the various interlocutory stages involving the discovery of documents and the like before proceeding a full trial at which the various witnesses will give their evidence orally and be cross-examined. Additionally, a Plaintiff who is able to demonstrate that Defendant has no arguable defence to the claim may apply for Summary Judgment, normally at the commencement of proceedings.

10 What is a payment claim under the Construction Contracts Act?

If the claim relates to the carrying out of construction work (such as a building contract) one option is to issue a payment claim under the Construction Contracts Act (“the CCA”) (if the invoices issued do not already constitute payment claims under the CCA). This gives the other party 20 working days (or such other period as may be provided for in the contract) to serve a payment schedule under the CCA. If no payment schedule complying with the CCA is served within the timeframe, you can then recover in Court the full amount claimed, together with the actual and reasonable costs of doing so. If, on the other hand, a payment schedule compiling with the CCA is served in time, the debtor is required to make immediate payment of the undisputed amount (if any). The disputed amount

can then be referred to adjudication under the CCA. The adjudication process should ordinarily be completed within 7 to 8 weeks of the adjudication procedure being commenced (and often earlier).

11 Can I recover my costs?

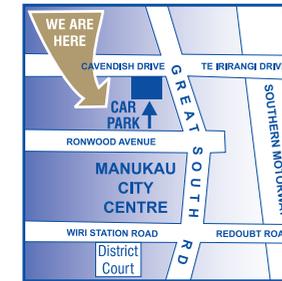
Whether you are able to recover your costs will depend on a number of factors, including the type of proceedings involved, the degree of success and, from a more practical perspective, the ability of the defendant to pay those costs. For example, where a dispute is referred for adjudication under the provisions of the CCA, the presumption in the Act is that both parties bear the costs of the adjudication process themselves. On the other hand, if you are seeking to recover an amount due to you under a payment claim served in accordance with the provisions of the CCA and no payment schedule has been served in time, then you are entitled to issue proceedings to recover the amount of the payment claim as a debt due in any Court and recover the “actual and reasonable” costs of doing so.

Where proceedings are issued in the Courts, the general rule is that the successful party will receive an award of costs in their favour. However, it should be noted that an award of costs does not necessarily equate to reimbursement of the costs actually incurred in recovering the debt. On the contrary, they are only intended to be a contribution to the costs incurred and as a general guide will only be approximately half of the actual costs involved. It is normally only in cases where there was a contractual provision entitling you to recover your actual costs on a full indemnity basis that you will be awarded your actual costs. Otherwise, you can expect to have to bear some of the costs of the proceedings yourself, even if you are successful.

A further point to note about Court awarded costs is that it is one thing to have an award of costs in your favour. However, it may be another thing entirely to obtain payment of the costs awarded to you. Whether that is possible will depend entirely on the ability of the other party to make payment, whether voluntarily or as a result of enforcement action being taken.

INDER LYNCH

Serving the community for more than 60 years



621 Great South Road
(cnr Cavendish Drive & Great South Road)
MANUKAU CITY
Telephone 09 266 6185

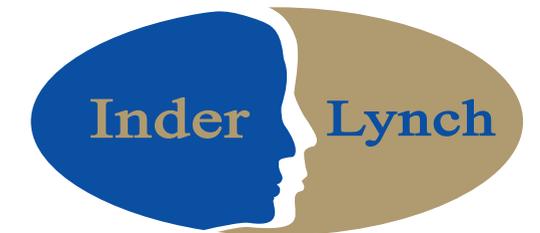


52 Wood Street
(cnr East & Wood Streets)
PAPAKURA
Telephone 09 299 8550



Level 1, 1 Hall Street
(cnr King & Hall Streets)
PUKEKOHE
Telephone 09 238 4166

Debt Collection



LAWYERS

All information in this brochure is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this brochure. It is recommended that clients should consult a qualified representative of Inder Lynch before acting upon this information.

Important facts about Debt Collection

1 What can I do to minimise bad debts?

Undoubtedly, the best way to deal with bad debts is to minimise the risk of them arising in the first place. The best way to do this is by implementing sound management practices such as:

- (a) Know your customer:
 - What is their full name?
 - What is their legal status (e.g. company, partnership, sole trader)?
 - Obtain full contact details.
 - Obtain trade references and make sure that they are checked.
 - Have your customer complete a written application for credit providing all of the above information before any credit is advanced.
- (b) When your customer is a limited liability company, obtain personal guarantees from the company's directors.
- (c) Make sure that you have robust terms of trade.
- (d) Establish credit limits with customers so as to minimise your exposure in the event that things go wrong.
- (e) Ensure that late payments are promptly followed up.
- (f) Ensure that no further credit is extended to customers who are in default. Don't be tempted to advance further credit in the hope that things will improve. If the customer indicates a desire to continue to deal with you, they can do so on a cash only basis. Otherwise you run the risk that the situation will only become worse.

2 I have a debtor who owes me money. Despite many promises of payment, I have still not been paid. What can I do?

Generally speaking, once you have reached the stage where repeated promises for payment are not being honoured, it is unlikely that further requests/promises of payment are going to amount to anything. Further promises are probably no more than an attempt to fob you off. Once matters have reached this stage, the dispute needs to be elevated, either by referring the same to a debt collection agency for more modest amounts or alternatively by initiating legal proceedings.

3 I have decided to take legal action. What steps will you take?

Usually, we would write to the debtor once more advising them that we have been instructed and demanding payment. This will send the debtor the clear message that the situation is now serious and can result in the debt being repaid (or at least satisfactory arrangements made). Unfortunately, that is not always the case and it then becomes necessary to adopt one or more of the forceful debt collection methods.

4 What debt collection methods are available?

There are a number of debt collection methods that are potentially available including:

- Issuing a statutory demand under the Companies Act.
- Issue ordinary proceedings in the District Court or the High Court.
- Serving a payment claim under the Construction Contracts Act.

Which of the above is the most suitable course of action will depend on a variety of factors including whether

or not the debtor is an individual or a limited liability company, the amount claimed, whether the debt is known to be in dispute and whether or not it is covered by the Construction Contracts Act.

5 What is a statutory demand?

A statutory demand is a formal demand issued under the Companies Act against a limited liability company. It gives the company 15 working days to make payment of the debt, failing which the creditor can apply to the High Court for an order that the company be placed in liquidation on the grounds that it is unable to pay its debts. It should be noted that this procedure is only available for debtors who are limited liability companies and only where the debt is not in dispute.

6 Will proceedings be issued in the District Court or the High Court?

This depends largely on the amount at stake. The District Court only has jurisdiction in claims for less than \$200,000.00 and therefore any claims above this amount must be filed in the High Court. It is possible to file proceedings in the High Court for claims of less than \$200,000.00 but generally speaking most debt collection claims for less than \$200,000.00 should be issued in the District Court.

7 How are Proceedings in the District Court commenced?

Most proceedings in the District Court are commenced by the Plaintiff filing a Notice of Claim and serving a copy on the Defendant. The Defendant then has 30 days to serve a Notice of Response failing which the Plaintiff will be able to seek Judgment by Default. If the Defendant serves a Notice of Response, the Plaintiff and Defendant then exchange "Information Capsules" at 30 working day intervals. "Information Capsules" are intended to

inform the other party of the essential nature of each party's case and the information each party relies upon to support their case. By the time Information Capsules have been exchanged, both parties should have sufficient information to make an assessment as to the strengths and weaknesses of their respective positions. This may well encourage settlement. If, however, that is not the case and the plaintiff wishes to pursue the matter further, a copy of the Notice of Response served by the Defendant together with copies of the "Information Capsules" are then filed in Court.

8 What happens once Proceedings have been commenced in the District Court?

Once the various Notices and Information Capsules have been filed in the Court, either a Judge or Registrar will determine whether the matter is to proceed to a "Short Trial" or a Judicial Settlement Conference. "Short Trials" are intended to cover simple cases of less than one day involving few witnesses, oral evidence, and with time limits being imposed on evidence and submissions. Alternatively, the matter will be allocated a 90 minute Judicial Settlement Conference, which will take place within a further 30 working days. At the Judicial Settlement Conference, a Judge will endeavour to assist the parties to come to their own agreement. If, however, the Judge is not satisfied that reasonable progress is being made towards settlement at the Settlement Conference, the Settlement Conference will then become Directions Conference at which time the Judge will direct that the matter proceed to either a "Simplified Trial" or a Full Trial. The majority of cases that are not settled at a Settlement Conference will be allocated a "Simplified Trial" in which the evidence is given in written form by way of affidavit, with limited cross examination. Summary Judgment, which is a procedure that enables plaintiffs who are able to demonstrate that there is no arguable defence to the claim to obtain