

Getting your hands on the Money (or not as the case may be)

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Part 1 – Crystallising the Right to Payment

- The Legal Right to Payment under the CCA
- Obtaining an Adjudicator's Determination where there is failure to issue a payment schedule or failure to pay a scheduled amount



The Legal Right to Payment under the CCA

- s20 CCA sets out the requirements for a Payment Claim. It must:
 - be in writing;
 - contain sufficient details to identify the contract;
 - identify the construction work and relevant period the claim relates to;
 - indicate how the amount was calculated; and
 - state it is made under the CCA



The Legal Right to Payment under the CCA

- s21 – Payment Schedule may be issued to respond to a Payment Claim. It must:
 - be in writing;
 - identify the Payment Claim it refers to;
 - indicate a scheduled amount; and
 - give reasons for any deductions/withholding



The Legal Right to Payment under the CCA

- s22 provides a payee becomes liable to pay the claimed amount on the due date if it does not provide a Payment Schedule:
 - within the time required by the construction contract; or
 - If no provision is contained in the contract, within 20 Working Days



The Legal Right to Payment under the CCA

- s23 - If a Payment Schedule is not issued, and the payer fails to pay the claimed amount in full it becomes a debt due and the payee can claim:
 - the unpaid portion; and
 - the costs of recovery
- Payee can also suspend works



The Legal Right to Payment under the CCA

- s24 – If a Payment Schedule is issued in time, but the scheduled amount is not paid in full, it becomes a debt due and the payee can claim:
 - unpaid portion; and
 - cost of recover
- Payee can also suspend works



Part 2 - Enforcing the Right to Payment

- What options do you have and why is enforcing a mere "debt" under s23 and s24 difficult?
- Application for entry of an Adjudicator's Determination as a Judgment
- Statutory Demand Process
- Enforcing a Charging Order
- Other enforcement options



What options do you have?

- A "Debt" due under s23 and s24 is mere debt. As such it can be opposed on wider grounds that a judgment debt.
- Prior to obtaining a judgment debt you can either:
 - Issue Summary Judgment Proceedings
 - Commence adjudication proceedings;



Summary Judgment

- Summary judgment involves:
 - Filing a claim with evidence by way of supporting affidavits
 - Half day hearing to determine whether there is an arguable defence
- It is available where you have a mere debt and can lead to a resolution of any issues; however it is a longer process than Statutory Demand



Summary Judgment (cont)

- It should be used where you are uncertain of the solvency of the debtor
- Potential pitfall: recent case where the Court held that the discrete issue should be resolved by way of adjudication and the summary judgment failed



Why Adjudicate?

Why adjudicate when you have a legal right already?

- Obtaining an Adjudicator's Determination (i.e. decision that an amount due is a debt under s23 or s24) should be straight forward (no need to argue substance of any dispute, only whether the Payment Schedule was issued or not, or whether the claimed amount was paid or not)



Why Adjudicate (cont)

- An Adjudicator's Determination can then be registered as a judgment
- Subsequent enforcement steps are more straight forward with a judgment than a mere debt and the grounds for opposition are limited
- Recommend enforcing a debt by adjudication, then registration as a judgment, statutory demand



Advantages of getting an Adjudicator's Determination

- Can apply for a charging order over land
- Narrower grounds of opposition if you need to enforce the judgment where there is an Adjudicator's determination.
- Timing
 - Adjudicator's Determination will provide a time for payment (usually 48 hours)
 - If there is no payment within the specified time you can make an Application for entry of an Adjudicator's Determination as a Judgment



Application for entry of an Adjudicator's Determination as a Judgment

- Procedure: Straight forward Application. Apply for:
 - Entry of the Determination as Judgment; and
 - Charging Order over Land if awarded in the Adjudicator's Determination
 - Lodged at the District Court pursuant to subpart 2 of Part 4 of the CCA



Application for entry of an Adjudicator's Determination as a Judgment

- Grounds for Opposition to entry as judgment:
 - Narrow in scope. Can only oppose on the following grounds:
 - Awarded sum has been paid
 - Contract to which the Determination relates is not a construction contract
 - A condition of the Adjudicator's Determination has not been met
 - Need to oppose within 15 Working Days after service of the Application



Application for entry of an Adjudicator's Determination as a Judgment

Charging orders and registration (s75)

- On entry as Judgment the Registrar must issue a Charging Order
- Practical Terms – when you have the judgment,
 - Apply for an Order registering the Charge over Land
 - Register with Linz - effective immediately on registration



Effect of Entry of Adjudicator's Decision as a judgment

- Once an Adjudicator's Determination has been entered as a judgment and not paid a contractor can:
 - Issue a bankruptcy notice; or
 - Issue a statutory demand; or
 - Take any steps available at law to enforce the judgment

Effect of Entry of Adjudicator's Decision as a judgment cont...

- Can a Principal, who hasn't paid, in a hearing to set aside a bankruptcy notice or the statutory demand raise a valid counterclaim, set-off or cross demand exceeding the amount of the adjudicator's decision?

Effect of Entry of Adjudicator's Decision as a judgment

- Court of Appeal has recently held in *Laywood & Rees v Holmes Construction* [2009] NZCA 35:
 - Entry of adjudicator's decision as a judgment meant that an employer could not raise any counter-claim, set off or cross demand to set aside a bankruptcy notice, even if it was a meritorious claim
 - Same applies in relation to application by company to set aside a statutory demand
 - This applies even if the counter-claim relates to events after the adjudication decision

Statutory Demand Process

- Timing
 - Can be issued either immediately on expiration of time for payment under Determination or on Entry as Judgment
 - Recommend the latter

Statutory Demand

- Procedure
 - S289 notice under Companies Act – set out amount plus interest (if any)
 - 10 Working Days to oppose
 - 15 Working Days to pay

Statutory Demand

- Grounds for Opposition
 - If no Adjudicator's Determination is entered as Judgment
 - Substantial dispute as to whether or not the debt is owing/due
 - Company appears to have a counterclaim, set-off, or cross demand and the amount in the demand is less than the amount of the counterclaim, set-off or demand
 - Other grounds the Court determines are valid

Statutory Demand

- Grounds for Opposition (s79 of the CCA)
- If you have an Adjudicator's Determination entered as Judgment the only ground for opposition is that there is a set-off of a liquidated amount:
 - That has been entered as judgment
 - There is no dispute between the parties as to the amount claimed by way of set-off

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Enforcing a Charging Order over Land

- Forcing a sale over land where there is a charging order
 - Can apply to the High Court for an order that the property be sold
 - The property will be sold in the same manner as a mortgagee sale
 - Recovery will still be in order of priority – be aware if there are mortgages you may not get anything
- **Be Aware:** on liquidation a charging order falls away

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Other enforcement options

- Liquidation
- Examination Orders
- Contempt of Court – Sequestration Orders

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Liquidation

- Next stages – liquidation
 - Public process
 - File Statement of Claim and Affidavit in Support
 - Advertise in newspaper and NZ Gazette
 - Evidence of Non-payment
 - Appointment of liquidators if no defence/payment
 - Takes approximately one month
- **WARNING:** if the debtor can prove solvency you may fail
- NB: Charging Order falls away on liquidation

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Order for Examination

- Prior to applying for Sequestration Order consider applying for an Order for Examination
- Provides the creditor to apply for an order requiring the debtor to attend the court to be examined orally as its assets
- Straight forward procedure if you have a judgment and a good tool for finding out what a debtor owns
- Failure to obey the order can lead to the debtor being sent to prison for contempt

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Contempt of Court – Sequestration Order

- Sequestration Order – the effect is to temporarily place property of the company in breach into the hands of “sequestrators” (usually accountants who are independent from the matter) and to deny the company the right to enjoy or dispose of the property until the further order of the Court.
- Drastic step and seen as a last resort. Employed with caution especially give the risk of injury to third parties, such as employees of the company.

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Sequestration Order (cont)

- Prior to applying for a sequestration order a party should notify the company in breach that failure to comply may lead to a process of execution to compel compliance.
- Given the drastic nature of the course of action, this step should not be taken if there is a risk of appeal of any judgment – caution should be exercised.

Sequestration Order (cont)

- To obtain a sequestration order the conduct must be wilful as distinguished from merely casual, accidental or unintentional
- Very high standard of proof
- Court will take into account the financial position of a company and the effect such an order would have on it
- **Caution:** need to show wilful conduct – questionable whether a failure to pay because the company has insufficient funds would amount to “wilful” conduct