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Précis Paper

Debt Recovery in the Local Court

A detailed discussion of debt recovery in the Local Court, with particular emphasis on the Small Claims Division.

Discussion Includes

- Overview of DebtCollect and SR Law
- Prevalence of debt recovery matters in the Small Claims Division of the Local Court
- Commencing legal action versus going to a commercial agent
- What preliminary steps should be taken before commencing debt recovery litigation?
- Common Money Count Pleadings and Notices to Plead Facts/Requests for Particulars
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- Recommendations to clients seeking legal advice on commencing debt recovery proceedings in the Local Court
- Takeaways for practitioners

Précis Paper

Video Title

1. In this edition of BenchTV, Mark Vine (Solicitor - DebtCollect) and David Simons (Legal Practitioner Director – SR Law) discuss the intricacies of debt recovery in the Local Court, with a particular emphasis on the Small Claims Division.

Overview of DebtCollect and SR Law

2. Mark Vine's debt collection practice, DebtCollect, is run almost entirely online, clients are rarely seen, and all correspondence is by email. On the other hand, David Simons' practice, SR Law, is more traditional, but has an online component as well.

3. At DebtCollect, all preliminary inquiries with debtors are carried out by the clients themselves. It is only when those preliminary enquiries have been carried out to no avail that DebtCollect takes over with the legal side of things. In contrast, SR Law carries out the preliminary, as well as the legal, work.

4. Both David and Mark specialise in Local Court matters. District and Supreme Court matters make up very little of their workload.

Prevalence of debt recovery matters in the Small Claims Division of the Local Court

5. The Law and Justice Foundation's 2014 Data Insights in Civil Justice Report reveals the following interesting statistics about debt recovery matters:
    - just over 100,000 were in the Local Court;
    - just under 5,000 were in the District Court;
    - just over 10,000 were in the Supreme Court.

    The Local Court therefore handles by far the majority of debt recovery matters. More startling a statistic, however, is that 85,000 of these 100,000 Local Court matters were in the Small Claims Division (< $10,000).

Commencing legal action versus going to a commercial agent

6. It is entirely up to the client how much or how little they wish to do to recover a debt before commencing legal action.

What preliminary steps should be taken before commencing debt recovery litigation?

7. A question that is often asked is: does the client have to do anything before commencing litigation, for example, a letter of demand, or a phone demand? If there is nothing that requires the client to do any pre-legal steps, then they may proceed directly to a statement of claim if they wish.

8. Although in South Australia a letter of demand must be sent before commencing legal proceedings, this is not the case in New South Wales nor in any other state. Further, in the area of retail leases, the legislation mandates compulsory mediation, but in most cases, preliminary action is not required. Making some sort of demand on the debtor is more a matter of good manners than anything else.

Common Money Count Pleadings and Notices to Plead Facts/Requests for Particulars

9. "Common money count pleadings" are shortened forms of pleading that were written into the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW).

10. In the vast majority of cases, common money count pleadings can be dealt with in 3-4 lines, and that is all that is required. However, the debtor can then serve a notice to plead facts, which will require the case to be pleaded in full. This is often considered a delaying tactic by the debtor's lawyers, as it makes the client plead the case in full when this is usually not necessary.

11. There are no common money counts for services rendered, nor for goods owing pursuant to a guarantee.

12. There is a rule that pleadings should be as short as the case requires, so there is good support for the argument that pleadings should be kept short.

Percentage of defended statements of claim

13. Very few statements of claim are defended and only about 5% go to a hearing. Further, less than 1% of matters that go to a defended hearing end up with a judgment after the hearing. Further, less than 1% of matters that go to a defended hearing end up with a judgment after the hearing.

14. Many people will file a defence and then settle it, so the matter never goes to hearing.

15. In 2000, though 15% of matters were being defended, only about 5% were going before the court. Further, 50.5% of matters lapsed, meaning that though a statement of claim was served, there was no judgment and no defence within 9 months. This likely means that the

debt has been paid, or there has been a settlement. 37.2% of matters were default judgments, meaning that a statement of claim was served, but no defence was filed within 28 days of service.

16. In summary, almost 90% of matters have either been lapsed or default judgments, and the rest have either been closed, discontinued, or settled, etc. Therefore, 90%+ of matters never see the inside of a courtroom.

Online versus physical running of matters

17. Since JusticeLink was introduced, all matters are issued online, are returned almost instantly, and judgments and most enforcements are done online.

18. Due to the proximity of DebtCollect to the courthouse, Mark has found that it is often easier and more time-efficient for him to deal with matters manually, in person, rather than online. David, on the other hand, has found doing things online via JusticeLink to be a much more efficient system.

Serving of statements of claim

19. When serving a statement of claim by mail, it is presumed served if it doesn't come back. Originally, the rule was that the statement of claim was presumed served unless it came back within 28 days. However, the rule now is that if the statement of claim comes back at any time, the judgment is automatically set aside.

20. Where a statement of claim is posted out by the court, it is deemed served 5 working days after it is filed with the court.

Debtors' responses to statements of claim

21. These days it is unusual for a debtor to even respond to a statement of claim; they are more likely to respond when they have a judgment against them.

22. Some defence solicitors might respond to a statement of claim with a lengthy request for further particulars; often this is a delay tactic on their part.

23. If a claimant's solicitor is served with a notice to plead facts after having served their amended statement of claim, they are advised to attach the documents when sending it back to the defendant. The advantage for a claimant's solicitor here is that the defence solicitor has only 14, rather than 28, days to file a defence.

Why commence proceedings in court if the matter can be settled out of court?

24. By the time a matter has reached David's practice, all attempts at settlement have been exhausted, so the chances of settlement prior to commencement of proceedings are fairly minimal. Nowadays debtors are becoming much more resilient to demands for payment.

25. Mark's practice encourages direct communication between their clients and their debtors in relation to the debt, before the commencement of legal action.

26. Once David's practice has commenced involvement in a matter, he prefers to keep the client out of negotiations to avoid the risk of them making admissions that might hurt their case if the matter proceeds to a defended hearing.

Possible outcomes of serving a statement of claim on a debtor

27. There are 4 possible outcomes of serving a statement of claim on a debtor:
    i. file a defence;
    ii. request for particulars/notice to plead facts (only where one of the common money counts has been used);
    iii. pay the debt; or
    iv. negotiate a settlement.

28. There is some lack of clarity as to what types of judgments are reported to credit bureaus: are only default judgments reported, or also judgments after a final hearing? Mark is of the opinion that judgments after a defended hearing should be reported to the credit bureaus. This is on the basis that the defendant has filed a defence to the statement of claim, has lost, and has been found to be owing the money.

29. Following the legislative changes brought about in 2005 (the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW)), statements of claim instruct defendants who are admitting part of the debt and defending another part, to pay the part of the debt they are admitting in order to avoid getting a judgment against them for that amount.

30. The previously existing "part-confession" was fraught with problems, so it has been abolished.

Defences encountered to statements of claim

31. There are sometimes the "nonsense" defences from defendants that do not make any sense at all. This is largely due to the fact that so many debtors are unrepresented as most claims are in the Small Claims Division, which is connected to the prevailing unfairness in the Small Claims Division in relation to costs.

Costs in the Small Claims Division and injustice to plaintiffs

32. 88% of plaintiffs are represented, however, represented defendants make up a much smaller amount.

33. The whole debt recovery system in the courts is geared up for failure by plaintiffs.

34. The majority of defendants are self-represented while the majority of plaintiffs are represented.

35. It could even be argued that it is sometimes easier and cheaper for debtors to let plaintiffs sue them and pay off the debt through the court than it is to pay it with their credit card.

36. While the Small Claims Division has many good things going for it, the costs situation makes it very unfair to plaintiffs, such that it almost forces them to settle.

37. In a recent matter Mark was considering taking on, the debt was for an amount of $2,000, yet by the time it reached hearing, the plaintiff had been charged $3,000 in costs, an amount which they will never be able to recover.

38. Upon receiving a defence, Mark sends to his client, with the defence, a standard letter including a warning that they will be a certain amount of dollars out of pocket even if they win, and inviting them to take over the running of their case themselves. In the last two years, only one client out of approximately 300 has opted to do this. This is largely due to lack of time on the clients' part.

39. Further, in relation to settling, it may be the case that the plaintiff might want to settle, yet is being met by obstructionist tactics from a self-represented defendant who may feel as though they have not got much to lose anyway.

40. When a party is dealing with a solicitor on the other side, as opposed to a self-represented party, there are rules that must be adhered to regarding communication, however, not all parties abide by these rules.

41. In 1992, the number of chamber magistrates was increased to help self-represented parties. Many pre-trial reviews were conducted in chamber, supervised by chamber

magistrates, especially in the suburban courts. However, in 2004, all the chamber magistrates were sacked, resulting in the system still being there, but all the supports having been taken away.

How does debt recovery in the Small Claims Division differ from debt recovery in the General Division?

42. The only difference between debt recovery in the Small Claims Division and debt recovery in the General Division becomes apparent once a defence is filed. The essence of the difference is that there is a lot less formality and much more efficiency in the Small Claims Division. Going by statistics, the Small Claims Division is efficient; it churns through the matters, it is "fast, cheap, simple".

43. For all its efficiency, however, the problem with the Small Claims Division lies with costs. David does not see anything changing in this regard, but suggests setting a percentage of the claim as the maximum costs available as a possible solution. Mark had proposed that a scale be developed for each step in the Small Claims Division, but this fell on deaf ears.

44. Though the General Division has, to an extent, also grasped the "fast, cheap, and quick" principle, there are still many adjournments in General Division matters, leading to a lot of inefficiency.

45. In the General Division, once a defence is filed, the matter is listed for call-over and a date is obtained. In contrast, at pre-trial review in the Small Claims Division, the particulars of the matter are discussed in detail. David has been doing many online pre-trial reviews, which do not require showing up in court, a summary of the case is put in, and the other side can consent or put in opposite orders.

46. Whether at a pre-trial review in the Small Claims Division or at a call-over in the General Division, the court in both cases will provide the parties with a timetable, direct them to exchange their witness statements on a particular date, and to come to court on a particular date.

47. There is one extra step in the General Division, however, this being a review date, which requires appearance before the magistrate to confirm that everything has been done and is ready to go. David anticipates that going forward this step will also be done online.

48. There is also a difference between the Small Claims and General Divisions in relation to the exchange of witness statements as ordered by the court. In the Small Claims Division, witness statements must be filed and served on the same day. However, in the General

Division, witness statements are not filed, but exchanged between the parties, and then submitted in court at the hearing under the *Evidence Act 1995* (NSW), with the witnesses, where they then become an exhibit.

49. It is done this way so that objections can be taken to paragraphs in the witness statement. The magistrate is not supposed to have an opportunity to read the statement until they have dealt with any objections to it under the *Evidence Act 1995*.

50. Therefore, the general rule is, "File and Serve in the Small Claims Division; only exchange in the General Division".

51. A common disadvantage in the Small Claims Division is that you will serve your statement on the other side, the time for service of their statement has elapsed, the other side reads your statement, and three days later serves their statement on you. This is in fact evidence in reply; it has given the other side an advantage by not complying with the order that was made, and you have no right of reply to it.

52. At the hearing, though the magistrate might grant an adjournment to rectify the prejudice caused, thereby giving you a right of reply, the costs involved in dealing with, and replying to, this evidence served out of time will not be covered by any costs order granted for the adjournment.

53. In Oliveri's case, the plaintiff served their statement, Oliveri (the defendant) was late in serving their statement, the court found that it could not rely on that evidence because it was served late, Oliveri continually appealed, and ultimately lost. Previously, in the days of Oliveri's case, the court would stop accepting parties' statements after the cut-off date. This resulted in bedlam by the time a hearing was reached.

54. Mark does not advise serving witness statements by email, as this gives the other side a chance to read your statement and draft their statement accordingly. David, on the other hand, serves statements by email, as there is a record of them being sent.

<u>Default judgment</u>

55. If a defendant does not file a defence within 28 days, a default judgment – that is, a finding by the court that the money is owing, is entered.

56. Plaintiffs often seem to think that the entering of a default judgment equates to immediate payment of the debt owing. However, a defendant does not actually know that a default judgment has been entered against them until there is some kind of enforcement.

57. There are 4 ways to enforce a judgment:

i. writ of execution (now called writ against property);

ii. garnishee order;

iii. examination notice & order;

iv. bankruptcy/liquidation.

If the debt cannot be recovered via one or all of these methods, it cannot be recovered at all.

58. Judgments are good for 12 years (except in cases of bankruptcy or winding up), and this can be extended. Most creditors will make a few attempts to recover a judgment debt and then write it off, likely resulting in millions of dollars in unpaid judgment debt that nobody is even trying to recover.

59. Mark encourages plaintiffs to not give up if they have not been able to recover their debt not long after default judgment has been entered. He likens a default judgment to a 12-year interest-bearing deposit which could generate substantial returns. As an example, in relation to a debtor from whom Mark recovered a judgment debt 11 and a half years after judgment; the ultimate amount recovered went from $5,000 (the judgment) to $25,000, due to interest.

60. For default judgments, a notice of motion for a default judgment should be filed, setting out how much, if anything, has been paid, how much is owing, any increase in costs that is allowed to be claimed, do an affidavit of service, etc.

61. Mark's strategy is to immediately apply for a writ for the levy of property to set the sheriff into motion, and then send the debtor an examination notice by post. This way the debtor knows that judgment has been entered and how much it is, including the costs of the writ. The next day, Mark issues the debtor with a bank garnishee. Even if it is not known where the debtor banks, Mark will simply start with the four major banks and go from there.

62. Both David and Mark have had matters where a debtor has paid the sheriff pursuant to a writ, however, the sheriff failed to update them of this development, and sat on the money for several weeks. A garnishee on the debtor's bank account was then carried out, resulting in the debtor paying the debt twice. There ought to be a mechanism in place for the sheriff to inform the client's lawyer that they have received the money; alternatively, the client's lawyer could try to make contact with the sheriff, but this is not particularly efficient.

<u>Applications to set aside default judgment</u>

63. Many applications are made to set aside default judgments, particularly when a debtor realises that their credit rating has been adversely affected.

64. To have a default judgment set aside, a debtor must show two things:
    i. why they failed to file a defence in the initial time that they had; and
    ii. that they have an arguable defence.

65. In relation to the first requirement, almost all debtors claim that they did not receive the statement of claim. In relation to the second requirement, this is a very low threshold, because if the debtor can show that they have even the slightest defence, judgment will be set aside.

66. There ought to be costs ramifications for defendants in not filing a defence at the first instance. This is because the plaintiff's solicitor has incurred a great deal of costs by the time a defendant applies to have a default judgment set aside, costs they should be reimbursed for.

67. These costs are called "costs thrown away". If there is no fault on the part of the plaintiff, they should ask for "costs thrown away" to be ordered. Plaintiffs' solicitors are advised to be insistent on asking for costs thrown away, as many courts seem to be reluctant to order these costs.

68. A standard argument in asking for costs thrown away to be ordered is: what has the plaintiff done wrong? Registrars and judges often tend to conflate the costs of the proceedings with the costs on default judgment, but the two are quite separate. David has encountered magistrates who have made substantial orders for costs thrown away, and who have made clear to defendants that they cannot file a defence until they pay those costs.

69. There is case law that says that an inability to pay costs should not be a barrier to one's access to justice. This has always been countered by the weakness of the proposed defence, which then lends itself to the argument that if the proposed defence is so weak, a motion to set it aside should not be granted.

<u>Payment of judgment debts by instalments</u>

70. Once a judgment is entered against them, a defendant (now judgment debtor) can apply to pay the judgment debt by instalments. To do so, the judgment debtor must file a notice of motion stating how much they want to pay, attaching to it an affidavit as to property and means. The Registrar reviews this notice of motion in chambers and decides whether or

not it is reasonable that the judgment debtor can pay off the judgment debt. The court then sends the order to both parties, and either can object to the order being made.

71. If the solicitor's client wants to have the order voided, set aside, or varied, a motion is filed and it is listed before the court and argument will be heard.

72. The *Uniform Civil Procedure Rules 2005* (NSW) clearly state that if an instalment order has not been complied with, it ceases to have any effect.

73. When an affidavit of non-compliance is filed, the listing should be automatically removed from the court diary, but this fails to happen.

74. When an instalment order is objected to, the Registrar must deal with it on the "balance of prejudice". That is, what will the plaintiff suffer if they have to wait, for example, 2 years to be paid, versus what will the defendant suffer if they are refused the opportunity to pay by instalments?

75. Where the plaintiff is a large corporation, courts are more likely to find that the balance of prejudice falls in the defendant's favour, and allow the defendant to pay by instalments. Conversely, where small business owner plaintiffs are concerned, courts are more likely to find that the balance of prejudice lies with the plaintiff, and refuse the defendant the opportunity to pay by instalments.

76. Given the hit-and-miss nature of enforcement, when preparing a credit application, clients are advised to find out where the debtor banks, so that if the debtor defaults, the client can approach the bank.

<u>Recommendations to clients seeking advice on commencing debt recovery proceedings in the Local Court</u>

77. In David's case, whether he is able to assist a prospective plaintiff to recover a debt really depends on the size of the debt they are seeking to recover relative to his costs. In Mark's case, because he runs a highly automated practice with little overheads, it is more affordable for a plaintiff to retain him to help recover the debt owed to them.

78. Mark always asks his clients the following questions:
    i. How old is the debt?
    ii. Do they know where the debtor worked and banked?
    iii. Do they know the debtor's address and whether the debtor still lives there?
    iv. Did the debtor tell the client why they wouldn't pay?

79. Privacy laws are a major obstacle to locating and tracking down debtors.

80. Although going to court and obtaining a judgment is the only way to force debtors to pay, prospective plaintiffs must be advised that going to court carries risks - costs risks, the risk of losing, they may end up paying the defendant's costs, etc. Further, prospective plaintiffs must be advised that it is not a perfect system even if they win, because they may end up with a judgment that proves very difficult to enforce.

81. Despite an imperfect system, there is still a very high overall success rate for recovery, of around 70%-80%. In contrast to this overall success rate, the failure rate for recovering debts from renters is very high, due to their itinerant nature. It is a different situation in the case of debtor farmers, where the success rate of recovery is largely seasonal, and clients must be advised that even though they may not be able to recover a debt from a farmer one year because their crop failed, they may be able to recover the debt the following year.

Takeaways for practitioners

82. There is not a great deal of money to be made in debt collection. It is primarily about volume, and though a good living can be made from it, practitioners are advised to:

i. not waste their time with frivolous claims;
ii. beware of clients who think their money will magically appear once a judgment is entered; and
iii. be as fast, simple, and efficient as possible.

83. Efficiency is advised even where the other side is engaging in delay tactics.

84. Lastly, practitioners are advised to not put time and work into debt recovery matters that is disproportionate to the amount of the debt - for example, do not treat a $7,000 debt in the Small Claims Division as though it is a High Court case.

BIOGRAPHY

Mark Vine

Solicitor, DebtCollect, Sydney

Mark has provided legal services for the past 18 years by running a specialised debt collection service. His service is considered the legal backbone to the debt collection process. Prior to this, he was the Chamber Magistrate and Registrar at the Downing Centre.

David Simons

Legal Practitioner Director, SR Law, Sydney

David was admitted as a lawyer in 1998. Since his admission, he has specialised in acting for creditors in debt collection matters. Prior to this, David was a licensed commercial agent and operated his own debt collection agency. He has been a part of the debt recovery industry for over 30 years.

BIBLIOGRAPHY

Cases

Oliveri's case (ask presenters for citation)

Legislation

Civil Procedure Act 2005 (NSW)
Evidence Act 1995 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)