DEBT RECOVERY

THE LAW DIGEST

TOPIC: THE PROCESS OF RECOVERING DEBT IN GHANA

Contributor
David Yaw Danquah, Esq

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For further information please contact david@legalstonesolicitorsllp.com

Contributor
David Yaw Danquah, Esq

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INTRODUCTION

Indebtedness within the Ghanaian market poses a severe challenge to lenders and businesses trying to grow their investment portfolios. Many business organisations are indebted, and thus growth is restricted as more profits will go to settling debts. Most growth is also hindered because they have lent out money to others who have not settled and thus halting investment and growth in the business sectors.

As a result of this, institutions dedicated to the recovery of debts have sprung up in Ghana. Their main focus is to recover debts that are long overdue and restore their monies. It is against this background that this article provides some practical tips to ensure you maximise recovery of your debts and avoid write-offs by focusing on "no-nonsense" techniques that can be deployed to prevent the likelihood of non-payment.

DEBT COLLECTION RATES

Legalstone Solicitors LLP follows international standard rates for debt collection cases and the fees stipulated by the Ghana Bar Association for the collection of the debt owed in commercial, corporate, and business contracts. More so, an individual or corporate entity needs to understand that one of the controlling factors for determining the rates of debt collection in Ghana is litigation and arbitration procedures.

DEBT RECOVERY PROCESSES

At Legalstone, we offer simple, effective, and swift solutions to recover debts in Ghana. Our team of lawyers and experts has an in-depth understanding of the laws and legal nuances for recovery of a debt owed clients be it individual or a corporate entity.

Our debt recovery solutions can issue an initial letter before the commencement of a court process to recover the amount due and owed. A letter before action is a formal letter written by our expert lawyers demanding payment of the debt owed your business. It warns of impending and unstoppable court action on failure to adhere to the moratorium granted for payment.

Our letter before action usually set out the following:

1. Circumstances leading to the debt owed.
2. The amount involved
3. The particulars of the Debtor
4. The particulars of the client
5. Set the time for payment, which is usually 7days moratorium.

In some cases, the issuance of the letter before action may lead to settlement of the debt due and owed our client without necessitating further actions. We are a law firm and not a debt collection agency. We litigate based on explicit instructions from our clients if our letter of demand doesn't result in payment.

Our debt recovery services include:

1. Commercial litigation and dispute resolution;
2. A letter before action (LBA), i.e., letters of demand;

3. Settling matters by way of Alternative Dispute Resolution (ADR) processes;
4. Obtaining and enforcing judgments by way of writs, instalment orders, garnishments among others;
5. Assisting you and your business by drafting the agreement to mitigate the need for debt recovering actions; and
6. Telephone collections and follow-ups.

PRACTICAL WAYS OF RECOVERING DEBT

Here are some of the practical approach to debt recovering in Ghana using the expertise of Legalstone Solicitors LLP.

1. Recovery through the issuance of Writ of summons.
2. Recovery through application for Summary Judgement.
3. Recovering through application for Mareva Injunction.
4. Recovery through Writ of Execution.

RECOVERY THROUGH THE ISSUANCE OF A WRIT OF SUMMONS

A creditor to a credit transaction which the debtor has defaulted in repaying on the terms agreed shall have the right to cause a writ of summons to be issued seeking for reliefs among which is to recover the amount due and owing.

A writ of summons is, therefore, a formal document by which the Chief Justice informs a defendant (Debtor) that an action has been commenced against him by a named plaintiff (the creditor). It commands the Defendant to cause an appearance to be entered within a specified time usually eight days on the service of the document if the Defendant wishes to dispute the Plaintiff's claim to recover the debt; otherwise, judgement will be given without further notice.

The High Court (Civil Procedure) Rules, 2004 (C.I 47) provides under Order 2 rule 2 that subject to any existing enactment to the contrary, and all civil proceedings shall be commenced by the filing of a writ of summons.

The filing of the Writ of summons invokes the jurisdiction of the Honorable Court to hear and determine the issues in dispute between the parties' to achieve speedy and effective justice, avoid delays and unnecessary expense, and to ensure that as far as possible, all matters in dispute between the parties may be ultimately, effectively and finally determined and that multiplicity of proceedings concerning any such matter is avoided.

The filing of the Writ of summons, therefore allows the Honourable Court to hear and determine the issues and finally render a judgement which if in favour of the plaintiff/creditor shall allow the plaintiff/creditor to recover all sums due and owing to him from the defendant/judgment debtor.

A writ of summons shall be valid in the first instance for twelve months beginning with the date of issue. Once the jurisdiction of the Court is invoked, all proceedings of the Court including the announcement of its decision shall be held in public except as may be otherwise ordered by the Court in the interest of public morality, safety or public order.

RECOVERY THROUGH THE APPLICATION OF SUMMARY JUDGEMENT:
The application of summary judgement is another valid mechanism that can be employed by a creditor in the recovery of a debt due and owing. Summary judgement as the name suggests is a judgement obtained without going through the rigorous processes of a full trial.

Summary judgement is available where a party can depose that to his belief there is no defence to the relevant part of his claim. The rule retained its root in the English 1962 rule revisions and was introduced in the 19th Century to meet convenient demand for efficient debt recovery or collecting. Its ambit has significantly developed and has become a procedure for the swift determination of a point of law. It enables a plaintiff (the creditor) to obtain a quick judgement where there is no defence to the claim by a defendant (Debtor).

Summary judgment is very much part of the rules of civil jurisprudence in Ghana. Order 14 rule 1 of the High Court (Civil Procedure) Rules, 2004 C.I 47 makes provision for summary judgement. It provides that "where in an action a defendant has been served with a Statement of Claim and filed an appearance, the Plaintiff may on notice apply to Court for judgment against the Defendant on the ground that the Defendant no defence to a claim, included in the writ, or to a particular part of such claim, or that the Defendant has no defence to such a claim or part of a claim, except as to the amount of damages claimed".

Order 14 rule 2 of the High Court (Civil Procedure) Rules, 2004 C.I 47 makes provision for the method of making an application to the Court for Summary Judgement. The rule sets out the function and application of Summary Judgment. The purpose of Order 14 of High Court (Civil Procedure) Rule, 2004 C.I 47 is to provide the opportunity to a Plaintiff who can show cause that the Defendant has no answer to his case to obtain judgments to his claim or part of his claim in a summary fashion. By summarily obtaining judgement means obtaining judgement without going through a full trial, if the Defendant has not been able to set up a good/bona fide defence or raise an issue or a triable issue to be tried.

This applies where for example, the Defendant's defence or the Plaintiff's defence to a Counterclaim has no hope of success and the defence raised would be a sham or has no real hope of success but to go through a full trial may merely delay the trial or judgement unduly.

An application for summary judgement shall be made on notice to the Defendant. The notice shall be supported by an affidavit verifying the facts on which the relevant claim or part of a claim is based and stating that in the deponent's belief (Plaintiff/Creditor) there is no defence to the claim or part or no defence except as to the amount of any damages claimed.

Critically crucial is the fact that the rules allow for application to be supported by any exhibit relating to it that demonstrates that Defendant has no defence to the action. These exhibits shall include any of the following;

a. Agreements, contracts or any other instruments that establish the debt being claimed.
b. Letters before action from the creditors
c. Response to the creditor's letter before action by the debtor admitting liability and praying for time to make payment.
d. Reference to the Court's records inclusive of the Defendant's Statement of Claim showing no

reasonable defence to the action.

Once the Court enters judgement in favour of the creditor, the creditor can proceed to enforce the judgement against the debtor without delay.

RECOVERY THROUGH THE APPLICATION OF MAREVA INJUNCTION

Mareva Injunction is a discretionary remedy which entitles the Court to balance the parties' respective interest. Mareva Injunction is, therefore, an extraordinary, equitable remedy intended to prevent a genuine risk that a Defendant would most likely dissipate assets before the conclusion of a trial or the determination of the action between the Parties'.

It is always advised for Creditors/Banks to approach the Court for Mareva order when there is the likelihood or suspicion that the debtor may dissipate or dispose of his assets before the case initiated against him in a Court of Competent Jurisdiction in Ghana is conclusively determined.

Also, the creditor on reasonable suspicion that the debtor will dissipate his assets, rendering any judgement nugatory shall approach the Court for a Mareva Injunction to restrain the debtor from removing or dissipating such assets till the final determination of the case so as not to render the judgement of the Court nugatory. The jurisdiction to grant the Mareva Injunction derives from the Court's inherent authority to grant an injunction when it appears to be just or convenient to do so.

Order 19 of the High Court (Civil Procedure) Rules, 2004 C.I 47 allows parties to an action to initiate an application pending the final determination of the suit. Specifically, order 19 rule 1 states, that every application in pending proceedings shall be made by motion.

Also, Order 25 also of the High Court (Civil Procedure) Rules 2004 C.I 47 deal with an interlocutory injunction, and interim preservation of property. Precisely order 25 rule 1 (1) states that the Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just or Government to do so, and the order may be made either conditionally or upon such terms and conditions as the courts consider just.

The combined effect of order 19 and 25 of the High Court (Civil Procedure) Rules, 2004 C.I 47 ground the application of a Mareva injunction in circumstances where it seems just and convenient to maintain the integrity of the court process by preventing a defendant from dissipating assets and becoming judgement-proof.

A plaintiff for Mareva Injunction must be able to demonstrate the following:

a) A strong prima facie case against the Defendant/Judgment Debtor
b) A likelihood or real risk that the Defendant intends to dissipate assets before judgement
c) The balance of convenience favours the Plaintiff.

A Mareva Injunction once granted by the Court operates to restrain the debtor from interfering with his assets until the case initiated by the Plaintiff is fully and effectively determined.

A Mareva Injunction does not, however, operate as a tool for attracting and executing judgement. Rather it is intended to preserve the assets of the Defendant until the final determination of the

suit. This allows for easy recovery of the debt owed through the exercise of various means of executing the judgment.

RECOVERY THROUGH THE ISSUANCE OF WRIT OF EXECUTION.
We shall consider two mechanisms for recovery of debt through the issuance of Writ of Execution:

WRIT OF FIERI FACIAS
This is the mode of enforcement of a money judgement by the seizure and sale of the debtor's goods chattels, lands or property sufficient to satisfy the judgement debtor cost and execution. It is a writ directed to the sheriff of the Court to seize the property of the judgement debtor as may be sufficient to satisfy the amount of the judgement debt together with interest and cost, and the purpose is to enable the property to be sold to pay the judgement debt, interest if any and cost.

The Writ of fieri facias the most common of all the writs of execution and is usually referred to in a shortened form as the Writ of fi fa. Its essence is that the amount ordered to be paid realised by the seizure and then the sale of the judgement debtors' properties and chattels.

In the case of Rom Engineering Ltd v. National Investment Bank [2013] 56 GMJ 167 CA, the Court of Appeal per Aduama Osei JA, said seizing property under Writ of fi fa places the seized property in the custody of the Deputy Sheriff. The judgement creditor has no duty to perform in the execution of a writ of fi fa. Until the attached property is sold or otherwise released from attachment, the Deputy Sheriff bears responsibility for its security.

These issues frequently arise with the execution of Writ of fi fa, and these are
a) What are to be seized
b) How much may be seized
c) Whose property may be sized.

The property of the judgement debtor against which execution may be denied are;
a. Movable property in possession of the judgement-debtor
b. Immovable property
c. Movable property which the judgement-debtor is entitled to subject to the right of a third party or entity.
d. Money or negotiable instruments
e. Shares in any body corporate.
f. Money or negotiable instruments.
g. Property in custody or under the control of any public officer in the officer's official capacity, and
h. Property in custodia legis. The Black's Law Dictionary defines property in custodia legis as a reference to property taken into the Court's charge during pending litigation over the said property.

The items seized are then sold, usually by public auction, under section 17(2) of the Auction Sales Law (PNDCL 230) an auction sale resulting from a judgement debt shall be subject to a reserve price to be determined by the Court which gave the judgment.

Thus, the successful party (Judgment Creditor), after the property has been seized, shall cause it to be valued by a competent valuer who would prepare a valuation and state the market price or commercial value and also the forced sale value.

Based on the valuation report and a successful auction sale, the Judgment Creditor shall be deemed successful at the recovery of the debt from the Judgment Debtor.

GARNISHEE PROCEEDINGS

Garnishee Proceeding is the process by which a judgement-creditor may attach debts due in satisfaction of the judgement debt. The debt owed by the third party to the judgement-debtor, on being attached, shall ultimately be paid by him to the judgement-creditor of Court.

In other words, if the judgement debtor is himself the creditor of another known as the garnishee, it is possible to obtain an order that the garnishee should pay the judgement creditor. This is known as the Garnishee order and is accomplished in two stages.

In the first stage the judgment creditor will obtain by way of ex parte, an "order to show cause" also called a "garnishee order nisi," which attaches the debt due to the judgment debtor and commands the garnishee to attend Court at the time and place specified in the order and show cause why he should not pay the debt directly to the judgment creditor.

Copies of the order must be served personally on the garnishee and the judgment debtor unless the Court otherwise orders, at least seven days before the return date. The order binds the garnishee as soon as it is served on him.

If on the return date the garnishee does not appear or dispute liability, the judge would usually make the order absolute. However, if at the hearing the garnishee disputes liability, the Court may summarily determine the issue or give directions for it to be tried. A bank account is an obvious target for garnishee proceedings; however, any order would only be made on the credit balance if any.

The following points are worthy of note when one seeks to activate a garnishee process as a way of recovery of debt.

1. The application in support of the order nisi must state the name and address of the branch of the bank at which the account is held, the account number and other relevant information if you have them.
2. Serve the order nisi on both the head office of the bank and the branch office.
3. You cannot take out garnishee proceedings in respect of sums of money standing to the credit of a judgment debtor in Court. You apply to the Court for an order for the payment of the money or a portion that is sufficient to pay the judgment debt and the cost of the application.
4. Costs of any application under O. 47 shall have priority over the judgment debt unless the Court otherwise directs.
5. Exchange control approval is required if the judgment creditor is resident outside Ghana and if any payment will be in breach of the Exchange Control Act. The Court may also order the garnishee to pay the amount into Court.
6. The Court will try claims by third persons over the debt sought to be attached.

LEGAL REPRESENTATIVE (LR)

Growing a healthy business requires that you have a strong legal team that employs practical strategies to the recovering of debt, defeating the idea of losing funds to defaulting clients.

It is advisable to engage the services of a lawyer before the initiation of processes for the recovery of a debt in Ghana. The work of the lawyer shall be to devise a strategy that will aid in the efficient recovery processes of the debt due and owing. The lawyer's job shall be to engineer a mechanism that leads to efficient debt recovery taking into consideration the circumstances of the case.

NOTES ON CONTRIBUTOR

Mr David Yaw Danquah is the founder and Managing Partner of Legalstone Solicitors LLP, a boutique law firm in Ghana with a concentration on Corporate and Commercial, Mining and Infrastructure, Debt Recovery and Restructuring, Real Estate and Construction Law, and Commercial Arbitration.

He heads the firm's practice areas of focusing are Corporate and Commercial, Mining and Infrastructure, Debt Recovery and Restructuring, and Commercial Arbitration.

David has advised on numerous investment and mining-related transactions. He also has assisted countless international entities in establishing their operations in Ghana, and through his firms, offers support services to those entities. He has an impeccable record of providing technical savvy and exceptional client services.

David is a graduate of Kwame Nkrumah University of Science and Technology (KNUST), Kumasi, where he received his Bachelor's Degree in Law (LL. B) and the Ghana School of Law, where he studied and received a Post Graduate Qualifying Certificate in Law (PQCL). He holds a Certificate in Negotiation Mastery from Harvard University. Presently, he is pursuing an LL.M Degree in International Dispute Resolution at the prestigious Queen Mary University of London, United Kingdom.

David is a member of the Ghana Bar Association, Association of International Petroleum Negotiators (AIPN) and Institute of Energy Law (IEL) based in Houston, U.S.

LEGALSTONE
SOLICITORS LLP

Website:
www.legalstonesolicitorsllp.com

Email:
info@legalstonesolicitorsllp.com
david@legalstonesolicitorsllp.com

Ghana Post GPS:
GA-417-3770