

MEMORANDUM

TO: Janice Smith/FNDC
FROM: Law North (GAD/ GMM)
DATE: January 17, 2020
RE: Enforcement options



This memorandum is provided for discussion purposes to assist in deliberations about enforcement of rates judgments. Some policy comments are made when considered appropriate. This memorandum is not intended to be a detailed opinion/narrative about every option, nor is it intended to replace specific advice for any particular rating unit. If advice is required for a particular rating unit we are happy to assist.

At the end of this memorandum a hypothetical situation is considered.

Executive summary

1. Debt collection is fact specific. A one sized all approach will not work. That is even more important for rates collections, which can include selling houses from ratepayers.
2. Each debt collection option should be considered for each case, and a plan decided on and implemented at staff/management level, guided by policy at Council level.
3. Policy must be fair and reasonable to all involved (both the ratepayer debtor, and the ratepaying public who carry the cost if rates are not recovered).
4. Policy must not be inflexible and must allow for exceptions if/when justified.
5. In a residential/family home context rating sales are a last resort and other enforcement options should be considered first. However, rating sales are both lawful and justifiable collection method and Council should not be opposed to using this process if necessary.
6. In a commercial context a rating sale can be utilised earlier in the process.

District Court enforcement options s133 District Court Act 2016: - methods to enforce a judgment for payment of money in the District Court

1. Warrant to seize property / chattels
2. Garnishee proceedings
3. Charging order over property
4. Attachment order against income

High Court/Rating Act

1. Rating sale
2. Bankruptcy / liquidation

Often before those formal steps are taken a financial assessment is a starting point to consider the debtor's ability to pay by examining their assets and liabilities.

There are two types of financial assessment procedures:

1. A court assessment (by phone) of the debtor's ability to pay. This procedure is undertaken by the Court (not FNDC, not law north) and carries a small fee (\$80) which is claimable. Costs in preparing the form are claimable (approx. \$127). If the Court cannot assess the debtor's finance over the phone they can issue a summons, but the Council as creditor is not entitled to attend.
2. A hearing which Council/lawyers attend to assess the debtor's ability to pay. The cost to file is more than the phone assessment (either \$130.00 or \$180.00 depending on if the Court will serve the notice, or it is done privately), and can be claimed back. Again, small legal fees are recoverable.

These may be good starting points – to see if a debtor has the money to pay (and has just not paid), has the income to pay, or does not. It allows the Council to consider next steps – whether that is an attachment order over income for instalment payments, or a rating sale if the person has no liquid assets.

Warrant to seize property / chattels

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- (1) A warrant to seize property is a warrant that requires the bailiff or constable to whom it is directed to seize and sell goods of a judgment debtor for payment of the following debts:
 - (a) the judgment debt, or so much of it that remains unpaid; and
 - (b) the costs of executing the warrant; and
 - (c) the costs of previous proceedings (if any) for enforcement of the judgment debt.
- (2) By the warrant, the bailiff or constable is authorised to seize—
 - (a) the goods of the judgment debtor, except—
 - (i) his or her tools of trade to a value not exceeding \$5,000; and
 - (ii) his or her necessary household furniture and effects, including clothing for the judgment debtor and his or her family, to a value not exceeding \$10,000; and
 - (b) money, bank notes, and securities (that is, bills of exchange, promissory notes, bonds, specialties, or other securities for money).

In short, this remedy allows a bailiff to take property that *belongs to the debtor* and sell it to pay the debt. We must provide a current address and then MoJ will send around the bailiff to the property. Two restrictions obvious at this point:

- This remedy is worthless against people we have not personally served/we don't know the location for.
- People can avoid the remedy by proving cars/other items are owned by other people. But this is harder today with no joint ownership of cars etc.

Other restrictions include people not being at home, as enforcement generally occurs during the day. People who are at work may not have cars / etc at home, and the bailiff may not be able to get access into the house.

Filing fee: \$200.00. Legal costs: Claimable portion is 0.2 only under the rules – ie: \$254 (for simple proceedings), or \$382 (for more complicated applications). ‘real cost’ to FNDC should be close to this, if not less, provided we have up to date information.

Disbursements: If certain items are there and can be taken, such as cars, there are towing fees, and this is deducted from costs of sale before paying to Council. Also auction fees if successful .

A bailiff can seize specific property – if we know of it. This is probably not realistic for FNDC who does not personally know the situation of the debtors.

If assets are seized, the debtor has 5 days to pay (in full) or the items are sold at public auction. From the costs of sale the costs of enforcement such as towing/auction are deducted, and then the council is paid the rest. If the amount paid to FNDC is insufficient to cover the debt, the balance remains owing.

Pros:

- A good enforcement provision if there are known assets – boats on the land, cars etc.
- If assets are found of value it can be a helpful way to ‘chip away’ at a debt, reducing it to an amount which may be manageable, thus possibly avoiding a rating sale.
- Best against debtors who are at home so there is less risk of avoiding the bailiff.

Cons:

- Can’t take assets from other people – ie: trust assets if trustees not debtor. This should not be as much of an issue if the debtor lives at the rating unit as joint owners will also be liable.
- Limitation on when you can get in to take goods – bailiffs usually working business hours.
- We have to know address – not viable for substituted serviced persons.

Possible policy considerations

- Do we want bailiff’s to be taking cars if the car is the only transport for a ratepayer family? This would not apply to multiple cars/boats/TVs etc which are arguably ‘fair game’

Garnishee proceedings

If someone (sub-debtor) owes the debtor money, you can apply to the court for that money to be paid to you instead of the debtor.

This is a type of proceeding where you need to know that the person is owed something. If you are unaware of money being owed to the debtor (or if you know nothing is owed) the application is a waste of time.

Helpful in many more situations than may be first thought however, consider:

- Money a person may have on deposit with a bank.
- Companies if the debtor is an owner – current accounts with companies are often in debt, with the company owing money to the shareholder.
- Trusts:
 - Has a person sold assets to a family trust (house) and has outstanding money due they are gifting to the trust?
 - Does a beneficiary have a current account?

Filing fee: \$250.00. Claimable costs: 0.4 (ie: \$508 or \$764).

Process: There is no form (compare to warrant to seize) – FNDC files an affidavit and an application and registrar (if accepting of the application) issues the orders. The sub-debtor has the chance to defend / object to the process, by claiming they do not owe the ratepayer/debtor.

Perhaps ironically a garnishee order is a judgment which can be enforced in the normal way. Meaning for example if the sub-debtor owes our ratepayer money, and the sub-debtor has a boat, a warrant to seize the property can be made against the *sub-debtor* and a bailiff can seize the sub-debtor's boat to sell the ratepayer's debt to FNDC. A somewhat circular process.

Pros:

- If we know money is owed this can be a useful way to get paid the rates debt.
- Can be very powerful if the sub-debtor is solvent – company/trust/bankruptcy issues can arise, or if the sub-debtor has assets which can be sold.

Cons:

- Suffers all the problems of the other judgment procedures IF the sub-debtor refuses to pay – ie you end up with a situation where you are wasting time chasing another person.

Attachment orders

An attachment order tells an employer (or Work and Income, ACC etc) to transfer money from the debtor's wages or benefit to the creditor. No more than 40% of net income can be taken.

On the one hand this is often seen as a very good order as it will allow a creditor to be drip fed what they are due, especially a smaller debt. However, on the downside a big rates debt can take a long time repay by instalments. At the same time, if the person leaves their employment or the benefit ceases the payments will stop – it is the creditor's obligation to check the payments and take steps if they stop.

Another problem with attachment orders is Council already offers rates easy pay options and the cases we are dealing with here have gone beyond that – either the debts were too high, or the ratepayers refused. This is an issue because the debtors will be required to pay their judgment debt by instalments and their current rates. The result of this will inevitably be a reduced weekly payment as rates are an expense the Court would factor into the amount ordered. A weekly payment of \$10.00 per week for a \$10,000.00 rates debt would not be helpful for example.

Our advice would be to look at these orders only for small debts.

Pros:

- A helpful method for collecting smaller debts.
- Allows debtors to cashflow debts

Cons:

- At times be benefiting the debtor more than the creditor as the amount paid can be small if deducted from benefits.
- Arguably useless for large debts unless the interim payments are significant. There is little merit (if any) in a tiny drip fed payment against a large debt.
- Council needs to have staff to monitor the payments *as well as* the rates payments.

Charging orders

Our advice is that charging orders be registered over the rating unit after every judgment for unpaid rates. This was effectively a standing order from Council previously, but with the volume of files we need to consider the issue again.

The costs of a charging order are added to the debt.

One common misconception is that you cannot sell land with unpaid rates. That is untrue. It is true that a standard condition in the NZ sale and purchase agreements is an undertaking to clear the rates, but the clause can simply be removed. Family deals commonly involve informal agreements and unpaid rates.

When a property is transferred to a new owner the new owner becomes liable for the rates debt. But they do *not* become liable to a judgment for unpaid rates – ie they do not become liable for costs and interest in the Court process.

Registering a charging order will ensure that ratepayers do not ‘pass the buck’ and vanish with cash.

A charging order also blocks a ratepayer from obtaining a mortgage, which is helpful.

There are two types of charging orders – rating act and district Court. District Court charging orders – in terms of land – are not as powerful as the Rating Act charging orders. That is because District Court charging orders expire, Rating Act charges do not. One benefit to District Court charging orders is that it can related to not only land but other personal property.

However, the limitation for both remains – this is not a remedy to *get paid*, it is a remedy to stop the debtor acting to get rid of their property. It is seen as a “stop order” to prevent the land/property being dealt with. This means that further steps will always be needed to recover the debt. The charge preserves Council’s position.

Pros:

- Preserves Council's position
- Puts pressure on ratepayer as they see that – finally – there is a real impact on their title.
- Nearly cost neutral as fees added to judgment debt

Cons:

- Further work required to recover money after charge registered.

Rating sale – Rating Act

A rating sale is the last-resort type remedy if all other options have failed. If a rating sale is being considered the Council will effectively be at a point where it must decide to either (a) apply for a rating sale, or (b) write off the rates debt and costs incurred. In our opinion it is only in very rare cases that the rates debt should be written off as the burden for meeting the rates shifts to the remainder of ratepayers. The danger in not taking a proactive stance with rating sales is that it sets a very dangerous precedent – that the Council is not going to take final steps and so paying rates is not required.

A rating sale is available if a judgment for unpaid rates is unpaid for three months following the judgment. We file a notice into the Court and the Court will provide notice of our intention to sell to anyone with an interest in the land. If the debt remains unpaid after six months, the land may be sold. The Rating Act contains procedural rules for implementing a sale.

The priority of payment following a sale is:

1. Court fees;
2. The judgment debt(s) for unpaid rates, plus interest, costs and expenses;
3. All further rates owed on the same land at the time of sale, *whether or not the rates are outside the period of limitation under the Rating Act*;
4. Encumbrances on the rating unit (mortgages, charges);
5. Any other judgment for unpaid rates, for *other* rating units in our district, owed by the ratepayer;
6. Any other rates due at the date of sale, for *other* rating units, whether or not the rates are outside the period of limitation under the Rating Act;
7. Balance proceeds of sale are paid to the Public Trust for that office to deal with.

One of the main benefits of a rating sale is, as above, the rates are paid before lending secured over the property. It will only be in exceptional cases (bare land) where the proceeds of sale will be less than the rates debt.

Rating sales are also helpful if a debtor owns multiple rates units as unpaid rates from those units can be collected.

Finally, a rating sale allows the Council to recover unpaid rates which have otherwise become statute barred. This is one reason we advise Council to *not* write off statute barred rates.

Our advice is that Council does utilise rating sales to recover unpaid rates. Whether rating sales are a last resort or utilised at an earlier stage will depend on the facts of the case. For example, – is the

rating unit a residential dwelling that the ratepayer occupies as a family home? Or is it an investment property? Is it bare land? Is the ratepayer a vulnerable person? What is the side of the debt?

It is noted that rating sales do create publicity above and beyond normal debt recovery procedures. That will inevitably be mixed publicity depending on who the ratepayer is.

Bankruptcy / liquidation

These similar recovery procedures are considered together. Bankruptcy for personal debtors. Liquidation for company debtors. These procedures are a good way to recover assets from a person who is unable to pay their debts. Both will result in another entity taking over the debtor's assets and selling them if necessary.

Because the Rating Act provides for rating sales situations where these procedures are needed should be limited. In a recent situation FNDC used bankruptcy proceedings to recovery money from a long-standing judgment debtor when the value of the debtor's land in the Far North district was less than the value of the debt. The debtor owned real estate in Auckland which we could not use the Rating Act procedures against (being out of our jurisdiction). In a case like that – which is rare – bankruptcy / liquidation is a very powerful tool. Had the debtor's Far North assets been valued at more than the debt it is expected the High Court would have refused to allow the application.

One downside to bankruptcy/liquidation is that you must commence separate legal proceedings, in the High Court. That can be costly.

Other matters for Council consideration

- Judgment debts have their own limitation periods and must be recovered within 6 years of the judgment issuing. The time period is in addition to the standard Rating Act limitation.
- When a judgment debt issues Council must be careful to ensure there is no doubling up of debts. Advice has been given previously that the judgment debt needs to be managed separately from the rates record to ensure that the customer does not receive arrears on unpaid rates on top of interest for a judgment debt. This has come up many times over the years and this seems a good time to consider a policy change. Ideally the rate account would be cleared of the debt so current rates will accrue simultaneously with the debt collection process.
- If a ratepayer's personal situation is such that recovery is difficult (perhaps a low income) then rather than writing off the rates debt the Council can simply defer recovery for a period and revisit the issue in the future. Provided current rates are paid that may be an attractive option.

Hypothetical situations

Hypothetical recovery process (A)

Facts:

Ratepayer: private individual, employed or on benefit

Use of rating unit: family home

Judgment debt: \$15,000.00 (rates debt and costs).

Charge property with debt to ensure Council protected. Undertake financial means assessment/or hearing. If ratepayer has assets which can be sold, obtain warrant to seize assets and sell these to pay down debt. If debt remains obtain attachment order to deduct debt from income by instalments.

If ratepayer does not have assets which can be sold, consider attachment order if income sufficient to repay by instalments. If ratepayer's income is low and payments by instalments is not reasonable (considering current rates which will also need to be paid), consider whether rating sale is a viable option – consider personal situation of ratepayer as part of exercise.

Consideration must also be given to why the rates debt is unpaid. Is the ratepayer simply unable to pay, and has allocated income elsewhere, or is the ratepayer on a "rates strike" for various reasons. In the case of a person who is simply unable to pay for personal reasons, every effort should be made to assist them, and a deferring of enforcing judgment may be considered provided current rates are paid. In the case of a person on a "rates strike" Council should not we suggest have sympathy for the ratepayer as this type of action carries risk of spreading and settling a bad precedent.

Hypothetical recovery process (B)

Facts:

Ratepayer: investor

Use of rating unit: investment/ bare land

Judgment debt: \$20,000.00 (rates debt and costs).

Council should be firmer with those who obtain rating units as part of a commercial enterprise. Charge property to protect Council position. Demand payment of debt but proceed to rating sale if debt unpaid. As human factors are not present there is little reason to investigate other recovery procedures. The rates debt is also higher than the above situation.

Hypothetical recovery process (C)

Facts:

Ratepayer: investor

Use of rating unit: investment/ rental property with tenant in occupation

Judgment debt: \$10,000.00 (rates debt and costs).

Charge property. With a lesser amount of debt, and a tenant in occupation of the rating unit, other options for recovery should be explored prior to a rating sale. However, less leeway should be given

than a case of a private owner/occupier, as this is still a commercial enterprise. We would not recommend for example attachment orders against an owner/investor but if assets can be seized and sold that should be explored prior to a rating sale.

Conclusion

There are various options available to the Council to collect unpaid rates debts. Our advice is that the Council consider the various options and create a policy to enable staff to determine which option to use on a case by case basis. Whether the decision to proceed to a rating sale is seen as a management issue for (senior) staff or a governance issue for Council, is itself a decision for Council.

The reason a policy should be adopted is to protect the Council (and Council staff) and ensure a correct decision-making process. Council action (or inaction) is always subject to judicial review. All policy must allow for exceptions, and cases can be assessed on a case by case basis. But if a policy is *not* adopted, and each case is considered each time afresh, there is a very serious risk that decisions will be made which conflict and which benefit certain individuals in a manner which cannot be justified to a Court on review.

There is not a one size fits all approach to decide which option is best. The decision will depend in numerous factors, including (but not limited to) the financial position of the debtor, the personal situation of the debtor, whether the debtor has tried to pay in the past, or ignored Council, whether the debtor is a company or a private individual, whether the land is a home or an investment, the size of the debt.

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