

Enforcement

Welcome to our webinar.

The session will start shortly.

Enforcement

Questions Welcome

- Freezing Orders
- Third Party Debt Orders
- Contempt
- Taking Control of Goods
- Charging Orders
- Attachment of Earnings
- Insolvency Proceedings

Freezing Orders

- Interim injunction that prevents a party from disposing of, or dealing with, assets they control, so as to defeat any eventual judgment. Also invariably requires R to immediately provide information on his assets, giving the value, location, and details of such assets.
- CPR 23 and 25, Practice Direction to CPR 25A. Application will invariably be before a High Court judge.

Freezing Orders

- Main question is whether it is “just and convenient” to grant a freezing order (s.37(1) SCA 1981);
- Need to show risk of dissipation. Non exhaustive examples of factors which might show there is a risk are:
 - Where R uses complex offshore structures (*Holyoake v Candy* [2017] EWCA Civ 92;
 - Any failure by R to file accounts when obliged to do so;
 - R’s credit record;
 - Any indication of intention to dispose of assets (even if made in without prejudice discussions, such evidence falling within the unambiguous impropriety exception to the without prejudice rule: *Motorola v Hytera Communications* [2020] EWHC 980 (Comm));
 - Evidence of dishonesty;

Freezing Orders

- Delay will weaken applicant's case (delay defeats equities, and further undermines case that R is likely to dissipate: *Cherney v Neuman* [2009] EWHC 1743 (Ch));
- Not to be sought lightly, given invasive nature;

Freezing Orders

What can be frozen?

- Not necessary that R owns the asset, but sufficient that they have control over the assets (*BTA Bank v Ablyazov* [2015] UKSC 64).
- Whether in England & Wales or worldwide (by virtue of s.37(1) SCA 1981, per *Derby & Co Ltd and others v Weldon and others* (No 6) [1990] 3 All ER 263);
- Assets may be jointly owned, or held on trust for R (*Pugachev* [2015] EWCA Civ 139).
- Assets frozen will usually be limited to a maximum sum, related to value of possible future judgment debt, although can exceptionally be a general order extending to all of R's assets if, for example, claim is a complex fraud claim where total value cannot yet be determined, or where there is a trust claim and there is uncertainty as to which assets are subject to trust.
- R will need living allowance.
- Chabra Order: Application can be made against a third party where assets held by third party against whom Applicant has no claim, if it appears to hold assets on behalf of the Defendant against whom Freezing Order has been made (*TSB Private Bank International SA v Chabra* [1992] 2 All ER 245).

Freezing Orders

What is required?

- Affidavit with exhibits, showing
 - Why it was necessary that the application be without notice;
 - Evidence of the respondent's assets;
 - Evidence of a real risk of dissipation;
 - A good arguable case
 - Any defences (full and frank disclosure)
 - Insolvency issues (which may remove the need for a freezing order)
- Undertakings to
 - Compensate R for loss caused, if court decides appropriate (applicant will also need to provide evidence of the Applicant's financial standing to support the undertaking in damages);
 - Issue Claim Form as soon as practicable;
 - Serve on R copies of Affidavits and exhibits; claim form, and application notice for continuation of the order;
 - Pay the reasonable costs incurred by party other than R which have resulted from finding out whether that person holds any of R's assets, and if court finds loss should be compensated.

Freezing Orders

With or Without Notice?

- Almost always without notice.
 - Requires a return date;
 - Importance of Note;
 - Onus on Applicant to facilitate Return Date;
 - Starting point is 7 days.

Freezing Orders

Important points

- Time for making an application? Usually before proceedings, but can also be sought
 - post judgment to preserve assets until enforcement can be completed, or
 - During proceedings if misconduct emerges such as attempts to fabricate evidence to conceal assets.
- Will be granted more readily post-judgment than before, particularly where:
 - R fails to respond to correspondence, and fails to make payment ordered;
 - Judgment makes findings of dishonesty against Defendant (Griffin Underwriting Ltd v Varouxakis [2021] EWHC 226 (Comm));

Freezing Orders

Important points

- Other things to be aware of:
 - Bankruptcy petitions;
 - Specific provisions in the relevant court guides, e.g. Chancery Guide, Queen's Bench Guide, Commercial Court Guide;
 - Duty of Full and Frank Disclosure, to include:
 - Matters of fact or law that may be adverse to the applicant, including any defence that may be open to R (*Bank Mellat v Nikpour* [1985] FSR 87)
 - Circumstances where an order for disclosure may infringe R's privilege against self-incrimination (*Den Norske Bank v Antonatos* [1998] EWCA Civ 649)
 - Failure to comply can result in costs on indemnity basis against Applicant.

Third Party Debt Orders

Third Party Debt Orders

- CPR 72
- Allows judgment creditor (i.e. Claimant) to secure sums owed by third parties (e.g. a bank with whom the debtor has a current account) to a judgment debtor (i.e. Defendant). Generally made without notice to avoid risk of dissipating assets.
- Difficulty in ascertaining bank accounts held by judgment debtor. Often useful following disclosure of bank accounts by respondent to a post-judgment freezing order where respondent has failed to satisfy judgment debt and/or interim costs order.

Third Party Debt Orders

Third Party Debt Orders

- Alternative means of obtaining this information is by making an application under CPR 71 (by Form N316, or N316A for a corporate officer) seeking an order that judgment debtor come to court to be questioned, on oath, by a court officer about their means, including employment, wages, bank and building society accounts.
- If a judgment debtor fails to attend court, or refuses to take the oath at the hearing or to answer any question, the court will refer the matter to a High Court judge or Circuit Judge who may then hold the person in contempt of court (CPR 71.8 and PD 71, para 6).
- Weakness with this approach is that judgment debtor may realise that judgment creditor intends to enforce against their bank accounts.

Application that judgment debtor come to court for questioning

- Application can be made any time after judgment or order obtained (CPR 71.2 and HMCTS explanatory leaflet EX 324. Judgment debtor does not have to be behind with payments;
- Can be made even if enforcement has been stayed (*Sucden Financial Ltd v Fluxo-Cane Overseas Ltd* [2009] EWHC 3555 (QB));
- Amount of judgment or order need not yet be determined, e.g. where order is only for costs for sums yet to be agreed or assessed (*W Nagel (a firm) and another v Pluczenik* [2019] EWHC 3126 (QB)), because the power to order attendance is not an enforcement procedure, but a process for obtaining information to allow judgment creditor to decide what means of enforcement should be used, or whether it is worthwhile at all;
- No jurisdiction to make these orders against non-party;
- Application can validly be served on judgment debtor abroad, because court has already ascertained jurisdiction over the judgment debtor in the proceedings (the time for disputing jurisdiction is within 14 days of filing an acknowledgement of service, by CPR 11), although the court will not have this power against officers of a corporate debtor outside the jurisdiction;

Third Party Debt Orders

Procedure

- 2-stages: First an application for an interim third party debt order; and Second an application for final TPDO;
- Application by Form N349, verified by a statement of truth, with *ex parte* applications subject to duty of full and frank disclosure;
- Application should generally be issued in court which issued judgment (CPR 72.3(1));
- Will be dealt with by a master or district judge on paper, without a hearing., at the interim stage.
- Final hearing then fixed not less than 28 days after interim TPDO (CPR 72.4);
- Process freezes debt in the hand of the third party;
- Final order obliges the third party to pay debt to judgment creditor.
- Applicants should first check whether the Debt Respite Scheme (Breathing Space) moratorium or mental health moratorium applies, and check whether any insolvency restrictions are in place.
- Court is unlikely to exercise discretion to make final order if it would give judgment creditor preference over other creditors.

Third Party Debt Orders

- Both third party and debt must be within the jurisdiction (CPR 72.1(1), *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64)
- Debt must be due, i.e. third party debtor must have an “*immediate and unconditional obligation*” to pay the judgment debtor a certain sum (*Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2014] EWCA Civ 1603).
- In addition to bank accounts, debts can include:
 - Rent liability (*Mitchell v Lee*) [1867] LR 2 QB 259;
 - Unascertained debts;
 - Judgment debts, providing they are liquidated as opposed to unliquidated damages.
 - Cannot include salary not yet payable, which should be pursued under the Attachment of Earnings Act 1971.
 - Cannot be obtained for a joint bank account (*Hirschorn v Evans* [1938] 2 K.B. 801)

Pensions

- *Blight and others v Brewster* [2012] EWHC 165 (Ch): Applicant victim of fraud and forgery by defendant, sought to enforce an order for payment of a judgment debt. Moss QC held that the jurisdiction under s.37 of the SCA 1981 extended to granting an injunction or appointing a receiver to help the enforcement of an judgment. The overriding consideration was the demands of justice.
- Equitable remedy of appointing a receiver by way of execution was available in respect of "*rights tantamount to ownership*", and the appointment of an equitable receiver was not limited to assets that are amenable to execution at law. Accordingly, the judge held "*There appears to me to be a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw monies needed to pay their creditors*", and ordered that the defendant delegate to the claimants' solicitor the power of election and for the court to authorise the solicitor to make the election in the defendant's name, and that immediately following the election, the sum payable from the pension fund would be subject to a third party debt order.
- Important to qualify that equitable remedies are discretionary, so will depend on facts of the case.

Contempt of Court applications

- CPR 81.3.
- In the context of enforcement, contempt applications will almost certainly be made in existing proceedings under CPR 23.
- Court's permission is required to make a contempt application where it relates to an allegation of knowingly making a false statement in any document verified by a statement of truth, or in a disclosure statement (CPR 81.3(5)(b));
- Shouldn't be ruled out, but Applicant's need to be aware of extensive costs, and limited benefit.

ATTACHMENT OF EARNINGS

Sources of law

- Attachment of Earnings Act 1971
 - s.1(2)
 - “(2) The county court may make an attachment of earnings order to secure—
 - (b) the payment of a judgment debt, other than a debt of less than £5 or such other sum as may be prescribed by rules of court.”
- CPR Part 89

ATTACHMENT OF EARNINGS

What is an AE order?

Directs a judgment debtor's employer to pay a specified portion of his or her wages or salary to the collecting officer of the court.

The collecting officer will then pay that money to the judgment creditor.

CPR r.89.7

- “(14) No attachment of earnings order may be made to secure the payment of a judgment debt if—
 - (a) the debt is of less than £50; or
 - (b) the amount remaining payable under a judgment is less than £50.

ATTACHMENT OF EARNINGS

Why apply for an order?

An order is most useful where the judgment debt is not of great value and the judgment debtor has few, if any, assets. At least the judgment creditor should receive some regular payments towards satisfaction of the debt.

ATTACHMENT OF EARNINGS

When application is inappropriate

An order is not available if debtor is:

- Self-employed
- Unemployed
- Member of armed forces
- Merchant seaman

ATTACHMENT OF EARNINGS

The application

- Must make application of County Court Money Claims Centre (CCMCC). CPR r.89.3.
- Use Form N55
- Court serves application and N56 (“reply form”) on debtor to him or her to file within 8 days of service: r.89.5

NB If debtor does not comply, may have to show cause why should not be imprisoned: see r.89.8. If fails to attend, may be imprisoned: AEA s.23

- Court may send to employer a request for statement of debtor’s earnings: r.89.6

ATTACHMENT OF EARNINGS

The order

- R.89.7

“(1) If the court officer—

- (a) receives the debtor’s reply form; and
- (b) has sufficient information to make an attachment of earnings order,

the court officer may make such an order.”

Note: the officer will tell the employer how much of the debtor’s earnings are “protected”.

ATTACHMENT OF EARNINGS

Reconsideration of order

R.89.7

(3) Where an order is made under paragraph (1), the creditor or the debtor may, within 14 days of service of the order and giving reasons, apply on notice for the order to be re-considered.

(4) Following receipt of an application in accordance with paragraph (3), the court officer must transfer the application to the debtor's home court for the hearing of the application.

(5) The creditor and the debtor must be given not less than 2 days' notice of any hearing fixed pursuant to paragraph (4).

(6) On hearing an application under paragraph (3), the District Judge may confirm the order or set it aside and make such new order as the District Judge thinks fit.

ATTACHMENT OF EARNINGS

Discharge, variation and lapse

AEA s.9

“(1) The court...may make an order discharging or varying an attachment of earnings order.

(4) Where an attachment of earnings order has been made and the person to whom it is directed ceases to have the debtor in his employment, the order shall lapse...

(5) The lapse of an order under subsection (4) above shall not prevent its being treated as remaining in force for other purposes.”

TAKING CONTROL OF GOODS

Sources of Law

- Tribunals, Courts and Enforcement Act 2007
 - Part 3 Enforcement by taking control of goods
 - Schedule 12
- Taking Control of Goods Regulations 2013/1894
- CPR Part 84

TAKING CONTROL OF GOODS

Power to take control of goods

- TCEA s.62

Applies Sched 12 (taking control of goods and selling them to recover a sum of money) where an enactment, writ or warrant confers power to use the procedure in that Schedule.

Such a power may be exercised only by using the procedure in Sched.12.
The 2013 regulations give more detail

This regime has replaced the old system of execution against goods (writs of fieri facias and warrants of execution).

TAKING CONTROL OF GOODS

What is the process?

High Court issues a writ of control

County Court issues a warrant of control

That enables a certified enforcement agent to be instructed to attend the debtor's premises and take control of goods.

There is the ultimate power to sell the goods and use the sale proceeds to discharge the judgment debt.

High Court enforcement officer

County Court bailiff

TAKING CONTROL OF GOODS

Procedure

1. Enforcement agent gives notice of enforcement to debtor (Sch.12 para.7).
2. (a) Debtor either makes contact with EA and pays debt; or
(b) debtor enters into an arrangement for payment which is maintained; or
(c) EA enforcement agent takes control of goods.
3. EA may take control of goods in four ways (Regulation 13)
 - secure goods on premises;
 - secure goods on a highway;
 - remove goods and store them elsewhere;
 - or enter into a controlled goods agreement.

EA may do that only within the prescribed period (Sch.12 paras 8 and 9) i.e.12 months from notice of enforcement (reg.9) and on any day of the week (reg.12) between 6 a.m. and 9 p.m. (reg.13).

TAKING CONTROL OF GOODS

Procedure

Having taken control EA,

1. sells the goods at public auction (Sch.12 para.41);
2. uses proceeds of sale to pay the amount outstanding, including debt and costs (Sch.12 para.62).

TAKING CONTROL OF GOODS

Creditor's application

CPR r.84.3

Applications must be made in accordance with Part 23 procedure, as modified by Part 84.

- If no pre-existing proceedings, must apply to County Court.
- If pre-existing proceedings, apply to High Court or the County Court in accordance with rule 23.2 [location of county court].

NB High Court and County Courts Jurisdiction Order 1991/724 Art.8

- If enforcing £5,000 or more - only High Court
- If enforcing less than £600 - only County Court

TAKING CONTROL OF GOODS

EA applications to court: CPR Pt 84

- to shorten the period for notice to the debtor of enforcement (r.84.4)
- to extend the prescribed period within which the enforcement agent may take control of goods (r.84.5)
- to take control of goods during prohibited periods (r.84.6)
- to enter, re-enter or remain on premises outside permitted hours (r.84.7)
- to re-enter premises giving less than the minimum period of notice (r.84.8)
- to issue a warrant in respect of specified premises and to use reasonable force to enter premises (r.84.9)
- to use reasonable force in respect of goods on a highway (r.84.10)
- to sell other than by public auction (r.84.11)
- to deal with abandoned goods (r.84.12)
- to obtain exceptional disbursements (r.84.14).

TAKING CONTROL OF GOODS

Exempt goods

EA cannot take control of all debtor's goods.
Sched. 12 para.4(1) excludes “exempt” goods.

Regs 4 and 5 define exempt goods.

e.g.

- tools and equipment of trade up to a value of £1,350
- clothing, bedding, furniture, household equipment reasonably required to satisfy basic domestic needs (examples given in reg.14(1)(b))

TAKING CONTROL OF GOODS

Remedies of Debtor

- TCEA Sched.12 para.66

If (a) EA breaches schedule or (b) writ or warrant is defective, debtor may bring proceedings for return of goods or damages

Debtor makes application under CPR r.84.13.

TAKING CONTROL OF GOODS

Controlled goods agreements

TCEA Sched.12 para.13 (4)

A controlled goods agreement is an agreement under which the debtor—

(a) is permitted to retain custody of the goods,

(b) acknowledges that the enforcement agent is taking control of them,
and

(c) agrees not to remove or dispose of them, nor to permit anyone else to,
before the debt is paid.

TAKING CONTROL OF GOODS

CGAs requirements

- Entered into between EA and debtor who is not a child or debtor's agent, aged 18 or over: reg. 14
- Signed by EA and debtor or debtor's agent: reg. 15(2)
- Contain prescribed information: reg. 15(3)
- EA must give signatory a copy of signed CGA: reg. 15(4)

TAKING CONTROL OF GOODS

Interference with procedure

If debtor wrongfully interferes with controlled goods and creditor suffers loss, creditor may bring a claim against the debtor in respect of the loss:
Sched.12 para.67

Sched. 12 offences

- Intentionally obstructing EA: para.68(1)
- Intentionally interfering with controlled goods without lawful excuse: para.68(2)

CHARGING ORDERS

Initial considerations

- Is the judgment debt due and enforceable?
- What resources does the debtor have?
- If a house, who lives there? What might be the equity?
- Who other than the debtor might object?

CHARGING ORDERS

Sources of law

- Charging Orders Act 1979
- Case law
- CPR Part 73 and 73PD.

CHARGING ORDERS

Charging Orders Act 1979

Section 1

“(1) Where, under a judgment or order..., a person (the “debtor”) is required to pay a sum of money to another person (the “creditor”) then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.”

“Sum of money” includes the sum awarded under the judgment plus accrued interest and costs. It does not include an award of damages to be assessed nor does it apply to costs to be assessed.

CHARGING ORDERS

Kinds of charging order

Section 1

“(1) Where, under a judgment or order..., a person (the “debtor”) is required to pay a **sum of money** to another person (the “creditor”) then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.”

“Sum of money” includes the sum awarded under the judgment plus accrued interest and costs. It does not include an award of damages to be assessed nor does it apply to costs to be assessed.

CHARGING ORDERS

Kinds of charging order

- a charging order on land (the most common);
- a charging order on securities;
- a charging order over a judgment debtor's interest in a fund in court; and
- a charge over the judgment debtor's interest in partnership property.

CHARGING ORDERS

Appropriate court

COA section 1(2).

If the relevant judgment or order was made by the High Court and exceeds the county court limit of £5,000, apply in either the High Court or county court. In any other case, the appropriate court is the county court. The jurisdiction of the County Court to make a charging order over land is unlimited.

Where an application for a charging order is to be made to the County Court, it must be made to the County Court Money Claims Centre, unless the application is for a charging order over an interest in a fund in court: r.73.3(2).

CHARGING ORDERS

Three stages

- Application for an interim order.
- Application for final order.
- Application for sale.

An application for a charging order may be made without notice:
r.73.3(1)

CHARGING ORDERS

Interim order

- Where an application is made to the CCMCC r.73.4 applies.
- Initially the application will be dealt with without a hearing.
- Initially it will be dealt with by a court officer provided that:
 - (a) the application is only for a charging order on the judgment debtor's interest in land; and
 - (b) none of the exceptions listed in paragraph (4) apply.

Those exceptions include a case where the court officer considers that the application should be dealt with by a judge.

CHARGING ORDERS

Reconsideration

- A party may request that a decision by a court officer be reconsidered by a District Judge.
- File request for reconsideration within 14 days after service of notice of the decision. It appears that the request may just be made in writing by letter. There is no reference to an application under CPR 23 being required in the CPR.
- Reconsideration will take place without a hearing. (CPR 73.5)

CHARGING ORDERS

Discretion

- The court has a discretion whether or not to make an interim charging order: COA s.1(1) and CPR r. 73.4(2) but in practice the court usually grants an interim order and exercises its discretion at the hearing of the application for a final charging order.
- The applicant should set out evidence of non-payment and, if applicable, the failure of any other methods of execution he or she has attempted to employ. The court is unlikely to make an order if it would be oppressive to do so, for instance, if the debt is too small to justify the remedy.

CHARGING ORDERS

Effect of interim order

COA s.3(4)

“a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand.”

- So, once the order is made, the effect is that an equitable charge is imposed over the debtor’s interest in the land.

CHARGING ORDERS

Subsequent steps

- Save for CCMCC cases the court will fix a hearing to consider whether or not a final charging order should be made. The hearing will be at least 21 days after the date of the interim charging order.
- In CCMCC cases, an interim charging order will not automatically require a hearing date for it to be made final. Rather, anyone who has been served and who objects to the application has 28 days from service to file an application.
- If an objection is received, then the matter will be referred to a district judge and the matter will probably be transferred to the debtor's home court (see CPR 73.10)

CHARGING ORDERS

Subsequent steps

The interim order must be served on the people listed in CPR r.73.7(7):

- the judgment debtor
- if the order relates to an interest in land, any co-owner;
- the judgment debtor's spouse or civil partner (if known)
- Such other creditors in the application or as the court directs (CPR 73.7(a)(d)).

CHARGING ORDERS

Judgment debtor's interest

- If the judgment debtor is the sole owner of the land the order should charge their legal and beneficial interest in it.
- If joint debtors hold the whole beneficial interest in the land then the legal estate held by the trustees (invariably the debtors themselves) should be charged (COA s.2; *Clark v Chief Land Registrar* [1994] Ch.370).
- If the judgment debtor is co-owner with someone else who is not a joint debtor, only the debtor's beneficial interest may be charged (*National Westminster Bank Ltd v Stockman* [1981] 1 W.L.R. 67).

CHARGING ORDERS

Registration

COA s.3(2)

“The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to charging orders...”

- To achieve priority over other unregistered equitable charges you must register the charging order. Since it is an equitable charge, it will be subject to any prior charges on the property.
- If the land is registered land, a charging order can be protected by either a notice or a restriction on the Land Register.
- Where the judgment debtor is a co-owner, it is usually more appropriate to lodge a restriction than a notice.

CHARGING ORDERS

Final hearing

- A person who objects to the court making a final charging order must file and serve written evidence not less than seven days before the hearing (CPR 73.10A).
- By r.73.10A(3)
“At the hearing the court may—
 - (a) make a final charging order confirming that the charge imposed by the interim charging order continues, with or without modification;
 - (b) discharge the interim charging order and dismiss the application;
 - (c) decide any issues in dispute between the parties, or between any of the parties and any other person who objects to the court making a final charging order;
 - (d) direct a trial of any such issues, and if necessary give directions; or
 - (e) make such other order as the court considers appropriate.”

CHARGING ORDERS

Discretion

- COA s.1(5)

“In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to—

- (a) the personal circumstances of the debtor, and
- (b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.”

- The court is likely to find undue prejudice to another creditor only where the applicant has been guilty of some sharp practice towards such a creditor: *British Arab Commercial Bank Plc v. Ahmad Hamad Algozaibi and Brothers Co* [2011] EWHC 2444 (Comm).

CHARGING ORDERS

Discretion

- The burden is probably on the judgment creditor to show why he or she needs the protection of a final order: See Pitchford L.J. (obiter) in *National Guild of Removers and Storers Ltd v. Jones and another* [2012] EWCA Civ 216.
- The court must, so far as possible do equity to all the various parties involved that is the judgment creditor, judgment debtor and all other unsecured creditors (*Roberts Petroleum Ltd v. Bernard Kenny* [1983] 2 AC 192).

CHARGING ORDERS

Discretion

- The court can take into account what has happened since the interim charging order (*Roberts v. Kenny* and also *Ropaigealach v. Allied Irish Bank plc* [2001] EWCA Civ 1790).
- The court can also take into account hardship that will be suffered by the judgment creditor if the charging order is not granted: *Harman v. Glencross* [1986] Fam 81 and *Kremen v. Agrest* [2013] EWCA Civ 4.

CHARGING ORDERS

Sale

- By r. 73.10C(1)

“Subject to the provisions of any enactment, the court may, upon a claim by a person who has obtained a charging order over an interest in property, order the sale of the property to enforce the charging order.”

- The claimant must use the Part 8 procedure: r.73.10C(4).

CHARGING ORDERS

Trusts of Land and Appointment of Trustees Act

If what has been charged under the charging order is the beneficial interest of the judgment debtor (which will be the case where the judgment debtor is a joint owner with another who is not a judgment debtor) the judgment creditor has sufficient standing to make an application for an order for sale under s.14 TLATA 1996 (see e.g. *Midland Bank Plc v Pike* [1988] 2 All E.R. 434; a case on s.30 Law of Property Act 1925 which has been replaced by s.14 TLATA). That is because he or she is a person who has an interest in property subject to a trust of land.

CHARGING ORDERS

Trusts of Land and Appointment of Trustees Act

“15 Matters relevant in determining applications

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

- (a) the intentions of the person or persons (if any) who created the trust,
- (b) the purposes for which the property subject to the trust is held,
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary.

CHARGING ORDERS

S. 15, Trusts of Land and Appointment of Trustees Act

- For the courts general approach see the judgment of Neuberger J in *Mortgage Corp v Shaire* [2001] Ch. 743.
- The section does enable the court to give greater weight than was formerly the case to the welfare of a minor who lives at the property.
- However it is a powerful consideration that a creditor is being kept out of their money and is not receiving proper recompense; see *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 F.L.R. 809 where a sale was ordered.
- The interests of a commercial creditor will usually take priority over those of a family in occupation.

CHARGING ORDERS

Sole ownership For the courts general approach see the judgment of Neuberger J in *Mortgage Corp v Shaire* [2001] Ch. 743.

- Ss 14 and 15 TLATA are irrelevant where the land itself is charged as it will be in a case where the judgment debtor is the sole owner: *Wells v Pickering* [2002] 2 P. & C.R. DG23 held the interests of the judgment debtor's children as occupiers of the property should not be taken into account. The matters for the court's consideration under RSC Ord.88 (the predecessor of r.73.10C) extend to proprietary interests but not to the welfare needs of those in occupation.
- Conversely: *Close Invoice Financing Ltd v Pile* [2008] EWHC 1580 (Ch) and *Fred Perry Holdings Ltd v Genis* [2015] 1 P. & C.R. DG5.

Winding Up

Not form of execution of judgment

Re Company (Nos.22 and 23 of 1915) [1915] 1 Ch 520

Phillimore LJ at 528:

‘In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding-up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding-up than any other creditor.

[The creditor] is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors, as in a creditor's suit for the administration of the estate of a deceased debtor or in a bankruptcy.’

Winding Up

Not form of execution of judgment

Ridgeway Motors (Isleworth) Ltd v Alts Ltd [2005] 1 WLR 2871
Mummery LJ at para. 29:

‘A winding up petition is neither (a) ... nor (b) a process of execution of the judgment on which the petition is based. It is sui generis, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a pari passu basis: see, for example, In re Lines Bros Ltd [1983] Ch 1, 20’

Winding Up

Grounds for Winding Up

Insolvency Act 1986

S.122(1) A company may be wound up by the court if—

(f) the company is unable to pay its debts

s.123(1) A company is deemed unable to pay its debts—

(b) if, in England and Wales, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part

Winding Up

Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021

In force 1.10.21.

“Relevant period”: from 1.10.21 to 31.3.22 (para.4)

During relevant period creditor may not present a petition for w-up unless 4 conditions met

Condition A: creditor is owed a debt by the company—

- (a) whose amount is liquidated,
- (b) which has fallen due for payment, and
- (c) which is not an excluded debt (rent or other sum under business tenancy unpaid by reason of financial effect of coronavirus)

Winding Up

Corporate Insolvency and Governance Act 2020

- Condition B: creditor has delivered written notice to the company in accordance with sub-paragraphs (4) to (6).
- Creditor must seek proposals for payment. If no satisfactory proposals within 21 days, creditor intends to present petition
- Condition C: no satisfactory proposal for payment within 21 days
- Condition D: debt is £10,000 or more

Any Petition then issued should state that the requirements of para.1 of Schedule 10 to CIGA are met and that either no proposal has been made or provide a summary of the reasons why the proposals are not to the creditor's satisfaction: para.2(2).

Winding Up

Judgment debt challenged - appeal

- El Ajou v Dollar Land (Manhattan) Ltd [2005] EWHC 2861 (Ch)

Judgment for €2.5m+. Permission to appeal with conditional stay. Terms of stay not fulfilled. Judgment creditor petitioned for w-up.

Held: Court had ruled that debt due. So petitioner was unquestionably a creditor. That the judgment might be overturned on appeal was no defence to the petition.

Depending on facts, respondent might obtain a stay of petition pending appeal. See e.g. Re BLV Realty Organisation Designs Ltd[2010] EWHC 1791 (Ch)

Adjourn petition?

Winding Up

Judgment debt challenged - stay pending appeal

Woodley v Woodley (No.2) [1994] 1 WLR 1167

Bankruptcy case. Court ordered a husband (judgment debtor) to pay £60,000 to his wife (judgment creditor), but stayed execution of the order pending an appeal.

C.A held that the judgment order remained ‘...due from him in pursuance of any order or judgment...’ throughout the period the stay of execution applied.

Balcombe LJ at 1178:

‘The debt of £60,000 became due from the husband ...in pursuance of the order ... and did not cease to be so due merely because the procedure for enforcing the order by way of execution was stayed pending the appeal.’

...

‘...I entertain no doubt that the existence of the stay of execution did not affect the liability of the husband to pay the lump sum order during the period [date of order] to [date debtor assets vested in Trustee in Bankruptcy]...’

Winding Up

Bankruptcy

- Insolvency Act s.267(2)
- Creditor may present a petition provided
- the amount of debt or the aggregate amount of debts is £5,000 or more
- the debt is for a liquidated sum and is unsecured
- the debt is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
- there is no outstanding application to set aside a statutory demand served (under s.268) in respect of the debt or any of the debts.

Winding Up

Statutory demand or not

IA 1986 s.268

(1) For the purposes of section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—

(a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as “the statutory demand”) in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules, or

(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the petitioning creditor, or one or more of the petitioning creditors to whom the debt is owed, has been returned unsatisfied in whole or in part.

Winding Up

Challenge to judgment debt

Insolvency (England and Wales) Rules 2016 r.10.24(2)

“If the petition is brought in relation to a judgment debt, or a sum ordered by any court to be paid, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment or order, or that execution of the judgment has been stayed.”

An application for permission to appeal is not a “pending appeal”: *Barker v Baxendale-Walker* [2018] EWHC 1681 (Ch).

Woodley v Woodley (No.2) [1994] 1 WLR 1167

Winding Up

Advantages of threat of bankruptcy

- Usually concentrates debtor's mind
- Procedure to make a debtor bankrupt is relatively quick (depending on debtor's response and court dates)
- Once bankrupt, the debtor is no longer in control. Insolvency practitioners are. The trustee will gather the assets.

Winding Up

Disadvantages

- Bankruptcy is for benefit of all creditors not just the judgment creditor. So dividend rather than whole debt will be recovered.
- Once the order is made, the process of recovering a dividend is slow and expensive.
- The process might entail further dispute and so further cost and delay.

Questions

- Christopher Arnull, Deloitte
 - Can parties control enforcement in contracts?

- Rohit Sthalekar, LMK Law
 - How does the current COVID-19 situation affect enforcement on commercial premises where Landlord has a judgement for rent arrear

- Anne Saunderson, Fosters Solicitors
 - How best to enforce an Order for Pre-action Disclosure

- Carl Jaffer, MFN Claims
 - What is the best course of action when the defendant has not complied with the Court Order (provision of documentation)

Next Time

Assessment of Damages in Professional Negligence Claims

- Francesca O'Neill and Henk Soede

Wednesday 23rd Feb, 12pm