

## **When the Battle is Only Half Won: Enforcing Tribunal Awards**

This seminar endeavours to provide an analysis of the general methods of enforcement of Tribunal awards and procedure associated with this. It does not address equitable receivers, attachment of earnings or second stage enforcement by orders for sale or through insolvency.

In place of ‘Creditor’ or ‘Claimant’, these notes use the term ‘Employee’ which is intended to refer to a person with the benefit of an employment tribunal judgment or order awarding compensation in their favour. As a judgment or order may be obtained against an employer or third party (in Equality Act claims for example), ‘Debtor’ is used for the sake of convenience.

### **The Problem**

The Taylor Review recently reported that in England & Wales 34% of employees interviewed were found to have unpaid employment tribunal awards.<sup>1</sup>

In November 2013 the formerly known Department for Business Innovation & Skills reported only 46% of those with unpaid awards in England & Wales took enforcement action, being a total of 22% of all employment tribunal claimants.<sup>2</sup>

Even after enforcement, only 49% of those who took enforcement action received their award in full, with 16% receiving theirs in part and 35% receiving nothing. The most common reason cited was that the Debtor was insolvent, although half of those interviewed believed their employer was now trading under a different name or in a different location.<sup>3</sup>

The National Association of Citizens Advice Bureaux reported their services experience around 650 – 700 cases of non-payment each year.<sup>4</sup> They suggest there may be as many as one in ten parties with unpaid employment tribunal nationally, arguing the level is such to invoke the need for mechanisms for state compensation and enforcement for outstanding awards.<sup>5</sup>

### **Key Framework and Methods of Enforcement**

Employment tribunals are not responsible for enforcement of their awards. Successful employees must instead pursue their judgments through the civil courts.

S.15 Employment Tribunals Act 1996 (‘ETA’), with effect from 1<sup>st</sup> April 2009, provides-

*“Any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been registered in accordance with employment tribunal procedure regulations shall be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of the county court.”*

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<sup>1</sup> Good Work: The Taylor Review of Modern Working Practices, July 2017 page 62.

<sup>2</sup> Department for Business, Innovation & Skills. ‘Payment of Tribunal Awards’ Study, Nov 2013 page 39.

<sup>3</sup> *ibid* page 6.

<sup>4</sup> National Association of Citizens Advice Bureaux. ‘Evidence: The Cost of a Hollow Victory’, March 2005.

<sup>5</sup> National Association of Citizens Advice Bureaux. ‘Justice Denied: The Deliberate non-payment of Employment Tribunal Judgments by Rogue Employers’, October 2008.

S.142 Tribunals Courts & Enforcement Act 2007 ('TCEA') introduces provision regarding the recovery of sums payable under ACAS conciliated settlements by inserting s.19A into ETA. Consequently, with effect from 1<sup>st</sup> April 2009, ACAS conciliated settlement is enforceable by execution as if an order of the court. This does not apply if the Debtor obtains a declaration from an employment tribunal or county court that order would not be recoverable under the general law of contract.

With effect from 6<sup>th</sup> April 2014, Schedule 12 TCEA with Parts 83 and 84 Civil Procedure Rules 1998 (SI 1998/3132) ('CPR') provide the framework for writs and warrants of control of goods.

General rules concerning enforcement are to be found in CPR Part 70 with applications for orders for questioning under Part 71, Third Party Debt Orders under Part 72 and Charging Orders under Part 73.

CPR r.70(5)(1) & (2)(b) expressly apply the Parts 70 – 73 to decisions of the Employment Tribunal and settlements enforced as if they were Court Orders<sup>6</sup> but not to ACAS Arbitrations.

The Insolvency Act 1986 and Insolvency (England and Wales) Rules 2016 (SI 2016/1024) ('IR') govern actions relating to insolvency whether corporate or personal. Whilst insolvency itself is outside the scope of this note, the statutory demand regime will be explored.

Unless a rule, statute or practice direction states otherwise, the following enforcement methods covered by the seminar are available –

- Obtaining Information – A hearing is set before Court Officer or Judge to obtain information under oath to clarify assets for enforcement.
- Warrants/Writs of Control – A bailiff or High Court Enforcement Officer takes the Debtor's goods and sells them to recover the debt;
- Third Party Debt Order – Order directed to third party (usually a bank or building society) holding funds on behalf of the Debtor to initially freeze and then deliver the value of the debt
- Charging Order – Order fixing a charge to land, bonds, stocks or shares for the amount of the debt to preserve an asset that can be used to satisfy the debt. Monies can be received on sale
- Statutory Demand – Non-Court based statutory precursor to insolvency proceedings (i.e. liquidation and bankruptcy) and commonly used to establish the debtor is insolvent

One point is true of all enforcement methods – if a Debtor has no assets or income, enforcement will be of little use. If a Debtor is insolvent there are special rules for some employment awards/claims allowing potential recovery from the National Insurance Funds – this is outside the scope of this seminar.

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<sup>6</sup> Relating to settlements through ACAS settlements but are required to comply with s.19A ETA

## **Special Rules Regarding Enforcement Against Partnerships**

Partnership property may be enforced against in England & Wales subject to certain conditions (CPR 70PD6A.1) – Any person who is not part of a limited partnership may be enforced against if they have –

- Acknowledged service as a partner;
- Been served with a copy of the claim form;
- Admitted they were a partner at the material time by statement of case (see CPR 16); or
- Found by the Court to have been a partner at the material time (70PD6A.2).

A partner may not be pursued by enforcement if they are member of limited partnership or the member is ordinarily resident outside the jurisdiction when claim form was issued unless –

- They acknowledged proceedings as a partner;
- Were served within jurisdiction with the claim form as partner; or
- Were served outside of England and Wales with the permission of the court in accordance with Section IV of CPR Part 6 (CPR 70PD6A.3)

Otherwise enforcement may not commence without the permission of the Court.

### **A. Registration**

The first part of the enforcement process is to register the judgment with the civil courts.

Before April 2009, employees would have to register tribunal awards with the county court who would convert them to county court judgments, specifying a new date for repayment (usually fourteen days from the making of the county court judgment) and enforcement would have to take place after the date of the newly created county court judgment expired.

With effect from 1<sup>st</sup> April 2009, s.15 ETA prescribes a more streamlined system –

- Tribunal awards do not receive further period on registration before being enforceable;
- Tribunal awards are usually payable 14 days from their making (r.66 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (SI 2013/1237));
- Decisions only need be lodged with the county court with the information prescribed by the practice direction (‘PD’) to Part 70 CPR (r.70(2A)(a)-(b));
- Once filed the Debtor will have their name registered and available for public inspection on the Register for Judgments, Orders and Fines (Reg.8(1)(d) and 9A(b) Register of Judgments, Orders and Fines Regulations 2005 (SI 2005/3595)). The Register is considered by creditors (i.e. banks and building societies) if considering offering credit.

#### *The Application for Registration*

Application to register is made simply by filing the decision and prescribed information with the Court (r.70.5(2A)(a)-(b)). No fee is payable for the application.

The prescribed information is completed on Form N322B or, N322A (the latter being in the case of ACAS conditional settlements) (70PD4.1).

Form 322B requires the Employee set out the following –

- The amount of the original award;
- The calculation of interest on the award;
- Amounts of monies paid towards the award and the balance remaining unpaid together with any costs claimed;
- The signing of the statement of truth on the Form by the Employee or their Solicitor;
- The decision or ACAS settlement (as the case may be) must be attached to the Form.

The Form is sent to the Court where the debtor resides or carries on a business unless stated otherwise in an enactment, rule, practice direction or as ordered by the Court (r.70.5(4)(b)).

An order is required from the county court for an ACAS conditional settlement – namely where the settlement requires the Employee to have taken an action in addition to discontinuing or not commencing proceedings (S.19A ETA and r.70.5(3)-(7A) CPR).

If an award is intended to be enforced by way of writ or warrant of control, a combined N471 Form in the case of a Tribunal award or N471A in the case of an ACAS settlement is used (CPR 70PD4.1A).

## **B. Obtaining Information from Debtors (Part 71 CPR)**

Whilst not technically an enforcement method, this mechanism allows an Employee who has a judgment registered with a county court to require the Debtor or Officer of the Debtor (in the case of a corporate debtor) to attend for questioning by the Court and to provide information for the purposes of enforcement.

Details of the mechanism are set out in the HMCTs Form EX324 *‘How do I apply for an order? Order to obtain information from a person who owes you money’*

### *The Application for Order to Obtain Information from a Debtor*

Applications are made by completing Form N316A in the case of a judgment or order against a company or N316 in the case of a judgment or order against an individual with fee of £55 or completed application for fee remission on Form EX160.<sup>7</sup>

The Form N316A must be completed by inserting the required information including –

- Name and address of the Debtor;
- The sum outstanding;
- Any specific questions required to be asked of the Debtor;
- Any specific documents the Employee wishes the Debtor to produce;

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<sup>7</sup> For guidance on completing the EX160 consideration should be given to the guidance notes in Form EX160A

- If the Debtor is a company, specify the name and position of the officer of the Debtor whom the Employee is seeking to have questioned (this may be a director, company secretary or any officer of the Debtor. If partnership it is any one of the partners);
- The statement of truth must be signed

#### *Court's Action on Receiving the Application*

If granted the court will issue an order to the Debtor or named company official specifying date, time and place of examination requiring they attend, produce at court the documents specified and answer on oath any requests as the court requires (r.71.2(5)-(6); 71PD2.1).

The Order will include the following warning –

*“If you the within-named [name of debtor/company official] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized” (CPR r.71.2(7))*

#### *Service*

The Order must be personally served on the person required to attend, unless otherwise specified, not less than 14 days before the scheduled hearing (CPR r.71.3(1)). Service may be effected by county court bailiff, High Court Enforcement Officer or the Employee or person acting on the Employee's behalf.

The Employee must inform the Court not less than seven days before the hearing if they have been unable to serve the Debtor (CPR r.71.3(2)).

The Employee must file affidavit of the person serving order giving details of how and when the order was served, how much remains outstanding and further or within the same affidavit stating either the Debtor or company officer has not requested an amount of money for travel expenses or that such expenses as requested have been paid (CPR 71.5(1)). This must be filed not less than 2 days before the hearing or on the day if attending in person (r.71.5(2)).

If the Debtor/company officer requires they may request within 7 days of service the Employee pay reasonably sufficient amount to cover travel expenses to and from court (71.4(1))

#### *The Hearing*

Unless otherwise ordered the hearing takes place before a court officer (r.71.6(2)). Compelling reasons are required if a judge is sought and this must be specified on the N316A Form.

For Companies – the Court Officer or Judge will record answers to questions on Form EX141, incorporating standard questions (including information about the Debtor's current operational and financial status, its assets, property and liabilities). They will also, require in addition to documents requested in by the N316A Form, certain standard documents comprising –

- Bank statements;
- Share certificates;
- Hire purchase and similar agreements;

- Outstanding bills owed to and by the Debtor;
- Two years' worth of accounts including current management accounts; and
- Court orders on which monies are still owed

For Individuals – the Court Officer or Judge will record answers to questions on Form EX140, which includes standard questions. They will also be required to provide information in documents or otherwise concerning –

- Dependants;
- Employment status;
- Earnings from employment or, if self-employed, annual turnover and amounts drawn from businesses;
- Property owned by the Debtor;
- Council tax paid by the Debtor;
- Income derived from lettings, savings, investments and assets;
- Details of other debts or court orders

In either case the Debtor or company officer is required to confirm if they have any offer to make for payment and to certify answers are correct. If they refuse this will be recorded

### *Sanctions*

If a Debtor or company officer fails to attend, refuses to take oath or answer questions or otherwise fails to comply, the court officer or district judge refers the matter to a Circuit Judge or High Court Judge. If, on referral, the Judge is satisfied with the procedural steps required of the Employee have been completed, he may make a committal order for contempt (CPR r.71.8(2) - (3)) suspended, provided the Debtor or company officer attend a rescheduled hearing and complies with terms of original order and committal order (r.71.8(4)(a)).

If the Debtor or company officer fails to comply again they may be arrested and brought before Judge to determine whether they should be committed for contempt (r.71.8(4)(b)).

### *Other Measures of Obtaining Information*

Ss.95-105 TCEA contain powers for both the High Court and county courts to deal with applications for information from Government departments but these procedures at the time of writing are yet to be brought into force.

## **C. Taking Control of Goods (CPR Parts 83 – 85)**

The action of taking control of goods is the colloquialism to the mechanism involving either a county court bailiff or High Court Enforcement Officer seizing goods belonging to debtor which are sold (usually at public auction) to satisfy the debt.

There are two different means of achieving taking control of goods - warrants of control (previously 'warrants of execution') which are enforced by county court bailiff and writs of control (previously writs of fi fa) which are enforced by High Court Enforcement Officer.

The CPR following the Civil Procedure (Amendment) Rules 2014 (SI 2014/407) now dictate the procedure for both actions under Part 83 (on the general provisions for both actions) and Part 84 (which addresses the specifics of enforcement by taking control of goods).

### *Jurisdiction*

Whether a warrant or writ of control can be used is dictated by the value of the debt –

- For awards of less than 600 only a warrant of control is available;
- For awards of between £600 - £4,999 the Employee may choose either a warrant or writ of control;
- For judgments of over £5,000 only a writ of control is available to an Employee. (Article 8(1) High Court and County Courts Jurisdiction Order 1991 SI 1991/724)

### *Fast Track*

From 1<sup>st</sup> April 2010 Employees seeking to enforce by taking control of goods may make use of the 'Fast Track Scheme'. The Scheme, operated by the run by Registry Trust Ltd (who operate Register of Judgments, Orders and Fines) involves the assignment of a High Court Enforcement Officer to the case, who pursues the award of Employee's behalf. It often represents the cheapest and most convenient method of enforcement.

The Employee commences the Fast Track process by completing a Form EX727 and paying the fee, currently £66, or application for fee remission on Form EX160, to the Registry Trust Ltd with the Employment Tribunal decision or a certified copy of it.

On receipt of the papers and fee the Registry Trust Ltd then allocate the case to High Court Enforcement Officer under supervision of solicitor. The Officer then files an N471 (or N471A as the case may be) and at the same time obtains a writ of control before attempting to take control of the Debtor's goods. Useful frequently asked questions are set out in the Form EX727.

If the High Court Enforcement Officer is successful they will take additional goods to cover the balance of their fees. If partially successful, they will deduct their fees in proportion to the amount recovered. If unsuccessful, the Employee loses their initial fee but incurs no other cost.

Whilst Government Study in 2013 noted that the introduction of Fast Track had not changed the rate of recovery of judgment debts,<sup>8</sup> the Registry Trust Ltd reported recently that in 72 of the 176 cases allocated to the Scheme in the first half of 2017 were successful.<sup>9</sup>

### *Warrants and Writs of Control (Non-Fast Track)*

Employees can elect not to use the Fast Track and apply for a writ or warrant themselves.

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<sup>8</sup> Department for Business, Innovation & Skills. 'Payment of Tribunal Awards' Study, Nov 2013

<sup>9</sup> Registry Trust Ltd. 'Fall in the number of Tribunal Awards', 14<sup>th</sup> March 2018

A warrant or writ does not require a judicial decision (unless permission is required) and notice to the debtor is not initially required unless the court directs this (CPR r.83.2(5)). In addition, although leave is required if executing alongside an application for an attachment of earnings for example (s.8(2)(b) Attachment of Earnings Act 1971), application may often be made in conjunction with other enforcement mechanisms.

Permission is required where the judgment is over 6 years old, the Debtor has died or there has been other change affecting liability, where post death of the Debtor the goods are in the hands of executors or administrators, where the goods are in the hands of receiver or sequestrator, where there are conditions on remedy or where the writ is in aid of another writ (CPR r.83.2(3)).

If unsuccessful, a second application for permission can be made but should only be undertaken if there is fresh material not before the court (*W T Lamb and Sons v Rider* [1948] 2 KB 331)

### *Considerations*

It is essential to consider before an application is made, whether the Debtor has failed to pay in the time allotted or has otherwise fallen behind in an instalment plan (CPR 83.9(5)(b)) and whether the debtor has goods to enforce against.

### *Application for Writ*

Application is made by Form N293A, with the Employee completing Parts 1 and 3 of the Form.

Part 3 requires, among other things, the details of an individual enforcement officer or direction to an unnamed enforcement officer of the postcode of the Debtor's residence or place of business of business, the amount of the judgment debt together with costs and interest less any amount received from the Debtor.

The Form is sent to the county court where the judgment was registered (CPR 40.14A; Queens Bench Guide [23.4.10 – 23.4.14]) enclosing the following –

- The judgment or order on which the writ is to enforce or an office copy with certificate received on registering the judgment with the county court;
- If required and obtained, the order granting permission;
- Where a judgment is against a State (as defined by s.14 State Immunity Act 1978), evidence the State has been served in accordance with CPR r.40.10 and that judgment has taken effect;
- The Court Fee (currently £66 – see EX50 Form);

On receipt of the Form, a Court Officer completes Part 2, seals it and returns it to the Employee.

The Employee on receipt of the returned N293A Form completes a draft Form 53 writ of control to be sealed by the High Court and sends this with the sealed N239A Form to the High Court or District Registry.

There have been difficulties with Court Officers refusing to complete Forms or delaying the process. If this occurs, the Senior Master's Practice Note on Enforcement in the High Court of 14<sup>th</sup> December 2015 recommends an application for transfer to the High Court is made to District Judge on notice.



Once the sealed writ is received the Employee must either apply sending a sealed writ to the Sheriffs Lodgement Centre or similar body or to the National Information Centre for Enforcement c/o the Registry Trust Ltd, 153-157 Cleveland Street, London W1T 6QW. The latter will automatically allocate a High Court Enforcement. A fee is often payable for the service (around £75).

Amounts received after the Writ has been sealed should be notified to the High Court Enforcement Officer as soon as practicable (CPR 70PD7.1).

Separate writs should be used if the judgment sought to be enforced includes order for “costs to be assessed” – one for the principle sum and one for the costs when assessed (CPR r.83.5).

#### *Application for a Warrant*

A warrant application is made using Form N323 to the county court hearing centre where the judgment or order was registered or such centre as it was transferred to (CPR 83.15) with –

- The tribunal judgment and certificate of registration;
- The court fee, currently £110 (please check Form EX50 for changes from time to time);
- A stamped and addressed envelope if Employee wants to receive confirmation the warrant has been issued.

Where the judgment is for payment of money with “costs to be assessed”, a separate warrant of control should be issued – one for the principle sum and one for costs once they have been assessed (CPR r.83.5)

If appropriate documents have been filed, the warrant is sealed by court officer from which point it is ‘issued’. This is usually within ten working days of receipt. The county court will then allocate a bailiff. For further details please consider EX322 Form.

#### *Costs Against the Debtor*

Fixed costs are available against the Debtor for the obtaining of a writ (currently £51.75) and warrant (currently £2.25 for debts greater than £25) plus the court fee (CPR r.45.8). Whether the costs of a permission application are added are at the court’s discretion (CPR r.44.2).

High Court Enforcement Officers’ fees are recovered and are recoverable on fixed rate based on the stage enforcement proceedings have got to and additional fee as percentage of the money recovered taken from proceeds of sale.

#### *Time Limit*

The Employee has a period of twelve months in which to enforce a writ or warrant of possession, although time may be extended on application to the Court (Reg.9 Taking Control of Goods Regulations 2013 (SI 2013/1894) (‘2013 Regulations’).

#### *What Happens on Enforcement of the Writ or Warrant*

The writ or warrant provides power to enter ‘relevant premises’ without a warrant if the bailiff or High Court Enforcement Officer reasonably believes that they are the place or one of the places where the Debtor usually lives or carries on a trade of business (TCEA Sch12 para.14(6))

On entry and discovery of 'Goods' the bailiff or Officer undertakes one of the following –

- Secure any goods found on premises;
- Secure any goods on a highway if found there;
- Remove the goods to another location a reasonable distance from where they were taken
- Enter controlled goods agreement whereby Debtor retains custody, but acknowledges control has been taken and agrees not to dispose or permit another to do so until the debt has been paid (para 13(4) Sch.12 TCEA; Reg.19 2013 Regulations)

The bailiff or Officer then prepares an inventory, values the goods and sells them at best price they can reasonably be obtained for after a minimum period of 7 days unless shorter period is agreed with the Debtor with notice to him of where sale will take place (Regs. 35 & 37 – 38 & 40 2013 Regulations; para 36(1) – 37(1) & para 39 TCEA)

'Goods' are defined as "property of any description, other than land" (para 3, Sch.12 TCEA). They do not include the following-

- Goods not owned by debtor – i.e. hire purchase or conditional sale
- Trust assets, subject to certain exceptions;
- Interests in land and fixtures upon land;
- 'Exempt goods' – including certain items for sleeping, cooking, cleaning, telephones or vehicles, animals or for disabled or business use;
- Other specific exemptions include partnership goods, assets of transport companies or chattels of a tenant debtor subject to landlords rent recovery;
- Goods on premises not subject to the power of enforcement and goods outside of England and Wales;
- Crown property to which separate procedures apply outside the scope of this seminar;
- Goods already seized under another writ or warrant of control;
- Also cases against enforcement of Debtor under special circumstances – a vulnerable person or a child or goods on a highway which might cause risk to public health (Regs.10 – 11 2013 Regulations).

The bailiff or Officer is not subject to special rules regarding enforcement before 6am and after 7pm unless permission is obtained (CPR 86.4) and prevented from enforcing without permission on Sundays, Good Friday or Christmas Day.

Whilst they cannot take such action at domestic premises generally, Officers or bailiffs are entitled to use reasonable forces to secure entry to commercial premises (Sch.12 paras 17-19A TCEA). This does not extend to use of reasonable force against persons (para 24(2) Sch.12).

There is further power to re-enter premises if there has been a breach of a 'Controlled Goods Agreement' (sch.12 para 16)

### *Suspending Warrants*

The county court has power to suspend a warrant on application made by Form N245. The High Court has power to stay or suspend for periods and on conditions by application made by Form N244. The details and tactics for such an application are beyond the scope of this seminar

For more information on bailiffs and High Court Enforcement Officers, please consider Form EX345 or the High Court Enforcement Officers' Associate (<http://hceoa.org.uk>).

### **D. Third Party Debt Order (CPR Part 72)**

A Third Party Debt Order (formerly known as a 'garnishee order') is a court mechanism which effectively freezes and transfers money owed by a Third Party (usually a bank a bank account) to the Debtor from the Third Party to the Employee rather than the Debtor. HMCTS has published details in EX325 'Third Party Debt Orders & Charging Orders'.

An impediment of this action is that an order cannot be made without details of the Third Party. However, in the case of the bank, full details of the Debtor and name of Bank should suffice.

Many Employees should be able to identify at least the name of the bank by clarifying where their wages have been received from. Banks to which pay has been received have in the past been willing to disclose the name of a debtor's bank – it stands to be seen whether this practice will continue under the General Data Protection Regulation (EU) 2016/679. Employees may need to use the Obtaining Information from Debtors procedure before making an application.

### *Pre-Application Considerations*

Before making for Third Party Debtor Order application, Employees will want to be confident-

- Of at least the basic details of a third party – i.e. name & registered address of a bank;
- That the third party owes a debt to the debtor – i.e. that a bank account is likely in credit;
- That the title to the third party's debt is held by the Debtor alone and not jointly held with another party (*Hirschhorn v Evans* [1938] 2 KB 801, CA).

### *Application for a Third Party Debt Order*

Application for a Third Party Debtor Order is made by Form N349 which requires certain information to be completed, including –

- The details of the Third Party alleged to hold money for the Debtor; if a bank or building society, the form requires details including the address of the head office, particular branch, account and sort code, name and address of the person to whom owes the debt and the grounds for that belief;
- If only some of the details are known, the Employee must mark a box on the Form confirming the same;
- Details of any other applications for Third Party Debtor Orders made by the Employee for the same debt;
- Any other person who has a claim to the money held by the Third Party;

- Sign the statement of truth;
- Enclose a Court Fee of £110 in respect of each Third Party subject of the application (see EX50 Form in respect of Court fees which change from time to time) or application for fee remission Form EX160.

### *The Interim Order*

When the application is received, a district judge will consider whether to make an order on paper without a hearing (CPR r.72.4(1)). If made the order will provide –

- A specific amount of money the Third Party must retain – the balance of the debt with interest and fixed costs inclusive of the application fee (CPR r.72.4(3));
- The date fixed for hearing to consider whether to make the order final, which shall be not less than 28 days from when the original order is made (CPR r.72.4(5));
- An order directed to the Third Party stating it is not to make any payment that reduces the amount owed to the Debtor to less than the amount specified (CPR r.72.4(2))

### *Service*

On receiving a sealed copy of the Interim Order, the Employee must ensure service of the Interim Order, Completed Form N349 and any supporting documentation on the following –

- The Third Party/Third Parties not less than 21 days before the date of the hearing; and
- The Debtor not less than 7 clear days before the date of the hearing (r.72.5(1));
- If the debt is due from a partnership, service must also be effected on a member of the partnership within England & Wales, a person authorised by a partner or some other person having control or management of the partnership business (72PD3A.2).

The rationale for the disparity in dates is to ensure that sufficient notice is given whilst allowing for the opportunity for the Employee to notify the Third Party before the Debtor to ensure the latter does not remove his monies from the Third Party before they are bound to retain it.

Either the Employee serves Debtor and Third Party or they can apply to the Court to carry this out. If the Employee serves, they must file a certificate of service (users would be advised to use the N215 Form) not less than two days before the hearing or at the hearing (CPR r.72.5(2)).

### *Steps After Service – the Third Party*

Once served on the Third Party the order is binding on them (r.72.4(4)). If the Third Party is a bank or building society, they will conduct a search of all accounts held by it in the Debtor's name and disclose to Court and Employee not less than 7 days before the hearing the following–

- The number of the account;
- Whether the account is in credit;
- If the account is in credit, whether the balance is sufficient to cover the amount specified by the Order;
- If the amount is insufficient to discharge the amount in the order, to disclose the precise balance (CPR r.72.6(1) & (2))

If the Third Party is unable to comply, because the debtor does not hold an account with them for example, they must inform the Court and Employee of this (CPR r.72.6(3))

If the Employee objects to the Third Party's assertion that no debt is owed, they must file and serve notice stating the basis on which the Third Party's assertion is disputed (r.72.8(3) & (4)).

If the Third Party objects to the order being made final they must (not less than 3 days before the hearing) file and serve notice stating this with written evidence in support (CPR r.72.8(1))

#### *Steps After Service – the Debtor*

If the Debtor is an individual and the effect of the Interim Order causes 'hardship', they may apply to the Court to exercise its discretion to make a 'hardship payment order'. This provides where the Court is satisfied hardship will be suffered by the Order, it may authorise payment(s) to be made from the funds in the Third Party's possession subject of the Order (CPR r.72.7).

If the Debtor objects to the order being made final they must (not less than 3 days before the hearing) file and serve notice stating this with written evidence in support (CPR r.72.8(1)).

#### *Steps After Service – the Court*

If made aware that another person has a claim to the sum subject to the Interim Order, whether from the Debtor, Employee, Third Party or otherwise, the Court will serve that person with a copy of the application, order and notice of hearing (CPR r.72.8(5))

#### *Hearing*

At the hearing the Court may make any of the following orders (in addition to its general case management powers such as the power to adjourn) –

- Make the Interim Order final;
- Discharge the interim order and dismiss the application;
- Decide any issues in dispute between the Parties or with any other person having a claim to the frozen monies or direct a trial of such with directions (CPR r.72.8(6)).

If the Interim Order is made final it will be enforceable against the Third Party as with an order for payment of any other monies (CPR r.72.9(1)). By paying the monies subject to the Order to the Employee the Third Party is discharged from its debt to the Debtor to the extent of the amount paid, even if the debt is later set aside (CPR r.72.9(2)-(3)).

### **E. Charging Order (Part 73)**

A Charging Order is a court mechanism securing an amount due under a judgment or order on property of the Debtor. HMCTS has published useful details on Charging Orders in its Form EX325 'Third Party Debt Orders & Charging Orders'.

A Charging Order operates by placing a charge of the amount under the judgment or order on the Debtor's land, securities, interest in a fund in court or interest in partnership property.

The effect of a Charging Order does not provide the amount under the judgment or order to the Employee (this is achieved by subsequent application for Order for Sale under CPR r.73.10C)

but safeguards it and can operate to allow the Employee to receive their money before the Debtor on sale of the property, subject to priority to earlier charges including mortgages.

### *Pre-Application Considerations*

It is important, before proceeding with a charging order application, to be confident the Debtor owns the property in question. Most commonly the property is land – often title can be clarified on HM Land Registry’s website (<https://www.gov.uk/government/organisations/land-registry>)

### *Application*

Application for a Charging Order is made for a charging order on land by Form N379 or for a charging order on securities by Form N380. Both requires certain information in addition to the Parties’ details and details of the judgment including and enclosures –

- Details of the security or land proposed to be charged;
- The Debtor’s interest in the security or land to be charged;
- Details of other creditors of the Debtor which the Employee is aware of;
- Details of other parties with an interest in the security or land; and
- If concerning land- attaching Official Copy of the Land Registry Entries to the Property;
- Attaching the court fee, currently £110 (please consult Form EX50 which details the fees as they do change from time to time) or application for fee remission Form EX160

Application may be made for a single charging order concerning more than one judgment debt or order against the Debtor (CPR 73.3(4)).

The N379/N380 Form and enclosures are issued in the County Court Money Claims Centre if concerning most matters in the county court (CPR 73.3(2)) or, if seeking charge on funds in court, to the county court where the funds are lodged (s.1(2) Charging Orders Act 1979).

The application may be made without notice (CPR 73.3(1)) which is used in the vast majority of applications to ensure the Debtor does not charge or sell the property before an order is made

### *The Interim Order*

If the application relates to land, the Court will usually place it before a Court Officer who will consider making an order on paper without a hearing (CPR r.73.4(2)-(3)), unless one of the following circumstances are apparent for which a Judge will assess the application –

- The property is held by the Debtor on Trust and the judgment or order sought to be secured is against the Debtor as Trustee (per s.2(1)(b)(i) Charging Orders Act 1979)
- The application is for a charging order on the interest of a partner in the partnership property under s.23 of the Partnership Act 1890;
- It relates to judgment/order made before 1<sup>st</sup> October 2012 payable by instalments; or
- Where the officer otherwise considers the application should be dealt with by a judge. (CPR 73.6(2)).

If before a Court Officer, they may make an Interim Order on land to which the application relates. If before a Judge, they may make an Interim Order over the Debtors interest in the property and, if necessary, transfer the matter to the Debtor's nearest county court for a fixing of a hearing to determine whether the Order should be made final for which the Court will serve notice of the hearing (CPR 73.4(5)-(6)).

If not in the County Court Money Claims Centre (i.e. because the interest is not in land) the matter is allocated to a district judge who may make an Interim Order –

- Imposing a charge over the Debtor's interest in the asset to which the application relates; and
- Fix a hearing to consider whether to make the charging order final (CPR 73.6(3))

#### *Steps After Receipt of the Order*

Once the order is received, the Employee is at liberty to register the charge. In the case of land, the Employee should apply to the Land Registry using form RX1 but would be well advised to use a conveyancer for the process.

A failure to register could affect priority of the charge – namely if another charge holder registers their charge before the Employee then they will take priority on sale of the property. This is particularly risky if the property is close to being in negative equity.

There is some debate as to whether there is a need to register both the Interim and then the Final Charging Orders. Although the process involves two separate orders, in reality there is really only one charge as the original interim order merely becomes unconditional on being made final. The Land Registry practice is to accept separate registrations but frequently parties register only the interim order.

Fees for registration are variable and the Employee should check with their conveyancer and the Land Registry's Website (<https://www.gov.uk/guidance/hm-land-registry-registration-services-fees>)

#### *Steps After Receipt of the Order Reconsideration*

A Party may request the decision of a Court Officer is reconsidered by District Judge by making application on N244 application notice within 14 days after being served with the decision of the application. Reconsideration takes place on the papers without a hearing (CPR r.73.5).

#### *Service*

Copies of the completed N379/N380 and any documents filed in support of it must be served by the Employee within 21 days of the Interim Order being made on –

- The Debtor;
- A co-owner of land (if any);
- The Debtor's spouse (if known);
- Such creditors identified in the N379/380 application or directed by the Court;
- If the order relates to a trust, on such trustee as the Courts direct;

- In the case of a charge on funds in court, the Accountant General at the Courts Funds Office; and
- If charged on securities then those parties listed in CPR r.73.7(7)(f) (r.73.7(1) & (7))

Where the application remains at the The County Court Money Claims Centre, the Employee must arrange for service himself and file a certificate of service (best done by completion of an N215 Form) in relation to each person served within 28 days of the Interim Order (r.73.7(2)).

Where an Interim Order has been made by or transferred to another court the above persons must be served not less than 21 days before the hearing, filing a certificate of service (with best practice again being the use of an N215 Form) not less than 2 days before the hearing or produce the same at the hearing (CPR r.73.7(5)-(6)).

#### *Steps After Service – the Debtor*

If the proceedings have not been transferred out of the Money Claims Centre, if the Debtor or any other person wishes to raise objection to the order being made final they must file and serve on the Employee written evidence stating the grounds of objection not less than 28 days after service of the interim order (CPR r.73.10(2)).

If objection is raised the Court must transfer the proceedings to the Debtor's nearest court for a hearing to determine whether the order should be made final and a notice of hearing in the Debtor's home court will be sent to out to the Parties (CPR r.73.10(3)-(5)).

If no objection is raised, a Judge will consider making the order final on paper without the Parties and may make any of the following orders –

- Making the Interim Order final;
- Discharging the Interim Order and dismissing the application;
- Deciding any issues in dispute between the Parties;
- Directing a trial; or
- Making such other order as they think appropriate (CPR r.73.10(6)-(7)).

#### *Hearing*

At the hearing the Court may make any of the following orders on hearing the Parties –

- Make the order final
- Discharge the interim order and dismiss the application;
- Decide any issues in dispute between the Parties or any other person who objects;
- Make such order as the court deems appropriate (CPR r.73.10A(3))

Judges will often expect to be provided with a list of creditors and official entries of the Land Registry Title at the hearing so it may be wise to bring such documents to Court.



## **F. Statutory Demand – Insolvency Proceedings**

If the Debtor is a company or individual the Employee may serve a statutory demand for the amount due as a precursor to demonstrating that the Debtor is insolvent. The mechanism is a precursor to insolvency proceedings (which are not addressed by this seminar) but can have the effect of placing pressure on the Debtor to discharge the judgment/order to avoid the same.

A Debtor is insolvent if they are ‘unable to pay their debts as and when they fall due’, a statutory definition which depends on whether the Debtor is a company or individual –

- A company is ‘unable to pay its debts as and when they fall due’ if among other things, they have been served with a statutory demand for a sum of £750 or more and a period of three weeks has expired without payment (s.123 Insolvency Act 1986);
- An individual is ‘unable to pay its debts as and when they fall due’ if a statutory demand has been served for an amount of £5,000 or over and a period of three weeks has expired (s.268, s.267(2)(a) & (4) Insolvency Act 1986)

### *The Statutory Demand*

A statutory demand in respect of company Debtors must –

- Be dated and authenticated by the Employee or person authorised to make demand on their behalf and, if by the latter, stating this and stating the connection to the Employee;
- Headed ‘Statutory demand under s.123(1)(a) of the Insolvency Act 1986’ in the case that the Debtor is a registered company or ‘Statutory Demand under s.222(1)(a) of the Insolvency Act 1986’ in the case the Debtor is an unregistered company;
- Provide identification details for the Debtor;
- State the registered office of the Debtor (if any);
- State the name and address of the Employee;
- State either a statement the demand is made under s.123(1)(a) or under s.222(1)(a);
- State the amount of the debt and the consideration for it (or, if there is no consideration, the way it arises – i.e. by way of judgment in the tribunal registered with the Court);
- Provide details of the judgment or order, if the demand is founded on that;
- Provide the name and details of the original creditor if the debt was assigned;
- State that the Debtor must pay the debt claimed within 21 days of service of the demand on it after which the Employee may present a winding up petition unless the Debtor offers provide security for the debt and Employee accepts this or the Debtor compounds the debt with the Employee’s agreement;
- State the name of the individual with whom the officer or representative of the Debtor may communicate with a view to securing or compounding the debt;
- State the named individual’s address, electronic address and telephone number (if any)
- Make a statement that the Debtor has a right to apply to the court for an injunction restraining the presenting or advertising a petition for winding up of the Debtor;

- State the name of the court (and hearing centre if applicable) to which, according to the present information, the Debtor must make the application if they choose to do so;
- State any charge by way of interest with amount or rate of the charge and the grounds on which payment is claimed stating - (a) Any charge by way of interest of which notice had not previously been delivered as included in its liability and (b) any other charge accruing from time to time (r.7.3 IR)

A statutory demand in respect of an individual must –

- Be dated and authenticated by the Employee or person on his behalf and, if by the latter, stating this and stating their relationship to the Employee;
- Where the debt is payable immediately state “Statutory demand under section 268(1) of the Insolvency Act 1986” or where not immediately payable state “Statutory demand under section 268(2)”;
- Provide identifying details of the Debtor;
- State the name and address of the Employee;
- State the amount of the debt, and the consideration for it or, if there is no consideration, how it arises – i.e. by way of judgment of the tribunal registered with the county court;
- If the demand is made under s.268(1) Insolvency Act 1986 and founded on judgment or order, state the date of the judgment or order and court to which it was obtained;
- If the demand is made under s.268(2), a statement of the grounds on which it is alleged the Debtor appears to have no reasonable prospect of paying the debt;
- If the debt was assigned, details of the original creditor and any intermediary assignees;
- State that if the Debtor does not comply with the demand bankruptcy proceedings may be commenced;
- State the date by which the Debtor must comply, if bankruptcy proceedings are to be avoided;
- State the methods of compliance which are open to the Debtor;
- State that the Debtor has a right to apply to the court to have the demand set aside;
- State that rule 10.4(4) IR states which court such an application must be made, and name of the court or hearing centre of the county court to which, according to present information, the Debtor must make the application to if he wishes to do so;
- State any application to set aside must be made within 18 days of service on the Debtor;
- State that if the Debtor does not apply to set aside within 18 days or deal with the demand within 21 days the Debtor could be made bankrupt and Debtor’s property and goods could be taken away.
- Name one or more individuals with whom the Debtor can communicate with with a view to securing or compounding the debt to the satisfaction of the Employee and satisfy there is a reasonable prospect the debt will be paid when it falls due,

- State the postal address, electronic address and telephone number of the named individual;
- State the amount claimed in the demand includes charge by way of interest not previously delivered to the debtor as a liability of the Debtor's or any other charge accruing from time to time, separately identifying the amount of rate of charge separately identified and grounds on which payment of it is claimed;
- If the Employee holds security in respect of the debt, the full amount of the debt should be specified but the demand must specify the nature of the security and value which the Employee puts upon it at the date of the demand and demand must claim payment of the full amount of the debt, less the specified value of the security (r.10.1 IR).

There are also special rules on demands served out of the jurisdiction which are outside the scope of this seminar (r.10.1(10) IR).

*Next Steps After Service – Debtor*

The Debtor may apply to restrain any petition if they are a company and may apply to set aside the statutory demand if they are an individual. In either case, on receipt of the application, the Court will list a hearing. The scope of such hearings are beyond this seminar.

*Next Steps After Service – Employee*

If the Debtor fails to take action or any action they take is unsuccessful in preventing progression on either the statutory demand the Employee make take second stage enforcement action by way of insolvency proceedings. This step is however beyond the scope of this seminar

20<sup>th</sup> June 2018

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