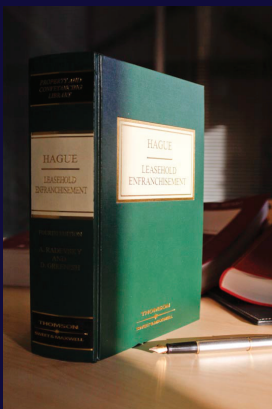


Guide to Enforcement



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INTRODUCTION

This guide is the third in our series of articles examining and explaining various aspects of the litigation process.

Enforcement is one of the most important aspects of contentious proceedings, and something that clients usually wish to discuss right at the outset of matters. This makes sense – there is little point in spending time and money pursuing somebody in circumstances where any judgement is unenforceable for one reason or another.

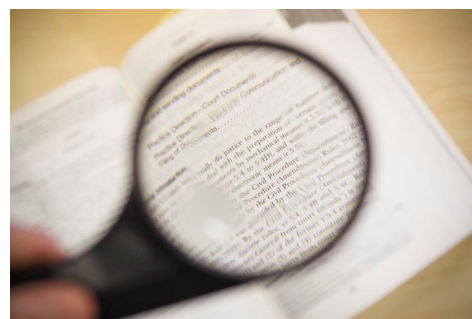
Before any action is taken, therefore, it is good practice for the creditor to first satisfy themselves that the debtor is good for the money. If the debtor has little or no assets then court orders are worthless from a practical point of view – it does not matter how many judgements ordering a debtor to pay that a creditor has obtained if the debtor simply does not have the ability to discharge them.

One option open to judgement creditors is to call debtors into court for questioning. A court officer will question the debtor about their full financial and employment situation, which will include details of any savings, investments, properties owned, money owed to the debtor and any other outstanding debts.

It is contempt of court for the debtor to either refuse to attend or to provide false information, which could result in a prison sentence.

If you have obtained a court order against a debtor, what can you do to enforce this order? Hopefully, the debtor will simply pay your debt but, increasingly, this is not the case.

This guide therefore examines the various enforcement options open to creditors to secure payment of monies owed.



1. BAILIFFS

One option open to judgement creditors is to use the county court bailiff service.

Once a judgement has been obtained, the judgement creditor can apply for what is known as a Warrant of Execution by paying the appropriate fee.

For this fee the bailiffs will contact the debtor and request payment, informing the debtor that they will attend at their premises if no payment is forthcoming. Thereafter, if the debtor does not pay the judgement debt the bailiff will arrange attendance.

Bailiffs have no right to force entry, so if a debtor refuses to allow the bailiff entry to their property the bailiff cannot force their way in.

However, if a debtor allows the bailiff access or if the bailiff can gain access via an open channel (for example walking into a shop or an office, being invited in, climbing over a fence or through an unlocked door or window) they can take what's known as "walking possession" of certain items of the debtor's property. When a bailiff takes walking possession the legal title of the goods in question passes to the bailiff, which means that the debtor is prevented from selling or otherwise disposing of the goods.

The bailiff has the option of removing the goods immediately, but usually does not do so and instead allows the debtor a period of time in which to raise the money necessary to discharge the debt. If the debtor is unwilling or unable to raise these funds then the debtor can seize the goods to sell at auction.

Not all goods at the debtor's premises can be so charged. Goods necessary for the debtor's livelihood (i.e. tools etc) together with goods not actually owned by the debtor (i.e. joint property or property owned by another but stored at the debtor's premises) cannot be taken.

Sending in the bailiffs is not a guarantee of payment. As can be seen above, debtors can simply refuse to allow bailiffs access to their property and even if access is granted the bailiffs can do very little if there are no goods worth seizing. Sometimes, however, the mere presence of bailiffs is enough to elicit a payment.

The fee for the Warrant of Execution is recoverable from the debtor and is added to the judgement debt. However, in circumstances where the debtor cannot pay then the creditor has to absorb this fee as well. The bailiff will usually make three attendances upon the debtor before giving up.

2. HIGH COURT ENFORCEMENT OFFICERS

An alternative method of enforcement is to utilise the services of High Court Enforcement Officers (formerly known as the sheriffs). Enforcement officers differ from bailiffs in several important respects.

As with the bailiffs, enforcement officers can only be used to enforce judgement debts, so the creditor must first obtain a court order against the debtor before proceeding along this route.

Perhaps the most important distinction is that enforcement officers can only be used to recover debts greater than £600.00.

In order to utilise the services of enforcement officers the creditor must obtain a writ of fieri facias (commonly abbreviated to fi. fa.) from the High Court (and pay the court fee, currently £50.00). This writ is a court order addressed to the enforcement officers instructing them to seize goods to the value of the judgement from the debtor.

The matter is then simply passed to the enforcement officers, who will take over conduct of the matter.

Enforcement officers are paid by results and so will not make any money unless they make a recovery from the debtor and, unlike bailiffs, enforcement officers are not civil servants but rather private individuals. This may therefore motivate enforcement officers to apply increased effort in order to secure recovery.

The fees of the enforcement officers (and the court fee for the writ of fi. fa.) are recoverable from the debtor in addition to the value of the judgement debt.

The enforcement officers will make contact with the debtor and attempt to elicit a payment. If no payment is forthcoming, they will attend at the debtor's premises and seize

goods owned by the debtor to cover the debt. The vast bulk of enforcement officers' fees only become payable after attendance is necessary, which is a fact that often has the effect of encouraging debtors to pay. The costs of attendance can run to several thousand pounds.

One point to note is that enforcement officers are entitled to recover their fees before making a payment to the creditor. Therefore, if there is not enough money to pay everybody in full it is the creditor, and not the enforcement officers, who will lose out. However, as enforcement officers work on a no recovery no fee basis, in the event that the debtor cannot discharge the debt then the only additional expense actually incurred by the creditor is the cost of the writ.

3. INSOLVENCY

Rather than sending bailiffs or enforcement officers to attempt to elicit a payment, a judgement creditor may choose to make a debtor either bankrupt (if the debtor is an individual or individuals in partnership) or, if the debtor is a company, have the company liquidated.

Bankruptcy and liquidation proceedings can be started in circumstances where the debtor owes at least £750.00, and the debt is liquidated (i.e. a specific sum of money is being sought rather than “damages”). If the money owed does take the form of an unliquidated sum then the creditor will need to obtain a court judgement for a specific sum before embarking on bankruptcy or liquidation proceedings.

Unlike the other enforcement options discussed in this guide, there is no requirement for the creditor to obtain a judgement before making a debtor bankrupt/insolvent if the above conditions are met.

To make an individual bankrupt or to put a company into liquidation the creditor should initially serve the debtor with a statutory demand. This is a formal document putting the debtor on notice that unless they pay the debt within 18 or 21 days then the creditor is at liberty to start insolvency proceedings. For this reason, statutory demands can have the effect of causing the debtor to make payment without the need for insolvency proceedings themselves.

However, if a debtor has a bona fide dispute and the statutory demand is not based on a court judgement then they can apply to have the demand set aside, and in these circumstances the court usually awards the debtor their legal costs in having the demand set aside. This dispute does not have to be a successful challenge but merely a bona fide argument against the debt. Therefore, if a creditor believes that there is any risk that the

debtor will not accept that the debt is owed then they are better going to court and obtaining a judgement before serving a statutory demand.

If a creditor serves a statutory demand and the debtor makes no challenge or payment within the 21 day period the creditor is then free to begin insolvency proceedings.

3.1 – Bankruptcy

Bankruptcy is appropriate for debtors who are individuals, or individuals trading in partnership.

A creditor will have to satisfy the court the debtor cannot pay their debts (a statutory demand not being paid is evidence of this), at which point the judge will make an order declaring the debtor bankrupt.

In bankruptcy, legal ownership of a debtor’s assets will pass to a Trustee in Bankruptcy, who has a duty to realise such funds as he can in order to pay off the debtor’s creditors.

Note that the Trustee’s duty is to secure payment for all creditors and not just the individual creditor who petitioned for the debtor’s bankruptcy. If there are not enough assets in a bankrupt debtor’s estate then such assets are there are shared out amongst the creditors proportionally by value.

Once an individual is in bankruptcy then there is an automatic moratorium on the creditor’s rights. This means that creditors must stop pursuing the debtor, and wait for the Trustee in Bankruptcy to make a payment unless they obtain the court’s permission to continue any action.

Under normal circumstances, a person will remain in bankruptcy for a period of twelve months, and the Trustee has that period of

time to realise any assets owned by the bankrupt for the benefit of the creditors.

The only exception to this rule is the bankrupt's residential property, which cannot be sold during the first twelve months following the bankruptcy order but then may be sold during in the following three years for the benefit of the creditors. If the Trustee receives an amount greater than the Bankrupt's debts then he must account to the Bankrupt for that surplus once the creditors have been paid.

Bankruptcy can have severe consequence for a debtor. Once a person has been made bankrupt then they may find it extremely difficult to obtain any kind of credit in the future, even after the period of bankruptcy has expired. Furthermore, a debtor loses all control over their own assets upon being made bankrupt. Finally, a bankrupt is responsible for the costs of the Petitioning Creditor together with costs of the Trustee in Bankruptcy, which can run to thousands of pounds.

3.2 – Liquidation

The liquidation process is the corporate version of the bankruptcy process. If a petitioning creditor can satisfy the court that the debtor company cannot pay their debts then the judge will make an order declaring the company insolvent. At this point, either an administrator or liquidator will be appointed.

Liquidation is a process whereby the liquidator realises all of the company's assets and then utilises any money received to pay off the creditors. Liquidators must pay off creditors in a strict statutory order, with fixed and floating charge holders having priority over unsecured creditors. Once a company has been liquidated it ceases to exist.

Administration is an alternative to liquidation. An administrator has broad powers to

continue running the company as he sees fit for the benefit of the company's creditors. Administrators may sell of parts of a

business, acquire new assets, make staff redundant or otherwise do anything that they believe would increase the creditors' return. If an administrator is unsuccessful in his attempts to save a business then a liquidator will be appointed.

The costs of liquidation and/or administration are payable by the debtor company.

As will all methods of enforcement, if a debtor has no or insufficient assets then a creditor will not make any or a full recovery following either the bankruptcy or liquidation process.

4. CHARGING ORDER

Another option available to a creditor is to apply for a Charging Order over a debtor's property. These are only appropriate, therefore, if a debtor owns a property with sufficient equity to cover the value of the debt.

If a creditor has obtained a judgement against a debtor but the debtor has refused or is unable to pay that judgement then the creditor can apply to the court for an order that the creditor's debt is charged against debtor's property. This Charging Order is registered at Land Registry on the title of the property, which means that the debtor will be unable to sell the property without discharging their indebtedness to the creditor.

In order to obtain a Charging Order the creditor must first obtain a judgement against the debtor. If the debtor does not satisfy this judgement then the creditor must make an application to court seeking a Charging Order. The court will then make an order for an Interim Charging Order which the creditor can forward to Land Registry to be placed on the debtor's title. Interim Charging Orders tend to be granted quickly without a hearing in order to protect the creditor's position as this prevents the debtor from selling their property quickly.

The court will then hold a hearing to make the Interim Charging Order final. Both the creditor and debtor are permitted to give evidence at this hearing, so the debtor has an opportunity to try to persuade the court why their property should not be charged. The court would not make the Charging Order final if the debtor has since discharged the judgement, or perhaps if the debtor will be able to discharge the judgement in the near future the court may be willing to defer making the charging order final for a specified period of time to await such payment. However, if the debtor cannot provide any reasons why the court should not make the

order final then the court will order that the property be charged.

Therefore, Charging Orders often do not provide an immediate payment for the creditor but do protect the creditor's position in that the debtor is prevented from selling their property without discharging the debt.

Charging Orders are useful if a creditor does not want to go to the expense of starting insolvency proceedings against a debtor, or if a creditor is willing to give a debtor time to pay a debt but wants some kind of security.

5. POSSESSION

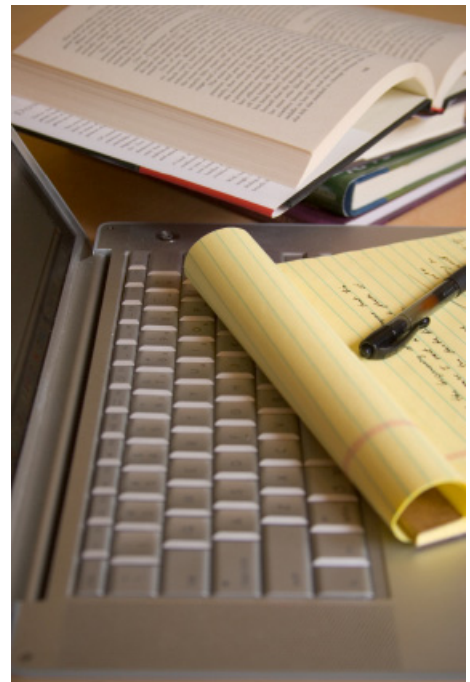
If a debtor is in occupation of a property owned or charged by a creditor and has fallen behind in their mortgage or rental payments then the creditor could seek to regain possession of their property. This essentially means that the debtor is forced to leave the property, which allows the creditor to regain control.

It is usually necessary for a landlord to obtain a court order before evicting a tenant/mortgagee from their property. The only exception to this is if a commercial tenant/mortgagee has a forfeiture clause in their lease/mortgage agreement. In such a clause is present a landlord can gain peaceable re-entry (for example by changing the locks when an occupier is away from the property). In all other cases an order from the court is necessary.

In order to obtain an order for possession the creditor must issue their claim with the court and obtain a hearing before a judge. The creditor will have to satisfy the court that the debtor has not fulfilled the conditions in the lease/mortgage. If the creditor can show this then the court will make an order for possession. The court will usually also make an order that the debtor repay any monies owed to the creditor, however tenants facing eviction are not usually in any position to pay such orders and chasing them for this money is therefore usually futile.

The creditor must then apply for a Warrant of Possession. The matters is then passed to the County Court bailiffs, who will contact the debtor requesting that they leave the property and thereafter attend at the property to forcibly remove the debtor if necessary.

The creditor can then take repossession of his property.



6. THIRD PARTY DEBT ORDER

A Third Party Debt Order is essentially an order directing a third party to transfer funds to a creditor. Third Party Debt Orders are therefore useful if the creditor knows that the debtor has funds in a bank account, or is owed money themselves by someone else.

A creditor must first obtain a judgement against the debtor before applying for a Third Party Debt Order. The court will only make a Third Party Debt Order in circumstances where the debtor has failed to pay the amount of the judgement when it was due, or failed to pay at least one instalment under the terms of the judgement.

To obtain a Third Party Debt Order the judgement creditor must apply to court. This application must contain of the amount outstanding, details of the third party and state whether anyone else has an interest in the money in question.

If claiming from a bank, a Third Party Debtor Order will only be granted if every named person on the bank account is also a judgement debtor.

If the judge is satisfied with this information they will make an Interim Third Party Debt Order, which “freezes” the debt. If the third party in question is a bank then this order will prevent the bank from allowing the debtor from withdrawing money from their account. If the third party owes money to the debtor then the order will prevent the third party from paying that money to the debtor.

It is important to note that Third Party Debt Orders are time sensitive. For example, if the debtor’s salary is paid into their bank account one day after the creditor obtained a Third Party Debt order freezing the bank account then the third party (the bank in this case) would not be prevented from releasing any money paid in after the date of the order.

If the third party is either a bank or a building society then they must conduct a search for any other accounts held in the sole name of the debtor, and report to the court the existence of all and any accounts and the amounts held in these account. The bank/building society is entitled to charge the debtor for these searches.

Shortly after the Interim Third Party Debtor Order has been made the court will arrange a hearing to decide whether to make the Order final and instruct the third party to pay the money to the creditor, or whether to dismiss the interim Order.

If the third party or debtor wishes to object to the Order being made final then they must provide written reasons not later than three days prior to the final hearing.

If the creditor believes that the third party owes money to the debtor and the third party disputes this then the creditor must file his written reasons for his belief with the court prior to the hearing.

If the judge is satisfied with the creditor’s account then they will make the Order final, and direct that the third party do pay the creditor from the funds owed to/held on behalf of the debtor.

If the debtor is an individual then they may make an application for a Hardship Order. A judge will grant a Hardship Order if the debtor can satisfy them that they/their family will suffer undue hardship as a result of the money being frozen.

It is important to remember that if the third party does not hold any of the debtor’s money, or is unable to pay the creditor, then the creditor will not receive anything.

7. ATTACHMENT OF EARNINGS

If the debtor is in paid employment then the creditor could seek an Attachment of Earnings Order in order to be repaid.

This is an order which will divert some of the debtor's salary from the debtor directly to the creditor.

In order to obtain an Attachment of Earnings Order the creditor must first obtain a judgement against the debtor. The court will only make an Attachment of Earnings Order if the debtor is an individual (rather than a company) and in paid employment. Attachment of Earnings Orders may not be made against members of the armed forces or merchant seamen (there are alternative mechanisms to extract money from such debtors).

If a creditor is unsure whether a debtor is in paid employment then there are several ways of seeking this information.

The easiest way is to ask the debtor's local court to search the Attachment of Earnings Index. The court will then check to see if there are any other Attachment of Earnings Orders made against a debtor and, if there is, then that debtor must be in employment. There is no fee for this service. Alternatively, the creditor could ask the courts to call the debtor in for questioning (as described above).

Once the creditor is satisfied that the debtor is in paid employment then they can apply for an Attachment of Earnings Order.

The court will then order the debtor to complete a form with details of their employment, income and outgoings. If the debtor fails to return this form then the court may order a bailiff to serve the debtor with the form and instruct them to complete it, or even issue a warrant for the debtor's arrest.

Once the debtor has completed this statement of means then an officer of the

court will consider what level of payment the debtor can afford to make, taking into account the cost of rent/mortgage, utility bills etc. If the debtor cannot afford to make any payment then no order will be made.

If the creditor does not agree with the level of payment then they can apply for the court officer's decision to be reviewed by a district judge.

If the court officer decides that the debtor can afford to make a payment then the Order will be made, which will set out the level of payment. The Order will be sent to the Centralised Attachment of Earnings System, who will be responsible for collecting the payment directly from the debtor's employer either weekly or monthly (in line with the debtor's usual salary arrangements).

If the debtor has more than one Attachment of Earnings Order made against them then a Consolidation Order may be made. The debtor, the debtor's employer or the creditor themselves may apply for a Consolidation Order. Furthermore, the court may make a Consolidation Order under its own volition.

Under a Consolidation Order the debtor's employer will make a single payment from the debtor's salary directly into court. The court will allow these payments to accrue until a given percentage of the debt is collected, and then make a payment out to the various creditors. Creditors usually receive less under Consolidation Orders than they would under normal circumstances.

The court make a charge of 10p for every £1.00 received under a Consolidation Order.

If the creditor does not wish to be included in a Consolidation Order then they must make an application to court where a district judge will listen to the creditor and then decide on an appropriate order.

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This article is intended as a general statement only and does not purport to render any specific advice, legal or otherwise. Specific advice on a particular problem should always be sought.

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