Civil Justice Council Enforcement Working Group

Call for Evidence 11 July - 16 September 2024

Organisation: Chancery Masters, High Court of Justice, Business and Property Courts of England and Wales ("B&PC")

CJC Enforcement Call for Evidence

The Call for Evidence closes on 16 September 2024 at 23:59.

Respondents do not need to answer all questions, if only some are of interest or relevance.

You must include the following information with your response:

Your response is (public/anonymous/ confidential):	Public
First name:	Zeenat
Last name:	Burns
Location:	London
Role:	Lawyer
Job title:	Chancery Lawyer
Organisation:	HMCTS
Are you responding on behalf of your organisation?	Responding on behalf of the Chancery Masters
Your email address:	[redacted]

Information provided to the Civil Justice Council: We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications, or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

The full list of Call for Evidence questions is below:

PLEASE SEE ANNEX A - LIST OF ENFORCEMENT OF DOMESTIC JUDGMENTS FOR REFERENCE (INCLUDING ORDERS FOR SALE IN CHARGING ORDERS). **THIS WORK IS NOT CONSIDERING POSSESSION ORDERS.**

RESPONSE ON BEHALF OF THE CHANCERY MASTERS

Introduction

This response is sent on behalf of the Chancery Masters. Regarding the enforcement of domestic judgments, the Chancery Masters have extensive experience of charging orders and third party debt orders, as well as experience of applications under Civil Procedure Rules, Part 71 – Orders to Obtain Information from Judgment Debtors, although as we explain below most applications for relief under Part 71 are transferred to the debtor's home court. It is very rare for us to deal with either warrants or writs of control.

The Chancery Masters have a wide jurisdiction but there are a few exceptions to this. The Chancery Masters do not deal with insolvency proceedings – that is the preserve of the Insolvency and Company Court Judges. We do not have jurisdiction in relation to contempt of court proceedings. We do not have jurisdiction to grant freezing injunctions – see Practice Direction 2B, paragraph 2. Note that Practice Direction 2B, paragraph 7 provides that where the court has made a freezing order under rule 25.1(f) and has ordered a person to make a witness statement or affidavit about his assets and to be cross-examined on its contents, unless the Judge directs otherwise, the cross-examination will take place before a Master or a District Judge. In practice, in the B&PC in London, such cross-examination invariably takes place before a Judge.

Some of the questions set out below do not relate to the work of the Chancery Masters, and therefore we feel unable to comment. These have been marked with N/A. Those questions that are applicable have been answered.

The key points we would make are found at questions 39 and 40 below.

Your experience and awareness of enforcement

1) Which enforcement methods do you have experience of, if any?

   A: We frequently deal with charging orders (including the making of a possession order following the making of a charging order), third party debt orders, and applications under CPR Part 71, as outlined above.

2) Are there any barriers you have experienced in seeking to enforce or satisfy a judgment and, if so, what were they?

   A: This is a matter for the parties seeking to enforce or satisfy a judgment to address.

3) Which of the attached enforcement mechanisms do you find to be most effective in obtaining a resolution, and why?

A: Although this is only an impression, provided that there is an asset over which a charging order can be made, and provided that there is sufficient equity in the property, charging orders are often an effective and comparatively straightforward means of enforcing a judgment.

4) Which of the attached enforcement mechanisms do you find to be least effective in obtaining a resolution, and why?

A: We do not routinely deal with all the different types of enforcement so are unable to comment.

5) Do you consider any of the attached enforcement mechanisms should be promoted as being more effective than others?

A: We do not routinely deal with all the different types of enforcement so are unable to comment. Further, we do not feel that it is the role of the judiciary to promote one means of enforcement over another.

6) Are there any enforcement mechanisms that you consider should be amended or varied to make them more appropriate for modern litigation from the perspective of either the creditor or the debtor?

A: Please see our general comments at questions 39 and 40 below.

7) Do you consider that there should be further measures attached to any of the current enforcement mechanisms to ensure greater fairness and/or protections for debtors?

A: Again, please refer to our general comments at questions 39 and 40 below.

8) Do you have experience of the court enforcement mechanisms interacting with debt collection standards and practices outside the court system?

A: No

9) Do you consider that the court enforcement mechanisms need to take into account debt collection standards and practices outside the court system and, if so, in what circumstances and in what ways?

A: Our preliminary view is that this is not necessary.

10) If court enforcement is to take into account debt collection outside the court system, what practical steps do you consider should be undertaken?

A: N/A

Supply of information about potential judgment debtors

11) What steps, if any, do you consider the court could and should undertake to encourage greater engagement of potential judgment debtors (given the high number of default judgments)? [NB the Civil Justice Council (CJC) is reporting separately on pre-action protocols (PAP) including the debt protocol and the PAP is therefore not addressed in this list of questions.]

A: A general issue, which we expand upon below, is whether too much enforcement work is still concentrated in the High Court. Potential judgment debtors may be more willing to engage with proceedings in their local county court, rather than the B&PC.

12) Should the court require details of a defendant at the commencement of proceedings in order to ascertain whether a defendant could satisfy a potential judgment? (For example, by specific questions being including in the Directions Questionnaire, including details of any debts being enforced outside the court system);

A: Our preliminary view is that generally this is a matter best left to the parties as the proceedings develop. Requiring "details of a defendant at the commencement of proceedings" (a) would tend to front-load costs and (b) could be an exercise of only marginal utility, because the creditor may not be in a position to know whether a defendant could satisfy a potential judgment, and a debtor may have little incentive to provide accurate information.

13) If information about the means of a potential debtor is sought early in proceedings, what information would you consider to be helpful?

A: N/A

14) What experience, if any, have you had with making use of the provisions of CPR part 71 (orders to obtain information from judgment debtors)?

A: The Chancery Masters have some, albeit fairly limited experience of CPR part 71 orders. This is because an application for debtor questioning should be issued in the court in which the judgment or order giving rise to the Judgment Debt was made. In relation to judgment or orders made in the High Court, if the court is satisfied that the papers are in order, it will make an order specifying the amount of the debt and directing that the Judgment Debtor attend court at the time and place specified in the order to answer such questions as the court may require on oath and to provide the documents described in the application. Typically, the practice of the B&PC is that the Debtor Questioning should take place in the County Court local to the Judgment Debtor. The court officer or District Judge in the Judgment Debtor's local County Court will undertake the Debtor Questioning on behalf of the Chancery Division Business and Property Court London: see Chancery Guide, para. 31.15, for details.

The Judgment Creditor may request that the Debtor Questioning take place before a judge in the Business and Property Court but will need to provide "compelling reasons" why such an order is warranted: see Chancery Guide, para. 31.17. Examples of "compelling reasons" might be, by way of example only, situations where the Judgment Debtor's assets are held in a

confusing and complex way, via numerous offshore companies or complex trust structures; or where the Judgment Debtor is resident abroad, and so there is no County Court local to the Judgment Debtor.

15) If you have used the provisions of part 71 to obtain information about a judgment debtor's means, have you found the process effective?

A: Our collective experience is that part 71 can be effective. It can also be cumbersome, lengthy and expensive.

16) If not effective, why not, and what changes would you make to the provisions relating to obtaining information from judgment debtors and does there need to be an amendment to part 71?

A: Maximising the chances of the part 71 procedure being effective requires a high degree of preparation by the judgment creditor, and a real focus on what they are seeking to determine. Creditors should be reminded that there are standard forms prepared for use in the part 71 procedure, at EX140 or EX141, which identifies in general terms the information that can be sought. The Judgment Creditor should also consider carefully what documents or categories of documents they wish the Judgment Debtor to produce, as this can be set out in an order to attend court for questioning. That serves to reduce the chance of the Judgment Debtor saying in the middle of cross-examination that he or she has further documentation available, but did not know that these should be brought to the hearing.

17) What would you consider to be an appropriate sanction/appropriate sanctions for a judgment debtor who fails to provide information to questions raised by the court?

A: If the Judgment Debtor fails to attend for questioning at the time and place indicated in the order, refuses to answer a question, or fails to comply with the order in some other way (such as failing to provide the documents identified by the order), the Judgment Debtor may be considered to be in contempt of court. If the Debtor Questioning was being undertaken by a court officer or District Judge in the County Court, or a Master or District in one of the Business and Property Courts, they will certify the non-compliance in accordance with CPR 71.8 and PD71.6. Such non-compliance will be referred to a High Court Judge (or Section 9 Judge). It would therefore be more efficient if the Masters' jurisdiction was extended to include contempt. There is a separate consultation on contempt of court which the Chancery Masters will be responding to.

The High Court Judge or Section 9 Judge can then consider whether to make a final order to comply, a suspended committal order or a committal order: see CPR 71.8, PD71.7 and PD 71.8. In practice, committal can be a very effective means of ensuring compliance, but the committal process is itself frequently time consuming and costly. The rules relating to committal have recently been reviewed, and we do not consider that this is the time to further review those rules.

Overall, we consider that the possible sanction of committal, given the safeguards that have been built into the committal process, are an appropriate final sanction for continued failure to comply with a part 71 order.

18) If judgment is obtained, should the court provide details of the judgment debtor with the claimant at the time of judgment and, if so, what details should be provided (if any)?

A: We fundamentally disagree with this suggestion. We understand from the Webinars run by the Working Group as part of this consultation that in some other European jurisdictions, there are such provisions. Our present view is that the court providing "details of the judgment debtor" to the claimant at the time of judgment risks being unworkable in practice, probably infringes Article 8 rights, and may well be unfair to the judgment debtor. Further, the court simply does not have the resources to try and gather information of the "details" of the judgment debtor (which we understand as being the "financial details" of the judgment debtor).

19) What safeguards should be put in place with respect to any data sharing to ensure that it is reasonable and proportionate and not unfairly detrimental to the debtor?

A: As set out above, it would not be appropriate for the court to be providing such information to the judgment creditor.

20) Should the court have a role, independent of any applications made by any creditor, in obtaining details of the debtor?

A: Again, that is not the function of the court. It is one thing where a creditor applies for financial information relating to the debtor, and, having provided the debtor an opportunity to respond, the court determines that the judgment creditor is entitled to the information. It is quite another matter (which is what we understand is being suggested above) for the court to have an independent role in seeking to obtain details of the debtor. It is inappropriate to ask the judiciary to seek to do this and, in any event, the judiciary do not have the resources to do this.

21) Should the court and/or the judgment creditor be given access to information held by HMCTS and the DWP (or other government departments or agencies) to gather financial information on the judgment debtor?

A: Again, we do not believe this to be appropriate for the court. We question what safeguards will be in place if the judgment creditor is able to access sensitive personal information about the judgment debtor.

22) What safeguards should be put in place to protect the individual with respect to financial information held by HMCTS and the DWP (or other government departments or agencies) and their privacy?

A: Again, we do not believe this to be appropriate.

23) Should the court and/or the judgment creditor be given access to information held by third parties, such as banks and credit agencies, to gather financial information on judgment debtors?

A: Again, we do not believe this to be appropriate.

24) What safeguards should be put in place to protect the individual with respect to financial information held by third parties, such as banks and credit agencies, and their privacy?

A: Our view is that, generally, orders should only be made by the court where the other party has a right to be heard before the making of the order and to provide submissions as to why any order should not be made. There are certain exceptions to this principle (such as for example the grant of freezing injunctions) but these have extensive safeguards built in for debtors, including the right to challenge the grant of the order, both by way of application and then on appeal, and the requirement of an undertaking in damages.

25) Would you welcome a change to legislation to allow either (17) or (19) above, which would include safeguards suggested under (18) and (20) above?

A: We do not entirely understand the question. The question at (17) refers to the appropriate sanction(s) for a judgment debtor who fails to provide information to questions raised by the court. In the context of part 71, at least, there is an existing sanction, which is the committal process. As explained above, we have serious reservations about the suggestions floated at (18) and (20) and would not support change to legislation to allow the gathering of financial information by the court.

26) What other protections do you consider should be available to the judgment debtor to prohibit all, or some, financial information being available either to the court or to the judgment creditor?

A: N/A

Support for debtors

A: We do not feel able to comment on the questions in this section.

27) Are you aware of any support or information provided to debtors following a judgment?

28) If so, what is that support or information?

29) What, if any, (additional) information and support do you consider should be made available to debtors and at what stage?

30) Are there any particularly vulnerable debtors who you consider need additional support. If so, how are those vulnerable debtors identified and what support do you consider is required?

31) What do you consider the most efficient and effective ways of disseminating information to debtors?

i. through court documentation at the commencement of the action;
ii. through court documentation at time of judgment;
iii. through bailiffs or enforcement officers;
iv. all the above?
v. any further means of communication?

32) If the defendant engages with the court process, should the court be proactive in providing a telephone advice service, or other access to free advice through third parties, in order to potentially facilitate early resolution?

Any proposed improvements

A: Please refer to our concluding comments at questions 39 and 40 below, where we expand on certain proposed improvements.

33) Do you consider there should be any changes to the system of enforcing judgments, or should the status quo be maintained?

34) If you consider there should be changes, what changes do you feel should be made to make enforcement more accessible, fair and efficient?

35) Whether you consider there should be changes or not, what, if any, additional safeguards and advice should be given to debtors?

36) Whether you consider there should be changes or not, what, if any, additional information should be given to creditors about methods of enforcement?

37) As the majority of debt judgments are judgments in default, what further steps do you consider could and/or should be taken to encourage defaulters (potential judgment debtors) to engage in the court process at an early, or any, stage?

38) Are there any other areas of enforcement that you feel could be improved and in what way and by which method(s)?

General

39) Please set out any additional comments you would like to make about the current system of enforcing money judgments in court. These comments can expand upon the questions raised above or raise new issues.

40) Please set out any current difficulties that you identify with the system of enforcement and outline any potential improvements you consider appropriate for either the creditor or the debtor.

A: We would end by making the following three points:

(1) One point which we have touched upon is whether too much enforcement work is still concentrated in the High Court. For example, where a creditor seeks an order for sale following the grant of charging order, the creditor *must* issue fresh proceedings under Part 8 of the Civil Procedure Rules: see Civil Procedure Rules, r. 73.10C(4). These proceedings are routinely issued in the High Court, Chancery Division, in accordance with the direction in paragraph 4.2 of Practice Direction 73. Many of those proceedings properly belong in the County Court. This will, however, require raising the threshold in the County Courts Act 1984, s. 23(c), which limits proceedings for enforcing any charge or lien to cases where the amount owed in respect of the charge does not exceed £350,000. Of course, the High Court can always transfer proceedings to the County Court after issue, but this involves further time and costs, which may be unfair to both the creditor and the debtor.

(2) We query whether it should invariably be the case that a creditor who wishes to enforce a charging by order for sale must commence fresh Part 8 proceedings. The effect of the Charging Orders Act 1979 is to provide for the creation of a charge which is the equivalent of an equitable charge. Such a charge may only be enforced by an order for sale. In some cases, where the creditor wishes to enforce the charge rapidly, then it ought to be possible for the creditor to enforce such a charge in the existing proceedings, rather than be compelled to issue fresh Part 8 proceedings. Alternatively, in some cases, the creditor may wish for reasons of their own to delay the enforcement of any charging order, in some cases for many years. In one recent case, a creditor had obtained a charging order in 2012, and only brought proceedings to enforce in 2024. In those cases, it is reasonable to require the creditor the requirement to start a fresh Part 8 claim. The cut off position could be, for example, if the creditor applies for an order for sale less than 2 years from the date of the making of the final charging order.

(3) A final, general point is that the current system for the enforcement of domestic judgments is overly complex, and does not fully align with the CPR as a whole. One could, for example, revise the existing system so that generally a creditor applies for one of the enforcement mechanisms by way of making an application under Part 23, rather than in some cases using an application notice (charging orders, third party debt orders), in others fresh Part 8 proceedings (orders for possession and sale following the grant of a final charging order), and in further cases by issuing a warrant or writ. We accept that this plea for a simpler procedural system should not extend to insolvency proceedings, which have their own statutory principles, and their own procedural code with the Insolvency (England and Wales) Rules 2016.

Chancery Masters
September 2024