

**Response from Eversheds Sutherland (International) LLP to the Civil Justice Council
Enforcement Working Group's Call for Evidence 11 July – 16 September 2024**

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The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. Our response reflects our experience in advising clients in this area. We confirm this response does not contain any confidential information and we are happy for it to be published as part of the consultation responses.

Your experience and awareness of enforcement

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

- General – identifying assets from public sources;
- Charging orders;
- Attachment of earnings orders;
- Third party debt orders;
- Warrants and writs of control;
- Insolvency proceedings;
- Contempt of court proceedings; and
- Freezing orders.

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

General – identifying assets

We have experienced barriers from the following public sources:

- (a) Land Registry, where one needs to know about a judgment debtor's property in order to search for its register of title (assuming it is registered), and cannot simply search the proprietorship register to find all properties owned by them absent a court order (assuming they are a private individual and not a company, and the cost of an application for such an order is usually prohibitive at the asset

identification stage), and corporate holding structures might be used to distance legal ownership from the ultimate beneficial owner; and

- (b) Companies House, whose records are not always up to date (particularly filed accounts) and, in our experience, can be manipulated. Indeed we have experience of companies being put into insolvency processes and into the hands of officeholders, despite which the former owners and controllers have been able to make subsequent filings (including without stating on the face of the notice/form who is purportedly making such filings) and even purge or amend historical filings, which Companies House has been unable to stop despite being informed about it.

Charging order proceedings can be protracted, with multiple hearings in the context of busy County Court lists often needed because of (i) debtors invariably being given at least one more chance, however unmeritorious their arguments and (ii) other parties asserting competing interests in properties (e.g. other occupants, spouses with alleged beneficial interests, and / or mortgagees whose secured debt is in an unknown amount which they typically will not share due to data privacy concerns).

Delays in obtaining interim charging orders (with different lead times in different courts) can result in property being dissipated in the meantime and / or other judgment creditors unexpectedly obtaining an interim charging order and thereby taking priority. We have also experienced applications for interim charging orders being rejected because, for example, the judgment debtor's full name appears on the register of title to a property but not on the judgment itself – despite the relevant property being the address for service in respect of the claim.

The Order for Sale process is complicated with another set of paperwork and another set of hearings required to complete. This formality and process could be simplified.

Eviction dates can easily be lost as a result of judgment debtors applying at late notice for a stay, which application necessarily takes time to be listed and heard (and so often leads to a stay by default). There are also additional costs in selling the property once possession is taken and valued, and inevitably the property is sold at less than full market value due to the distressed nature of the sale. All of this reduces the net recovery for judgment creditors.

Attachment of earnings orders are only valuable when a judgment debtor is in salaried employment with a *bona fide* third party, i.e. they are not useful when a judgment debtor is self-employed or runs their own company and can manipulate their salary to frustrate this enforcement method. Even when a judgment debtor is in salaried employment, our experience is that they might be on such a low income that the recovery is very limited and there is a real risk they will quit their job if they can maintain broadly the same lifestyle on state benefits without having their income garnished by a judgment creditor.

Third party debt orders are ‘hit and miss’, as one does not always know which third parties owe money to a judgment debtor, how much money the third party owes to the judgment debtor, nor whether third party has a pre-existing right of set off that takes priority which they wish to exercise (and if so, how much indebtedness that would remove). They can, therefore, be uneconomical – particularly if the judgment debtor forces the issue of a final third party debt order to a contested hearing, the costs of which can exceed the value of the sums in dispute.

As regards **warrants and writs of control**, our experience of County Court bailiffs contrasts with High Court Enforcement Officers (HCEOs). In our experience, the former tend not to recover as much as the latter. This might be because County Court bailiffs are employed by HMCTS and there are no obvious incentives to make recoveries, by contrast with HCEOs who generally operate on a ‘no collection no fee’ basis. Our experience is that different County Court Judges take different views on whether to transfer a judgment to the HCEOs for enforcement. Some require County Court bailiffs to at least attempt to enforce before transferring, others, will transfer it immediately.

Insolvency proceedings can easily be frustrated by judgment debtors who find a practitioner to propose an IVA/CVA, which can require time and costs to oppose/resist, can be exploited by the judgment creditor’s claim being drowned out by spurious creditors, and result in the judgment debtor retaining more assets than they otherwise would. Even where a judgment debtor is made insolvent, the insolvency practitioner’s fees can quickly erode any assets, resulting in little to no distributions for creditors.

Contempt of court proceedings can (in our experience) be costly and time-consuming. We suspect that this is because ultimately, a respondent’s liberty is at stake, and so the Court will undoubtedly want to give the respondent the benefit of its procedural discretion and also because the applicant must meet a higher standard of proof. Our experience is the Court is prepared to allow repeated extensions of time, additional rounds of evidence, repeated adjournments to trials, and other procedural ‘indulgences’ that would not be granted in other types of civil proceedings. As well, given that respondents to contempt applications can appeal findings of liability and sentencing as of right, and have access to non-means tested civil legal aid, any applicant should expect the proceedings to go at least to the Court of Appeal asserting as many grounds of appeal as possible, which is an inhibiting factor given the associated time and cost. Although the costs of successful contempt proceedings are recoverable in principle, a separate enforcement process would be needed to recover them, and a proven contemnor is unlikely to pay them voluntarily, such that contempt proceedings are unlikely to be economical.

Freezing orders are, in our experience, expensive to obtain and maintain. In addition to the costs of the *ex parte* hearing, there are the costs of notifying third parties of the freezing order and dealing with any queries, considering the ancillary disclosure given by the respondent (asset disclosure usually being piecemeal and difficult to test the veracity of), attending the return hearing (which might be an initial return hearing to

carry the position forward to a substantive return hearing), deal with the administration of the order in respect of legal expenses and ordinary living / business costs and requests for consent to deal with assets in ways otherwise prohibited by the freezing order, and determining whether the freezing order has been breached and, if so, what to do about it.

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

We cannot give a definitive answer as it depends on the circumstances of each particular matter.

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

Freezing orders and contempt of court proceedings tend to be brought against serious wrongdoers (*i.e.* rather than opponents in a genuine commercial dispute) with whom resolution tends to be very difficult, and such processes tend to have an escalatory effect rather than directing matters to a resolution. In any event, we would tend not to conceptualise them as enforcement tools, but rather freezing orders as a tool to hold the ring pending enforcement *via* other methods, and contempt of court proceedings a penal process brought in the public interest as a *quasi*-prosecutor rather than as a means to the end of making recoveries.

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

All but freezing orders and contempt of court, though each has its drawbacks for the reasons given at question 2 above.

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?*

Charging orders would be more effective if judgment creditors were aware before starting such proceedings of all property owned by judgment debtors and what other interests were claimed in those properties (including how much secured indebtedness will take priority over the judgment debtor's claim). Interim charging orders should be granted instantaneously in straightforward cases. Order for sale proceedings should be streamlined by reducing the procedural formalities required.

Third party debt orders would be improved by judgment creditors being able to ascertain at which banks/financial institutions, judgment debtors hold accounts and what the balance is on those accounts, as well as attaching to any additional indebtedness which the third party owes the judgment debtor after the interim third

party debt order is served but before the hearing on whether to make it final, e.g. funds are paid into a bank account after service of the interim third party debt order. This would remove the 'hit and miss' issues with such enforcement as described above.

As regards **writs and warrants of control**, whilst High Court Enforcement Officers are generally effective, they should be regulated to minimise the risks of a judgment debtor being misled. County Court Enforcement Officers might also be incentivised to encourage them to achieve recoveries (within the bounds of what is lawful).

Contempt of court proceedings would be improved if some limits were placed on a respondent's right to appeal (on which the Law Commission is currently consulting), so as to reduce the risk of unmeritorious and wide-ranging appeals being brought simply as of right. Automatic disbaring from the underlying claim for admitted / proven contemnors should also be considered.

Freezing orders would be improved if ancillary disclosure could be sought directly from third parties at any stage during the lifetime of the freezing order – provided that the third party's reasonable costs of compliance were payable by the applicant, respondents were subsequently notified of the disclosure, and such disclosure was subject to the applicant's standard form undertaking to use the information and documents only for the purposes of the instant proceedings – as this would make it easier to police the freezing order. Likewise if applicants could access a central register of property and bank accounts including balances held by the respondent.

Generally the Judiciary should perhaps be subject to enforcement KPIs equivalent to "days to trial" in order to incentivise prompt enforcement / disincentivise drifting of enforcement.

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?*

We have no substantive comment to make.

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

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?*

We have no substantive comment to make.

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

We have no substantive comment to make.

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.]*

We are aware that the Civil Procedure Rules Committee is looking at amending the CPR to allow email service as standard, and consider such a change would assist if implemented, as in our experience postal service can be lost or overlooked, and hard copy papers are hard to engage with – they represent more ‘friction’ for defendants.

We would also recommend making as much of the process as smartphone friendly as possible, given that the majority of default judgments are entered in the county court against individuals who are litigants in person. For example, access to YouTube videos from HMCTS explaining the process and its potential consequences, and an ability to complete acknowledgements of service / defences online on a smartphone-friendly webpage.

Debtors could be incentivised to engage with proceedings and comply with judgments voluntarily, for example through credit score benefits or reduced interest for timely admissions / payment.

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 included in the Directions Questionnaire, including details of any debts being enforced outside the court system).*

No. A defendant to an unproven claim should not be required to provide details of their otherwise-private financial position, which might be burdensome and itself form the basis of interlocutory disputes. The Court is also unlikely to have the resources to interrogate or verify the details given. Of course, claimants can still apply for freezing orders and ancillary disclosure orders against respondents in appropriate cases.

However, once judgment has been entered, we think it would be helpful if the Court required details of the defendant’s financial means.

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

Subject to the response above, helpful information would include a potential debtor's ordinary income (including sources) and outgoings, employment information (if an individual), assets (including jointly owned assets) and liabilities (including contingent liabilities), in what forms these assets and liabilities are held, any interests they hold in trusts or other legal structures, in what jurisdictions they are held, any pending financial transactions, and whether any of that is foreseeably going to change in the next 24-36 months – all given on affidavit.

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)?*

We have experience of using the provisions of CPR Part 71.

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?*

In our experience, the advantages of CPR Part 71 are that (i) if the debtor complies it is possible to obtain useful information, and (ii) a judgment creditor can put bespoke questions to the debtor and get a judge / court officer to ask them.

However, the disadvantages are that (i) unless bespoke questions are used, there is a risk that the process becomes a form filling exercise, (ii) there is a real risk that a judgment creditor does not attend or provide documents / answers as required, and (iii) it is difficult to prove that they have misled the Court, or to move the Court to sanction the debtor for non-attendance.

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?*

We have no substantive comment to make, as the efficacy of the process is generally dependent on the judgment debtor's compliance (or otherwise) with it, which is something that cannot easily be controlled or predicted.

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?*

Contempt of court.

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)?*

Yes. See response 13 above.

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?*

The judgment creditor may only use the judgment debtor's data for the purpose of enforcement of a judgment in the proceedings in which it is obtained, except where:

- (a) The data has been read to or by the Court, or referred to, at a hearing which has been held in public;
- (b) The Court gives permission; or
- (c) The judgment debtor consents in writing.

This would be analogous to the collateral use restrictions on disclosed documents at CPR 31.22 and witness statements at CPR 32.12.

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

No.

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?*

Yes, as well as Land Registry and HMRC.

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?*

See response 19 above.

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?*

Yes.

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?*

See response 19 above.

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?*

Yes.

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?*

None.

Support for debtors

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

No.

28. *If so, what is that support or information?*

We have no substantive comment to make.

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

Claims subject to the Pre-Action Protocol for Debt Claims should involve the debtor being given details of where they can find information and support at all key stages of the proceedings, i.e. from the claimant in the Letter Before Action, from the claimant or Court upon service of Claim Form and Particulars of Claim, from the Court upon service of any orders, and from the Court upon service of the judgment debt and any enforcement papers. The information and support should be in an accessible format for defendants to such proceedings (e.g. YouTube videos in plain English, and/or a smartphone friendly website).

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?*

We have no substantive comment to make.

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

- a. *through court documentation at the commencement of the action;*
- b. *through court documentation at time of judgment;*
- c. *through bailiffs or enforcement officers;*
- d. *all the above?*

e. any further means of communication?

All of the above.

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?

Yes.

Any proposed improvements

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

See responses above.

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

See responses above.

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

We have no substantive comment to make.

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

We have no substantive comment to make.

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?

See response 11 above. In addition:

- Debt collection companies not being permitted to use paperwork which resembles Court paperwork as if the former is being ignored there is a risk the latter will be mistaken for 'more of the same' and ignored too; and
- Citizens Advice Bureau being better funded to support defendants.

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

We have no substantive comment to make.

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.*

We have no substantive comment to make.

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.*

We have no substantive comment to make.