BY EMAIL – ANONYMOUS SUBMISSION

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23 September 2024

Dear Civil Justice Counsel Enforcement Working Group,

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[redacted] is a leading international commercial law firm. Our disputes practice advises a diverse range of international corporates, financial institutions and states and state-owned enterprises in complex commercial litigation, arbitration and investigations.

Our London-based litigators represent clients in proceedings in most divisions of the High Court, the Court of Appeal and the Supreme Court and regularly advise on enforcement of judgments and arbitral awards. We give advice on enforcement prospectively (when assisting clients in negotiating disputes clauses in their commercial contracts) as well as at the outset of a dispute (to help clients to decide whether and in which jurisdiction they should proceed with any claim) and at the enforcement stage itself.

At the enforcement stage, [redacted] predominantly acts for commercial judgment creditors who are seeking to enforce high value judgments against sophisticated commercial parties or high net worth individuals. Our comments below are therefore made in this context. We also occasionally act pro bono for small businesses and individuals, bringing claims and seeking enforcement of judgments on their behalf against judgment debtors who have failed to pay their judgments. As it is not our main area of focus, we do not comment in detail on the enforcement of judgments against parties involved in lower value, non-commercial disputes, and in particular do not comment on enforcement of judgments against vulnerable or impecunious individuals. We recognise that different considerations may apply in relation to such cases.

We are grateful for this opportunity to provide evidence to the Civil Justice Council. We have sought the views of London-based litigators who advise regularly at the enforcement stage of proceedings. Our response focuses on the wider issues and themes we see in the enforcement context rather than responding to the specific questions raised.

The position of a judgment creditor

Any reform to the enforcement regime should take into account the fact that any judgment creditor seeking to enforce a judgment against a judgment debtor has suffered two injustices. First, the injustice that gave rise to

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the judgment itself. Secondly, the injustice that stems from the judgment debtor not complying with the terms of the judgment. It is our view that the enforcement process should recognise this two-fold injustice and, at least where commercial judgment debtors are concerned, have the primary aim of facilitating and removing barriers to enforcement.

Access to information about judgment debtor

A key issue for effective enforcement under the current system is the difficulty in accessing information about the judgment debtor's assets. Under the current regime, obtaining information about a judgment debtor's assets is extremely difficult in practice and often requires the use of specialist asset tracing firms. That aside, the primary source of information available to judgment creditors about a judgment debtor's assets is usually the judgment debtor. Given that the need to obtain this information stems from the judgment debtor's refusal to comply with a court order for payment, the judgment debtor alone is likely to be an unsatisfactory, and often unreliable, source for this information. This is particularly so when seeking to enforce judgment against a proven fraudster.

Even where a judgment creditor is able to examine the judgment debtor in court (CPR Part 71), the lack of reliable information about a debtor's assets makes it difficult in practice effectively to challenge the debtor's account of their own assets. Judgment debtors are often obstructive, and it is hard to check whether their answers are untrue or incomplete.

A more effective enforcement regime would allow judgment creditors more readily to access information from third parties. This has been considered by Parliament in the past. We note that a disclosure regime was enacted in Part 4 Tribunals and Enforcement Act (ss 95-105) but these provisions have never entered into force. That regime contained measures to help creditors with claims in the civil court to enforce their judgments, including a court-based mechanism to help the court gain access to information about the judgment debtor, on behalf of the creditor. In our view it would be worth considering whether a disclosure regime could be introduced that would give judgment creditors greater access to the information that they need to enforce their judgment, whilst not placing excessive burden on private sector third parties who may be asked to give disclosure.

The case for modernisation

The current enforcement regime is ripe for wholesale modernisation, as many of its mechanisms are of ancient origin and are not always attuned to the complexities of enforcement for commercial judgment creditors in the modern world. A commercial judgment creditor is often required to apply for different types of enforcement against different asset types. It is not always clear why that is necessary. Further, this approach involves judgment creditors attempting to identify a judgment debtor's assets (often in the face of strong resistance from the judgment debtor and/or third parties against providing such information), before they can bring enforcement action. This process is both expensive and inefficient for both the court and the judgment creditor.

Further, it can be difficult even for lawyers experienced in the area to navigate the intricate technicalities of enforcement regimes that have evolved over hundreds of years. By way of example, an interim third party debt order does not attach to amounts paid into a bank account after the order is served on the relevant bank. If an order was served on day 1 but £1m was paid into the account on day 2, the £1m would not be subject to the interim third party debt order.[1] A judgment creditor will have no visibility in most cases on the timing of payments and so it is often a matter of luck as to whether the interim order captures anything at all. While this can potentially be solved by appointing a receiver by way of equitable execution, it would be worth considering whether there is a simpler solution to this problem. By way of further example, charging orders are restricted to the limited class of assets listed in section s 2(2) Charging Orders Act 1979 (i.e. land, certain shares and units in a unit trust with an England and Wales nexus and funds in court). While the nexus to the jurisdiction

[1] CA in *Happenstall v Jackson and Barclays Bank (Garnishees)* [1939] 1 KB 585 at 592: "*All these decisions make it quite clear that a garnishee order attaches no debts which do not exist at the moment when the order is made and served*".

is obvious, it is less obvious why the class of assets is so restricted and there must be a wider list of assets that could be subject to charging orders.

Although existing methods of enforcement can be updated to deal with some of these practical issues, we consider that more significant reform is now needed than just amending and updating the court rules. To our knowledge, there has not been a major review of the law of enforcement since the Civil Enforcement Review was launched in 1998 which, among other things, enacted primary legislation creating a more comprehensive register of judgments and put the law concerning bailiffs on a statutory footing as well as significantly updating the court rules to reflect this and modernise them. That review, however, did not consider whether more wholesale modernisation was needed or consider if the court should play a more proactive role.

A comprehensive review of the current enforcement regime would mean that best practice in other jurisdictions (civil and common law) could be examined and draft legislation prepared to modernise and reform the law of enforcement. We note that some other jurisdictions have already modernised their enforcement systems and these models may offer better models for enforcement. Singapore's enforcement regime now allows judgment creditors to make a single application to a Sheriff, authorising the Sheriff to enforce against a judgment debtor using one or more of the methods of enforcement available in Singapore.[2]

We appreciate a wholesale review of this type is likely beyond both the remit and resourcing of the CJC, although the Law Commission could consider this as part of its work. While this project would be a significant undertaking, a world leading commercial jurisdiction that does not have a modern and effective enforcement regime is unlikely to continue to thrive in circumstances where other well-respected commercial jurisdictions are prepared to modernise to a meet the needs of their users.

We should be grateful if you would treat this as anonymous and would be happy to discuss any of the above points should that be helpful. [redacted]

Yours faithfully,

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[2] Single enforcement application (from 1 April 2022) (judiciary.gov.sg).