

Remote Controlled: What does ‘Virtual Enforcement’ mean for Debt Advice Clients?



The recent decision in *Just Digital Marketplace Ltd [2021] EWHC 15 (QB)*¹ is the biggest

change in enforcement since the current regulations took effect in 2014. Michael Agboh-Davison takes an early look at some implications for advisers and clients.

For a full understanding of the judgment, this article should be read alongside Robert Rosenberg’s summary in the previous issue of *Quarterly Account*, and Rachel Wilson’s recent *Adviser* article.²

IT’S NOT JUST ABOUT JUST

This judgment was not about approving Just’s business proposal or the concept of virtual enforcement. It was making a decision on a discrete point of law – whether a valid controlled goods agreement (CGA) can be made if a bailiff has not physically entered the premises where the goods are located (paragraph 23). The immediate consequences of the judgment will relate to Just’s enforcement of High Court writs, but the decision is relevant to all enforcement companies, and all types of enforcement under Schedule 12, Tribunals, Courts and Enforcement Act 2007 (TCEA).

We have a good idea how Just will use the judgment, as it has been open with the advice sector about its intentions.³ Its emphasis will be on early resolution and CGAs made remotely at the compliance stage, with smaller debts possibly requiring no CGA. We cannot

assume that other companies will approach the prospect of remote CGAs in the same way.

VIRTUAL ENFORCEMENT ENABLES CLIENTS TO CHOOSE WHICH GOODS TO PUT AT RISK

In virtual enforcement, the client offers goods for inspection up to a value a bailiff agrees would cover the debt. This inverts the conventional process of a bailiff attending a property to *seek out* suitable goods. The practical effect is that a client can more easily conceal goods, for example those with sentimental value, which they do not want to put at risk.

A client’s non-exempt goods are ‘bound’ from the point the notice of enforcement is served, or in the case of fines, High Court writs and County Court warrants, from the point the bailiff receives instruction. This is to prevent clients selling or giving away goods before the initial bailiff visit, since if they do, the bound goods can be treated as if they were still the client’s property.⁴

However, nothing compels a client to reveal the existence or location of bound goods. A bailiff can apply for a court warrant to force entry to third party premises to take control of bound goods, but the bailiff would need to know where the goods are, and a client is under no obligation to disclose this. This is very different to the position after goods have been taken into control, where interference with the goods, for example by hiding them from a bailiff, is a specific offence.⁵

In practice, this means a client is

free to move, hide, or not disclose goods as long as they have not yet been taken into control, and this should be easier before a pre-arranged video call than it would be in an unannounced doorstep visit.

FORCED ENTRY WILL BE HARDER BUT WE CAN’T RULE IT OUT

The judgment found that powers under paragraph 19A, Schedule 12, TCEA allowing a bailiff to use force without a warrant to remove goods following default on a CGA are not applicable to virtual CGAs.

However, at paragraph 153 the judgment suggests an application for a warrant for forced entry could allow this. This may be possible under current Regulations. Paragraph 16 of Schedule 12, TCEA allows a bailiff to enter premises to inspect or remove controlled goods and paragraph 20 allows application to court for a warrant permitting reasonable force to enter under paragraph 16. However, paragraph 22(1) states that this warrant can only be issued if the court “is satisfied that prescribed conditions are met”, and there appears to be no such conditions in Regulations or the Civil Procedure Rules.⁶ It is unclear how the absence of prescribed conditions would affect a court’s

1. tinyurl.com/QA60-VE1

2. tinyurl.com/QA60-VE4

3. For a summary, see Kruse, J (2021) *Virtual Enforcement - The Latest Developments* - tinyurl.com/QA60-VE5

4. Paras 4, 5 and 61 of Sch 12 TCEA

5. Para 68(2) Sch 12 TCEA

6. Thanks to Graham O’Malley for the point about prescribed conditions



decision on whether to issue a warrant.

Forced entry to domestic premises to remove controlled goods is already rare in practice. If forced entry is only possible after a virtual CGA with a court warrant, it should be less common than with a conventional CGA. However, we cannot guarantee to a client that it could not happen.

LOWER VIRTUAL ENFORCEMENT FEES MAY BENEFIT SOME CLIENTS

If a virtual CGA is made, the enforcement fee of £190 or £235 is not chargeable. For High Court and non-High Court enforcement, the regulations specify that this fee is only chargeable “from the first attendance at the premises”.⁷ This means if a virtual CGA is made and the debt repaid with no requirement for a later physical visit, the fees are capped at the £75 compliance fee. If the virtual CGA is broken and a visit occurs, the enforcement fee will be added.

A client with stable circumstances who can afford repayments at a rate that satisfies the creditor could therefore save at least £190 in fees compared to making a CGA on the doorstep. For these clients, a virtual CGA might be a rational choice.

There may be an argument that if a broken virtual CGA results in the same fees that would have been added in a conventional CGA anyway, there is nothing to lose by trying it. Advisers should be careful here though, as the attraction of lower fees might convince clients to agree to higher instalments than they can afford.

IT MAY BE HARDER TO IDENTIFY VULNERABILITY

A bailiff cannot take control of goods where only a vulnerable person is in the premises and they should inform the creditor.⁸ Advisers know how much of a struggle it can be to get bailiffs to accept client vulnerability, even when presented with evidence.

Seeing a client in person – or better still in their home environment – provides extra clues to potential vulnerability which can be harder to detect if you are not in the same room. This will be familiar to advisers who have moved from face-to-face to telephone provision during the pandemic. Similarly, in the transition from doorstep to video call there is a concern that indicators of client vulnerability might be less obvious to bailiffs.

CLIENTS WHO ARE UNABLE TO COMPLETE A VIRTUAL CGA MAY LOSE OUT

Where a client is willing to participate in a virtual CGA but is unable, through no fault of their own, they risk the disadvantage of missing out on the lower virtual CGA fees. Where their inability

7. Regs 5(1)(b) and 6(1)(b) The Taking Control of Goods (Fees) Regulations 2014

8. Reg 10(1)(b) The Taking Control of Goods Regulations 2013 and para 30 Taking Control of Goods: National Standards - tinyurl.com/QA60-VE13

to complete a virtual CGA is a consequence of a disability, this may amount to direct discrimination under s13(1) Equality Act 2010 (EA), because it amounts to charging a person with a disability more to provide the same service. Note that the definition of disability in s6(1) EA is not dependent on receiving a disability benefit.

There is an obligation on service providers in s20(3) EA to make “reasonable adjustments” to avoid putting people with disabilities at a “substantial disadvantage”. This is an “anticipatory duty”, meaning a service provider must plan ahead and not wait until a situation arises where a person using a service is actually disadvantaged.⁹ A client whose disability prevents them completing a virtual CGA has a strong argument that they should not have to pay more fees as a result, and bailiffs should have a procedure in place to deal with this situation.

Of course, clients may be unable to participate in a virtual CGA for other reasons, such as lack of access to a smartphone or internet connection, or unfamiliarity with the technology. Digital and financial exclusion are not grounds for discrimination in law, so if these clients could not complete a virtual CGA, the higher conventional CGA fees would amount to a further ‘poverty premium’.¹⁰

CLIENTS WITH/ CONSIDERING A DRO SHOULD STILL AVOID VIRTUAL CGAs

There is no distinction between conventional or virtual CGAs in respect of insolvency. In a debt relief order (DRO), where goods are validly taken into control before the DRO is approved, the debt is treated as secured to the value of the controlled goods.¹¹ In this situation, the bailiff retains the right to remove and sell the controlled goods if the client defaults on the CGA. This means in any cases where a DRO is a possibility, the

adviser must clearly explain this risk and a virtual CGA should almost certainly be avoided.

MAKING ARRANGEMENTS WITH HCEOs AT THE COMPLIANCE STAGE MAY BE EASIER NOW

Advisers will be familiar with HCEOs refusing to make arrangements over the phone at the compliance stage. They cite the “command” of the writ of control, which gives no discretion to make a payment arrangement without taking control of goods.¹² This is confirmed in the Explanatory Memorandum to the Taking Control of Goods (Fees) Regulations 2014¹³:

“Unless a debtor pays in full at the compliance stage, the enforcement agent is obliged to visit the debtor in every High Court case in order to take control of goods, thereby triggering the first enforcement stage.”

The judge comments at paragraph 33 that the prescribed notice of enforcement – which is used in all types of enforcement – suggests that an arrangement could be entered before an initial visit without taking control. The judge acknowledges that this point is contested, but the case did not require a decision on this (footnote to paragraph 34).

In January, the High Court Enforcement Officers Association (HCEOA) best practice guidance to members was updated. The previous guidance said:

“During this stage an instalment arrangement would not normally be entered into.”

This has now been updated to add:

“... unless the judgment creditor has given specific written instructions to the HCEO to accept an arrangement during an extended compliance period.”¹⁴

This improved clarity might make it easier to agree arrangements

at the compliance stage with other HCEO firms, providing the instructing creditor consents to this.

VIRTUAL ENFORCEMENT MAKES BAILIFF ADVICE MORE COMPLEX

Advisers will need to update the traditional bailiff advice we have been familiar with for years, and check our offices and websites for information that might now be inaccurate.

For clients who are offered a virtual CGA, there is a more complicated choice than before, and advisers will need to support them to make an informed case-by-case decision. There are situations where lower fees and no knock on the door will justify agreeing a virtual CGA, but for other clients the higher conventional CGA fees and doorstep visit might be acceptable if they do not have to put their goods at risk. The benefits and risks of the two approaches must be carefully evaluated.

The bailiff visiting and attempting to gain entry is such a powerful image in the popular imagination that it might not be clear to some clients that the remote process has almost the same legal consequences. However clearly this is explained in a video call, some clients who have not taken impartial debt advice will not grasp the full implications of the virtual CGA. Advisers will inevitably see cases where potential DRO clients have agreed to a virtual CGA before getting advice.

One selling point for the virtual CGA is that it is less intrusive¹⁵ but a client may still feel coerced or

9. tinyurl.com/QA60-VE7 (paras 7.20-7.26)

10. See, for example, Davies, S and Trend, L (2020) *The Poverty Premium: A Customer Perspective* - tinyurl.com/QA60-VE8

11. Insolvency Service (2021) *DRO A-Z*, 2nd Edition, p60

12. tinyurl.com/QA60-VE10 - note the paragraph starting “You are now commanded...”

13. tinyurl.com/QA60-VE11 (para 7.3)

14. tinyurl.com/QA60-VE12 (para 13.3)

15. tinyurl.com/QA60-VE6

overwhelmed by a phone or video call. There is still a risk of clients agreeing to arrangements they later regret or cannot afford. Where a virtual CGA does not appear to be in the client's interests, advisers might consider recommending a third party is present to ensure this does not happen.

THERE ARE NEW OPPORTUNITIES FOR MISREPRESENTATION

Advisers will have heard many client accounts of bailiff visits where exchanges on the doorstep do not appear to represent the true legal position. A complex change brings new possibilities for misrepresentation. It may not be long before we hear clients telling us that a bailiff said: "The law has changed and I can take control of goods without coming into your house, so you may as well sign this CGA."

Advisers should be alert to this and other malpractice, such as attempts to take control of goods seen through windows and letterboxes.

If you encounter this, complain. These risks further support the case for a strong independent regulator for the enforcement industry.

Just has stated that its video calls will be recorded, and any other companies entering this field would presumably do the same. Recordings should therefore be available, and advisers may want to recommend clients request copies of these.

WHAT ELSE IS AROUND THE CORNER?

The virtual enforcement model seems like an obvious development in hindsight, but who in the advice sector saw it coming? Many debt advisers hearing about Just's proposals would have assumed that the illegitimacy of taking control without physical entry was established in the Poll Tax era.¹⁶ The judgment reminds us that historic case law is not necessarily persuasive when it

16. *Evans v South Ribble Borough Council* [1992] QB 757

comes to interpreting the intended effects of the TCEA and 2014 reforms (paragraph 106).

It also raises the prospect of future technological change, where perhaps a bailiff could "send a drone round" (para 156). It is unknown at the moment whether regulations might be amended in light of the judgment to bring the virtual CGA in line with the conventional CGA in terms of forced entry and fees. The limit on fees and the potential difficulty of removing goods by force are probably a disincentive for other firms to offer competing virtual enforcement services, or develop completely new variations. However, this is a real possibility in the future and we should not assume this is the last disruption.

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