



Specialist Debt Advice Service

Spotlight

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Shelter

Charging Orders – Attaching conditions

In this month's Spotlight we consider the relationship between instalment orders, charging orders and orders for sale and provide guidance on when an instalment order might be used to prevent enforcement of a charge.

The historical position – judgments made before 1 October 2012

Prior to the amendments to the Charging Orders Act implemented in 2012, advising judgment debtors with an order to pay a debt by instalments was not straightforward, as statute did not provide a clear answer to the question of whether a charging order could be obtained to secure the judgment debt. Several cases in the Court of Appeal helped to provide some clarity; we will examine these below.

The legal position expressed in these cases is still good law in respect of judgments made before 1 Oct 2012.

In *Ropaigealach v Allied Irish Bank*¹, a charging order nisi in favour of the bank was made in Cardiff County Court, followed 2 weeks later by a successful application for an instalment order. A final charging order was then made a few weeks later. The case went to the Court of Appeal, with Mr Ropaigealach relying on s86(1) County Courts Act 1984 which prior to 2014 prevented any execution of an order where instalments were up to date. This section now only prevents the issue of a warrant of control².

The Court of Appeal agreed with the decisions of the lower courts, that the nisi order was the "execution" that most likely would have been prevented, had the instalment order been made

first. Hale LJ stated that there was nothing to prevent a charging order running alongside an instalment order.

In *Mercantile Credit Co v Huxtable*³, the charging order nisi was obtained after the judgment debt was set to be paid by instalments. In this case, the court's discretion under s1(5) of the Charging Orders Act 1979 was used to deny the claimant a final charge. In giving the leading judgment Stocker LJ commented that... "*.... the section of the County Courts Act which enforces execution of payment by instalments under Section 86 must apply to Section 1 of the 1979 Act, and if it were necessary so to hold, I would hold that there was not jurisdiction in the court to make a charging order as long as the instalments were being regularly paid by the judgment debtor.*"

So, in these cases the Court of Appeal reached different decisions based on the existence (or lack of) of the interim charging order at the point of setting payment by instalments. The comments of Stocker LJ are *obiter*, meaning they were persuasive but not binding. Nevertheless, this approach has been followed by the courts for judgments made prior to 1 October 2012, and advisers would be wise to refer to the judgment in *Huxtable* if a creditor applies for a charging order where the debtor has maintained payments on an instalment order.

The position for judgments made after 1 October 2012

On this date, the relevant provisions of the Tribunals Courts and Enforcement Act 2007⁴ came in to force, allowing judgment creditors to apply for a charging order notwithstanding the existence of an up to date instalment order. S3(4C) prevents the charging order from being enforced by sale where an up to date instalment order is in place.

The importance of instalments

As we have seen, making payments under an instalment order will prevent a charging order being made where the judgment was obtained before 1 October 2012. However, many of our clients already have a charging order, or have a judgment that was entered after this date.

Initial objections

Most charging order applications are made to the County Court Money Claims Centre as required by CPR 73.3. A court officer or judge may make an interim charging order and, if appropriate, the application can be transferred to the debtor's home court for a hearing (this will happen automatically where an instalment order was made prior to 1 October 2012).

If the matter has not been transferred for a hearing, the defendant must file and serve on the judgment creditor written evidence stating grounds of objection (including a request for an instalment order) not later than 28 days after service of the interim order. The application will be transferred to the defendant's local court for a hearing.

If the charging order was applied for other than at the CCMCC the defendant should file and serve written evidence stating the grounds of objection not less than 7 days before the hearing.

Variation

Applying to vary an order payable forthwith to one payable by instalments is a way by which judgment debtors can avoid defending a claim for an order for sale. An application of this type can be made by “any person interested in any property to which the order relates”⁵.

An application to vary the charging order could be made on form N245 where the underlying judgment was made in default. However, we suggest debtors apply on form N244 and provide a witness statement that explains what the implications would be if the order were to be enforced by sale. It also provides adequate space for the application to state the grounds – of particular importance if judgment was made on admission, has been defended, or has been varied at any point⁶.

The basis of the application should be stated as [s3\(5\) Charging Orders Act 1979](#), [CPR 40.9A](#) (variation of payment) and [CPR 13.3](#), as well as [s71\(2\) County Courts Act 1984](#). Where the charging order was made in the CCMCC without a hearing the applicant can also refer to [CPR 73.10B](#), which requires the matter to be transferred to the defendant’s home court. The fee is £50 regardless of the form used⁷.

In brief:

- An up to date instalment order will prevent a creditor applying for a charging order where the judgment was made prior to 1 October 2012
- Maintaining instalments on a charging order will prevent enforcement by sale
- Instalments can be set to run alongside a charging order at the outset by following the procedure for objections, or an application can be made to vary an existing charging order
- An application to vary a charging order should be made to the court that made the order
- We suggest using form N244 and helping the client to prepare a witness statement in support of the application
- Our recent resource and webinar, Dealing with Judgment Debts contains lots of information about varying orders and preparing witness evidence.

1 [2001] EWCA Civ 1790

2 Words in s. 86(1) substituted (6.4.2014) by Tribunals Courts and Enforcement Act 2007 s148 sch 13 para 70(2) with s89, S.I. 2014/768, art 2(1)(b)

3 The Times 1 April 1987, The Independent 17 March 1987, (Transcript: Association)

4 s93(1), (3)

5 s3(5) Charging Orders Act 1979, *Harman v Glencross* [1986] 1 All ER 545, CA

6 CPR 40.9A(8)(c)

7 Civil Proceedings Fees (Amendment