

ENFORCEMENT PROCEDURES AVAILABLE TO A CREDITOR

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INABILITY TO PAY DUE TO INSOLVENCY

Introduction

- Sometimes obtaining some form of judgment is only half the battle to being paid.
- If a debtor is insolvent it is usually very difficult and very rare to obtain full payment.
- If a creditor has not got a judgment against a debtor the courts provide limited assistance to a creditor.
- If a creditor has a judgment against a debtor there are a number of methods a creditor can adopt to seek to obtain payment with the assistance of the courts.

They are:

- ◆ Enforcement of Judgment Order – send in the bailiff
- ◆ Third Party Debt Order
- ◆ Attachment of Earnings Order
- ◆ Charging Order
- ◆ Bankruptcy proceedings

ENFORCEMENT OF JUDGMENTS AND ORDERS

- Part V of the County Courts Act 1984 provides for the enforcement of court judgments.
- Section 85 provides that any sum of money payable under a judgment or order of the County Court can be recovered in the case of default or failure of payment by execution against the goods or the party against whom the judgment or order was obtained.
- If a debtor owns plant, buildings or materials it can be a useful method of obtaining payment.
- An application is made by the creditor to a court officer for the issue of a writ of “fieri facias” (a warrant of execution) which empowers a bailiff to obtain goods belonging to the debtor and sell them with the proceeds of sale going to the creditor to satisfy the debt. Any balance after satisfying the debt would be owed to the debtor.
- An application under section 85 can only be made if the debt is payable at the time the application is made.

ENFORCEMENT OF JUDGMENTS AND ORDERS

- If a court has ordered payments to be made by instalments an application can not be made under section 85 unless an instalment has not been paid within time. An application could only be made in respect of the missed instalment (section 86 of the Act).
- The court has the power to stay execution of a warrant of execution (section 88).
- The procedure for obtaining a warrant of execution is set out in the County Court Rules Order 26.
- The County Court Rules Order 26 rule 2 provides for High Court judgments and orders to be enforced by a warrant of execution issued out of any court in the district in which the execution is to be levied.

THIRD PARTY DEBT ORDERS

- A third party debt order is an order by which a third party who owes money to a judgment debtor is ordered to make payment to the judgment creditor.
- The application is made under the Civil Procedure Rules Part 72.
- The creditor makes an application to the court and without notice to the third party the court will make an interim third party debt order.
- Under the interim order the third party will be ordered to attend court so that the court can determine whether a final order should be made. The interim order will also set out how much the third party must retain, which can include fixed fee court costs.

THIRD PARTY DEBT ORDERS

- The interim order requires the third party not to make any payments to the judgment debtor which reduces the sum owed to the judgment creditor below the sum referred to in the interim order.
- An application can be sought against the judgment debtor's bank or building society.
- There are specific rules concerning information a bank or building society should provide within 7 days of receiving an interim order (details of bank accounts held and if in credit by how much).
- The interim order must be served on the third party and the judgment debtor.
- A final third party debt order could require the third party to pay direct to the creditor a sum of money to satisfy the whole or part of the debt owed by the debtor to the creditor (subject to the third party owing that sum to the debtor).

ATTACHMENT OF EARNINGS ORDERS

- It overlaps to some extent with Third Party Debt Orders.
- Under the Attachment of Earnings Act 1971 a county court can issue an attachment of earnings order to secure payments in respect of a High Court or County Court maintenance order, payment of a judgment debt or payments under an administration order.
- The High Court and Magistrates Court can also make various attachment of earnings orders.
- The application can only be made against individuals who are in employment (not companies).
- The application is made to the court for an order against a party who employs the debtor.
- The order could be for periodical payments.
- The sum ordered is paid to the collecting officer of the court.

CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

- Part 73 of the Civil Procedure Rules allow a party to seek to enforce a judgment by way of a charging order, stop order or stop notice over or against a debtor's interest in an asset.

CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

Charging Orders

- A charging order must normally be made to the court which issued the judgment which is being enforced. It is made without notice to the debtor and is initially dealt with by a judge without a hearing.
- A charging order can be sought in respect of any assets (personal property, land, shares, dividends etc).
- It is an order for a charge against assets in circumstances where a court has ordered the debtor to pay a sum of money to the creditor.
- Following an application the judge may make an interim charging order imposing a charge over the debtor's interest and fixing a hearing to consider whether to make a final charging order.

CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

- An interim charging order may be made and served upon third parties who hold securities for the debtor.
- The effect of an interim charging order is that if the debtor disposes of his interest in any securities the subject of the order, the disposition of the interest will not be valid against the creditor.
- If a third party acts in a way that disposes the interests of the debtor despite being served with an interim charging order, the third party will be liable for that part of the debt to the creditor.

CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

- A party may object to the court making a final charging order.
- At the hearing the court may make a final order confirming the charge issued in the interim order or vary it as the court deems appropriate.
- The court may also resolve any dispute between the parties objecting to the interim order or order a trial to resolve any dispute.
- An application can be made to the court to sell the assets to which the charge applies in order to satisfy the debt.

CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

Stop Orders

- A stop order is an order of the High Court which prevents funds in court from being taken out or securities from transferred or sold or dividends being paid out or any dealings with unit trusts.
- The application is made upon notice to the party who is the subject of the order.

CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

Stop Notice

- A stop notice is similar to a stop order and can be made for the same reasons but it does not require notice. It is an administrative process carried out by a court officer. It can be overturned with good reason by application of the party who is the subject of the stop notice.

ASSISTANCE FROM THE COURTS TO OBTAIN INFORMATION FROM A DEBTOR

Orders to Obtain Information from Judgment Debtors

- Part 71 of the Civil Procedure Rules empowers a court to order a party to provide information for the purpose of enabling a judgment creditor to enforce a judgment or order.
- An application is made to the court requiring the debtor to attend court to provide information.
- The application can be made in respect of individuals or companies (in which case the application should require an officer of the company to attend court to provide the information).
- The application can be made without notice and if in the prescribed form will be granted by a court officer.

ASSISTANCE FROM THE COURTS TO OBTAIN INFORMATION FROM A DEBTOR

- The application must identify the information sought.
- The court officer can issue an order requiring the judgment debtor to attend court to provide the information sought
- The judgment debtor can be asked to produce documents to the court and to answer questions on oath.
- Failure by a debtor will to comply with an order will make the debtor liable to imprisonment for contempt of court and the court order must make that clear.
- The court Practice Direction Part 40 provides guidelines concerning requests for accounts and inquiries generally.

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

Self Help – Retention of Title – Removal of Goods

- Without a judgment against a debtor it is difficult to obtain redress from the courts.
- The ownership of materials, plant and goods may pass from a subcontractor to a contractor and/or from a contractor to an employer before payment is received.
- It may be possible to prevent ownership from passing “up the line” until payment has been received for property that is intended to pass under a construction contract.

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

- There are two possible scenarios:
- Materials, plant and goods which are not incorporated into the works (but may be on site).
- Materials, plant and goods which are incorporated into the works.
- In the case of unfixed materials, plant and goods, a robust “retention of title” clause in the relevant subcontractor/contractor or contractor/employer contract may be sufficient to prevent ownership passing “up the line”.

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

- Materials, plant and goods which are incorporated into the works will become the property of the building owner under an overriding principle of land law.
- There is a grey area concerning when materials etc. become fixed.
- It is determined by the degree and purpose of incorporation into the works.
- If the purpose of incorporation is for the permanent and substantial improvement of the building into which they are being incorporated then whether their removal would not cause damage to the building or materials themselves is irrelevant. They are deemed part of the building.

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

- If the purpose is not for the permanent and substantial improvement of the building and their removal would not cause damage to the building or the materials themselves a retention of title clause may have effect.
- See *Holland v Hodgson* (1872) per Lord Blackburn:

There is no doubt that the general maxim of law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz, the degree of annexation and the object of the annexation ... Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

In *Elitestone v Morris* [1997] the House of Lords approved the *Holland v Hodgson* judgment. The House of Lords had to decide if a chalet resting on a concrete base had become part of the land. They distinguished between a chattel, fixture and part of the land. The HL decided that it had become part of the land as it could not be taken down and re-erected like a portacabin. Further, it could be enjoyed *in situ* thereby giving rise to a strong inference that it was to become part of the land.

A fixture may not become part of the land. It will depend on the degree and purpose of annexation.

In *Minshall v Lloyd* (1837) the court stated:

“... something as basic as doors, windows and shutters, in the construction of a building are so much part of the structure that it would bring an air of unreality ... to suggest that the joinery did not become a fixture”

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

- Section 25 of the Sale of Goods Act 1979 may also defeat a retention of title clause.
- Section 25 applies in situations such as where an intermediary (for example a contractor) is in possession of goods from a supplier (under a contract between them which contains a retention of title clause) and with the consent of the supplier the contractor passes them on to the employer who receives them (by paying the contractor for them) in good faith without knowledge of the retention of title clause. The supplier would not be entitled to rely on its retention of title clause in the event that the contractor does not pay the supplier.
- It is applicable to supply only contracts.
- It does not apply to labour and supply contracts.

STEPS AVAILABLE TO A CREDITOR WITHOUT A JUDGMENT AGAINST A DEBTOR

In *Archivent v Strathclyde General Council* (1984) Archivent supplied materials to a main contractor who became insolvent after incorporating some of them into the works but before paying Archivent. The Employer had paid the main contractor for the materials. The Employer did not know of a retention of title clause in the Archivent/main contractor contract and clause 25 of the Act applied and the Employer was entitled to the fixed and unfixed materials.

CREDITOR'S VOLUNTARY ARRANGEMENT (CVA)

- As the name suggests it is voluntary arrangement between a debtor and its creditors.
- It is a binding agreement between the debtor and its creditors.
- A CVA provides a company with breathing space.
- The debtor company must be viable for a CVA to work.
- CVA's can work if a company has a short term cash flow problem.
- Commonly, the agreement will be to defer payment to the creditors or provide for part payment to the creditors.

CREDITOR'S VOLUNTARY ARRANGEMENT (CVA)

- The directors, administrator or liquidator of the company must propose the CVA.
- Creditors and shareholders cannot propose a CVA.
- An application can be made to a court for a moratorium to prevent action being taken against the company for a period of 28 days.
- A meeting is (usually) called for the purpose of voting on the proposed CVA.
- Seventy five per cent (in terms of value) of the creditors need to agree to the proposal to make the CVA binding.
- It is only binding on the creditors who had notice of the meeting.

STATUTORY DEMANDS

Statutory Demands

- A statutory demand is a formal document which warns a debtor of possible bankruptcy proceedings if a debt is not satisfied.
- It is a pre-requisite to involuntary bankruptcy proceedings.
- It is not always necessary to have a judgment in the creditor's favour. If a debt is clearly due and it is clear that a debtor does not have the ability to make payment a creditor can issue a Statutory Demand.
- A creditor does not need to involve the services of a solicitor to issue a statutory demand.

STATUTORY DEMANDS

- A statutory demand must be issued before bankruptcy proceedings can be commenced unless there is a judgement against the debtor.
- Bankruptcy proceedings are commenced by issuing a winding up petition.
- There are a number of standard form statutory demands.
- There are differing forms for different circumstances (under sections 123(1)(a) or section 222(1)(a) or under section 268(1)(a) of the Insolvency Act 1986).
- When a debtor receives a statutory demand it can either satisfy the demand by:
 - ◆ paying it,
 - ◆ agreeing terms with the creditor (instalments, security, etc),
 - ◆ or disputing the demand.
- Disputing the demand requires a debtor to notify the creditor that it disputes the demand and give reasons why the demand is disputed.

STATUTORY DEMANDS

- A debtor can also apply to the courts to have a statutory demand set aside.
- The courts will set aside a statutory demand if (amongst other things):
 - The sum demanded is disputed,
 - The party issuing the demand holds security for the debt,
 - The demand is for less than £750,
 - The debt is subject to an instalment order,
 - The debt is subject to a stay.
- A court will set a statutory demand aside if the sum claimed is in dispute.

STATUTORY DEMANDS

- If a statutory demand is set aside the creditor will usually have to pay the debtor's costs of the application.
- An application to the court to set aside a demand must be made within 18 days of service of the demand.
- If the debtor does not apply to court to set aside a statutory demand the debtor has 21 days from service of the statutory demand to satisfy it or reach a settlement with the creditor.
- A statutory demand is not effective for a debt of less than £750 as bankruptcy proceedings cannot be commenced for a sum less than £750.
- If a statutory demand is ignored or the creditor and debtor do not agree terms the creditor can commence bankruptcy proceedings.

STATUTORY DEMANDS

- Bankruptcy proceedings should not be commenced if the debt is disputed in some way.
- If a court will not enforce bankruptcy proceedings a creditor may be liable in costs and damages in consequence (which may include loss of reputation, loss of earnings etc).
- Bankruptcy proceedings will not necessarily assist a creditor to get paid. It will have the effect (if successful) of closing a company down. Where a debtor's debts outweigh its assets a creditor is not going to have the debt satisfied in full.
- Usually there is pecking order under which the assets of a company are utilised to satisfy debts:
 - Revenue and Customs,
 - Secured creditors,
 - Unsecured creditors.

LEGAL PROCEEDINGS

A party cannot commence legal proceedings against a company in administration or liquidation. Leave of the court is required.

Proceedings already commenced at the date of administration or liquidation is not affected by the rule against commencing proceedings.