

CHARGING ORDERS INTRODUCTION AND PROCEDURE

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Overview



- (1) General principles
- (2) The court's discretion
- (3) Procedure for obtaining a charging order



(1) Introduction: What is a charging order?

“A charging order is an order made by the court charging some specified property of the judgment debtor with the ability to satisfy the judgment debt and is thus a mode of enforcement of money judgments and orders. It operates to give the judgment creditor security for the payment of the amount due under the judgment and produces the fruits of the judgment not at the time when the charge is imposed but at the time when the charge is enforced.” -- *Report of the Committee on the Enforcement of Judgment Debts, 1969.*

- Means of *indirect* execution of a judgment debt.
- Can be obtained over specified land or a specified interest in land belonging to the judgment debtor.
- Enforceable as a general equitable charge over the land.

Sources of Law



- (1) Charging Orders Act 1979: substantive law
- (2) Part 73 of the Civil Procedural Rules: procedural law

Overarching principles

s.1(1) COA 1979:

“Where, under a judgment or order of the High Court or the family court or the county court, a person (the “debtor”) is required to pay a sum of money to another person (the “creditor”) then, for the purpose of enforcing that judgment or order, the appropriate court ***may*** make an order in accordance with the provisions of this Act **imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.**”

s.1(5) COA 1979:

“In deciding whether to make a charging order the court shall consider **all the circumstances of the case** and, in particular, any **evidence before it** as to—

(a) the personal circumstances of the debtor, and

(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

Who can apply for a charging order?

- Judgment creditor can apply for charging order at same time as other means of enforcement.
- NOTE: the definition in s.1(1) COA 1979 *does not include*: (i) an unascertained sum; (ii) an order to pay costs which have not been assessed; (iii) a compensation order made in criminal proceedings; (iv) an order against the Crown.
- BUT *does include*: (i) industrial tribunal awards (Employment Tribunals Act 1996, s.15); (ii) awards for repayment to the Secretary of State for Social Security (Social Security and Housing Benefits Act 1982, s.41); (iii) fines and other penalties imposed by magistrates (Magistrates' Courts Act 1980, s.87); (iv) arbitral awards (Arbitration Act 1996, s.66)

Section 2 COA 1979: What can be charged?

(1) Subject to subsection (3) below, a charge may be imposed by a charging order only on—

(a) any interest held by the debtor beneficially—

(...)

(b) any interest in land held by a person as trustee of a trust (“the trust”), if:

(i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust, or

(ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit, or

(iii) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.

When is a charging order appropriate?

- Does not guarantee prompt payment: but a charging order against debtor's property may induce faster payment.
- Useful where a debtor lacks liquidity and where other forms of execution would not recover the debt.
- May not be appropriate if there are significant prior charges over the property – the amount secured by prior charges may increase.
- Not appropriate if the debtor has no beneficial interest in the property.

Advantages:

1. Priority over unsecured creditors.
2. Partially secured creditor may become fully secured if value of charged property increases over time.
3. Secures judgement debt *and* interest.
4. Interim charging order can be obtained on an application without notice, preventing the debtor from disposing of his property.

(2) The court's discretion

- In exercising its discretion the Court must take into account all the relevant circumstances whether they arose before or after the interim order.
- The Court should exercise its discretion equitably having regard to the interests of ***all parties involved***, including ***other unsecured creditors***, as well as interests of the judgment creditor and the judgment debtor.
- (1) The liquidation of a company, whether by resolution or by order for compulsory winding up, and (2) the bankruptcy of an individual brings into operation a statutory scheme for dealing with the company's or individual's assets and accordingly if a winding up or bankruptcy occurs before the final order the Court will decline to make a final order.
- The size of the debt is one of the factors to be taken into account in the exercise of the court's discretion. In practice the courts take a different attitude to the granting of a charging order (which, of itself, merely gives security) from the making of an order for sale.

Bankruptcy



- Once a bankruptcy petition has been presented the court is unlikely to make to make a final charging order as this would prefer one creditor (*Roberts Petroleum Ltd v Bernard Kenny Ltd (In Liquidation)* [1982] 1 W.L.R. 301)
- Section 1(5) COA 1979: court must consider whether a charging order would unduly prejudice other creditors.
- The judgment creditor can retain the benefit of a charging order only if the final order was made before presentation of the petition (ss.83 and 346 of the Insolvency Act 1986). However, a creditor can ask the court to make an interim order and list the date for consideration of a final order after the date of hearing of the bankruptcy petition. The interim order would be discharged if the debtor is adjudged bankrupt but could be made final if the petition were dismissed.

Insolvency



- Where the judgment debtor obtains an interim under the Insolvency Act 1986 because he intends to enter into a voluntary arrangement with his creditors, the court's consent is required to any application for an interim or final charging order.
- Any charging order obtained in ignorance of an interim order under the Insolvency Act is liable to be set aside.

Personal circumstances of the debtor: family homes

- The courts seek to balance a judgment creditor's entitlement to obtain security for the judgment debt with the claims of the debtor's spouse and children.
- "Each case depends upon striking a fair balance between the normal expectations of the judgment creditor and the hardship to the wife and children if a charging order is made." – per Moore-Bick LJ in *Kremen v Agrest* [2013] EWCA Civ 41
- One way of doing so is to make a charging order subject to a condition that it is not to be enforced before a certain date.

Human Rights: Art 8 and A1P1?



“It is of course in accordance with the law that a charging order has been made and, to the extent that it is now enforced, that will be in accordance with the law also. It will also be in the public interest to enforce charging orders generally because of the economic importance of ensuring that there is an efficient machinery for the enforcement of debt obligations(...) in applying the court’s discretion, it must be applied in a way which gives due respect to the right of all those living in the property, not just the debtors, to have respect for their family life and their home. Against that must be weighed the rights of the chargee under the equitable charge... not to have to wait indefinitely for payment or to have no means of enforcing its security.”

– *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch), per Judge Purle at [12] and [13].

(3) Procedure for obtaining a charging order

- (1) The application
- (2) The making of an interim charging order by the court
- (3) The making of a final charging order by the court

Governed by Part 73 of the CPR, and the Practice Direction to Part 73.



(i) The application: Which court?

CPR 73.3(2): “Where an application for a charging order is to be made to the County Court, it **must be made to the County Court Money Claims Centre.**”



(i) The “appropriate court”

When is an application to be made to the County Court? Section 1(2) COA 1979:

- Where the debt is less than £5,000 (the County Court Limit)
- Where the debt is more than £5,000, the application can be made in the County Court or the High Court.

Except:

- Where the order to be enforced is an order of the family court (appropriate court is the family court)
- Where the order to be enforced is a maintenance order of the High court or an order for costs made in family proceedings in the High Court (appropriate court is the High Court or family court)



(i) Multiple judgments

- Can apply for a single charging order in respect of multiple judgments against the same debtor: CPR r.73.3(4)

(i) The application notice

Practice Direction to Part 73: **Form N379**. **Application notice must contain:**

- (1) the name and address of the judgment debtor;
- (2) details of the judgment or order sought to be enforced;
- (3) the amount of money remaining due under the judgment or order;
- (4) if the judgment debt is payable by instalments—
 - (a) whether the order was made on or after 1 October 2012; and
 - (b) the amount of any instalments which have fallen due and remain unpaid;
- (5) if the judgment creditor knows of the existence of any other creditors of the judgment debtor, their names and (if known) their addresses;
- (6) identification of the asset or assets which it is intended to charge including, where applicable, the title number under which any land upon which it is sought to impose a charge is registered;
- (7) details of the judgment debtor's interest in the asset; and
- (8) the names and addresses of the persons on whom an interim charging order must be served under rule 73.7.



(i) The application notice continued...

- The application form requires full and frank disclosure of any other known creditors and any other interested parties including beneficial co-owners, trustees and persons with rights of occupation.

(i) Application tips

- (1) Attach a copy of the judgment or order to the application.
- (2) Give as much detail as possible about the land and attach office copy entries to the application.
- (3) Give as much detail as possible in respect of any beneficial interest.
- (4) Remember that the applicant is asking the court to exercise its discretion, and that objections may subsequently be made to the order becoming final – make full use of the “Further Information” box!
- (5) Build as strong a case as possible by setting out any information which would justify the court making the order, e.g. the creditor’s financial position, any refusals to pay, any other methods of enforcement previously attempted.

(ii) The Interim Charging Order

CPR r.73.4.

- The application for a charging order will initially be dealt with without a hearing.
- Interim Charging Order usually made by a court officer, except:
 - (a) orders made against a person as trustee of a trust.
 - (b) partnership property
 - (c) where an instalment order made before 1st October 2012
 - (d) where the court officer otherwise considers that the application should be dealt with by a judge.
- High success rate.
- Where the order is made by the judge, that judge will consider whether it is appropriate to transfer the application to the judgment debtor's home court.
- **Charge must be registered in order to be effective, otherwise it could be defeated by a sale to a bona fide purchaser for value without notice.**



(ii) Request for review of the officer's decision

CPR 73.5(1): “A party may request that a decision by a court officer be reconsidered by a District Judge”.

- A request for reconsideration **must be filed within 14 days** after the party is served with notice of the decision.
- Reconsideration will take place without a hearing.
- Request must be in writing but not necessarily as an application under part 23 – there is no requirement for an application fee to be made.
- The party making a request for reconsideration should include the reasons why a reconsideration is being sought.

(ii) Service of the Interim Charging Order: County Court Money Claims Centre



CPR r.73.7

- Where the interim charging order has been made at the County Court Money Claims Centre and has not been transferred out of that Centre for a hearing, copies of (1) the interim charging order, (2) the application notice and (3) any documents filed in support of it **must** be served by the judgment creditor on the persons listed in paragraph (7) **within 21 days of the date of the interim charging order**.
- The judgment creditor **must file** (1) a certificate of service in relation to each person served together with (2) a statement of the amount due under the judgment or order including any costs and interest, **within 28 days of the date of the interim charging order**.
- If the judgment creditor fails to comply, and does not apply for an extension of time within the period specified, the matter must be referred to a judge to consider whether to dismiss the application and discharge the interim charging order.

(ii) Service of the Interim Charging Order: other courts



- Where the interim charging order has been made at a court other than the County Court Money Claims Centre, or where the matter has been transferred out of that Centre under rule 73.4(6) for a hearing, copies of the interim charging order, the application notice and any documents filed in support of it must, not less than 21 days before the hearing, be served by the judgment creditor on the persons listed in paragraph (7).
- In this case, the judgment creditor must either (i) file a certificate of service in relation to each person served not less than 2 days before the hearing, or (ii) produce a certificate of service at the hearing.

(ii) Who must be served with the Interim Charging Order by the judgment creditor: para (7) of r.73.7



- (1) the judgment debtor;
- (2) any co-owner;
- (3) the judgment debtor's spouse or civil partner (if known);
- (4) such other creditors as are identified in the application notice or as the court directs;
- (5) if the order relates to an interest under a trust, on such of the trustees as the court directs.

(iii) Further consideration in the County Court Money Claims Centre



CPR r.73.10

- Any person who objects to the court making a final charging order **must** file and serve on the judgment creditor written evidence stating the grounds of objection, **not later than 28 days after service on that person of the application notice and interim order.**
- The court must then transfer the application to the judgment debtor's home court for a hearing, and must serve notice of the hearing on the judgment creditor and all persons served with the Interim Charging Order.
- If no objections are received, the application will be considered by a judge upon the expiry of the 28 day period for filing objections.



(iii) Tips for objections

- A debtor needs to make as compelling a case as possible ahead of the final hearing, including details of any children or dependent adults living in the property, and any disabilities or medical issues.
- Where further time to pay is sought, details of income and outgoings should be provided, along with information on assets and debts.

(iii) The Final Charging Order

- Judge will decide whether to make a final charging order either (1) at a hearing following the filing of an objection, or (2) on paper on the expiry of the 28 day period.
- the court *may*:
 - (a) make a final charging order confirming that the charge imposed by the interim charging order continues, with or without modification;
 - (b) discharge the interim charging order and dismiss the application;
 - (c) decide any issues in dispute between the parties, or between any of the parties and any other person who objects to the court making a final charging order;
 - (d) direct a trial of any such issues, and if necessary give directions; or
 - (e) make such other order as the court considers appropriate.

NOTE: a court may also determine that a judgment debtor needs more time to put their case together and adjourn the hearing.

(iii) The Final Charging Order continued...

- The court may make a final charging order subject to conditions, such as:
 - The charge should not be enforced provided the debtor pays the debt by specified instalments.
 - The charge should not be enforced until after a certain date.
- The court may discharge the order, in which case (if the charge has been registered) the order should also direct that that the relevant entry on the register be cancelled.
- Tip: take a draft order to any hearing setting out the details of the charging order, the registration number of the property in question, and the entry number at which the interim order is registered on the office copy entry.

(iii) Service and Costs

- The court must serve the final charging order on any person required to be served with the interim charging order.
- Fixed costs apply to the *making* of a final charging order: r.45.8 + table 5

On the making of a final charging order under rule 73.10(7)(a) or 73.10A(3)(a):

£110.00

The court may also allow reasonable disbursements in respect of search fees and the registration of the order.

- Note: a successful objector may ask for their costs at any hearing.

(iii) Discharge of a Final Charging Order

CPR r.73.10B

- Where the final charging order was made without a hearing, any application to discharge or vary a charging order must be made to the County Court Money Claims Centre.
- Upon the filing of an application to discharge or vary a charging order at the County Court Money Claims Centre, the application must be transferred for a hearing to the judgment debtor's home court.
- Where the final charging order was made at a hearing, any application to discharge or vary a charging order must be made to the court which made the charging order.
- The court may direct that any interested person be joined as a party to such an application and that the application be served on any such person.
- An order discharging or varying a charging order must be served on all the persons on whom the charging order was required to be served.

Conclusions



- A charging order is essentially a county court remedy, but it is discretionary.
- Although there is a high success rate for obtaining interim charging orders, clients should be advised that there is no guarantee of obtaining a final charging order.
- There are cost risks of obtaining an interim charging order on a dubious basis.
- Equally, there is little point in incurring costs objecting to an order being made final unless there are good grounds for objecting: a final charging order does not mean that a sale of the property is imminent.
- The application form is very important and is the applicant's opportunity to get as much information before the court as possible. A strong application may deter speculative objectors.