

Charging Orders - Introduction and procedure

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Overview

- General principles
- Procedure
- Two main sources of law:
 - Charging Orders Act 1979 (“**COA**”)
 - CPR Part 73
- Though charging orders can be sought under other provisions, e.g. Council Tax (Administration and Enforcement) Regulations 1992; Partnership Act 1890

What is a charging order?

- An order of the Court imposing a charge on property of a judgment debtor in order to secure the payment of money due under a judgment (s. 1(1) COA).
- Applied for by the judgment debtor.
- It has the same effect, and is enforceable in the same manner as, an equitable charge created by the debtor (s. 3(4) COA).

What can be secured?

- “...any money due or to become due under the judgment or order”: s.1(1) COA
- Extends to the judgment debt, costs, and interest (even if interest is not mentioned): ***Ezekiel v Orakpo*** [1997] 1 WLR 340
- “judgment or order” includes the award of any court or arbitrator which is enforceable as if it were a judgment or order of the high/family/county court: s.6(2) COA. E.g.
 - awards by Employment Tribunals: s. 15 Employment Tribunals Act 1996
 - fines imposed by magistrates: s. 87 Magistrates Courts Act 1980
 - arbitral awards: s. 66 Arbitration Act 1966
- More than one judgment or order: s. 1(4) COA

What can be secured?

- But does not include
 - unascertained sums: ***Monte Developments Ltd v Court Management Consultants Ltd*** [2010] EWHC 3071 (Ch)
 - costs that are yet to be assessed: ***Monte Developments Ltd***
 - sums that can only become due following some further step: ***Monte Developments Ltd***
 - a compensation order made in criminal proceedings: ***Osbourne v Kendrick*** [2001] EWCA Civ 690
 - awards prohibited by statute, e.g. against the Crown (s. 25(4) Crown Proceedings Act 1947) or property of a state's central bank (s. 14(4) State Immunity Act 1978)

What can be charged?

- Only the types of property outlined in s. 2 COA
- Any interest a judgment debtor holds beneficially:
 - in land, certain securities, or funds in court (s. 2(1)(a)(i) and s. 2(2) COA);
 - or under a trust (s. 2(1)(a)(ii) COA)

NB: precise extent of debtor's beneficial interest does not have to be ascertained before order made: ***Walton v Allman*** [2016] 1 WLR 2053
- Any interest held by a person as trustee of a trust, if the interest is in such an asset or is an interest under another trust and—
 - the judgment or order was made against that person as trustee (s. 2(1)(b)(i) COA)
 - the whole beneficial interest under the trust is held by the debtor (or debtors) unencumbered and for his/their own benefit (s. 2(1)(b)(ii) and (iii) COA)

When will it be granted: court's discretion

- Court has discretion: s. 1(1) COA provides it “may” make an order
- Court must consider all the circumstances of the case, and in particular any evidence before it of
 - the personal circumstances of the debtor
 - whether any other creditor or debtor would be unduly prejudiced by the making of the order (s. 1(5) COA)
- Court should exercise discretion equitably, having regard to the interests of **all** parties involved, including other unsecured creditors, the judgment creditor, and the judgment debtor: ***Roberts Petroleum Ltd v Bernard Kenny Ltd*** [1982] 1 WLR 301, 307CA (unaffected on this point by the UKHL: [1983] 2 AC 192)
- Summary of 10 principles in WB Vol 1 (2019) 73.4.5

When will it be granted: court's discretion

Insolvency/Bankruptcy: bring into operation statutory schemes under Insolvency Act 1986:

- If it appears judgment debtor to become bankrupt, court will generally not make final charging order: ***Roberts Petroleum Ltd***
- This applies even if bankruptcy petition presented, but order not yet made: ***Sandhu v Sidhu*** [2011] EWHC 3675 (Ch)
- Benefit of a charging order can only be retained against the receiver or trustee if a final charging order was made before the bankruptcy order: s.183, 346 IA 1986
- Where a judgment debtor obtains an interim order under IA 1986, court's consent required for any application for interim or final charging order: s. 252 IA 1986

When will it be granted: court's discretion

Personal circumstances: family home

- ***Kremen v Agrest*** [2013] EWCA Civ 41:
 - Each case depends on striking a fair balance between the normal expectations of the judgment creditor, and the hardship to wife and children if a charging order is made.
 - The interests of the creditor should be respected “save to the extent necessary to override them to make appropriate provision for the wife and any minor children”.
 - Sometimes this can be achieved by granting the charging order by postponing the sale of the property.
- Guidelines for cases where there is a divorce: ***Harman v Glencross*** [1986] Fam 81.

Human Rights?

- Charging order may have implications for Art. 8 (right to respect for one's private life and home) and A1P1 (peaceful enjoyment of property).
- Ample authority that orders for sale require consideration of human rights grounds: see e.g. ***Close Invoice Finance Ltd v Pile*** [2008] EWHC 1580 (Ch), [12]-[13].
- Some very slight indication that it is only at order for sale stage that human rights concerns arise: ***Walton v Allman*** [2016] 1 WLR 2053, [60] but not beyond doubt.

Pros/Cons

Advantages	Disadvantages
Provides security for principal and interest – a better position than unsecured creditors in the event of insolvency	Depends on the value of the debt to the secured asset, and any other security already granted
Can help realise the debt – order for sale	Court has discretion
Threat of an order for sale a useful “stick”	Security may worsen over time – value of land falls, value of prior charges increases, interest accrual
Application for interim charging order usually made without notice – stop asset disposal	May have to wait substantial time before debt can be realised
Final charging order, once made, can only be impeached in limited circumstances	Depends on debtor having interest in the land

Useful where:

- Debtor lacks liquidity
- Other forms of execution would not recover debt

Procedure

CPR Part 73 and Practice Direction 73

- (1) Application
- (2) Interim Charging Order
- (3) Final Charging Order

The Application

Venue (s. 1(2) COA; Art 3 County Court Jurisdiction Order 2014/503):

- Where debt is less than £5,000, County Court
- Where debt is more than £5,000, County or High Court
- Where it is to be made to the County Court, it is to be made to the County Court Money Claims Centre unless the application is for a charging order over an interest in a fund in Court: CPR r. 73.3(2)

Except:

- Where order to be enforced is made in family proceedings, Family Court
- Where order to be enforced is maintenance order of High Court or order for costs in family proceedings in High Court, High Court or Family Court

The Application

Form (PD73 para 1).

- Requirements outlined in PD73 para. 1:
 - Form N379
 - list of required information
- A claim under the Arbitration Act 1966 may be made in an arbitration claim form: CPR r. 62.18(1)(a)
- Points to note:
 - Give as much detail as possible on the land to be charged, beneficial interest, any other known creditors of the judgment debtor
 - Attach a copy of the judgment or order
 - Asking court to exercise discretion without hearing – build a strong case by setting as much information as possible – e.g. on creditor's financial position, refusals to pay, other methods of enforcement attempted.

The Interim Charging Order

- Usually dealt with by Court Officer without a hearing, save where:
 - Orders sought against a person as trustee,
 - Partnership property
 - An instalment order made before 01 October 2012
 - Where the Court Officer otherwise considers application should be dealt with by a judge (CPR r. 73.4)
- Judge may transfer the application to judgment debtor's home court for fixing of a hearing for final charging order (CPR r. 73.4)
- Charge **must be registered** to avoid defeat by bona fide purchaser for value without notice. May be registered under s. 3 COA
- Party may, within 14 days, request review of a decision made by a court officer. This too will take place without a hearing (CPR r. 73.5)

The Interim Charging Order

Service of documents by the judgment creditor (CPR r. 73.7)

- If made at the CCMCC:
 - Copies of the order, application and documents must be served within 21 days
 - Certificates of service for each person, and statement of amount due (incl. costs and interest), must be filed within 28 days
 - Failure to comply will lead to referral to a judge to consider whether to dismiss the application and discharge the interim order
- For other courts:
 - Copies of the same documents must be served 21 days before the hearing. Certificates of service for each person filed 2 days before hearing, or produced at hearing

The Interim Charging Order

- People to be served (CPR r. 73.7(7))
 - (1) Judgment debtor
 - (2) Any co-owner of an interest in land
 - (3) Judgment debtor's spouse/civil partner (if known)
 - (4) Other creditors identified in the application notice or as the court directs
 - (5) If order relates to interest under a trust, such trustees as court directs
 - (6) (Various parties if the interest charged is in securities)
 - (7) If the interest charged is in funds in court, the Accountant General at the Court Funds Office
- CPR Part 6 rules for service apply

The Interim Charging Order

Further consideration of application in the CCMCC (CPR r. 73.10)

- Any person objecting to making of final charging order must file and serve written evidence stating grounds of objection within 28 days of service of interim charging order
- Court must then transfer application to judgment debtor's home court, and serve notice of hearing on judgment creditor and persons served under CPR r.73.7
- If no objections received, judge will consider application after 28 days of interim charging order.

For further consideration of orders transferred out of the CCMCC, see CPR r. 73.10A

The Final Charging Order

Whether considering after 28 days or following a hearing, the court may (CPR 73.10.7)

- Make the final charging order confirming the interim charging order continues, with or without modifications
- Discharge the interim charging order and dismiss the application
- Decide any issues between any of the parties
- Direct a trial of any such issues and give directions if necessary, or
- Make such other order as it considers appropriate. Note, this can include:
 - adjourning to allow the judgment debtor more time to put together its case
 - Making the final charging order subject to conditions (e.g. not to be enforced providing instalments paid, or before a certain date)

The Final Charging Order

Service: the court must serve any final charging order on all persons on whom the interim charging order was required to be served (CPR r. 73.10(9))

Costs: fixed under CPR r. 45.8 (table 5) – £110 plus reasonable disbursements for search fees and registration of the order

Application for discharge or variation (CPR r. 73.10B, s. 3(5) COA):

- If final charging order made at CCMCC without a hearing, application to be made to CCMCC and transferred to judgment debtor's home court
- If final charging order made at a hearing, application must be made to that court
- Court may order joinder of any party, and must serve any order on all parties

Thank you for listening

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