Bindmans

DISPUTE RESOLUTION FOR BUSINESSES

Enforcement of judgments

Even if you have been to Court and a Court has awarded a Court judgment in your favour, in some instances, debtors do not always pay their judgments by the date set out in the judgment.

In such circumstances, there are a number of methods available to creditors to seek to recover that judgment debt, or to put pressure on the debtor to make payment.

The main aim of most enforcement actions is for the creditor to recover the monies owed to them. However, there are occasions where the debtor will simply not be able to pay, but the creditor still wishes to assert pressure on the debtor by some kind of insolvency action (such as bankruptcy or winding up petitions). Whilst the Courts do not like parties using these types of insolvency methods as a way of seeking payment of debts, they are used to put pressure on an opponent to pay or come to an arrangement to pay the judgment debt. However, they should not be used if the debt is genuinely disputed, although this is not usually the case once a Court has ordered judgment against a party.

The first step to consider when determining which enforcement action to take, is to check whether the debtor has assets that they can use to pay the judgment debt. This can be done by carrying out a number of various searches, such as credit searches, searching Companies House or HM Land Registry, the Individual Insolvency Register or the Register of Judgments Orders and Fines in England and Wales. You may also check with third parties, or by asking the debtor themselves to fill out an assets and liabilities form. If they refuse to provide such information, it is possible to make an application to the Court to compel them to attend Court and provide such information.

On occasion, it may be appropriate to instruct an enquiry agent to make more detailed searches into what assets a debtor has. If the debtor does not have any assets, it may not be worth enforcing the judgment. Similarly, if it appears that the debtor may be bankrupt or about to enter into some other insolvency arrangement, it may not be worth pursuing the enforcement. If a debtor becomes bankrupt or the company becomes insolvent during the enforcement process, then as a creditor, you are likely to be treated as an unsecured creditor and are unlikely to recover the full amount of the judgment debt.

If you are unaware of whether a debtor has assets and the debtor refuses to provide such information upon request, then it is possible to make an application to Court for the debtor to attend questioning, under oath, by a Court official, who will be able to request details about their income, employment, wages, bank/building society accounts and any other relevant financial information which may then assist in a creditor in determining which method of enforcement may be most appropriate.

Next, you need to check if the judgment debt is due and enforceable. Most Court judgments will provide a date by which the judgment debt needs to be paid and will also state whether it can be paid in instalments. The usual timeframe for payment of a judgment debt is within 14 days of the date of the judgment. However, the Court does have the power to extend this. If this timeframe for payment has not expired, or the debtor has not breached the terms of the instalment payments, you are unlikely to be able to enforce the judgment debt until it does expire.

Whilst the normal rule is that you have six years from the date of the judgment to commence any action for enforcement, in practice, most creditors seek to enforce judgments as soon as they are able to. This is because the longer you leave between judgment and enforcement, the longer it provides for a debtor to move or remove assets to avoid paying the sums they owe to you.

A number of the different enforcement options are set out below, together with a brief explanation of each of them. At Bindmans, we are happy to discuss these options with you to see if they are appropriate for your claim.

TAKING CONTROL OF GOODS

This is possibly the quickest and most popular method of enforcement. Once a debtor has failed to pay a judgment, you can then instruct a Court official to attend the debtor's premises and seize control of goods, which the Court official will then sell to raise funds to satisfy your judgment. In the High Court, this is usually done by a High Court Enforcement Officer (via a Writ of Control) and in the County Court, by a County Court bailiff under a Warrant of Control. The enforcement officer will usually recover their costs from the debtor too.

- If the debt is less than £600, the enforcement has to remain with the County Court bailiff.
- Any debts of over £600 may be transferred to the High Court for enforcement by the High Court Enforcement Officers, who are often seen as more effective (and less busy) than the County Court bailiffs.
- If the judgment is over £5,000, it must be transferred to the High Court for enforcement.

THIRD-PARTY DEBT ORDER

If you are aware that there is a third party holding money on behalf of a debtor, then it is possible to apply to the Court to request that those monies are frozen and, if a final order is made, that the third party is ordered to pay the judgment sum to you from those frozen funds.

Third-party debt orders are not that popular as you need evidence that the debtor has funds available with a third party, but if you are aware that the debtor has a bank account and there are sufficient funds in that bank account to be able to repay you, then they could be considered as a method of enforcement. For example, if you are aware that the debtor's salary is paid into a particular bank account, this could be a way of recovering monies owed to you.

Third-party debt orders can be used to recover all or part of a judgment owed to a creditor. They can also be used alongside the other methods of enforcement set out in this note.

In order to obtain a third-party debt order, applicants need to follow a two-stage process, first making an application for an interim third-party debt order, followed by a subsequent application for a final third-party debt order.

A creditor can make an application for an interim third-party debt order at any time after they have obtained a judgment, although the judgment debt must be due and enforceable, so any timeframe for paying the judgment debt or instalment must have expired.

It is also worth noting that if you obtain an interim order, the interim order will only be sent to the third-party (i.e. bank) and they will only 'freeze' the money that is in the debtor's account on the day the interim order is served on them. As such, if you know that a debtor will not be paid until a certain day in the month, you may decide not to serve the interim order until just after the debtor has been paid to ensure that the freeze on the account includes the most recent receipt of wages.

The application for an interim third-party debt order is made to the Court that granted the judgment, and will usually be assessed by a judge based on the papers alone – there is no need for a hearing and also no need to notify the debtor that you are making the interim application (as this would put them on notice and they may try to move assets around).

If the Court grants the interim third-party debt order, it then needs to be served on the third party and the debtor. This can be done by the Court or the creditor, although it is advisable for the creditor to do this, so they can control the process.

The interim order is served on the third party first (again so as not to notify the debtor of the application) and should not be served on the debtor until at least seven days have passed since it was served on the third party. The interim order will contain a date for a hearing at which it will be determined if the interim order should be made a final third-party debt order. The interim order should be served on the debtor at least seven days before the date of this hearing.

If the creditor serves the interim order, they will need to provide proof of service (via a certificate of service) that they have correctly served the third-party and debtor prior to the hearing.

The effect of the interim order is that the monies that the third party owes to the debtor are 'attached' to answer the creditor's judgment demand. As such, if the third party pays these monies to the debtor, they risk having to pay them over again to the creditor. In practice, banks or building societies will freeze those accounts, or will only allow the debtor to withdraw limited sums, so that the amount owed to the creditor remains in the bank account. It's important to note that the interim order has the effect of freezing the funds, it does not order the third-party to pay the funds to the creditor. This can only be done once the interim order is made final.

After a period of at least 28 days have passed from the date of the interim order, the Court will list a hearing to determine if the interim order should be made final. The creditor (or their legal representative) should attend the hearing, together with anyone who objects to the interim order being made final. The Court will use its discretion to either grant the final order or discharge the interim order and dismiss the application.

If a final order is made, then the third party should pay the sums stated in the order to the creditor. Once they do so, the obligations of the third party under the final order are discharged. If for any reason the third party fails to pay the sums to the creditor, then the creditor can bring their own enforcement actions against the third party.

ATTACHMENT OF EARNINGS

If the debtor is employed, it may be possible to seek an order that a proportion of the debtor's salary is deducted and paid by the employer directly to the creditor. Such a method of enforcement is only available in the County Court and only available against individuals. It is however a relatively inexpensive method of enforcement, but can take a long time for the debt to be repaid in full as the Court has to follow certain set rates as to what can be paid back each time the debtor is paid. It does however have the advantage that payments are coming from the employer direct, so you are not relying on the debtor to make payment themselves.

CHARGING ORDERS

A charging order secures a judgment debt by imposing a charge over the debtor's interest in land or other assets. They are most commonly used where

a debtor owns their own property, ideally free of any mortgage. The charging order prevents the debtor from selling the property without paying what is owed to the creditor first. If there is not going to be sufficient equity in the debtor's property after any mortgages have been paid, then a charging order is not necessarily appropriate. Courts are usually reluctant to grant charging orders where the amount owed to the creditor is low and where a different method of enforcement may be available.

The charging order does also not mean that the property will automatically be sold so the creditor can be paid. A separate application for an 'order for sale' is required and Courts can be reluctant to order someone to sell their property, especially when it is occupied by the debtor's family and dependents. As such, a creditor may have to wait a number of years before the debtor decides to sell the property themselves.

INSOLVENCY BASED ENFORCEMENT – BANKRUPTCY PETITIONS AND WINDING UP PETITIONS

As mentioned above, Courts do not like creditors using traditional insolvency-based forms of enforcement to recover debts. However, they are frequently used to exert pressure on debtors to pay or refinance.

The usual first step is to serve a statutory demand on the debtor giving them 21 days to pay the debt or make acceptable arrangements to pay.

If they fail to do so, non-payment following a statutory demand is seen as good evidence to a Court that the debtor is unable to pay their debts as and when they fall due, and allows the creditor to present either a bankruptcy petition (against an individual) or a winding up petition (against a company).

You can only present a bankruptcy petition or winding up petition if the debt owed meets the following thresholds:

- For a bankruptcy petition, the debt has to be £5,000 or more
- For a winding up petition, the debt has to be above £750

We would recommend that you instruct solicitors to act for you in the presentation of either a bankruptcy petition or winding up petition, as there are a number of procedures and time limits to comply with and if you do not follow these steps, you can lead to your petition being dismissed.

The presentation of bankruptcy petitions and winding up petitions should not be used where the debt is disputed or where the debtor may have a counterclaim or right of set off which reduces the amount owed to below the above thresholds. If you present petitions on this basis, you risk the Court dismissing your petition and ordering you to pay your opponent's costs.

If you are successful in making the debtor bankrupt or winding up the debtor company, then an insolvency practitioner (a trustee in bankruptcy for individuals or a liquidator for companies) will be appointed to collect the debtor's assets and distribute them amongst all outstanding creditors. This often means you may not make a complete recovery of the sums owed to you, especially if there are multiple creditors.

This process can be time consuming and expensive and does not always lead to recovery, but does exert the most pressure on debtors to seek to resolve the debt.

GET IN TOUCH

Mark Ovenell

PARTNER

Dispute Resolution

E: mark.ovenell@bindmans.com

T: +44 20 7833 4433

> The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

CHAMBERS AND PARTNERS 2022

BINDMANS LLP

236 Gray's Inn Road | London | WC1X 8HB

T: +44 20 7833 4433 | E: info@bindmans.com | W: bindmans.com