



## Enforcing a Charging Order

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If a court decides that a debt is properly owed to the creditor, it will make a judgment order against the debtor. If the debtor still does not pay the debt, the creditor will need to apply to the court to enforce that judgment. There are a number of debt enforcement options available, including Charging Orders. A Charging Order is a legal charge on the judgment debtor's property for monies owed to the creditor. If the property is sold, the full amount of the charge has to be paid before any of the proceeds of the sale can pass to the debtor. To force the sale of the debtor's home, the creditor would need to apply to the court for an Order for Sale. It would be for the court to decide whether or not to make such an order.

The rules about when a judgment creditor can apply for a Charging Order changed significantly from 1 October 2012. Specifically, sections 93 and 94 of the *Tribunals, Courts and Enforcement Act 2007* were brought into force by the *Tribunals, Courts and Enforcement Act 2007 (Commencement No.8) Order 2012*. Both sections amend the *Charging Orders Act 1979*.

Section 93 came into force on 1 October 2012. It amends the *Charging Orders Act 1979* so that where a debtor is required by a county court or High Court to pay a sum by instalments, an application for a Charging Order may be made straight away by the creditor even though there has been no default in payment. However, the court must take the fact there has been no default into account in deciding whether to make the order. In any event, an Order for Sale to enforce the Charging Order may not be made where there has been no default in payment.

Section 94 came into force on 17 May 2013. It inserts into the *Charging Orders Act 1979* a new provision (section 3A) giving the Lord Chancellor a power by regulations to set financial thresholds for the making of Charging Orders and Orders for Sale. The [Charging Orders \(Orders for Sale: Financial Thresholds\) Regulations 2012](#) came into force on 6 April 2013. The Regulations introduce a financial threshold of £1,000 for the enforcement of Charging Orders by an Order for Sale, where the Charging Order relates to a debt owed under an agreement regulated under the *Consumer Credit Act 1974*.

This note provides a brief overview of the different types of debt enforcement methods available to a creditor who is in possession of a court judgment. The rest of the note deals only with Charging Orders; how charging orders are now granted by the court and enforced by way of an Order for Sale.

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### 1 Over view of debt enforce methods

If a court, having considered all the evidence of a case, decides that a debt is properly owed to the claimant it will make a judgment order against the defendant (referred to as the 'judgment debtor'). In legal terms, the claimant (referred to as the 'judgment creditor') is said to have 'obtained judgment against the defendant'. However, the court will not enforce the order unless it is specifically asked to do so.

When a judgment creditor has not received payment for a court judgment, he/she may apply to the court to enforce that judgment. They have several enforcement options open to them, including:

- execution against goods (i.e. instructing bailiffs to seize the debtor's goods);
- an Attachment of Earnings Order (previously known as a garnishee order);
- a Third Party Debt Order;
- a Charging Order on a debtor's property or asset

In brief, execution against goods is the most common method of debt enforcement. A High Court Enforcement Officer (HCEO) or county court bailiff is instructed to seize and sell the debtor's goods in order to satisfy the debt. HCEOs and county court bailiffs have to comply with a set of rules in enforcing the court's judgment. The most important of these is that enforcement officers have no right to force entry into a residential property.<sup>1</sup>

An Attachment of Earnings Order allows for a specified sum of money to be deducted directly from the debtor's salary by an employer, who forwards the money to the court to repay the debt. It follows that this type of order is not suitable for debtors who are self-employed.

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<sup>1</sup> See '[The current regulation of bailiffs](#)', House of Commons Library standard note, SN/HA/ 4103, 26 March 2013, [online] (accessed 22 April 2013)

A Third Party Debt Order is usually made to stop the debtor taking money out of his/her bank or building society account. Instead, the money owed to the judgment creditor is paid from the account. Similarly, if the judgment creditor knows that the debtor is owed money from a third party they can apply to the court for third party debt order. A third party debt order will prevent the debtor having access to the money until the court makes a decision about whether or not the money should be paid directly to the creditor. For such an order to work, the money held by the third party must be held solely for the debtor (for example, a creditor cannot apply for a third party debt order against a joint bank account unless the judgment debt is owed by all the account holders).

Finally, a court Charging Order will place a legal charge on the judgment debtor's property for monies owed to the creditor. The purpose of the Charging Order is to secure the debt. The majority of charging orders are made against the debtor's own home but a charging order could also be made against the debtor's interest in land (freehold or leasehold) or stocks and shares. Charging orders can only be granted in respect of judgment debts, where a court has already held that a debt is legally owed and payment is due. The application for a Charging Order has two stages, resulting in an interim order and then a final order. An interim Charging Order is usually granted by the court to stop the debtor from selling a property before a final order can be considered. If a court grants a final Charging Order, and the debtor subsequently sells his/her property, the full amount of the charge has to be paid before any of the proceeds of the sale can pass to the judgment debtor. If there are a number of charges on the property they will take priority according to the date that the charges were registered with the Land Registry.

In certain circumstances, a judgment creditor in possession of a final Charging Order can also force the sale of the debtor's property by applying to the court for a further order called an Order for Sale. It is in the court's discretion whether or not to grant this order. The regulations on when a judgment creditor can apply for a Charging Order and when that order may be enforced by way of an Order for Sale have recently changed (see below).

For completeness, I should also mention 'Orders to Obtain Information'. On application to the court, a judgment creditor can request that the debtor attends court under an 'Order to Obtain Information'. This is not a method of attempting to retrieve the money owed, but an order that the debtor attends a court interview to discover more detailed information about his/her financial situation. In practice, it involves the debtor going before the court to answer questions about his/her financial affairs.

Each debt enforcement method has its own particular strengths and weaknesses. The right method for the judgment creditor to pursue will depend on what assets the judgment debtor owns and the debtor's income. However, for those creditors attempting to recover payment of an unsecured consumer debt, Charging Orders are increasingly being used as a method of enforcement. The rest of this note deals only with obtaining and enforcing a Charging Order.

## **2 Obtaining a Charging Order**

The rules about when a judgment creditor can apply for a Charging Order changed from 1 October 2012.

### **2.1 Situation before 1 October 2012**

If the judgment creditor was given a court judgment before 1 October 2012, he/she can apply for a Charging Order if the court order says the debtor must pay

- the whole debt immediately or by a certain date (called a forthwith judgment) and the debtor hasn't done this; or
- by instalments and the debtor has missed one or more payments<sup>2</sup>

## 2.2 Situation after 1 October 2012

The starting position is that sections 93 and 94 of the *Tribunals, Courts and Enforcement Act 2007* (TCEA 2007) were brought into force by the *Tribunals, Courts and Enforcement Act 2007 (Commencement No.8) Order 2012*. Both sections amend the *Charging Orders Act 1979* (the COA 1979).

Section 93 came into force on 1 October 2012. It amends the COA 1979 so that where a debtor is required by a county court or High Court to pay a sum by instalments, a Charging Order may be made straight away even though there has been no default in payment, but:

- the court must take the fact there has been no default into account in deciding whether to make the order; and
- an Order for Sale to enforce the Charging Order may in any event not be made where there has been no default in payment<sup>3</sup>

It is the Government's view that this provision will decrease the aggressive pursuit of debt by encouraging judgment creditors to enter into affordable repayment schemes with debtors with the reassurance that should this not be kept, there is a long term security on the money they are owed.<sup>4</sup>

As indicated above, Section 93 does not apply to any judgment made before 1 October 2012.

Section 94 of the TCEA 2007 came into force on 17 May 2012. It inserts into the COA 1979 a new provision (section 3A) giving the Lord Chancellor a power by regulations to set financial thresholds for:

- the making of Charging Orders; and
- for the enforcement of such orders by an Order for Sale

The implication of section 94 on an application for an Order for Sale is considered in detail below.

## 3 Enforcing a Charging Order

### 3.1 Orders for Sale

Possession of a Charging Order does not, in itself, lead to repayment of the debt. The order is normally viewed as security for a debt, not satisfaction of it. Once a Charging Order has been registered against the debtor's property, it is not unusual for the judgment creditor to simply leave it in place whilst he/she pursues another course of enforcement action, such as entering into a repayment agreement.

That said there are circumstances where a judgment creditor in possession of a Charging Order will immediately make a further, separate application to the court for an Order for Sale. An Order for Sale would force the sale of the charged property (either immediately or at

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<sup>2</sup> See the case of *Ropaigealach v Allied Irish Bank plc* [2001] EWCA civ 1790

<sup>3</sup> Section 93(3)

<sup>4</sup> [HC Deb 8 January 2013 c.GC6-13](#)

some point in the future if a suspended order is made) and the proceeds of sale would be used to pay off the creditor (after other secured loans ranking in priority have been paid). Any equity remaining in the property would then pass to the debtor.

### 3.2 New regulations on the financial threshold for Order of Sale

Prior to 6 April 2013 there was no financial threshold in place; a judgment creditor could apply to the court for an Order for Sale on any debt amount secured by a Charging Order.<sup>5</sup>

As a result of the coming into force of section 94 of the TCEA 2007, the [Charging Orders \(Orders for Sale: Financial Thresholds\) Regulations 2012](#) were enacted on 6 April 2013. The Regulations introduce a financial threshold of £1,000 for the enforcement of Charging Orders by an Order for Sale, where the Charging Order was made to secure the payment of money owed under an agreement regulated under the *Consumer Credit Act 1974*.

The new Regulations relate only to regulated debts defined within the *Consumer Credit Act 1974*. According to the Government, the reason for introducing a financial threshold only to these types of debt and not all debt is because the lender has priced the recovery risk into their premium interest rates. Creditors not covered by the *Consumer Credit Act 1974* (such as individual creditors, utility companies, government and local authority) are unable to take this measure and have limited means to recover monies owed to them.<sup>6</sup>

The new Regulations have arisen as a result of an impact assessment carried out by the Ministry of Justice, which followed the publication of the Coalition Agreement Commitment to introduce more protection against aggressive bailiffs and unreasonable Charging Orders.<sup>7</sup> The impact assessment considered a variety of threshold limits ranging from £1,000 up to £25,000 and the impact this would have on creditors, consumers, courts and other enforcement methods alike. The Grand Committee considered draft regulations on 8 January 2013. Explaining why the Government had set the financial threshold at £1,000, Lord McNally, Minister of State (Ministry of Justice) made the following points:

Following extensive public consultation, we intend to introduce a £1,000 financial threshold, as set out in the draft regulations. While this differs from the £25,000 threshold set out in the coalition agreement, it was concluded to be the most appropriate level at which the necessary balance between the rights of debtors and the rights of creditors could be most effectively struck. While stakeholder opinion was, perhaps predictably, split between creditors and debtors, there were other groups who also held strong opinions—for example, the legal profession and the judiciary.

A number of arguments against a high financial threshold, or even any threshold, were given. With a high threshold, such as £25,000, there is a risk that creditors may seek to recover their debt by initiating bankruptcy proceedings as an alternative to enforcement. This would be a more draconian outcome for debtors than an Order for Sale. As many noble Lords will be aware, bankruptcy often results in debtors losing their homes, whereas the protections which are already in place within the enforcement system—and which will continue to be in place if these draft regulations are approved—protect most debtors from losing their homes.

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<sup>5</sup> The threshold will not affect a charge being enforced by way of an Order for Sale if the application was made prior to 6 April 2013

<sup>6</sup> [HC Deb 8 January 2013 c.GC6-13](#)

<sup>7</sup> Ministry of Justice Impact Assessment, “*Whether a minimum limit should be imposed on order for Sale applications in relation to Consumer Credit Act debts only*”, IA No: MoJ 075, 2 February 2012 Final

A high threshold may mean that creditors may be less likely to risk providing unsecured credit if it is seen to be more difficult to recover. This would reduce the availability and increase the cost of unsecured lending, which can be a valuable and much needed source of credit to some individuals. It is also important to remember that when we talk about creditors, this does not just mean large organisations. It also means individuals and small businesses which may be severely impacted by a high threshold, as debts below £25,000 may represent a significant proportion of their commitments and assets, making it important that they can recover this where possible.

This brings me back to judicial discretion. As I described earlier, this already provides a great deal of protection to debtors, yet balances this against the needs of creditors. Responses to the consultation indicated that there was significant danger that introducing a threshold, especially a very high one, would restrict such discretion in individual cases. We do not want this to be an unintended consequence of introducing a threshold, so a lower threshold of £1,000 was seen as a proportionate response. It maintains the flexibility of discretion while ensuring that those with a lower level of debt are protected from applications for Orders for Sale.

In conclusion, the Government's commitment to provide protection to debtors holds strong. We believe that the implementation of these regulations will deliver this protection without a disproportionate effect on the successful recovery of debt by responsible creditors. We have taken all stakeholders' opinions into consideration and have tailored our approach in the light of this to ensure that we are introducing the most appropriate threshold level. I therefore commend this draft order to the Committee and I beg to move.<sup>8</sup>

In effect, the £1,000 threshold was settled on as being considered, in the light of the consultation responses, to be a level which would not encroach on judicial discretion whilst also providing an extra level of protection to debtors with small debts.<sup>9</sup>

Importantly, the Regulations are to be subject to a review three years after their commencement date.

### **3.3 Judicial discretion**

It is important to note that both the application for a Charging Order and the further application for an Order for Sale are always listed for hearing before a judge and so are subject to case-by-case judicial discretion and case law. In each case the judge will consider, among other things:

- the proportionality of the debt as set against each of the parties' assets and commitments;
- whether the property in question is the primary residence of the debtor or a secondary residence or a commercial property;
- who else may reside within the property, including children;
- the balance of rights between the creditor and the debtor; and
- whether the debtor should be granted additional time to pay, resulting in a suspended order

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<sup>8</sup> [HC Deb 8 January 2013 c.GC8-9](#)

<sup>9</sup> Ministry of Justice, '[Solving Disputes in the County Courts – creating a simpler, quicker and more proportionate system – A consultation on reforming civil justice in England and Wales](#)', The Government response, February 2012, [online] (accessed 17 April 2013)

Both the COA 1979 and section 71(2) of the *County Court Act 1984* (CCA 1984) give the court wide discretion to refuse an Order for Sale or suspend it on terms that the debtor repays the debt by instalments. Guidance on the Civil Procedure Rules advises judges that ordering the sale of a property is ‘*an extreme sanction*’ and all circumstances would have to be considered.<sup>10</sup> However, paragraph 73.10.1 of the guidance also states that sale of the debtor’s home is likely to be ordered in “*a case of the judgment debtor’s contumelious neglect or refusal to pay or in a case where in reality without a sale the judgment debt will not be paid.*”<sup>11</sup>

### **3.4 The proportion of Charging Orders enforced**

Orders for Sale are not a common method of debt enforcement. Evidence shows that under the existing arrangements only a very small proportion of Charging Orders (some 0.5%) result in an Order for Sale (and some of these may be suspended orders).<sup>12</sup> By way of explanation, the Government states:

This is in part due to the fact that the process of applying for, calculating potential equity in and administering the sale of a debtor's property is economically risky for creditors. This, together with case-by-case judicial discretion, means that it is very rare for debtors to lose their homes as a result of a Charging Order.<sup>13</sup>

In short, the process of applying to the court for an Order for Sale and then administering the sale of a debtor’s property can be economically risky and, in some cases, potentially damaging to the creditor’s reputation. Therefore, many creditors are averse to the making such applications.

As a result of the new Regulations, a creditor seeking to apply for a Charging Order, with a view to enforcing the security, needs to consider the new threshold limit of £1,000 on any regulated agreements. If the debt is below this amount, the creditor may need to consider alternative methods of enforcement, such as insolvency, Third Party Debt Orders, Attachment of Earnings Orders etc

## **4 Insolvency proceedings - alternative to debt enforcement methods**

As outlined above, the Government considered a variety of threshold limits for applying for an Order for Sale ranging from £1,000 up to £25,000 and the impact this would have on creditors, consumers, courts and other enforcement methods. The fear was that if a higher limit were set, creditors may consider bankruptcy as a more favourable method of debt enforcement.

Currently, a creditor can begin bankruptcy proceedings if they are owed more than £750. In brief, a statutory demand is served on the debtor formally requesting payment of the debt within a specified time period. If the statutory demand is ignored, this would be sufficient grounds for the creditor to petition the court for a bankruptcy order against the debtor. The presentation of a petition may also prevent another creditor from enforcing his/her judgment against the debtor’s available assets. Of course, this procedure can be expensive and if the

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<sup>10</sup> Supreme Court Practice – guidance on Civil Procedure Rules

<sup>11</sup> *Ibid*

<sup>12</sup> Recently, the Office of Fair Trading (OFT) imposed requirements on a large banking group to assess concerns about the way some customer debts are enforced via charging orders. On consideration of court records during the period September 2009 to September 2010, only a small amount of charging orders were enforced by way of an order for sale, being some 0.5%.

<sup>13</sup> [HC Deb 8 January 2013 c.GC7](#)

judgment debtor has few assets and a number of other creditors there is no guarantee that the creditor will receive any of the money owed.

The policy on bankruptcy proceedings comes under the remit of the Insolvency Service, an executive agency of the Department of Business, Innovation and Skills (BIS). The creditor petition debt level for bankruptcy has not been increased since 1986. The expectation is that the Insolvency Service will, in due course, be consulting on whether the limits should be raised and if so, by how much.