

**This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 10 March 2020.**

## **12. Creditor action against the insolvent and their property**

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## **Frequently asked questions**

### **In what circumstances can a creditor take a debtor's goods?**

There are three main routes by which a creditor can seek to take a debtor's goods to recover a sum of money. These are following the obtaining of a court judgment, following the obtaining of a liability order (by organisations such as the Child Support Agency or local authorities) or by a landlord where rent is outstanding. HMRC also have an ability to take goods where sums are outstanding.

### **A landlord's ability to take goods – Isn't that called distraint?**

It was called distraint, the act of recovery being known as the levying of distress. This ancient right was repealed on 6 April 2014 and replaced by a more regulated and limited process called taking control of goods.

### **When can a landlord take control of goods?**

A landlord may take control of goods by following a process known as Commercial Rent Arrears Recovery ('CRAR'). As the name suggests, the process is open only to landlords of commercial premises and can only be used to recover rent. Additionally, there must be a lease in place. In all other circumstances it will be necessary for the landlord to obtain a court judgment to recover outstanding rent.

### **How does the obtaining of a judgment lead to the ability to take control of goods?**

A judgment can be a decision of a court that one person is liable to pay another person a sum of money. If that person does not pay over the sum, the court can issue a warrant, or writ of control, which allows the judgment creditor to appoint a person to recover the sum due by following the taking control of goods process.

## **Can a creditor still take a debtor's goods even if they have gone into liquidation or bankruptcy?**

Generally speaking, a creditor is prohibited from taking a debtor's property once they have gone into formal insolvency. There are however some steps that they can take to recover property and these are explained in detail below.

## **What should I do if the creditor is trying to take a debtor's goods in circumstances where they have no power to do so?**

The creditor should be informed of the restrictions that apply once formal insolvency commences and advised of their ability to make a claim in the insolvency. Assuming that the action being taken does not involve assets in the insolvency, this is ultimately a matter between the bankrupt and their creditor and, beyond informing the parties of the legal position, the Official Receiver need not be involved.

## **What about an attachment of earnings order?**

An attachment of earnings order is a court order that allows a creditor to take a portion of a debtor's salary, direct from the employer, until a debt is repaid. Such an order is discharged by the making of a bankruptcy order, and the Official Receiver would normally only assist in this process, if required, to obtain an IPA.

## **What is a lien?**

A lien is a right of a creditor to hold goods and sell them if a cost incurred in relation to those goods has not been paid by the debtor. An example would be a garage holding a debtor's car against an unpaid repair bill. Liens are generally enforceable even where formal insolvency has commenced – though not if the lien relates to the insolvent's papers.

# **Creditor action against the insolvent and the insolvent's property – General overview**

## **12.1 Introduction**

This chapter provides guidance and information to assist the official receiver when dealing with the situation of a creditor attempting to take action against the insolvent and, in particular, the property of the insolvent.

The chapter covers the situations where such action is permitted, and provides guidance to assist the official receiver in ensuring that the action is carried out within the limits permitted by the legislation.

Despite the general prohibition of creditors taking action against the property of the insolvent once insolvency proceedings have commenced (which is generally the presentation of the petition in a winding-up and the date of the order in a bankruptcy), certain creditors retain rights to take action against property, and others sometimes attempt to take action where no rights exist.

## **12.2 Circumstances under which a creditor may be able to take action against property of the insolvent after commencement of insolvency**

There are certain situations where creditors may, in limited circumstances, retain a right to take action against the property of the insolvent after the commencement of insolvency. These circumstances are outlined here and detailed guidance is given below:

- in execution of a judgment
- the enforcement of a commercial rent arrears recovery ('crar')
- secured creditor enforcing security
- creditor claiming a lien
- attachment of earnings or attachment of debt

## **12.3 Legal actions against the insolvent or property of the insolvent**

When a winding up order is made against a company, no action or proceeding can be taken against the company without the permission of the court<sup>1</sup>. Matters are slightly different in bankruptcy as, where bankruptcy proceedings are pending; the court may stay any proceedings or allow them to continue on any terms that it thinks just. When a bankruptcy order is made, the creditor can have no remedy against the bankrupt and cannot commence any legal proceedings<sup>2</sup>.

Where proceedings are on-going at the date of the order, or are commenced after the date of the order, the official receiver should notify the claimant and the court of the making of the order and the statutory provisions outlined above<sup>3</sup>.

1. Section 130(2)

2. Section 285(2) and (3)

3. RRLPC

## **12.4 Action short of legal proceedings being taken against the bankrupt**

Occasionally, a creditor will continue to write to a bankrupt, or otherwise contact them, requesting repayment of a debt, despite being on notice of the bankruptcy. Assuming that the official receiver is satisfied that the debt concerned is a bankruptcy debt (and not, for example, a non-provable debt) the creditor should be written to reminding them of the making of the bankruptcy, informing them that they are listed as a creditor in the proceedings and outlining the restriction on remedies<sup>1</sup>. Ultimately, however, the responsibility for dealing with continuing contact by creditors rests with the bankrupt, who may choose to report matters to the Police where such contact is perceived to be harassment, or similar.

1. RRL

## **Powers of creditors generally to take control of a debtor's goods**

### **12.5 Creditor taking control of goods – General**

The ability of a creditor to seek recovery of debts through the removal and sale of property of the debtor, whether after obtaining a court order or through common-law or statutory rights not involving the courts, has been formalised in statute, bringing

into force a tightly regulated process. This process is known as ‘taking control of goods’.<sup>1, 2</sup>

This section provides an overview of the legislation and the following sections explain how the provisions interact with the insolvency provisions.

1. Tribunals, Courts and Enforcement Act 2007, Part 3

2. Taking Control of Goods Regulations 2013

## 12.6 Taking control of goods – General

The process for taking control of goods applies where an enactment, writ or warrant confers power to take control of goods and sell them to recover a sum of money<sup>1</sup>. It also applies in respect of a ‘Commercial Rent Arrears Recovery’ (‘CRAR’). In summary, the process is one that allows a creditor to take control of the goods of a debtor and sell them to recover a sum of money, but also has in place protections of the rights of the debtor. Where such a power to take control of and sell goods exists it may only be put into force by following the procedure in the legislation.

1. Tribunals, Courts and Enforcement Act 2007 section 62

## 12.7 Taking control of goods – Use of enforcement agents

One of the key features of the taking control of goods legislation is that the process may only be carried out by certified ‘enforcement agents’, whose power to act can be withdrawn where it is shown that they are in breach of the rules governing the process.<sup>1, 2</sup>

1. Tribunals, Courts and Enforcement Act 2007 sections 63 and 64

2. Tribunals, Courts and Enforcement Act 2007 schedule 12, paragraph 2

## 12.8 Enforcement agents

An individual may not act as an enforcement agent unless they<sup>1</sup>;

- obtain a certificate to act from the county court
- are exempt from the need to have such a certificate (a police constable, an officer of Revenue and Customs, a person appointed as a court officer or staff, or when is acting in the course of their duties as an officer of a government department), or
- are acting in the presence and under the direction of either a person with a certificate or an exempt person.

1. Tribunals, Courts and Enforcement Act 2007 section 63

## 12.9 Execution of a judgment

It is necessary for a judgment creditor, following the obtaining of a writ of control or warrant of control, to follow the taking control of goods process set by the legislation.

## 12.10 High Court writs of control and County Court warrants of control

Where a creditor has obtained a judgment for a debt of more than £600 and the debtor has not satisfied the judgment, the creditor may apply to the High Court for a writ of control to take control of goods.

If the debt is more than £5,000 the creditor is obliged to apply to the High Court.

For a debt between £600 and £5,000, the creditor has the choice of issuing a warrant in the County Court or in the High Court. The enforcement of an agreement under the Consumer Credit Act 1974 may however only be enforced in the County Court. Where the debt is below £600, the creditor is obliged to apply to the County Court<sup>1</sup>.

1. High Courts and County Courts Jurisdiction Order 1991 article 8

## 12.11 Time limits relating to writs and warrants of control

A creditor can apply for a writ of control or a warrant of control at any time up to six years after the date of the judgment<sup>1</sup>.

Writs and warrants last for 12 months but can be renewed if application is made before the expiry of the original writ/warrant<sup>2</sup>.

1. Civil Procedure Rules 1998 part 83.2

2. Civil Procedure Rules 1998 part 83.3

## 12.12 Stay of execution

The court has the power to stay the execution of a writ or warrant for such time and on such terms as it thinks fit <sup>1,2</sup>.

1. Tribunals, Courts and Enforcement Act 2007 section 70

2. County Courts Act 1984 section 88

## 12.13 Appointment of an enforcement officer to execute a High Court writ

England and Wales is divided into districts for the purpose of the execution of High Court writs, and at least one enforcement officer (HCEO) is assigned to each district. An enforcement officer who is appointed to the district to which the writ relates will be appointed to execute the writ of control. HCEOs also have discretion to accept writs for anywhere in England and Wales, but may decline to accept a writ if it is for an area to which they are not assigned. Judgment creditors are able to request that a particular HCEO acts in execution of a writ, otherwise writs are allocated for execution on a rota basis<sup>1</sup>.

An HCEO is not a court employee and will therefore have to qualify as an enforcement agent in order to act in relation to writs of control.

Further information regarding HCEOs can be found on the [High Court Enforcement Officer's Association website](#).

1. Courts Act 2003 schedule 7

## 12.14 The execution of a warrant of control – County Court bailiff

A warrant of control is dealt with by a County Court bailiff, who is a salaried court employee and, as such, is considered to be a qualified enforcement agent for the purposes of the legislation, giving them the ability to take control of goods.

The warrant gives the bailiff the power to take control of goods, and they are obliged to deal with the warrant as soon as possible. The bailiff is liable for damages to the creditor if they, by reason of neglect, connivance or omission, lose the opportunity of executing the warrant<sup>1</sup>.

1. County Courts Act 1984 section 124

## 12.15 Private (certified) bailiffs

Private bailiffs are either self-employed or employed by commercial firms. They often carry out enforcement for:

- the local authority, for council tax arrears;
- magistrates' courts, to collect fines and penalties;
- the child support agency, to collect unpaid child maintenance;
- landlords, to collect rent under a CRAR; or
- HMRC to collect unpaid income tax or VAT.



Private bailiffs generally need to be certified by a County Court to carry out enforcement activity of this sort. Similarly, they are required to qualify as enforcement agents to carry out the taking control of goods procedure.

## 12.16 Taking control of goods by magistrates' court

Where there is a default in paying a sum adjudged to be paid by a conviction or order of a magistrates' court, the court may issue a warrant of control allowing the taking control of goods process to be instigated<sup>1</sup>. Generally, such warrants are enforced by private bailiffs but may be enforced by a magistrates' court bailiff.

1. Magistrates' Courts Act 1980 section 76

## 12.17 Commercial Rent Arrears Recovery ('CRAR')

The process by which a landlord of commercial premises can seek to recover rent arrears is by following the 'taking control of goods' process. The process, when used by a landlord to recover arrears in this way, is known as Commercial Rent Arrears Recovery ('CRAR')<sup>1</sup>.

A CRAR can only be used in relation to a property that is wholly commercial<sup>2</sup>. There must be a lease and the recovery can be only for 'pure' rent, due and payable, including interest and tax on interest but not to include, for example, council tax, service charges or utilities charged under the lease, or uncertain amounts<sup>3, 4</sup>. In this context, 'landlord' can generally be taken to mean the person, in relation to a lease, entitled to the immediate reversion in the property comprised in the lease, or a mortgagee in possession<sup>5</sup>.

A CRAR can only be carried out by an enforcement agent appointed by the landlord.

Otherwise, it will be necessary for the landlord to obtain a judgment before instigating the taking control of goods process.

1. Tribunals, Courts and Enforcement Act 2007 section 72

2. Tribunals, Courts and Enforcement Act 2007 section 75

3. Tribunals, Courts and Enforcement Act 2007 sections 76 to 77

4. Taking Control of Goods Regulation 2013 regulation 52

5. Tribunals, Courts and Enforcement Act 2007 section 73

## 12.18 CRAR against sub-tenant

Where a landlord has the right to use CRAR against the immediate tenant, the right exists to instead serve a notice on any sub-tenant requiring that sub-tenant to pay rent due directly enforcement agent under the CRAR, instead of paying it to their own landlord in the usual way. This arrangement will continue until the sub-tenant ceases to be liable for rent or the arrears are paid off.

For as long as the notice has effect, the superior landlord has the right to recover from the sub-tenant the amount due by the use of a CRAR<sup>1</sup>.

1. Tribunals, Courts and Enforcement Act 2007 section 81

## 12.19 Taking control of goods by HMRC

HMRC have the power to instigate the taking control of goods process without a prior court order<sup>1</sup>.

Officials of that department are considered to be enforcement agents for the purposes of the legislation, meaning that a private bailiff need not be appointed to carry out the process, but may be so appointed.

1. Finance Act 2008 section 127

## 12.20 Taking control of goods by the Child Support Agency

The Child Support Agency can, after obtaining a liability order (which is an order given by a Magistrates' Court that the debt be repaid), use the power to take control of goods, engaging an enforcement agent, to the extent that the liability order remains unpaid<sup>1</sup>. Generally, such warrants are enforced by private bailiffs.

1. Child Support Act 1991 section 35

## 12.21 Taking control of goods by local authorities

A local authority can, after obtaining a liability order (which is an order given by a Magistrates' Court that the debt be repaid), use the power to take control of goods, engaging an enforcement agent, to the extent that the liability order remains unpaid<sup>1</sup>. Generally, such warrants are enforced by private bailiffs.

1. Local Government Finance Act 1988 section 62A

# **Creditor taking control of goods and insolvency - General background and initial action to take**

## **12.22 Taking control of goods and insolvency – General**

There are provisions in the Act which allow a creditor with the right to take control of goods, including a landlord under a CRAR, to achieve limited priority over other creditors of the insolvent. Further details are given below to assist in establishing whether the creditor has applied the rules correctly.

## **12.23 Initial action by the official receiver – Establish if goods taken control of**

The official receiver should at an early stage in the insolvency establish from the directors, bankrupt or other relevant third party (for example employees or professional advisors) whether any of the insolvent's property has been taken control of.

## **12.24 Can the controlled goods be claimed for the estate?**

The official receiver needs to consider whether goods taken by a creditor in respect of the execution of a judgment or a CRAR may be claimed for the benefit of the bankrupt's estate. The official receiver should consider, in particular, whether the CRAR process or execution (as the case may be) has been followed correctly. In this, the official receiver may consider the information above, but is entitled to assume that the process has been correctly followed unless information to the contrary is made available.

The official receiver should also consider when the goods were taken, whether the sale of the goods has been completed and whether (in company cases) the goods were subject to a charge.

## **12.25 Obtain details of the goods taken control of**

Once the official receiver has established that goods have been taken control of, steps should be taken to ascertain from the insolvent or other third party, the following information:

- the date that goods were taken control of
- that name and address of the creditor
- the name and address of the enforcement agent who dealt with the process;
- the amount of the debt
- details of the goods taken control of and, if removed, the location of those goods, and
- a copy of the notice of taking control of goods issued by the enforcement agent
- whether the goods have been sold and, if so, the date of the sale

## **12.26 Inform interested parties of the making of the order – County court**

In respect of County Court warrants of control, written notification of the making of an insolvency order and the appointment of the official receiver<sup>1</sup> should immediately be sent or given to the relevant county court district.

A judgment creditor may obtain warrants in more than county to recover the judgment debt. The official receiver should serve notice on the county court district in each county in which the insolvent is believed to have held or occupied property or traded.

1. NORD1

## **12.27 Inform interested parties of the making of the order – High Court Enforcement Officer**

Any High Court Enforcement Officer (HCEO) can execute a writ of control in any county. If the official receiver is not aware of which HCEO has been appointed, it will not be possible to issue the standard letter of notification<sup>1</sup>.

A directory of HCEOs can be found on the [High Court Enforcement Officer's Association website](#).

In the event that the official receiver has information that a writ of control has been issued in relation to a debt, but is unaware of which HCEO has been appointed they

may send the standard letter<sup>2</sup> to the creditor asking them to provide details of the HCEO appointed. The standard letter of notification can then be issued to the HCEO. The notice should be issued electronically, where possible, but if it is issued by post it should be sent by recorded delivery<sup>3, 4</sup>.

1. NTSB

2. HCELECT

3. Rule 1.47

4. Rule 12.57(2)

## **12.28 Inform interested parties of the making of the order – Private bailiff acting as enforcement agent**

The official receiver should serve notice of the insolvency on any private bailiff acting as an enforcement agent appointed by a creditor to take control of goods.

## **12.29 Notice to enforcement agent where sale is imminent**

Where property of the insolvent is about to be sold by the enforcement agent charged with taking control of the goods, the official receiver must take urgent action to ensure that the agent is aware of the insolvency order. If necessary, this may mean that the official receiver has to serve notice by hand.

Once notice has been served, the official receiver may allow the sale to proceed providing the guidance at paragraph 12.48 is followed.

Service of the notice upon an agent of the enforcement agent or on an auctioneer instructed by the officer will not be sufficient notice to stop the sale<sup>1, 2</sup>.

1. *Hellyer v Sheriff of Yorkshire* [1975] Ch 16

2. *Re Bishop ex parte Langley* [1879] 13 ChD 110 CA

## **12.30 Official receiver to move goods under threat of control**

It may be prudent for the official receiver to remove to storage goods at the insolvent's premises that are under threat of control, subject to cost/benefit considerations.

## **12.31 Official receiver has no duty to inform creditor of intention to move goods**

It is not necessary for the official receiver to give a creditor with a right to take control of goods any notice of an intention to remove or dispose of the insolvent's goods. Notice should however be given where the creditor has requested to be kept informed, or the official receiver intends to dispose of the goods in situ.

## **12.32 Goods taken control of by HMRC**

Subject to the restrictions outlined above, HMRC has the right to take control of a bankrupt's goods at any time<sup>1</sup> (even after the making of the order).

1. Section 347(8) and (9)

## **12.33 Goods taken control of by HMRC after bankruptcy order**

HMRC have agreed with The Service that where they have taken control of goods after the date of the bankruptcy order, the goods or the related proceeds of sale, will be passed to the official receiver upon notification of the bankruptcy order and receipt of a request for the goods or proceeds of sale.

HMRC have also agreed that they will not exercise their right to take control of goods after they become aware of the bankruptcy order unless other creditors entitled to take control of goods have, to the detriment of HMRC, taken control of goods or if the debtor continues to trade.

## **12.34 Charged goods taken control of (companies only)**

Where there is a fixed charge over a company's assets which have been taken control of by another creditor, the official receiver should inform the chargeholder of the action taken against the goods and take no further action in the matter (provided there is no doubt as to the validity of the charge).

## **12.35 Receiver/administrative receiver appointed**

Where a receiver or administrative receiver has been appointed, the question of taking control of goods should be left to the administrative receiver to resolve,

provided the charge under which the appointment is made covers the controlled/threatened goods.

## **Insolvency and the execution of a judgment by a creditor**

### **12.36 Overview and definition of terms**

A creditor's right to take control of goods to enforce a judgment (commonly known as execution) will be affected by the making of an insolvency order and the effectiveness of the execution will depend on a number of factors which are considered below.

The terms 'execution' and 'taking control of goods' should be taken to mean the same as each other in respect of the enforcement of a judgment<sup>1</sup>. For the sake of simplicity and with the aim of reducing any confusion the term execution is used in this section of the guidance.

1. Tribunals, Courts and Enforcement Act 2007 section 62

### **12.37 Goods taken control of on behalf of judgment creditor prior to commencement of insolvency**

Where the execution has been completed prior to the commencement of insolvency proceedings (the date of the presentation of the petition in a liquidation; the date of the order in a bankruptcy), the creditor will be entitled to retain the benefit of the execution<sup>1, 2</sup>.

This includes any payments, including instalment payments, made to the creditor under a controlled goods agreement<sup>3</sup>.

1. Section 183(1) and (2)

2. Section 346(1) and (5)

3. Re Samuels [1935] Ch 341

### **12.38 Enforcement agent to hold sale proceeds for 14 days**

If a judgment debt is greater than £500 in relation to a company or £1,000 in relation to an individual, an enforcement agent must hold the proceeds from the sale of controlled goods for a period of 14 days from the date of sale, pending the presentation of any petition for winding-up or bankruptcy<sup>1, 2, 3</sup>. If the judgment debt is less than the amounts outlined above, but the addition of allowable expenses results in the amount outstanding exceeding this amount, the officer charged with the execution must also hold the sale proceeds for 14 days<sup>4</sup>.

1. Section 184(3) and (4)

2. Section 346(3) and (4)

3. Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004

4. *Re Brubb ex parte Simms* (1877) 5 Ch D 375

## 12.39 Enforcement agent to hold sale proceeds if receives notice of petition

If the enforcement agent charged with the execution receives notice of an insolvency petition (or, in the case of a company, notice of a voluntary winding-up) within the 14 days in which they are required to hold the proceeds, then they must hold any funds for the liquidator or trustee if an order is subsequently made<sup>1, 2, 3</sup>.

1. Section 184(4)

2. Section 346(3)

3. *Marley Tile Co Ltd v Burrows* [1978] QB 241

## 12.40 Definition of the completion of the process

The legislation provides that the taking control of goods process is completed by seizure and sale, or by the making of a charging order<sup>1, 2</sup>.

It has, however, been held that the process is not complete if monies are still in the hands of the enforcement agent. If therefore, the enforcement agent charged with the execution still holds the proceeds of sale or goods on receipt of the notice of the insolvency, they must pass the funds or goods to the liquidator or trustee<sup>3, 4, 5</sup>.

1. Section 183(2)

2. Section 346(5)

3. Section 184(2)



4. Section 346(2)

5. Bramley Ltd v Leigh [1950] 2 KB 548

## 12.41 Funds held by officer when notice of order received

If the enforcement agent charged with the execution is holding funds when they receive notice that a winding-up order or bankruptcy order has been made, the funds will be payable to the liquidator or trustee, after the deduction of the costs of execution<sup>1, 2</sup>.

1. Section 184(4)

2. Section 346(3)

## 12.42 Funds paid over to creditor after receipt of notice

The enforcement agent may be sued by the liquidator or trustee if proceeds are paid to the judgment creditor despite the officer charged with the execution having received notice<sup>1</sup>. The officer may, in turn, sue the judgment creditor<sup>2</sup>.

1. Notley v Buck [1828] 108 ER 1003

2. Re Husband [1875] LR 19 Eq 438

## 12.43 Execution after notice of proposed voluntary liquidation

Where a voluntary liquidation precedes a winding-up order, the creditor will not be able to retain the proceeds if they had notice of the proposed voluntary liquidation before the completion of the execution<sup>1, 2</sup>.

1. Section 183

2. Re Caribbean Products (Yam Importers) Ltd [1966] Ch 331

## 12.44 Execution after the commencement of winding up

Any execution carried out after the commencement of a winding up (being the presentation of the petition) is void against the liquidator<sup>1</sup>. Any goods or proceeds of

sale held by the enforcement agent or court bailiff should be passed to the liquidator. Additionally, any proceeds passed to the creditor should be recovered.

1. Section 128(1)

## **12.45 Execution after commencement of bankruptcy**

After the making of a bankruptcy order, no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall have any remedy against the property of the bankrupt in respect of that debt<sup>1</sup>.

Any goods or proceeds of sale held by the enforcement agent should be passed to the trustee. Additionally, any proceeds passed to the creditor should be recovered.

1. Section 285(3)

## **12.46 Recovery of execution in partnership cases**

If a winding-up order is made against a partnership, the official receiver should seek to recover any monies in accordance with the following guidance, bearing in mind that any execution after the commencement of the winding up (including one instigated by the official receiver as trustee of the partners' estates) will be void.

Where there are bankruptcy orders against the partners, but no winding-up order against the partnership, and there is an execution against the partnership, the official receiver will have to propose the argument that the judgment creditor is a creditor of the partners (the partnership having no legal rights or liabilities of its own) in order to seek to recover property.

## **12.47 Execution for non-provable debt – official receiver as trustee (bankruptcy only)**

Where the creditor's debt is non-provable in the bankruptcy, the creditor may continue proceedings after a bankruptcy order with the permission of the court<sup>1</sup>. The creditor is, however, restricted to taking action against property acquired by the bankrupt after the date of the bankruptcy order, which property has not been claimed by the trustee at the time the writ or warrant of control was delivered to the enforcement agent.

It is important therefore that, for property not removed from the bankrupt's premises, there is an accurate inventory of property belonging to the estate or, for after-acquired property, a copy retained of the notice claiming the property. It is often better that the property is removed to storage where possible.

1. Section 285(1) and (2)

## Dealing with recovered goods

### 12.48 Dealing with goods recovered from enforcement agent

Where the official receiver has recovered goods in the possession of an enforcement agent, the goods should be realised as appropriate.

It ought not to be necessary to verify if there is any third party property in the goods recovered, as it is not possible for an enforcement agent to take control of third party property<sup>1</sup>.

As an alternative to taking delivery of the goods, the official receiver may agree to the sale being conducted by the enforcement agent, if this will result in a better return to the estate. In this regard, the official receiver should consider the removal, sale and storage charges of each option, and the possibility that a better return may be obtained if, where the enforcement agent only holds a portion of the insolvent's goods, the sale of the whole of the assets would be more advantageous.

1. Tribunals, Courts and Enforcement Act 2007 schedule 12 paragraph 10

### 12.49 Dealing with seized goods where annulment, rescission, etc. is possible

If there is a possibility of the insolvency order being rescinded, appealed, stayed or annulled, the enforcement agent should not be instructed to undertake a sale of the goods.

Where there is likely to be a delay before the hearing, the official receiver may proceed with the sale with the agreement of the judgment creditor and directors/bankrupt. If such agreement cannot be obtained and the official receiver is concerned at storage charges, or similar, they should apply to court for directions<sup>1, 2</sup>.

1. Rule 13.4

2. Section 303(2)

## **12.50 Costs of execution**

Where funds are to be remitted to the official receiver by the enforcement agent less costs, details of those costs should be requested<sup>1</sup>. If the official receiver considers the declared costs to be excessive, an explanation should be requested in respect of any disputed item.

If the agent refuses, or is unable to do so and also refuses to adjust their costs, the official receiver may require, in writing that the bill of costs be subject to detailed assessment.

1. Rule 12.42

## **Insolvency and the taking control of goods by a creditor other than in execution of a judgment**

### **12.51 Scope of this section of the guidance**

This section of the guidance provides guidance on the interaction between a creditor's right to take control of goods other than in execution of a judgment and the insolvency legislation.

### **12.52 Continuing use of the term 'distress' in the insolvency legislation**

Whilst the term 'distress' was updated in the general legislation in April 2014 and is now known as 'taking control of goods', the term distress continues to be used in the insolvency legislation<sup>1, 2, 3</sup>. Distress, for the purpose of the insolvency legislation is defined as including 'use of the [taking control of goods process] and references to levying distress, seizing goods and related expressions shall be construed accordingly'<sup>4</sup>.

1. Section 128

2. Section 176

3. Section 347

4. Section 436

## **12.53 Power of creditor to take control of goods other than in execution of a judgment – Qualifying creditors**

An enforcement agent acting on behalf of a landlord may take control of goods under a CRAR in certain circumstances.

The HMRC have a general power to take control of goods and the Child Support Agency and local authorities may also do so, appointing a private bailiff as enforcement agent, after obtaining a liability order.

Such creditors will be known as ‘qualifying creditors’ for the purposes of this part.

## **12.54 Ability of a qualifying creditor to take control of goods in insolvency**

In a company case, a creditor has effectively no ability to take control of goods after the presentation of the winding-up petition.

In bankruptcy, subject to the restrictions in terms of time-limits outlined below, the enforcement agent on behalf of qualifying creditor may take control of goods at any time (even after the making of the order), but not after discharge in respect of a debt incurred before the date of the bankruptcy and, in the case of a landlord, only for rent due for the six-months prior to the beginning of the bankruptcy<sup>1</sup>.

1. Section 347(1) and (5)

## **12.55 Amount in relation to which landlord can validly take control of goods (bankruptcy only)**

A landlord’s right to take control of goods post-bankruptcy is limited to rent for the six months prior to the bankruptcy order. The legislation provides that, when calculating the amount of rent in relation to which the landlord may validly take control of goods, rent should be considered as accruing from day to day and should be apportionable in respect of time accordingly. If rent is payable in arrears, it should be apportioned using a figure for the daily rent multiplied by the number of days for which rent is outstanding up to the date of the bankruptcy order<sup>1</sup>.

Where rent is payable in advance, and is due for payment prior to the date of the bankruptcy order, it should not be apportioned even if part of the rent is for a period after the date of the order<sup>2</sup>.

1. Apportionment Act 1870 section 2

2. Re Ellis v Rowbotham [1900] 1 QB 740

## **12.56 Goods taken control of more than three months before the order**

If an enforcement agent has taken control of goods more than three months before the insolvency order, the qualifying creditor is entitled to retain any goods or monies that that may still be held at the date of the order, unless, in a company case, the goods were taken control of after the presentation of the winding-up petition<sup>1, 2, 3, 4</sup>.

1. Section 128(1)

2. Section 176(2) and (3)

3. Section 347(3) and (4)

4. Re Bellaglade [1977] All ER 319

## **12.57 Goods taken control of after the presentation of a winding-up petition**

Any taking control of goods process by an enforcement agent carried out, or being carried out after the commencement of a winding up (being the date of the presentation of the petition) is void against the liquidator, except with the permission of the court. It is extremely unlikely that any court would allow a landlord to gain advantage over other unsecured creditors in this way<sup>1</sup>.

Any goods or proceeds of sale held by the enforcement agent should be passed to the liquidator. Additionally, any proceeds passed to the landlord should be recovered.

1. Section 128(1)

## **12.58 Goods taken control of under a CRAR after presentation of bankruptcy petition or making of bankruptcy application**

Where goods have been taken control of by a landlord under a CRAR after the presentation of a bankruptcy petition or application and an order is subsequently made on that petition, any surplus over and above the six months rent that is allowed to be recovered should be held to the order of the trustee<sup>1</sup>. This is subject also to

provisions regarding the taking control of goods within three months of the order (see below).

1. Section 347(1) and (2)

## **12.59 Goods taken control of within three months of order**

Where a qualifying creditor has taken control of goods within three months of the making of the winding-up order or bankruptcy order, the goods or proceeds of sale are charged for the benefit of the preferential creditors to the extent that any assets comprised in the insolvent's estate are insufficient to meet the preferential creditors' claims<sup>1, 2</sup>. Where there are other assets in the case which would pay in full preferential creditors, then the creditor is entitled to retain the goods or proceeds of sale.

In a company case this is subject to the general rule that the taking control of goods process is void after the presentation of the petition (see above).

1. Section 176(2)

2. Section 347(3)

## **12.60 Goods taken control of after bankruptcy order**

An enforcement agent acting on behalf of a qualifying creditor may take control of goods (subject to the restrictions outlined above) at any time and even against property comprised in the bankrupt's estate and property vested in the trustee. The only exceptions to this are where an application for an interim order in relation to an IVA is pending, in which case permission of the court is required<sup>1, 2</sup>.

1. Section 347(1), (8) and (9)

2. R v Camberwell Green Justices, ex parte Gravesande [1973] RA297

## **12.61 Goods taken control of after premises disclaimed (bankruptcy only)**

An enforcement agent acting on behalf of a qualifying creditor may take control of goods, in the terms outlined above, even if the official receiver has issued a disclaimer of the premises in which the goods are located, assuming the bankrupt is still in control of the premises<sup>1</sup>.

## **12.62 Value of goods at risk exceeds value of debt in relation to which creditor may take control of goods (bankruptcy only)**

If, an enforcement agent acting on behalf of a qualifying creditor has issued notice of an intention to take control of goods and the difference between the value of the bankrupt's property at risk and the sum owed to the creditor for which they can take control of goods is sufficient to provide a reasonable sum for the estate, the official receiver should, where possible consider one of the following actions to avoid the costs of the taking control of goods process:

- giving an undertaking to pay the rent/debt; or, if not possible,
- paying the rent/debt from available funds; or, if not possible,
- incurring a debit balance to pay the rent/debt.

## **12.63 Giving an undertaking to pay the rent/debt to avoid control of goods being carried out (bankruptcy only)**

Where it is necessary to give a guarantee to pay the outstanding rent/debt in relation to which the qualifying creditor intends to take control of goods, such guarantee should be in the form of Annex A.

Before giving such an undertaking, the official receiver must ensure that the goods will realise more than sufficient to cover the amount due.

A copy of the undertaking must be placed in the file-plan and also passed to any insolvency practitioner who may subsequently be appointed.

## **12.64 Paying the rent/debt to avoid control of goods being carried out (bankruptcy only)**

Where, in circumstances that it is prudent to avoid goods being taken control of and the creditor will not accept the official receiver's undertaking to pay the rent/debt, the official receiver must take immediate steps to protect the estate by paying the rent/debt from available funds.



## **12.65 Paying the rent/debt to avoid control of goods being carried out – Incurring a debit balance (bankruptcy only)**

Where, in circumstances that it is necessary to pay the rent/debt to avoid control being taken of the bankrupt's goods, the official receiver may create a debit balance to pay the sum for which the landlord/creditor could take control of goods.

The record on the case file of the decision to create a debit balance must explain the following:

- the reason why other creditors will materially suffer if the goods are taken control of;
- the realisable value of the assets involved;
- the likely balance which will be available to the estate after deducting the costs associated with the sale;
- the amount of debit balance required; and
- that the official receiver is satisfied that the assets are not subject to liens or other third party claims.

In summary, for the incurring of the debit balance to be agreed the benefit to the estate must be substantial.

If the payment required is over £2,500, the guidance in chapter 1 regarding the requirement to obtain the permission of the Senior Official Receiver's Office should be followed before committing to any expenditure. Such application for permission should cover details of the matters outlined in the bullet points above.

## **12.66 Undertaking to pay the rent – Separate account to be kept**

The official receiver's undertaking to pay rent/debt at Annex A includes confirmation that a separate account will be kept of the proceeds of sale of the goods and that the costs of the taking control of goods will be part of the debt over which there is a charge to the enforcement agent.

## **12.67 Where insolvent is sub-tenant**

The landlord has the right to take control of goods of a sub-tenant to recover outstanding rent. Where the debtor is the tenant, the rights and restrictions of/on the landlord to act in this way where an insolvency order has been made apply equally where the insolvent was a sub-tenant.

# **Creditor applying for or enforcing a charging order in relation to the insolvent's property**

## **12.68 Making of a charging order**

The legislation allows a judgment creditor to obtain a charge over property of the judgment debtor<sup>1</sup>. The procedure is that the court will consider the application for a charging order, taking into account the financial position of the debtor and will discretionally make an interim charging order (formerly known as a charging order nisi). This is a paper exercise by the court.

Assuming the interim charging order is made, the court will set a date for a hearing to make the charging order final. This will generally be a few weeks after the making of the interim charging order. The court will consider the circumstances of the debtor and whether any other party (other creditors, for example) will be unduly prejudiced by the making of the order. If satisfied, the court will make the charging order final.

1. Charging Orders Act 1979 section 1

## **12.69 Charging order made final before commencement of insolvency**

Provided a charge was made final ('absolute') prior to the commencement of the liquidation (presentation of petition) or bankruptcy (making of the order), a creditor would normally be entitled to retain the benefit of the charge<sup>1, 2, 3</sup>. This is subject to the charge being valid and not being a preference.

1. Nationwide Building Society v Wright [2010] Ch 318

2. Section 183(3) (a)

3. Section 346(5) (a)

## **12.70 Charge generally not to be made final after commencement of insolvency**

It has been held that the liquidation or 'incipient' liquidation (which would generally be taken to mean the presentation of a petition) of a company would be sufficient grounds for the court not to make a charging order and, where an interim charging

order has already been made, to discharge that order<sup>1</sup>. This principle would apply equally in bankruptcy.

It has also been held that, in considering an application for a final charging order in circumstances where it is aware of the insolvency proceedings, the correct course of action for the court would be to adjourn the application pending the outcome of the petition, following which it is likely that the application will be stayed indefinitely<sup>2, 3</sup>. In this, it should be noted that the applicant is under a positive obligation to bring the existence of other creditors to the attention of the court<sup>4</sup>.

1. *Re Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 2 AC 192

2. *Nationwide Building Society v Wright* [2010] Ch 318

3. Section 285(3)

4. Practice Direction Part 73 paragraph 1.2(5)

## **12.71 Charging order may be made after commencement of insolvency in limited circumstances**

It has been held that, in exceptional circumstances, a creditor may obtain the benefit of a final charging order made after the commencement of insolvency. An example of these exceptional circumstances would be where the court and the applicant were unaware of the insolvency proceedings<sup>1</sup>.

It is vitally important therefore that, where the official receiver becomes aware of an interim order made in favour of a creditor, they make the court aware of the insolvency.

1. *Tagore Investments SA v Official Receiver*

## **12.72 Notifying court of insolvency order where charging order application made**

Where the official receiver, as liquidator or trustee is aware that an interim charging order has been made, they should notify the court of the insolvency proceedings.

When notifying the court of the insolvency proceedings, the official receiver should exercise care not to be deemed to have entered into the legal proceedings. When dealing with a liquidation the official receiver may, when informing the court of the insolvency proceedings, refer to the decision outlined *Re Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 1 All ER 564 HL. For bankruptcy cases, the

official receiver may refer to section 285(3) of the Act and the decision in *Nationwide Building Society v Wright* [2009] BPIR 1047.

If the official receiver follows this advice, it is not likely that they will be considered to have entered into the proceedings.

## 12.73 Charging order by a solicitor

Prior to the making of an insolvency order, a solicitor can make an application for a charging order under the common law or statute<sup>1</sup> over a debtor's property.

A solicitor will also have the right to a charge over property in the hands of the liquidator or trustee where the solicitor's work led to the property coming into the estate, even if they did not apply for a charge prior to the insolvency order. The charge may be for an amount relating to their costs in obtaining the property either before or after the order<sup>2</sup>. The official receiver should therefore treat costs incurred by a solicitor in recovering property as a first charge upon the property and pay the costs irrespective of whether or not a charge was obtained prior to the insolvency order. If the official receiver, as liquidator or trustee, considers the costs to be unreasonable, they may request detailed assessment of the costs.

1. Solicitors Act 1974 section 73

2. *Re Meter Cabs Ltd* [1911] 2 Ch 557

## 12.74 Charging orders by post-bankruptcy creditors

A post-bankruptcy creditor should not be able to obtain a charging order against property once it has vested in the trustee as the legislation provides that a charging order may only be obtained against the debtor's beneficial interest, which will have vested in the trustee, and therefore no longer be the debtor's<sup>1,2</sup>.

Steps taken by the official receiver, as trustee to protect the property at the Land Registry should be sufficient to bring the bankruptcy to the notice of post-bankruptcy creditors.

1. Section 306

2. Charging Orders Act 1979 section 2

## 12.75 Insolvent's property repossessed by mortgagee

Where the insolvent's property has been repossessed by the chargeholder but has not yet been sold, the mortgagee should be put on notice of the official receiver's interest in any surplus sale proceeds, using the standard letter<sup>1</sup>.

When the chargeholder obtains possession the official receiver should cancel any insurance obtained on the property. The official receiver should inform the chargeholder that the insurance has been cancelled.

1. MP3

## **12.76 Sale of insolvent's property by chargeholder**

Where the property has been taken into possession and sold, the official receiver should obtain a copy of the completion statement from the chargeholder and should claim the insolvent's share of any surplus following sale.

A chargeholder in possession has a duty to take reasonable care to ensure that the price at which the property is sold is the best price which could be achieved<sup>1, 2, 3</sup>.

1. Skipton Building Society v Bratley [2000] 3 WLR 1031

2. Barclays Bank plc v Kingston [2006] EWHC 533 QB

3. Alpstream AG v PK Airfinance Sarl [2015] EWCA Civ 1318

## **12.77 Halting chargeholder's sale of property**

It is possible for the official receiver, as liquidator or trustee, to apply to court to stop the sale of a property by a chargeholder, but this should not be considered unless there is compelling evidence that the sale is being conducted significantly under market value.

In this, it should be noted that there is an accepted view that a sale of a property in possession will achieve a lower sum than a sale of the same property through 'normal' channels, and the bar to be cleared to challenge an apparently under-value sale by a chargeholder is high<sup>1</sup>.

1. Meah v GE Money Home Finance Ltd [2013] EWHC 20 (Ch)

## **12.78 Request by chargeholder for official receiver to convey property**

If the official receiver, as liquidator or trustee, is requested by a secured creditor (or a receiver appointed by a secured creditor) to transfer or convey a property, remuneration should be charged on a time and rate basis and solicitors should be instructed to act in the sale. The official receiver should ensure that the chargeholder gives a written indemnity (and, if possible, a cash deposit) to cover all the expenses in connection with the transaction.

## **Liens**

### **12.79 General**

A lien is a right to retain possession of another's property, where that possession already lawfully exists, pending the discharge of indebtedness. An equitable lien, however, does not require possession to be valid.

A lien sometimes arises where a service has been performed but not paid for. An example of this is a garage retaining possession of a car until a repair bill is paid, or a solicitor retaining papers pending the settlement of fees. A lien differs from a pledge as the property is delivered to the creditor not for the purpose of security for a debt but rather in relation to the carrying out of a service.

### **12.80 Liens – Right of creditor**

A lien generally entitles the creditor to retain possession of the property, but, unlike a charge not to deal with it (to sell it, for example). Certain liens do, however, give the holder of the lien these rights (see below).

The existence of a power to sell does not convert the lien into a charge as such a charge would require registration<sup>1</sup>.

1. Hamlet International Plc [1998] 2 BCLC 164

### **12.81 Treatment of a creditor with a lien**

Assuming that the official receiver is satisfied that a lien is valid, a creditor with a right to a lien should be treated effectively as a secured creditor in the insolvency, unless the lien is over books and papers of the insolvent (and are not documents of title), as such a lien is unenforceable.

### **12.82 Lien over books and papers**

A lien over books, papers or other documents of the insolvent is unenforceable to the extent that it would stop the official receiver, liquidator or trustee having access to them. This is to ensure that the public interest of creditors is accorded priority over private security rights.

A lien over documents of title (share certificates, property deeds, leases, etc.) is however enforceable against the official receiver, liquidator or trustee<sup>1, 2</sup>.

1. Section 246(2) and (3)

2. Section 349(1) and (2)

## 12.83 Liens and liquidation

As a company subject to liquidation proceedings remains the legal owner of its property, a creditor may claim a lien, where such a right exists, over any property passed to them, including any passed to them after the commencement of winding-up (generally, the date of the presentation of the petition) but not normally after the winding-up order<sup>1, 2</sup>.

The official receiver should therefore ensure that property of the company is not passed to a creditor of the company where that creditor might be able to claim a lien.

1. *Brereton v Nicholls* [1993] BCLC 593

2. *Re Wiltshire Iron Co, ex parte Pearson* (1867-1868) LR 3 Ch App 443

## 12.84 Liens and bankruptcy

In bankruptcy, a lien is exercisable only on property passed to the creditor before the estate vests in the trustee.

If after-acquired property comes into the possession of a creditor before the trustee is able to lay claim to it, the creditor will not have a lien over that property, as the trustee's title to the property relates back to the date when it was acquired by, or devolved upon, the bankrupt<sup>1</sup>. The lien will, however, be valid if the creditor was unaware of the bankruptcy at the time that the property came into their possession<sup>2</sup>.

1. Section 307(2)

2. Section 307(4)

## 12.85 Legal liens

A legal lien exists through common law and not through contract. A legal lien differs from a mortgage in that it cannot be assigned without the express permission of the

owner of the goods and it can exist from, and only for only as long as, the time that the property is in the rightful possession of the holder of the lien<sup>1</sup>.

The debt must have accrued and not be accruing in order for the lien to be valid<sup>2</sup>.

A legal lien may be either general or particular.

1. Langley Beldon & Gaunt Ltd v Morley [1964] 11 WLUK 8

2. Crawshay v Homfray (1820) 4 B & Ald 50

## 12.86 General liens

A general lien (sometimes referred to as a retaining lien) occurs where there is a right to retain possession of any property of the debtor until all debts due to that person have been paid. General liens are not favoured in law as they give special privilege against other creditors<sup>1</sup>.

1. Rushforth v Hadfield (1805) 6 East 519

## 12.87 Particular lien

A particular lien occurs where there is a right to retain possession of a particular item of the debtor's property until the debt in relation to that property is paid<sup>1</sup>. Where the debt is repaid, the property may not be retained pending the payment of any general sums due to the creditor<sup>2</sup>.

1. Hammond v Barclay (1802) 2 East 227

2. Jones v Tarleton (1842) 9 M&W 675

## 12.88 Statutory lien

A statutory lien is one created by statute, rather than by contract or the common law. An example is the lien that a seller has in respect of goods unpaid for<sup>1</sup>. Statute can also nullify a common law lien, such as ending a lien over books and papers.

1. Sale of Goods Act 1979 part V

## 12.89 Contractual lien

It is possible for a lien to arise under contract. In that case, the effect and extent of the lien will be governed by the terms of the contract<sup>1</sup>.

A pledge or pawn can be a type of contractual lien<sup>2</sup>.

1. Walker v Birch (1795) 6 Term Rep 258



## 12.90 Equitable lien

An equitable lien differs from a legal lien in that possession of the property is not necessary for the lien to be valid<sup>1, 2</sup>.

1. Re Bond Worth Ltd [1980] Ch 228

2. Re Welsh Irish Ferries Ltd [1986] Ch 471

## 12.91 Skilled worker's lien

The right of a skilled worker to claim a legal lien will normally be given by an express contract term. In the absence of such a contract term, the right to claim a lien may only arise from custom and usage, where the right to claim a lien is so universally agreed within a trade (warehousing being an example), that everyone could be expected to know of it or easily find out<sup>1</sup>.

Such a lien is the one that is perhaps most likely to be encountered by the official receiver, in terms of a garage claiming a lien over the bankrupt's vehicle where there are outstanding repair costs.

1. Re Plaipe v Allcock (1866) 4 FF 1074

## 12.92 Vendor's lien

A vendor's lien is one that is founded on the principle of equity (fairness) that a person who has obtained property under contract will not be able to retain it without payment. In this case, the property will be in the hands of the purchaser, but subject to a lien in favour of the seller<sup>1</sup>. Such a lien can apply to land<sup>2</sup>.

1. Mackreth v Symmons (1808) 15 Ves 329

2. Hearle v Botelers (1604) Cary 25

## 12.93 Solicitor's lien

A solicitor may have a general lien, including over money in the client account, but not in relation to an insolvent's books and papers or might have a particular lien, including over costs awarded to a client following litigation. The right to a lien arises at a time when the solicitor was first retained by the insolvent and the lien forms part of the contract (either written or implied) entered into between the solicitor and the insolvent<sup>1</sup>.

1. Re Capital Fire Insurance Association [1883] LR 24 ChD 408

## 12.94 Banker's lien

A bank may claim a general lien on property deposited with it by a debtor. This would include a cheque received by the bank from the insolvent, whose account is overdrawn, even if not received until after the order<sup>1</sup>. In the normal course of events, this situation is unlikely to arise as cheques for the insolvent intercepted by the official receiver will be paid into the Insolvency Services Account (ISA).

A lien may not apply where the property was deposited with a bank for a specific purpose (such as safekeeping). This may apply to property in a safe-deposit box, for example.

1. Re Keever (a bankrupt) ex parte the trustee of the property of the bankrupt v Midland Bank Ltd [1966] 3 All ER 631

## 12.95 Creditor's power to deal with property subject to lien

A person with a lien has no automatic right to sell the goods. A contractual power of sale may have been given or it may be given in statute. Following sale of an insolvent's goods, the holder of a lien should pass any surplus proceeds to the liquidator or trustee, or may claim in the proceedings where there is a shortfall.

## Attachment of earnings and attachment of debt

### 12.96 Attachment of earnings

On the application of a judgment creditor, the court can make an attachment of earnings order under which the debtor's employer is required to deduct specified amounts from the debtor's earnings and pay them into court. These sums will be used to discharge the judgment creditor's debt<sup>1</sup>.

1. Attachment of Earnings Act 1971 section 3

### 12.97 Attachment of earnings order and bankruptcy

On the making of a bankruptcy order, a creditor who has a provable debt is not entitled to retain the benefit of an attachment of earnings<sup>1</sup> unless it was completed and the sums paid before the commencement of the bankruptcy<sup>2</sup>. The creditor will be

entitled to any monies paid into court between the petition date and the date of the bankruptcy order unless they had received notice of the presentation of the petition<sup>3</sup>. The court may discharge the attachment of earnings order on the making of a bankruptcy order<sup>4</sup>. It is anticipated that the order would be discharged on notification to the court of the making of the order.

1. Section 285(1)

2. Section 346(1)

3. *Re Green (a bankrupt) ex parte the Official Receiver v Cutting* [1979] 1 WLR 1211

4. Attachments of Earnings Act 1971 section 9

## **12.98 Official Receiver's role in the discharge of an attachment of earnings**

The official receiver should normally only become involved in the discharge of an attachment of earnings order where such is necessary for the purposes of enabling the bankrupt to comply with an IPO/IPA. Similarly, any application that post-bankruptcy payments to the creditor are reclaimed for the benefit of the bankruptcy estate should only be made in connection with an IPO/IPA, since the monies represent post-bankruptcy income. Otherwise, the bankrupt should seek their own legal advice as to whether an application to discharge the attachment or earnings order or reclaim post-bankruptcy monies taken by the creditor should be made.

## **12.99 Third party debt orders (attachment of debt)**

A third party debt order is where a judgment creditor is able to claim, for their benefit, money which is due to the debtor from a third party, often the debtor's bank or building society. Such an order was formerly known as a garnishee order and the process is known as the attachment of a debt<sup>1</sup>.

The process is that the court will make an interim third party debt order on a without-notice application by the creditor. At a later hearing, the court will make a final third party debt order unless any interested parties make representations to the court as to why the order should not be made. The judgment creditor will then be able to claim the money.

1. Civil Procedure Rules 1998 part 72

## 12.100 Third party debt orders (attachment of debt)

Any attachment of debt which is not complete (that is, where the money has not been paid over to the creditor) prior to the commencement of the winding-up or bankruptcy will be void against the liquidator or trustee<sup>1, 2, 3</sup>.

1. Section 183

2. Section 346

3. JGD Construction Ltd v Mills [2013] EWHC 572 (Ch)