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## Enforcement against goods: This legislative overload must stop

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Effective and efficient procedures for the enforcement of judgments and orders is an essential element in a modern civil justice system. While there are a small number of cases where the court's order stands as it is without more<sup>1</sup>, it is far more common for court decisions to require some form of follow up action, such as the payment of money, or putting right some wrong, usually by the unsuccessful party. Responsible litigants will obey court decisions without the need for coercive measures. Effective enforcement processes will encourage reluctant parties to comply of their own volition; their absence will encourage widespread disobedience<sup>2</sup>.

Judicial statistics reveal that the civil courts are predominantly used for debt collecting purposes. Annually in England and Wales about 1.4 million County Court claims are started, with about 20,000 claims being started in the Queen's Bench Division and about 30,000 in the Chancery Division. In the County Court there are about six times as many specified money claims than any other category of case. Only about 13 per cent of issued claims are defended, and only about 3.5 per cent progress through to trial<sup>3</sup>. There are therefore something like 1 million undefended money claims each year. For these cases, obtaining judgment is the easy stage. Difficulties start with enforcement.

Most European jurisdictions provide a range of enforcement methods for money judgments. In England and Wales a money judgment becomes payable 14 days after the judgment unless the court specifies a different date for payment, or if the court grants a stay<sup>4</sup>. A judgment creditor can obtain court assistance in obtaining information about a judgment debtor's financial means<sup>5</sup>, which may help in choosing the most appropriate enforcement method to match the judgment debtor's circumstances. It is then the responsibility of the judgment creditor to decide which enforcement methods to use, and when. Third party debt orders<sup>6</sup> may be obtained to attach any money that might be owed to the judgment debtor; charging orders (and stop notices)<sup>7</sup> may be obtained to impose charges over securities or land owned by the judgment debtor; attachment of earnings orders can be used to require the judgment debtor's employer to make periodic deductions from the judgment debtor's salary<sup>8</sup>, and enforcement may be effected against the judgment debtor's goods.

Of these methods, enforcement against goods is by far the most frequently used. In 2001 a total of 2.3 million warrants were issued<sup>9</sup>. Of these, about 400,000 were warrants of execution to enforce County Court judgments, another 50,000 were writs of *fieri facias* to enforce High Court judgments, almost 800,000 were for council tax arrears, over 500,000 were for Magistrates' Court fines, and 400,000 to enforce road traffic fines. Another 70,000 were tax and non-domestic rates arrears cases.

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<sup>1</sup> Declaratory judgments and procedural orders imposing immediate sanctions are examples

<sup>2</sup> Or even, as it was delicately put by the Council of Europe, the fear that without an effective system of civil enforcement, other forms of 'private justice' may flourish

<sup>3</sup> Ministry of Justice figures, <https://www.gov.uk/government/publications/court-statistics-quarterly>

<sup>4</sup> CPR, r 40.11 (or if any provision of the CPR makes different provision, r 40.11(b)). Stays of execution are governed by r 83.7, and may be sought at the time judgment is given or at any time thereafter. They may be granted if there are special circumstances which render it inexpedient to enforce the judgment or order, or on the ground that the applicant is unable to pay (r 83.7(4))

<sup>5</sup> CPR, Part 71

<sup>6</sup> CPR, Part 72

<sup>7</sup> Charging Orders Act 1979 and CPR, Part 73

<sup>8</sup> Attachment of Earnings Act 1971 and CCR ord 27

<sup>9</sup> White Paper: Effective Enforcement. Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents (Cmnd 5744, Lord Chancellor's Department, 2003, 'the 2003 White Paper'), p 129

This is not the full picture, because landlords have enjoyed a centuries old self-help right to distrain against goods for arrears of rent, typically through bailiffs, a common law right that was overlain by a number of ancient statutes<sup>10</sup>. In 2003 there were over 2,600 enforcement agents. Enforcement against goods is therefore a significant part of the civil justice system. It is not the most glamorous part, and does not often receive the attention it deserves.

A combination of its common law origins<sup>11</sup>, piecemeal legislative reform, the fact enforcement against goods covered enforcement of judgments as well as distraint for rent, and different rules applying to different courts, resulted in a complex and unsatisfactory legal framework<sup>12</sup>. As the editors of *Current Law Statutes Annotated* commented, the law governing enforcement of judgments by the seizure and sale of goods was unclear and confusing, and the law relating to distress for rent was a complex and somewhat anachronistic set of rules developed over the centuries in a haphazard fashion to meet contemporary demands<sup>13</sup>. What was at the time the Lord Chancellor's Department carried out a detailed review of the law<sup>14</sup>, which culminated in the enactment of Part 3 of the Tribunals, Courts and Enforcement Act 2007, which lays down a modern unified system of enforcement against goods.

Policy aims stated in the 2003 White Paper included the recognition that it is crucial that creditors who have established a legitimate claim should be able to pursue it through a straightforward and accessible system. Balanced against that is the equally important policy that debtors who genuinely do not have the means to pay should be protected from the oppressive pursuit of their debts<sup>15</sup>. The Government's view was that a single piece of enforcement law was necessary; that permitting the seizure and sale of a debtor's goods in order to enforce a judgment debt may always be necessary; that the procedure had to be effective in order to give creditors confidence that they will receive the money owed; and that the process should protect debtors from undue economic hardship and personal distress<sup>16</sup>. A recurring theme is that there is in social policy terms a real difference between debtors who "won't pay" and those who "can't pay"<sup>17</sup>. While a strong approach is probably essential when dealing with debtors in the first category, that is almost certainly going to be oppressive, and equally futile, for those in the second category.

### **Alternative European Processes**

Italian enforcement against goods follows a broadly similar system as in England and Wales. The basic pattern is that the debtor's property is attached, then sold at a public auction, with the net proceeds being delivered to the judgment creditor<sup>18</sup>. In Germany, compulsory enforcement may be

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<sup>10</sup> From the Distress for Rent Act 1689, which is one of 24 statutes dealing with rent arrears recovery which were either repealed in full or amended by the Tribunals, Courts and Enforcement Act 2007, sch 13, part 4

<sup>11</sup> Authority for certain key principles (including the concept that "the house of every one is his castle") applied in *Khazanchi v Faircharm Investments Ltd* [1998] 2 All ER 901 on forced entry by sheriffs was *Semayne's Case* (1604) 5 Co Rep 91a. Most of the authorities cited came from the eighteenth and nineteenth centuries

<sup>12</sup> Specialist books on the subject include Mather on Sheriff and Execution Law (3rd ed 1935), Eddy on the Law of Distress (3rd ed 1961), Kruse, *Dealing with Distraint* (6th ed 1996) and Black and Sandbrook, *Enforcement of a Judgment* (9th ed 1997)

<sup>13</sup> *Current Law Statutes Annotated* [2007] at 15-78

<sup>14</sup> 'Independent Review of Bailiff Law' Professor Jack Beatson QC (report to Lord Chancellor's Department, 2000); 'Report of the First Phase of the Enforcement Review' (Lord Chancellor's Department, 2000) Green Paper: 'Towards Effective Enforcement: A Single Piece of Bailiff Law and a Regulatory Structure for Enforcement' (Cmnd 5096, Lord Chancellor's Department, 2001); and the 2003 White Paper

<sup>15</sup> 2003 White Paper, p 6

<sup>16</sup> 2003 White Paper p 36

<sup>17</sup> 2003 White Paper pp 11, 20.

<sup>18</sup> *Codice di procedura civile* (Code of Civil Procedure), art 474-632; 'Enforcement of Civil Judgments and Orders in Italy: An Overview' Elisabetta Silvestri (2000) *Bond Law Review* 183, 186

pursued based on judgments that have become final and binding<sup>19</sup>. Unless the compulsory enforcement is assigned to the courts, it will be implemented by court-appointed enforcement officers who are to effect it on behalf of the creditor<sup>20</sup>. Court-appointed enforcement officers have authority, based on their enforcement instructions and by the enforceable execution copy being physically handed over to them, to accept performance by the debtor, to issue receipts in this regard, and to enter into payment agreements with effect for the creditor<sup>21</sup>. A court-appointed enforcement officer has various powers to use central sources of information to locate the debtor's address<sup>22</sup>. Among the powers granted to them is the authority to use force if they encounter resistance<sup>23</sup>.

In France the legal profession is divided into *avocats* (advocates with rights of audience in the general courts), *notaires* (notaries, who deal with authenticating deeds and related legal matters), and *huissiers de justice* (sometimes translated as bailiffs or judicial officers). Seeking repayment of debts is one of the functions of *huissiers*<sup>24</sup>, who also serve documents, seek to resolve disputes between landlords and tenants, and act as mediators. Being representatives of the legal system, *huissiers* have responsibilities both to ensure that enforceable titles are made effective, and to ensure judgment debtors are properly informed and protected<sup>25</sup>. They are required to liaise with creditors to ensure they act within a framework acceptable to the creditor, but it is the *huissier* who decides whether a particular course of action should be followed in the circumstances<sup>26</sup>.

Sweden has an Enforcement Authority<sup>27</sup>, which is a government agency with exclusive powers to enforce debts, levy distraint, and handle evictions. A person seeking to recover an outstanding debt has to make a claim to the Enforcement Authority. The Authority then forwards details to the debtor, who is given 10 days to respond. If the debtor fails to respond, the Authority has the power to withdraw money from the debtor's bank accounts or to deduct money from the debtor's income. It also has the power to sell the debtor's home. The Authority maintains a public register of debts, which is used for credit scoring purposes.

As described by Wendy Kennett<sup>28</sup> a number of European jurisdictions adopt systems of court control of enforcement of civil judgments. An example is Denmark, which uses a system of enforcement through enforcement judges, who have access to various government records to assist them with appropriate information about the judgment debtor. In the same category is Spain, where court enforcement of a judgment is conducted by a lawyer known as a *secretario judicial*. Again, they have access to official information from government agencies, but also have access to information about debtors from banks.

No single system is a panacea. The Swedish system on the face of it is a model of efficiency. Objections could be raised that it does not do enough to protect those who cannot pay, and may be

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<sup>19</sup> Zivilprozessordnung ('ZPD'), section 704, [http://www.gesetze-im-internet.de/englisch\\_zpo/](http://www.gesetze-im-internet.de/englisch_zpo/)

<sup>20</sup> ZPD section 753(1)

<sup>21</sup> ZPD section 754(1)

<sup>22</sup> ZPD section 755

<sup>23</sup> ZPD section 758(3). For this purpose they may ask the police for support

<sup>24</sup> Similar systems are used in Belgium, the Netherlands and Luxembourg

<sup>25</sup> 'Huissier de justice, un nouveau juriste pour l'an 2000' in Liber Amicorum Marcel Briers, Mys and Breesch, 1993) at 91

<sup>26</sup> 'Key principles of the new system of enforcement in the civil courts: a peep over the garden wall' Wendy Kennett (1999) 18 CJQ 311,320

<sup>27</sup> Kronofogdemyndigheten, or Crown's Bailiff Authority. There is a similar system in Finland

<sup>28</sup> In *Key principles of the new system of enforcement in the civil courts: a peep over the garden wall* (1999) 18 CJQ 311 at 318

too quick for some debtors who may not be seeking to evade payment at all<sup>29</sup>. Views differ on how acceptable it is for enforcement agents to have access to personal data on debtors obtained from official agencies, let alone banks<sup>30</sup>. It is not only England and Wales that has laboured under an overly complicated system for enforcing judgments. In Italy the whole of the third book of the code of civil procedure is devoted to enforcement proceedings<sup>31</sup>. Italian enforcement law has been described as a maze that is slow and full of pitfalls<sup>32</sup>. There are numerous technicalities, such as the requirement that judgments can only be enforced if the judgment creditor first obtains a special certification authorising enforcement<sup>33</sup>. Court control through enforcement judges looks to have the advantage of official endorsement of the methods used in individual cases, combined with access to official information to ensure the most suitable processes are used. However, enforcement in Spain follows a court control system which superficially falls into the same category as that used in Denmark. Notwithstanding, Spanish enforcement has been described as among the least efficient in Europe<sup>34</sup>.

It may be concluded that it is not the model itself that is important, but the efficiency with which the model is applied in practice. Pervasive inhibitors to efficiency are background legal complexity, and unnecessary procedural requirements.

### **Enforcement and the European Convention on Human Rights**

A failure of the judicial system to enforce a judgment at all may amount to a breach of the right to a fair trial in the ECHR, art 6(1). Total failure to enforce judgments must be rare, but in *Van de Hurk v Netherlands*<sup>35</sup> the Dutch Crown's statutory power partially or completely to deprive a judgment of its effect was held by the ECHR to render the proper administration of justice nugatory.

A more pervasive problem is excessive delay. A breach of art 6(1) was found in *Zappia v Italy*<sup>36</sup> where the delays were of Dickensian *Bleak House* proportions. As explaining in *Hornsby v Greece*<sup>37</sup>, the right to a fair trial "... would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being exclusively concerned with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6."

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<sup>29</sup> For example, missing the demand for payment through being away on holiday or business, and finding on returning that the debt has been entered on the public register

<sup>30</sup> Chapter 3 of the 2003 White Paper contained proposals on data disclosure orders. These were thought to allow enforcement efforts to be targeted towards the procedure that would be most likely to be effective, and make it possible to identify at an early stage debtors who do not have the resources to pay

<sup>31</sup> Codice di procedura civile (Code of Civil Procedure), art 474-632

<sup>32</sup> 'Enforcement of Civil Judgments and Orders in Italy: An Overview' Elisabetta Silvestri (2000) *Bond Law Review* 183, 186

<sup>33</sup> *Ibid*, at p 185; Codice di procedura civile, art 475

<sup>34</sup> 'Key principles of the new system of enforcement in the civil courts: a peep over the garden wall' Wendy Kennett (1999) 18 *CJQ* 311,318

<sup>35</sup> *Van de Hurk v Netherlands* (application 288) (1991) 18 *EHRR* 481

<sup>36</sup> *Zappia v Italy* (application 24295/94) (1996). Thirty three years had elapsed from the commencement of proceedings, and enforcement was still pending

<sup>37</sup> *Hornsby v Greece* (application 18357/91) (1997) 24 *EHRR* 250 at [40]

The Greek Government in *Hornsby v Greece* had argued that the obligations in art 6(1) ended when the relevant judicial authority made a final and binding decision. The applicants had applied for authorisation to set up a language school on the island of Rhodes, which had been rejected on the ground that authorisation would only be given to Greek nationals. In 1989 the Greek Supreme Administrative Court set aside the Director of Secondary Education's decisions to refuse authorisation. Despite requests from the applicants, and further court proceedings, no administrative action was taken by the State to give effect to the Supreme Administrative Court's decision for the next 5 years. It was argued that the Supreme Administrative Court's decision had been declaratory, so no action was needed to 'enforce' the decision. What is particularly important about the decision of the ECHR is that this is not an answer. Administrative authorities form one element of a State that is subject to the rule of law. So, where administrative authorities refuse or fail to comply with a judicial decision, or even delay in doing so, the guarantees under art 6 enjoyed by a litigant during the judicial phase of the proceedings will be held to be rendered devoid of purpose, which would be a breach of art 6<sup>38</sup>.

*Hornsby v Greece* was applied in *Immobiliare Saffi v Italy*<sup>39</sup>, where the applicant was a landlord who complained of excessive delay in the enforcement of an order for possession of rented accommodation. While a stay of execution for such period as is strictly necessary to enable a satisfactory solution to be found for public order problems may be justified in exceptional circumstances<sup>40</sup>, on the facts execution was not effected over a 13 year period. Over the first 6 years this was because the Italian State resorted to a series of emergency measures to suspend the enforcement of non-urgent orders. For the next 6 or 7 years it was because the enforcement authorities were rationing the use of the police in attending when orders for possession were enforced, and due to restrictions in resources it was only urgent cases that were being dealt with. These delays were not subject to any effective review by the courts, and their effect was to deprive the applicant of its right under art 6(1) to have its dispute with its tenant decided by a court. Accordingly, there was a breach of the right to a fair trial<sup>41</sup>.

How art 6 applies to enforcement in England and Wales is less well explored. Professor Zuckerman has expressed the view, which is almost certainly right, that the fact English law leaves the initiative on enforcement to the parties cannot in itself be a violation of art 6<sup>42</sup>. As Professor Zuckerman says, as long as the State places at the disposal of judgment creditors as effective system for enforcing judgments, it will have fulfilled its obligations under art 6.

### **Taking Control of Goods: the New Scheme**

Enforcement by taking control of goods<sup>43</sup> involves an enforcement agent taking control of the judgment debtor's goods and selling them to recover the sum owed under a judgment debt<sup>44</sup>. This

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<sup>38</sup> At [41]

<sup>39</sup> *Immobiliare Saffi v Italy* (application 22774/93) (1999) 30 EHRR 756 at [63]

<sup>40</sup> At [69]

<sup>41</sup> At [74]

<sup>42</sup> Zuckerman on Civil Procedure (3rd ed Sweet & Maxwell 2013), para 23.121. Professor Beatson (see n14 above) was of the same view regarding art 6(1), but had doubts about whether the existing enforcement system met the requirement in art 8(2) that an interference with private and family life and the home, particularly in the case of vulnerable people, should be both in accordance with law and proportionate. Ensuring compliance with these requirements was one of the motivating factors behind the reforms that came into force in 2014 (see the 2003 White Paper at p 36)

<sup>43</sup> Tribunals, Courts and Enforcement Act 2007, ss 62 to 90. The 2003 White Paper used the term 'taking legal control of goods', but this has been shortened in the Act

<sup>44</sup> Tribunals, Courts and Enforcement Act 2007, s 62(1)

method of enforcement is not available if the judgment is payable by instalments, and the instalments are up to date<sup>45</sup>. Nor is it available where the debtor is a child under 16<sup>46</sup>.

The current law relating to enforcement against goods in England and Wales came into force on 6 April 2014<sup>47</sup>. Sheriffs were replaced over 10 years ago by enforcement officers by the Courts Act 2003. Bailiffs are now replaced by enforcement agents<sup>48</sup>. Writs of *fieri facias* and warrants of execution are replaced by writs and warrants of control<sup>49</sup>. Protected goods are replaced by a modern concept of exempt goods<sup>50</sup>. Taking walking possession has become entering into a controlled goods agreement<sup>51</sup>. Procedures have been modernised, and brought into the main scheme of the Civil Procedure Rules<sup>52</sup> from the relative obscurity of the schedules of preserved provisions. All this is to be welcomed.

New concepts are introduced, such as the certification of enforcement agents<sup>53</sup>, and the 'TCG procedure'. This means the statutory procedure for taking control of goods and selling them to recover a sum in accordance with the statutory scheme in the Tribunals, Courts and Enforcement Act 2007, sch 12, and regulations made under that Act<sup>54</sup>.

The legislation is trying to do a number of things. In addition to enforcing money judgments against goods, the scheme also deals with writs and warrants for the delivery up of goods and warrants of possession against land. Also encompassed within the scheme are writs of sequestration<sup>55</sup> and writs of *fieri facias de bonis ecclesiasticis*<sup>56</sup>. The common law right to distrain for rent arrears is also abolished, and replaced for landlords of commercial premises by a right to use the procedure in the

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<sup>45</sup> CPR, r 83.15(10)

<sup>46</sup> Taking Control of Goods Regulations 2013, SI 2013/1894, reg 10

<sup>47</sup> Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2014/768. 6 April 2014 is also the commencement date for all the other related secondary legislation

<sup>48</sup> Tribunals, Courts and Enforcement Act 2007, s 63, and the Tribunals, Courts and Enforcement Act 2007 (Consequential, Transitional and Saving Provision) Order 2014, SI 2014/600, art 3(1)(d). Generations of lawyers were brought up with the theory that sheriffs were more effective than bailiffs in recovering money owed by judgment debtors as a result of the incentives available to sheriffs through poundage, or payment by results. This altered in more recent times with the realisation that bailiffs were predominantly dealing with debtors in the 'can't pay' category. See for example Professor Andrews 'English Civil Procedure' (OUP 2003), para 39.18

<sup>49</sup> Tribunals, Courts and Enforcement Act 2007, s 62(4)

<sup>50</sup> Tribunals, Courts and Enforcement Act 2007, sch 12 para 11(1)(b) and the Taking Control of Goods Regulations 2013, reg 4 and 5

<sup>51</sup> Tribunals, Courts and Enforcement Act 2007, sch 12 para 13(4) and the Taking Control of Goods Regulations 2013, reg 15

<sup>52</sup> In the new CPR, Parts 83, 84 and 85, added by the Civil Procedure (Amendment) Rules 2014, SI 2014/407

<sup>53</sup> Tribunals, Courts and Enforcement Act 2007, ss 64 and the Certification of Enforcement Agents Regulations 2014, SI 2014/421

<sup>54</sup> CPR, r 83.1(2)(h)

<sup>55</sup> A writ of sequestration appoints sequestrators to enter a contemnor's land and to seize the contemnor's personal property until a contempt of court is purged, see Blackstone's Civil Practice 2014 (OUP 2013) paras 81.27 to 81.31 and CPR rr 81.19 to 81.32

<sup>56</sup> CPR r 83.1(2)(l). A writ of *fieri facias de bonis ecclesiasticis* is an ancient procedure for seizing a debtor's ecclesiastical property to satisfy a High Court judgment (*Current Law Statutes Annotated* [2007] at 15-79) after a writ of *fi. fa* (now writ of control) has been returned unsatisfied. These are directed to the bishop of the diocese (formerly RSC ord 47, r 5; now CPR r 83.11), and executed by diocesan officers of the bishop (Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice, 22nd ed Stevens, 1981, p 355)

Tribunals, Courts and Enforcement Act 2007, schedule 12, for taking control of goods<sup>57</sup>. This introduces another acronym, 'CRAR', standing for commercial rent arrears recovery<sup>58</sup>.

### *Transfers*

A case may need to be transferred before a judgment creditor can proceed with enforcement by taking control of goods. There are two situations:

- (a) Proceedings will have to be transferred to the High Court where the judgment was obtained in the County Court and exceeds £5,000 (other than judgments arising from regulated agreements under the Consumer Credit Act 1974)<sup>59</sup>; and
- (b) Proceedings will have to be transferred to the County Court where a High Court judgment is for less than £600<sup>60</sup>.

### *Responsibility for bailiffs / execution of warrants of control*

Under the County Courts Act 1984, s 123, county court District Judges were responsible for the acts and defaults of the bailiffs attached to their court. In order to remove any potential conflict between the District Judge's role as High Bailiff and their judicial responsibilities, such as in relation to the suspension of warrants<sup>61</sup>, section 123 has been revoked<sup>62</sup>. Responsibility for issuing warrants of control in the County Court is now given to 'any person authorised by or on behalf of the Lord Chancellor'. In practice this is the court manager.

### *Enforcement agents*

Under the former system there was a fragmented enforcement profession. Perceived problems were that some firms and individuals operated outside any regulatory structure, and there was some evidence of threats and intimidation being used against vulnerable people, even in their own homes<sup>63</sup>. A central recommendation of the 2003 White Paper to address this was to implement a unified legal structure for all enforcement agents who should be regulated by a statutory body<sup>64</sup>. This was intended to operate a licensing regime for enforcement agents, with a code of conduct and regulatory powers to protect debtors and prevent malpractice. The only existing relevant regulator identified in the 2003 White Paper was the Security Industry Authority<sup>65</sup>.

In the event these proposals were not implemented. Instead there is a certification scheme for enforcement agents under the Tribunals, Courts and Enforcement Act 2007, ss 63 and 64. Section 63(2) provides that an individual may act as an enforcement agent only if they are duly certified under s 64, if they are exempt, or if they act in the presence and under the direction of someone who is certified or exempt. Exemptions apply to police constables, officers of HM Revenue and

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<sup>57</sup> Tribunals, Courts and Enforcement Act 2007, ss 72

<sup>58</sup> Commercial rent arrears recovery is a subject in itself, as is the related warrants of control procedure in the magistrates' courts, which is also dealt with by the Tribunals, Courts and Enforcement Act 2007. The rest of this article will concentrate on taking control of goods as a means of enforcing a civil judgment

<sup>59</sup> High Court and County Courts Jurisdiction Order 1991 (SI 1991/724), art 8(1)(a)

<sup>60</sup> High Court and County Courts Jurisdiction Order 1991, art 8(1)(b)

<sup>61</sup> 2003 White Paper, p 16

<sup>62</sup> Tribunals, Courts and Enforcement Act 2007, sch 13, para 78. Section 85(2) is also amended to reflect the change, see Tribunals, Courts and Enforcement Act 2007, s 67

<sup>63</sup> Green Paper 'Towards Effective Enforcement' (July 2001); National Citizens Advice Bureaux 'Undue distress: CAB clients' experience of bailiffs' (May 2000); 2003 White Paper, p 25

<sup>64</sup> 2003 White Paper, pp 6 and 25

<sup>65</sup> 2003 White Paper, p 26. Another White Paper, 'The Government's proposals for regulation of the private security industry of England and Wales' (March 1999) proposed a licensing system to regulate private sector security industry personnel, such as wheel-clampers, door supervisors, security guards, private investigators and security consultants. See the Private Security Industry Act 2001



Customs, court officials, and officers of government departments<sup>66</sup>. Certificates are issued by a judge of the County Court<sup>67</sup>, although certificates issued under the Law of Distress Amendment Act 1888, s 7, have effect as if issued under s 64<sup>68</sup>. Detailed rules regulating the certification process are contained in secondary legislation<sup>69</sup>. A certificate will not be issued unless the applicant is a fit and proper person to hold a certificate and possesses sufficient knowledge of the law and procedure relating to the powers of enforcement by taking control of goods to be competent to exercise those powers<sup>70</sup>. Before a certificate is issued the applicant must lodge the sum of £10,000 in court by way of bond security for the purpose of securing the costs of investigating any complaints<sup>71</sup>.

### *Enforcement officers*

With a policy of having a unified legal system governing all enforcement agents, and with the Tribunals, Courts and Enforcement Act 2007, s 63, seemingly saying that enforcement by taking control of goods is restricted to certified enforcement agents and exempt persons (which do not include enforcement officers), it might be thought that the successors to the High Court sheriffs would have no role in the modern system of taking control of goods. Certainly there is nothing in the Tribunals, Courts and Enforcement Act 2007 that sets out clearly and succinctly how enforcement officers fit into the new scheme. This can only be discerned by a careful reading of the amendments and revocations made to the Courts Act 2003 as set out in the Tribunals, Courts and Enforcement Act 2007, sch 13 and 25.

About half the provisions in the Courts Act 2003 relating to High Court enforcement against goods remain in force after the implementation of the Tribunals, Courts and Enforcement Act 2007. The Courts Act 2003 had already revoked the provisions relating to writs of *fi. fa.* that used to be found in the Senior Courts Act 1981, ss 138 to 138B. The Courts Act 2003, s 99(2), also revoked the common law rule that writs of execution had to be directed to the sheriff, replacing the old law with provisions on writs of execution that are set out in the Courts Act 2003, sch 7. While paras 8 to 11 of sch 7 no longer apply to enforcement by taking control of goods from 6 April 2014, the rest of sch 7 continues in force. Under sch 7, para 2(1), an enforcement officer continues to be an individual authorised to act as such by the Lord Chancellor or a person acting on his behalf. High Court writs of execution<sup>72</sup> have to be directed to an enforcement officer<sup>73</sup>. While an enforcement officer has the duties, powers, rights, privileges and liabilities that a sheriff of a county would have had at common law<sup>74</sup>, this is subject to the Tribunals, Courts and Enforcement Act 2007, sch 12, in the case of a writ conferring power to use the sch 12 procedure<sup>75</sup>.

What this seems to mean is:

(a) County Court enforcement by taking control of goods is primarily to be dealt with by enforcement agents certified under the Tribunals, Courts and Enforcement Act 2007, s 64;

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<sup>66</sup> Tribunals, Courts and Enforcement Act 2007, s 63(3), (4). A 'court official' is a civil servant appointed under the Courts Act 2003, s 2(1), so does not include an enforcement officer

<sup>67</sup> Tribunals, Courts and Enforcement Act 2007, s 64(1), as amended by the Crime and Courts Act 2013, sch 9, para 46

<sup>68</sup> Tribunals, Courts and Enforcement Act 2007, s 64(4)

<sup>69</sup> Certification of Enforcement Agents Regulations 2014, SI 2014/421

<sup>70</sup> reg 3

<sup>71</sup> reg 6

<sup>72</sup> Other than writs of sequestration and writs of *fieri facias de bonis ecclesiasticis* (Courts Act 2003, sch 7, para 3(2))

<sup>73</sup> Courts Act 2003, sch 7, para 3(1)

<sup>74</sup> Courts Act 2003, sch 7, para 4(2)

<sup>75</sup> Courts Act 2003, sch 7, para 4(1A) as added by the Tribunals, Courts and Enforcement Act 2007, sch 13, para 151(2)

- (b) High Court enforcement by taking control of goods is primarily to be dealt with by enforcement officers authorised under the Courts Act 2003;
- (c) Duties, powers, rights, privileges and liabilities of High Court enforcement officers when dealing with writs of control are governed by the Tribunals, Courts and Enforcement Act 2007, sch 12<sup>76</sup>; and
- (d) Duties, powers, rights, privileges and liabilities of High Court enforcement officers when dealing with other writs of execution are those that a sheriff would have had at common law.

#### *Commencing enforcement by taking control of goods*

Enforcement by taking control of goods is commenced by issuing a writ of control in the High Court or a warrant of control in the County Court. A writ or warrant of control is normally issued simply by filing a request for its issue, producing the judgment (High Court only)<sup>77</sup>, and paying the court fee<sup>78</sup>. However, permission to issue the writ or warrant is required in a number of situations, such as where six years or more have passed since the date of the judgment, or where any of the parties have died since the date of the judgment<sup>79</sup>.

#### *Notice of enforcement*

Before taking control of the debtor's goods the enforcement agent must give the judgment debtor notice of enforcement in the prescribed form<sup>80</sup>. This must be served on the debtor at the address where they usually live or carry on business at least seven clear days before the enforcement agent takes control of the goods<sup>81</sup>. This gives the debtor a chance to pay off the judgment before their goods are seized.

#### *Period of validity*

A writ or warrant of control is valid for a period of 12 months, but the court can order it to be extended for a further 12 months<sup>82</sup>. Enforcement by this method can be effected on any day of the week, but only between the hours of 6 am and 9 pm, unless the court orders otherwise<sup>83</sup>.

#### *Gaining entry*

At common law the sheriff was not permitted to use force to gain initial access to a dwelling house<sup>84</sup>. Forcible entry was permitted in the case of commercial or business premises<sup>85</sup>, or after the sheriff or his officers had been forcibly ejected. In a case involving distraint for rent<sup>86</sup>, the bailiff gained access, but was forcibly ejected when preparing the inventory. It was held that the bailiff was entitled to break open the door of the property when, about an hour later, having obtained reinforcements, the debtor refused to admit him. Once inside the premises the sheriff might proceed to removing sufficient goods to satisfy the judgment debt, or might leave an officer on site in 'close possession' of the goods, or might enter into 'walking possession' of the goods, typically using a written agreement with the debtor or some responsible person on the premises. For many years it was the practice for

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<sup>76</sup> For the rest of this article the term 'enforcement agent' will be used when describing the requirements of the Tribunals, Courts and Enforcement Act 2007, sch 12, although they also apply to enforcement officers

<sup>77</sup> CPR, rr 83.9, 83.15

<sup>78</sup> Civil Proceedings Fees Order 2008, SI 2008/1053, as amended by the Civil Proceedings Fees (Amendment) Order 2014, SI 2014/874, fee 7.1 (High Court) or fee 8.1 (County Court)

<sup>79</sup> CPR, r 83.2

<sup>80</sup> These, and the other forms to be used by enforcement agents, must conform to the design and layout of the forms in the schedule to the Certification of Enforcement Agents Regulations 2014 (reg 3(b)(iii))

<sup>81</sup> Taking Control of Goods Regulations 2013, regs 6 and 8

<sup>82</sup> reg 9

<sup>83</sup> regs 12 and 13

<sup>84</sup> *Semayne's Case* (1604) 5 Co Rep 91a

<sup>85</sup> *Hodder v Williams* [1895] QB 663

<sup>86</sup> *Francome v Pinche* (1766) Esp 382

sheriffs in Greater London to return to take goods covered by walking possession agreements accompanied by a locksmith and a removal van. If the building was locked but unoccupied at the time, the locksmith would be used both to gain entry and to secure the premises after the goods were removed. This practice, which involves forcible entry, was found to be illegal in *Khazanchi v Faircharm Investments Ltd*<sup>87</sup>.

Under the new scheme, the only premises that may be entered without an entry warrant are premises where the debtor usually lives or carries on a trade or business<sup>88</sup>. An entry warrant may be sought from the court if there is reason to believe the debtor has goods on those other premises<sup>89</sup>.

Entry must be through a door or other usual means of access, such as through French doors or a loading bay<sup>90</sup>. Reasonable force may be used to effect entry or to do anything for which entry is authorised if this is necessary<sup>91</sup> in the following situations:

- (a) where the enforcement agent has power to enter the premises under paras 14, 15 or 16. These powers cover the place the debtor usually lives or carries on a trade or business, and other premises covered by an entry warrant<sup>92</sup>;
- (b) where enforcement is at a place the enforcement agent reasonably believes the debtor carries on a trade or business<sup>93</sup>;
- (c) where the enforcement agent has a power of re-entry under para 16 and the enforcement agent reasonably believes the debtor carries on a trade or business on the premises<sup>94</sup>; and
- (d) where the enforcement agent has taken control of the goods by entering into a controlled goods agreement, and the debtor has failed to comply with any provision of the controlled goods agreement relating to payment of the debt, provided the debtor is given notice of the enforcement agent's intention to re-enter<sup>95</sup>.

In addition, the enforcement agent can apply for a warrant permitting the use of reasonable force to execute against goods on the highway or to effect re-entry<sup>96</sup>.

These enhanced powers to use force to effect entry or re-entry, which overturn the position established by *Khazanchi v Faircharm Investments Ltd*, are the major benefit to creditors of the new scheme. They were intended to be balanced by the regulatory scheme envisaged by the 2003 White Paper. There are obvious concerns that the certification and complaints processes in fact enacted under the Tribunals, Courts and Enforcement Act 2007, s 64, will not have the machinery to curb excesses.

### *Seizing goods*

Taking control of goods involves doing one of the following<sup>97</sup>:

- (a) securing the goods on the premises. This may be by locking them in a cupboard or outbuilding, or immobilising them<sup>98</sup>;

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<sup>87</sup> *Khazanchi v Faircharm Investments Ltd* [1998] 2 All ER 901 both for distraint for rent (*Khazanchi v Faircharm Investments Ltd*) and for writs of fi.fa. (*McLeod v Butterwick*, which was heard at the same time)

<sup>88</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 14(6)

<sup>89</sup> para 15

<sup>90</sup> Taking Control of Goods Regulations 2013, reg 20

<sup>91</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 17

<sup>92</sup> para 18

<sup>93</sup> para 18A, inserted by the Crime and Courts Act 2013, s 25(3)

<sup>94</sup> para 19

<sup>95</sup> para 19A, inserted by the Crime and Courts Act 2013, s 25(4)

<sup>96</sup> Taking Control of Goods Regulations 2013, regs 28 and 29

<sup>97</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 13

- (b) securing them on the highway;
- (c) removing them and securing them elsewhere. Unless there are exceptional circumstances, they must be secured within a reasonable distance from where they were seized. The debtor must be provided with an inventory of the removed goods as soon as reasonably practicable, and the enforcement agent has a duty to take reasonable care of the removed goods<sup>99</sup>; or
- (d) entering into a controlled goods agreement.

Unless the goods seized are goods on the highway (typically a car or van), the enforcement agent may not take control of goods whose aggregate value is more than the amount outstanding<sup>100</sup>. It is only goods that belong to the debtor and which are in the place where the debtor usually lives or carries on business that may be seized<sup>101</sup>. Exempt goods may not be seized<sup>102</sup>. Exempt goods are defined to include<sup>103</sup>:

- (a) items or equipment used personally by the debtor in his employment, business, trade, profession, study or education, up to a value of £1,350;
- (b) clothing, bedding, furniture, household equipment, items and provisions as are reasonably required to satisfy the basic domestic needs of the debtor and every member of the debtor's household;
- (c) assistance dogs;
- (d) vehicles with disabled persons badges;
- (e) goods which happen to be the debtor's home, such as a houseboat.

#### *Priorities*

It sometimes happens that more than one creditor will seek to enforce by taking control of the debtor's goods at about the same time. The priority of a writ of control is determined by reference to the time it is received by the enforcement officer, whereas the priority of a warrant of control is determined by reference to the date it is issued<sup>104</sup>.

A related problem is in establishing whether a purchaser of any of the judgment debtor's goods will take them free of the claims of the judgment creditor under a writ or warrant of control. The property in the judgment debtor's goods is bound by the writ or warrant of control from the point the issued writ or warrant is received by the enforcement officer or enforcement agent<sup>105</sup>. From that point any transfer or assignment of any interest in the debtor's goods is subject to the creditor's right to enforce against those goods, unless the third party purchaser bought the goods in good faith, for valuable consideration, and without notice of the writ or warrant. The reason why the enforcement officer<sup>106</sup> or enforcement agent<sup>107</sup> is required to endorse the writ or warrant of control with the time and date of receipt is to provide evidence of the point in time when the writ or warrant was received for this purpose<sup>108</sup>.

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<sup>98</sup> The common law concept was 'impounding', for which see *Khazanchi v Faircharm Investments Ltd* [1998] 2 All ER 901 at [5] and [27]

<sup>99</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, paras 34 and 35

<sup>100</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 12

<sup>101</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, paras 9(a), 10 and 14(6)

<sup>102</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 11

<sup>103</sup> Taking Control of Goods Regulations 2013, regs 4 and 5

<sup>104</sup> CPR. r 83.4(5)

<sup>105</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, paras 4 and 5

<sup>106</sup> Courts Act 2003, sch 7, para 7

<sup>107</sup> County Courts Act 1984, s 99 as substituted by the Tribunals, Courts and Enforcement Act 2007, 69. This cross-refers to warrants of control issued under the County Courts Act 1984, s 85(2), a provision which is substantially amended by the Tribunals, Courts and Enforcement Act 2007, sch 13, para 69

<sup>108</sup> This was made clear by the now repealed Senior Courts Act 1981, s 138(3). The underlying principles in paras 4 and 5 were previously enacted in the Sale of Goods Act 1893, s 26

### *Controlled goods agreement*

Under a controlled goods agreement the debtor is permitted to retain custody of the goods, but acknowledges that the enforcement agent is taking control of them, and agrees not to remove or dispose of them, or permit anyone else to do so, before the debt is paid<sup>109</sup>. It can be entered into between the enforcement agent and the debtor, or an adult authorised to do so by the debtor, or someone with apparent authority if the premises are used for a trade or business<sup>110</sup>. The agreement must be in writing, and comply with the requirements in the Taking Control of Goods Regulations 2013, reg 15. Subject to the court authorising shorter notice, the enforcement agent has to give the debtor two days' advance notice in writing of any intention to re-enter the premises (usually because the enforcement agent now intends to remove the seized goods)<sup>111</sup>.

### *Sale*

Often, the threat of sale is sufficient incentive to persuade the debtor to pay. On payment the execution is superseded and the goods are released<sup>112</sup>. Otherwise, the enforcement agent must make or obtain a valuation of the controlled goods, and must sell or dispose of them for the best price that can reasonably be obtained<sup>113</sup>. The debtor must be given seven clear days notice in writing of the arrangement for sale<sup>114</sup>. Unless the court orders otherwise, the goods will be sold by public auction<sup>115</sup>. The auction must be publicly advertised and must be conducted by a qualified auctioneer or on an online auction or internet auction site<sup>116</sup>. After the sale the debtor is given a detailed account in writing of the sale, and the proceeds are used to pay the amount outstanding on the judgment. Purchasers of the goods acquire good title<sup>117</sup>.

### **Structure of the Legislation and Conclusion**

What is of concern is the complexity of the statutory scheme implementing these changes. Restricting the ambit of the review to enforcing court judgment by taking control of goods, the law is to be found in no less than four Acts of Parliament<sup>118</sup>, including five schedules to those Acts, nine statutory instruments<sup>119</sup>, three Parts of the CPR, and two Practice Directions. Most of these are lengthy documents. Discovering the law involves piecing them together, and trying to make sense of what are often complex provisions that do not always have obvious meanings. This is simply the latest in an increasing trend towards overly complicated legislation. No doubt the skill of the Parliamentary draftsmen is to be applauded, but the effect is to make the law almost impossible to find by those most likely to need to use it.

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<sup>109</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 13(4)

<sup>110</sup> Taking Control of Goods Regulations 2013, reg 14

<sup>111</sup> Taking Control of Goods Regulations 2013, regs 23-27 and Tribunals, Courts and Enforcement Act 2007, sch 12, para 16

<sup>112</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, para 6(3)(a)

<sup>113</sup> paras 36 and 37

<sup>114</sup> para 40

<sup>115</sup> para 41

<sup>116</sup> Taking Control of Goods Regulations 2013, reg 43

<sup>117</sup> Tribunals, Courts and Enforcement Act 2007, sch 12, paras 50 and 51

<sup>118</sup> The County Courts Act 1984; the Courts Act 2003; the Tribunals, Courts and Enforcement Act 2007; and the Crime and Courts Act 2013

<sup>119</sup> High Court Enforcement Officers Regulations 2004 (SI 2004/400); High Court Enforcement Officers (Amendment) Regulations 2004 (SI 2004/673); Taking Control of Goods Regulations 2013; Certification of Enforcement Agents Regulations 2014; Civil Procedure (Amendment) Rules 2014 (SI 2014/407); Tribunals, Courts and Enforcement Act 2007 (Consequential, Transitional and Saving Provision) Order 2014 (SI 2014/600); Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014 (SI 2014/768); Crime and Courts Act 2013 (Commencement No 9) Order 2014 (SI 2014/830) and Civil Procedure (Amendment No 4) Rules 2014 (SI 2014/867)

Legislation implementing procedural change will typically use primary legislation to confer jurisdiction to take the relevant action, with secondary legislation implementing the procedure. Modern primary legislation frequently sets out the jurisdiction in general terms, with the detail to be fleshed out in regulations made by statutory instrument. As is common when the change is to civil procedure, secondary legislation is required both for the fleshing out and also for inserting the court procedures to be followed by making amendments to the Civil Procedure Rules<sup>120</sup>. Invariably, provisions in the CPR are supported by Practice Directions setting out details of the procedure that are felt do not need to be included in the CPR themselves<sup>121</sup>.

The primary scheme for taking control of goods is set out in schedule 12 to the Tribunals, Courts and Enforcement Act 2007. This runs to 69 paragraphs. This scheme is supplemented by the Taking Control of Goods Regulations 2013, which often make parallel provision for similar concepts. The Regulations run to 55 regulations. This is underpinned for the County Court by the amended provisions in the County Courts Act 1984, ss 85 to 104, and for the High Court by the Courts Act 2003, s 99 and sch 7. In both courts further primary legislation is to be found in the Tribunals, Courts and Enforcement Act 2007, ss 62 to 70. The procedural rules in CPR Parts 82 to 85 cover 32 pages. They include separate provisions for High Court writs (rr 83.9 to 83.14) and County Court warrants (rr 83.15 to 83.29).

It is not just the number of provisions, and the number of sources, that is the problem. Many of the provisions have been amended, even before they came into force, with the amendments being hard to find deep inside schedules to other statutes. Placing the forms to be used by enforcement agents in the statutory instrument dealing with certification is not going to make them easy to find by debtors. There are further complications based on the inter-relation between taking control of goods and insolvency which are dealt with elsewhere in the insolvency legislation. The result is a spider's web of interlocking and difficult to understand provisions which are not going to be easy to find by those needing to know about the system. How finding the law is going to be possible with future amendments to these various instruments, combined with decisions of the courts, hardly bears thinking about.

One of the objectives of enforcement reform was the simplification of the law in this area. Professor Beatson<sup>122</sup> called for a single piece of legislation to regulate all enforcement agents. Simplification of the law was a major objective of the Enforcement Review. As stated earlier, it is crucial that there is a straightforward and accessible system<sup>123</sup>. Regarding the Civil Procedure Rules, it is also a statutory requirement. The Civil Procedure Act 1997, s 1(3)<sup>124</sup>, declares that the power to make and alter the CPR must be exercised so as to secure that the civil justice system is accessible, fair and efficient, and that the CPR are both simple and simply expressed.

There is no doubt that enforcement against goods is a complex area, with competing interests and difficult balances to maintain. There was always going to be a need for commencement orders and rules of court. That said, the least it deserved was a single statute setting out in one place all the law governing the jurisdiction, priorities and mechanics of enforcement against goods, and the duties, powers, rights, privileges and liabilities of enforcement agents.

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<sup>120</sup> The Civil Procedure Rules 1998 are of course contained in a statutory instrument, SI 1998/3132 as amended

<sup>121</sup> Civil Procedure Act 1997, ss 1 and 5 and sch 1, para 6; see Blackstone's Civil Practice 2014 (Oxford: OUP) para 1.7

<sup>122</sup> See n14 above, and 2003 White Paper, p 36

<sup>123</sup> 2003 White Paper, p 6

<sup>124</sup> As amended by the Courts Act 2003, s 82(1)