Specialist Debt Advice service

Resource

Dealing with Judgment Debts

CONTENTS

1. CIVIL PROCEDURE

1.1 The Woolf Reforms

The Civil Procedure Rules were introduced in 1999 to replace the Rules of the Supreme Court (now referred to as "Senior Court") and the County Court Rules. They make up a procedural code whose overriding aim is to enable the courts to deal with cases justly. Their introduction was prompted by the Access to Justice reports, and the reforms were named after the Rt Hon Lord Woolf, the author of the study. At the time, civil cases were extremely expensive, with legal costs regularly exceeding the value of the claim. The enacting legislation, the Civil Procedure Act 1997, states that "The power to make Civil Procedure Rules is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient".

1.2 Rules, Practice Directions and Pre-Action Protocols

The aim of the Rules is laid out in the overriding objective (CPR 1). It requires the courts to take an active part in proceedings, encouraging cooperation and swift resolutions. Totalling 89 parts, divided into individual rules, the CPR provides a guide to court processes including pre-action conduct, service of documents, litigation, enforcement and sanctions.
Some Rules have an accompanying Practice Direction (PD) that helps litigants and their representatives to follow the Rules. The PDs contain specific information such as the correct form to use, timescales and service of documents. There are also corresponding Pre Action Protocols for some types of claim, including debt claims and possession claims by social landlords and mortgage lenders.

For the purpose of advising clients about how to deal with their judgment debts, we will be concentrating on those Rules which govern varying and setting aside judgments. If you are reading this online, you will be able to find links throughout to the relevant rules. If not, we suggest looking up the corresponding Rule and Practice Direction on the Ministry of Justice website, available at http://www.justice.gov.uk/courts/procedure-rules/civil/rules. The SDAS E-bulletin will contain updates about the rules.

1.3 Part 7 or Part 8?

We envisage that most judgments will have been entered following the process in Part 7 of the Rules. We will also consider how they apply to Part 8 claims. The Part 8 procedure is used where there is unlikely to be a substantial dispute of fact: instead the parties are seeking a ruling on an issue. For example, applications for an Order for Sale and claims to set aside a

transaction because of undue influence or fraud. These types of claim are allocated to the Multi-track, generally the track used for high value and/or complex cases. In 2013, costs reforms were introduced to CPR PD 3E (known as the Jackson Reforms) that apply to all multi-track cases. They require parties to file detailed costs statements, and to attend case management hearings.

For Part 7 claims, the route used by creditors of contractual debts to obtain judgment, the rules are not quite as onerous. Most claims issued for less than £10,000 will be automatically allocated to the small claims track, with the benefit of small claims costs protection – a bonus for a litigant in person wishing to defend this type of claim without significant costs risks. This also means that defendants will not be able to claim their costs from the claimant if successful.

For higher amounts, the claim will normally be allocated to the fast track. The claims will only be allocated if a defence is filed, at which point both parties are sent an allocation questionnaire to determine the appropriate track. If a defence is not filed, judgment will be entered in accordance with the process in Part 7.

1.4 Part 7 / Part 8 table

Part 7 Claims	Part 8 Claims
Claim issued on N1 Claims for contractual debts Claims for debts in restitution (such as overpaid wages)	Claim issued on N208 Claims that require a ruling: Orders for Sale Declarations of trusts or beneficial interest in land Void transactions due to fraud, misrepresentation, undue influence Tenancy deposit claims Where the defendant's names are not known (permission required)
Costs generally low - moderate Will benefit from small claims costs protection if value of claim under £10,000	Costs can be significant Parties file a statement of costs prior to CMC hearing
Defendant can file acknowledgment of service/admission N9A, defence N9B Default judgment entered if no response from defendant	Defendant can file acknowledgment of service/defence on form N210 Hearing set if no response from defendant, who may attend but may not be permitted to give evidence
Possession claims are issued on form N5. They follow the procedure in Part 55 CPR, and the related PDs. There is a protocol for mortgage and rent possession claims. Some types of debts are registered for enforcement as though they are judgments of the County Court. Examples include benefit overpayments, Penalty Charge notices and Tribunal decisions. Because the Part 7 (or Part 8) process has not been followed, the ability to set aside or vary a judgment does not apply to this type of judgment debt.	

1 Civil Procedure Act 1997, s1(3)

2. PRE-ACTION CONDUCT FOR DEBT CLAIMS

The Pre-Action Protocol for debt claims is a civil practice direction that should be followed where there is no other specified protocol.

This practice direction also provides the objectives of the pre-action conduct and the protocols. The objectives include the courts expectation that the parties will have exchanged sufficient information to understand each other's position, make decisions about how to proceed, try to settle issues without proceedings, consider Alternative Dispute Resolution, support efficient management of proceedings and reduce costs. See paragraph 3 of the practice direction.

Paragraph 4 discusses that the parties should act reasonably and proportionately in complying with the practice direction and the relevant pre-action protocol.

2.1 Pre-Action Protocol

On 1st October 2017 a pre-action protocol for debt claims was introduced.

This protocol applies where a business (creditor) is claiming money for repayment of a debt from an individual (debtor). This would not cover business debts unless one party was a sole trader.

If the claimant is a mortgage lender or social landlord this protocol will not apply - they have their own specific protocols.

The aims of the protocol are as follows:

(a) encourage early engagement and communication between the parties, including early exchange of sufficient information about the matter to help clarify whether there are any issues in dispute;
(b) enable the parties to resolve the matter without the need to start court proceedings, including agreeing a reasonable repayment plan or considering using an Alternative Dispute Resolution (ADR) procedure;
(c) encourage the parties to act in a reasonable and proportionate manner in all dealings with one another (for example, avoiding running up costs which do not bear a reasonable relationship to the sums in issue);

(d) support the efficient management of proceedings that cannot be avoided.
The protocol sets out that the creditor must send the debtor a letter of claim containing certain information (please see paragraph 3.1 of the protocol for details). The debtor should be given 30 days to respond before any court action is taken. Further time constraints/ obligations are imposed by the protocol depending on the debtor's response (see paragraph 4).

Paragraph 5 states that information should be exchanged, and documents provided to enable the understanding of the parties' positions. If the debtor requests documentation, this mist be provided within 30 days if it is available and if not an explanation why.

Paragraph 6 provides that if there is a dispute about the debt a resolution should be sought through an alternative to court action, such as Alternative Dispute Resolution. Specific reference is made to using the Financial Ombudsman where appropriate.

2.2 Non-compliance

Paragraph 7 of the protocol explains that the court will take non-compliance into account when giving directions for the management of proceedings but that the court 'is not likely to be concerned with minor or technical infringements, especially when the matter is urgent'. Paragraph 13 of the practice direction repeats this.

Paragraph 15 of the practice direction states that when there has been non-compliance with the protocol or the practice direction proceedings can be stayed, or sanctions can be applied.

As per paragraph 16 of the practice direction, sanctions could include an order to pay costs or part of the costs of the other party. This could potentially be costs on an indemnity basis which means actual out of pocket legal expenses.

If the claimant/ creditor is the party who has not complied with the protocol, sanctions could include deprivation of interest for a period or lowering the interest rate.

If the defendant/debtor is at fault the interest rate can be increased to a higher rate for a period of time (not exceeding 10% above base rate).

2.3 Practical Application

Non-compliance with the protocol can be included in a response to a claim form, whether you admit or defend a claim. Non-compliance is not a defence to owing the money.

Likewise, non-compliance with the protocol will not in itself be a ground for setting aside a judgment but pointing out non-compliance in a request for a re-determination, variation or set aside application could result in the client paying a lower interest rate or not having to pay the claimant's costs.

3. THE ROUTES TO JUDGMENT

A County Court money claim for a specified amount is made on Form N1 and issued under Part 7 of the CPR. Where the claim is for less than £100,000 the claim must be issued in the County Court, which has jurisdiction up to £350,000 (although the County Court Money Claims Centre limit is £100,000 for all claims). Where the claimant expects to recover more than £100,000 the claim may be issued in the High Court, especially where the issues are complex. Some claims involving trusts of land and estates have a County Court limit of £30,000[1].

For defendants, the claim form will usually be the first notification of proceedings, although the pre-action protocol for debt claims requires commercial claimants to follow various steps before the claim is issued (see Pre-Action Protocols above).

3.1 Service of the claim form and related documents

The particulars of claim may be served at the same time as the claim form, or within 14 days of the date of service, and no later than the last date for service of the claim. The forms for defending and admitting the claim and acknowledging service must also be served by this date.

Rule 7.5 provides that where the claim is served within the jurisdiction, the claimant must complete the step required in the following table before midnight on the calendar day four months after the date of issue of the claim form:

Method of service	Step required
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

3.2 Deemed date of service

The claim form is deemed to be served on the second business day after the relevant step under the table above, although the court can authorise substituted service permitting service by an alternative method or at an alternative place and may dispense with service altogether in "exceptional circumstances". See CPR 6 for full requirements for service.

For claims issued in the County Court Money Claims Centre, the claim will be deemed to be served on the fifth day after the claim was issued, irrespective of whether that day is a business day or not. CPR PD 7E contains the rules for issuing claims using the CCMCC.

3.3 Acknowledgement of service

The provisions for acknowledgment of service are set out in CPR 10. A defendant is not required to file an acknowledgment of service unless they need additional time to file the defence or challenge the court's jurisdiction.

The acknowledgment must be filed within 14 days of the service of the claim and grants an extension of a further 14 days during which time judgment cannot be entered. More time can be requested if necessary – permission should be sought before the deadline has passed.

An admission or partial admission can be made in writing during the pre-action procedure, stating it is being made under CPR 14. This admission can be used as the basis for judgment and can only be withdrawn if the claimant consents or with permission of the court.

A child or a person who lacks capacity to defend proceedings (a "protected party") cannot make an admission under any circumstances.

3.4 Admitting the claim

Part 14 CPR applies where the defendant admits the whole or part of a claim.

An admission should be made by sending Form N9A to the claimant within 14 days of service of the claim form.

If the defendant admits the claim but does not request time to pay, judgment will be entered and will specify the date by which the whole of the judgment debt is to be paid or, the times and rate at which it is to be paid by instalments.

Where the defendant admits the claim and requests time to pay, the claimant will decide whether it accepts the defendant's proposal. The claimant will then return Form N225 to the court either accepting the defendant's repayment terms or declining the terms.

If the claimant rejects the offer of repayment, a court officer will determine the time and rate of payment where the amount outstanding - including costs - is less than £50,000, otherwise it will be determined by a judge. This is known as judgment entered after determination (see section on determining the rate of payment below, including the right to redetermination).

3.5 Partial admission

In some cases, a client may want to make a partial admission because the claim amount is disputed. This can be done pursuant to CPR 14.5.

To do this, the defendant must file the N9A admission stating the amount they believe they owe and their payment proposal, as well as the N9B defence form to explain why they do not owe the full amount of the claim. This should be sent to the court.

Notice shall then be served on the claimant who will decide whether they accept the partial admission. If the offer is accepted judgment will be entered specifying the payment terms. If they reject the admission, the proceedings will continue and there is likely to be a hearing to determine the amount of the liability, if any.

3.6 Defending the claim

Where a defendant wishes to defend all or part of the claim, the defendant must file a defence form as per CPR 15.2.

A defence should be filed to the court on Form N9B within 14 days of service of the claim unless the defendant returns the acknowledgement of service notifying the court of their intent to defend the claim. Returning the acknowledgement of service allows the defendant a further 14 days to file their defence.

In Billington v Davies[2], default judgment was entered where a defence had been filed out of time. The court rejected the argument that the fact that a defence had been filed prevented the claimant from obtaining default judgment. This case highlights the importance of requesting permission of the court to file a defence late - and obtaining that permission - before the deadline for filing.

The defence should address each point in the claim and say whether it is admitted or denied, and the reasons for any denial. The form is filed and served on all parties to the proceedings.

A District Judge may look at the facts presented and make a summary judgment and/or strike out a statement of case because either the claim or the defence has no real prospect of success, and there is no other compelling reason for a trial. A defendant might ask for the court to issue summary judgment because the claim has been issued out of time, for example. Summary judgment is not available in possession claims and they are very unusual in Part 8 claims.

If the court decides that the defence requires a hearing, the next stage is the completion of allocation questionnaires by each party. Failing to return the questionnaire within the time limit set by the court can lead to the claimant entering judgment. Once the questionnaires have been returned the claim will be allocated to either the small claims track, fast track or multi-track, and further directions will be issued, such as a date for the exchange of witness evidence. All deadlines must be met, otherwise the defaulting party will be forced to apply for relief from sanctions. See Relief from Sanctions below.

3.7 Default Judgments

Default judgments are dealt with under CPR Part 12 and the associated practice direction. They are not available for Part 8 claims.

A judgment is entered in default where there has been no trial because a defendant has failed to file an acknowledgment of service and/or a defence, or a claimant has failed to serve a defence to counterclaim.

The court can also make a default judgment on its own initiative where the defendant has failed to engage in the litigation process[3].

In the case of a default judgment, payment will usually be ordered forthwith. This means that the amount under the judgment will be due immediately rather than payable by instalments.

1 County Court Jurisdiction Order 2014

2 [2016] EWHC 1919 (Ch)

3 LexisNexis, Dispute Resolution, Default Judgment Overview

4. DETERMINING THE RATE OF REPAYMENT

Determining the rate of repayment following an admission to a money claim is addressed from CPR 14.9 and in Practice Direction 14.

The defendant may make an offer of repayment if admitting all or part of a claim. Form N9A should be completed to provide details of means and the offer of repayment.

4.1 Whole of Claim Admitted

Where the whole of the amount of the claim is admitted, the N9A should be completed and returned to the claimant. The claimant must then consider whether to reject or accept the defendant's offer.

If the claimant accepts the offer they are required to send Notice to court and judgment will be entered with the payment terms as offered and accepted. Note that there have been reports of claimants 'accepting' offers for higher sums than were offered and not receiving N9A forms and entering judgment in default. It is advisable to send the N9A by recorded delivery and/or send a copy to court.

If the claimant does not accept the offer, they must send notice of their rejection, with reasons, along with the completed N9A, to the court.

4.2 Determination by court staff

As long as the amount of the claim is not more than £50,000, a court officer may determine the rate of payment without a hearing. This is intended to be an administrative function and court officers are supposed to follow guidance in Determination of Means – guidance to court staff.

In theory, court staff are supposed to compare income with expenses, disallowing any frivolous or non-essential expenditure, to arrive at an appropriate rate of payment. However, the process is fraught with difficulties and the guidance has not been updated recently. It is thought that it has, in practice, fallen out of use. It may never have been consistently used. Having said that, it is advisable, when completing the N9A statement of means, to ensure that it does not appear from the figures that the defendant can afford to pay more than they have

offered. If the figure that court staff determine is not more than the amount of the offer, the order should be made at the rate offered.

4.3 Determination by judge

A judge (normally a district judge) may determine the rate of payment either with or without a hearing. Any hearing will normally be at the defendant's local hearing centre.

In either event, the court should take account of the defendant's statement of means, the claimant's objections and any other relevant factors.

4.4 Re-determination

Where the rate of payment was determined by court staff or by a judge without a hearing, the defendant may, within 14 days of service of the determination notice, apply for re-determination.

This application may be made by letter and no fee should be charged. It is helpful to say that the application being made under CPR 14.13. It is part of the initial process of setting the payment rate and should not be confused with N245 applications to vary the payment rate that may be made at a later stage. It is not uncommon for court staff to mistakenly demand a fee. If this happens you can refer staff to What Happens Next in the Determination of Means guidance.

Where the decision was made by a court officer, redetermination may be made without a hearing unless this is specifically requested in the application.

The redetermination hearing will normally be held at the defendant's local hearing centre. The defendant should be prepared to attend the hearing and explain why it would be reasonable to make the order of payment at the proposed rate. Ideally, witness statement evidence should be sent to the claimant and court in advance of the hearing. It is likely to be more difficult to persuade district judges to make nominal or very low instalment orders following the judgment in Loson v Stack[1] which, in the absence of a viable payment plan, attaches more weight to a claimant's right to enforce a judgment than the defendant's need to pay by affordable instalments.

1 [2018] EWCA 803

5. VARYING ORDERS FOR PAYMENT

A debtor may wish to vary a forthwith judgment to an instalment order, or to alter the payments due under an existing instalment order. We will now consider how the application might be made and the approach the court is likely to take.

5.1 When should the N245 be used?

If a client wants to vary a default judgment or a judgment given following acceptance of a client's offer in the admission form the following process for varying a judgment applies. After payments by instalments has been ordered by the court (either following completion of the admission form by the client and acceptance of that offer or by judgment in default) the client can apply to vary this at any time under rule 40.9(A) (8) - (15) CPR.

CPR 40.9(A)(8) confirms that the debtor may apply for an order that the judgment debt
(a) if payable in one sum, be paid at a later date than that by which it is due or by instalments; or
(b) if already payable by instalments, be paid by smaller instalments.

Rule 40.9(A)(15) confirms that this application can be made at any time:
Any order made under any of the foregoing paragraphs may be varied from time to time by a subsequent order made under any of those paragraphs.

What must the application include?

CPR 40.9(A)(9) states that the application must be in the appropriate form, state the proposed terms, state the grounds on which it is made and include a signed statement of the debtor's means.

The N245 form should be used for making such an application as the form includes space to provide details in respect of all of the above.

5.2 Procedure

The fee for making this application is £50. The completed form should be sent to the court where the judgment was made. If the client also wishes to suspend a warrant of control, this

application can be made using the same application by simply ticking the box on the N245. If this is the case, the N245 should be sent to the court where the judgment is being enforced, rather than the court where the judgment was made.

It is advisable that the client sends a covering letter to explain why they are asking for the judgment to be varied. Although not strictly necessary, this will give the defendant the opportunity to give their application some context, since the N245 form does not allow for this.

It may also be a good idea for the client to send a copy of the completed N245 and letter to the creditor, but the defendant is not obliged to.

CPR.40.9(A) (10) - (14) explains the variation process after the application has been made by the debtor. This is summarised as follows:

- The court sends the creditor a copy of the debtor's application and if the creditor objects they have to notify the court within 14 days of service, along with their reasons for objecting.
- If there is no objection a court officer will vary the order in line with the terms applied for.
- If the creditor does object, a court officer may decide the rate of repayment and vary the order accordingly.
- Any party affected by this order can apply within 14 days of service for the order to be re-considered. Reasons should be given. If such an application is made the proceedings will automatically be transferred to the debtor's home court.
- A hearing will be scheduled, and both parties will be given at least 8 days' notice of the hearing date.
- At the hearing, a district judge can make whatever order they think fit.

5.3 When should the N244 be used?

If a client wants to vary a judgment to pay via instalments that has already been re-determined (or which could have been re-determined but the client is out of time) or a judgment where instalments have been set at a hearing, they can only apply to vary the judgment if there has been a change of circumstances. This application should be made on an N244 form and the fee would be £50.

The N244 form should also be used when the debtor would normally apply using an N245 form (because they want to vary a default judgment, or a judgment given following acceptance of a debtor's offer in the admission form) but they cannot even make a nominal offer. The N244 can be used to simply stay a judgment whereas the N245 requires that some offer of payment is made.

The N244 form should also be used if the order was made as a result of part 8 proceedings.

Practice direction 14 paragraphs 6.1 - 6.2 confirms that:
6.1 Either party may, on account of a change in circumstances since the date of the decision (or re-determination as the case may be) apply to vary the time and rate of payment of instalments still remaining unpaid.
6.2 An application to vary under paragraph 6.1 above should be made in accordance with Part 23.

What must the application include?

Part 23 covers application notices and states that the application should include what order the applicant is seeking, and briefly, why the applicant is seeking the order.

When explaining what order is being sought, the debtor should ensure that they specifically state that they are requesting a variation under practice direction 14.6 of the Civil Procedure Rules.

The debtor should also ensure that the change of circumstances they are relying on are set out very clearly, and that evidence is attached in the form of a financial statement and anything else that could be relevant.

Practice Direction 23A contains prescribed information for the application including the title and reference number of the claim. The application should also state whether the matter requires a hearing. Upon receipt of the application a District Judge or Master will decide whether the application is suitable for consideration without a hearing, and notify this decision to the parties along with the date and time of any hearing.

If this procedure is used, the defendant will also have to specifically request in the application that the claim is transferred to their local county court under CPR 30.2(1) as this will not happen automatically.

5.4 Procedure

The completed N244 should be sent to the court where the judgment was made.

Whether a hearing is listed and whether the case will be transferred to the applicant's home court will depend on whether these things have been requested in the application. The court will consider the application and decide whether it is just to change the rate of repayment.

5.5 Loson v Stack

The case of Loson v Stack[1] has important implications for debtors looking to vary orders for payment. The Loson case concerned an application to vary two costs orders using the provisions in CPR 40.9A.

In the first instance, Ms Loson's offer of £50 per month (when her income of part time wages and benefits totalled to £2000 per month) was found to be acceptable.

Stack appealed and this appeal was allowed by HHJ Luba on the basis that the £50 per month would not cover the statutory interest.

Ms Loson appealed this decision, but the appeal was not allowed. The Court of Appeal did not allow the appeal on the basis that the £50 per month offer did not represent a 'realistic repayment schedule', especially when statutory interest was taken into account.

Para 23 of the judgment states:
"... I do accept that for the debtor to obtain the benefit of an instalment order, whether originally under CPR 40.11 or by way of variation under CPR 40.9A, the Court must be presented with a realistic repayment schedule backed up by evidence that the creditor can be expected to receive the amount of principal and any interest within a reasonable period of time. To that extent, the interests of the creditor will be paramount."

A concerning aspect of this judgment is the apparent error in reasoning made by both HHJ Luba and the Court of Appeal in relation to the interest as the order made by the district judge would not have attracted statutory interest.

See the County Court (Interest on Judgment Debts) Order 1991 at s3: Where under the terms of the relevant judgment payment of a judgment debt…is not required to be made until a

specified date, or is to be made by instalments, interest shall not accrue under this order until that date, or on the amount of any instalment, until it falls due, as the case may be.

It is therefore very important that s.3 County Court (Interest on Judgment Debts) Order 1991 is referred to when making an application to vary an order for payment, and that is explicitly stated that interest will not accrue on the instalment order due to this legislation.

The other implication of the Loson case is that creditors will undoubtedly rely on this as authority for not accepting affordable/ nominal offers of repayment and courts may be less likely to vary orders for payment where the debt will not be repaid in what they consider to be a 'reasonable period of time'.

5.6 Varying a Consent Order

The court will rarely agree to vary a consent order although they have the discretion to do so under CPR 3.1(7) which provides the court with a general power to vary any order. Consent orders can either be viewed as a contract agreed between parties or a record that both parties do not object to a particular issue during proceedings.

Prior to the introduction of the CPR, if a consent order was viewed as a contract between parties, the court could only intervene and vary a consent order under general principles of contract law such as mistake or misrepresentation. If the consent order was simply parties not objecting, usually to a procedural matter, this could be varied as any other court order (Siebe Gorman v Pneupac[2]).

Following the introduction of the CPR, a judge does now have discretion to vary either type of consent order but the distinction is still important because the court would be less likely to vary a consent order that is seen as a contract between parties which settles a dispute or the substantial issue in a case. This was confirmed by the decisions in Ropac v Inntrepreneur Pub Co[3], Pannone v Aardvark Digital[4] and Safin v Estate of Dr Said Ahmed Said Badri[5].

Even if the benefits of an agreement are not what one of the parties expected, the court will still usually uphold a freely made agreement (Weston v Dayman[6]).

A Tomlin order is a type of consent order which agrees to suspend proceedings on agreed terms. Those terms are usually set out in a schedule which is attached to the order.

The court will rarely intervene to vary the terms of an agreement set out in the schedule to a Tomlin order. This was confirmed in the recent case of Shah v Chafer[7]. In this case it was held that 'the court has no general power to vary the terms of an agreement set out in the schedule to a Tomlin Order save insofar as the circumstances give rise to a power to do so as a matter of the general law of contract: Pannone LLP v Aardvark Digital Ltd[8] per Tomlinson LJ at 2284C and Community Care North East v Durham County Council[9].

However, the court does have power to vary the order itself as opposed to the schedule: Community Care North East v Durham County Council (supra). - Lady Justice Asplin at para.13.

The judgment clarifies that the court's role is not, except in very limited circumstances, to alter agreements made between contracting parties. The court will vary previous orders of the court as they see fit to comply with agreements made between parties, but will not vary the agreements themselves, unless there is a power to do so under general contact law.

5.7 Applying for an administration order as a way of varying payments

If a judgment is made against a debtor and they have at least one other debt, an administration order may be worth considering as an alternative to applying to vary the judgment. This will only be an option if their total debt is £5000 or less.

Administration orders are made under s112 County Court Act 1984 and are governed by Civil Procedure Rules 1998 Schedule 2 CCR Order 39. An administration order would include all of the debtor's debts and would prevent any creditor, including the creditor with the judgment, taking any enforcement action without permission from the court. After completion of the administration order, any debt balance (including the judgment debt balance) remaining is not payable. The debtor would make a payment to the court every month and the court would distribute this between their creditors. The court charges an administration fee which is taken as a percentage (currently 10%) of the payments the debtor makes.

An application is made on Form N92. Form N270 provides guidance on how to complete the N92.

The court looks at what the applicant can afford to pay and could make a composition order (where only part of the debt is repaid) if the debtor cannot clear the debt within a reasonable

time. It has been suggested in guidance to court staff that a ‘reasonable period of time’ in this context is 3 years.

If a composition order is not necessary, a court officer can make the administration order without a hearing. Only a district judge can make a composition order there is likely to be a hearing. An application cannot be dismissed, or any debts excluded, without a hearing (r5(6) and (8) CCR 39).

The court has discretion when deciding whether to make the administration order and they may not if making the order unreasonably deny the creditor a remedy in respect of the debt.

Once an administration order is made it can be reviewed by the court at any time. To request a review a debtor should write to the court making the request, stating their reasons and including a financial statement. A hearing will then be arranged. Rule 14 CCR Order 39 explains that:
(1) On the review of an administration order the court may –
(a) if satisfied that the debtor is unable from any cause to pay any instalment due under the order, suspend the operation of the order for such time and on such terms as it thinks fit;
(b) if satisfied that there has been a material change in any relevant circumstances since the order was made, vary any provision of the order made by virtue of section 112(6) of the Act;
(c) if satisfied that the debtor has failed without reasonable cause to comply with any provision of the order or that it is otherwise just and expedient to do so, revoke the order, either forthwith or on failure to comply with any condition specified by the court; or
(d) make an attachment of earnings order to secure the payments required by the administration order or vary or discharge any such attachment of earnings order already made.
(2) The court officer shall send a copy of any order varying or revoking an administration order to the debtor, to every creditor whose debt is scheduled to the administration order and, if the administration order is revoked, to any other court to which a copy of the administration order was sent pursuant to rule 9.

Statutory interest does not run on debts that have been included in an Administration Order.

1. [2018] EWCA 803
2. [1982] All ER 377
3. [2001] LTR 10
4. [2013] EWHC 686 (Ch)

5. [2015] EWCA Civ 739
6. [2006] EWCA Civ 1165
7. [2018] EWCA Civ 1334
8. Ibid
9. [2012] 1 WLR 338 per Ramsey J at [23] – [28]

6. SETTING ASIDE JUDGMENT DEBTS

For claims issued under Part 7 where no admission or defence has been filed, the conditions for setting aside a judgment are reasonably straightforward.

Part 13.2 covers situations where the judgment was wrongly entered, because:

- It was entered before the time limit to respond had expired, or when a defence had been filed; or
- The defendant has applied to have the claimant's statement of case struck out, or for summary judgment; or
- The claim was paid before judgment was entered.
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Where any of the above apply, the court must set aside the judgment.

Part 13.3 applies in other circumstances, and the court may exercise discretion. The court may set aside judgment if one of the following applies:

- The defendant would have a reasonable prospect of success in defending the claim; or
- There is some other good reason why the judgment should be set aside or varied, or that the defendant should be allowed to defend the claim.

Neither 13.2 nor 13.3 apply to Part 8 claims or possession orders, which have their own rules.

6.1 Practical guidance

We will now consider how to make a successful application to set aside a default judgment. Applications which are relying on the court's discretion should be made with reference to the Denton test (more about that below, see Relief from Sanctions). In practice, this means answering the following questions fully and with evidence, where appropriate:

- Why didn't the defendant defend the claim in the first place?
- Was the application made promptly once the defendant found out about the default judgment?
- Would the defendant have had a reasonable prospect of defending the claim?

Most commonly we encounter situations where a default judgment has been entered because of a failure to file a defence.

The application should first of all address the reason for not defending the claim in the first place. If there is some reason why the defendant did not receive a copy of the claim form (for example because they were out of the country, or the claimant had the wrong address) then evidence should be provided. The court will consider a claim to be properly served if it was sent to the last known address of the debtor but can take the non-receipt of court documents into account when exercising discretion to set aside.

6.2 Promptness

A defendant relying on this Part will also have to demonstrate that they have made the application promptly. This is likely to be a problem for some of our clients, who may not have sought advice straight away after they learned about a judgment. Any more than a few day's delay in making the application will have to be justified to the court, especially if the delay runs into weeks or even months. Our section on witness statements addresses evidential requirements, and how the client's circumstances can be presented to the court.

In Regency Rolls Ltd & Anor v Carnall[1], an application made after 28 days was held not to be made promptly. The Court of Appeal emphasised the importance of meeting all 3 criteria in CPR 39.3.

In Bank of Credit and Commerce International v Zafar[2], a delay of 30 days was accepted but described as "dangerously close to the margin" and the Court excluded certain evidence. A longer delay may be overlooked where there is a very good defence.

In MacDonald v Thorn plc[3] the Court of Appeal held that a long delay was "not conclusive against ordering the judgment to be set aside where the defendant has a real prospect of success" but did not set default judgment aside in this instance. A delay in bringing proceedings was irrelevant and should be disregarded – the claim was brought within the statutory limitation period.

6.3 Prospect of success

Although an application to set aside default judgment does not need to contain all the details of the defence, providing as much detail as possible at this stage means the court can consider whether it is in the interest of justice to allow the defence to be put forward. A very good defence, and one that would result in a just outcome, can override other considerations

such as the need to be prompt. The court can also give summary judgment on the set aside application, striking out the claim as well as setting aside the judgment, if sufficient evidence is provided at the point of application, and it is decided that a trial would be unnecessary.

6.4 Setting aside orders made after a hearing/trial

Setting aside an order after judicial intervention is much more difficult than achieving relief from sanctions on a default judgment. Where the defendant has attended, been involved or been represented in proceedings the judgment will only normally be set aside if the judgment was obtained by fraud, oppression or abuse of process.

The court will set aside an order made at a trial where the defendant did not attend if the criteria in CPR 39.3(5) are met:
(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
(b) had a good reason for not attending the trial; and
(c) has a reasonable prospect of success at the trial.

In TBO v Mohun-Smith[4], a 7 day trial was vacated when the defendant did not turn up. He had provided a sick note from his GP and requested an adjournment, which was refused, and default judgment entered for the claimants. The defendant made an application under CPR 39.3 to set aside the order. In the Court of Appeal judgment, Dyson MR commented on the "grave consequences" for the defendant's Article 6 rights, and that the High Court had failed to correctly apply the applicable guidance that the Court should generally "not be very rigorous" when considering the applicant's conduct.

In Madison CF (118118 Money) v Various[5], distinction was drawn between 371 judgments made in default, and the 37 judgments made after an admission. For those 35 judgments, CPR 13 provides no route to set aside.

Instead, the court considered the inherent power of the court and invoked CPR 3.1(7) and counsel for the applicant referred to CPR 40.1, which relates to judgments and final orders. A final order should not be set aside save possibly "in truly exceptional circumstances". This would normally only include judgments obtained by fraud, oppression or abuse of process. The cases were dealt with administratively with no judicial input. This, along with the exceptional circumstances of the case meant that they should be set aside. No order for costs

was made due to the defendants being litigants in person and having no costs to recover above that rate.

6.5 Relief from sanctions

A litigant can apply for relief from sanctions where they have failed to do something such as file a defence, complete an acknowledgment of service, or filed witness evidence late. The sanction will normally be entry of default judgment but could entail striking out of evidence or a statement of case, or refusal of an appeal or application to set aside an order.

All applications to set aside a judgment in default engage the relief from sanctions provisions.

An application for relief from sanctions is made using the provisions in CPR 3.9:
(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders.
(2) An application for relief must be supported by evidence.

6.5 Denton v White – Relief from sanctions

All applications to set aside default judgments should meet the considerations in the Denton test, particularly in regard to promptness and the reason for not defending the claim/missing deadlines.

In Denton v White[6], the Court of Appeal devised a three stage process for dealing with applications for relief:

1. How serious or significant is the breach?
   Where the breach of a deadline or rule is not serious, the next two tests can be taken "less ponderously". Failure to file a schedule of costs, failure to comply with an Unless Order and submitting witness evidence 6 months after the time limit were all considered sufficiently serious to deny relief from sanctions without considering the next two stages. Late service of witness statements is always considered to be a serious breach.

In Priestly v Dunbar[7] an application to set aside default judgment was made with significant delay. The default was held to be a significant one. However, the lack of promptness did not make it just to dismiss the application, particularly as the defence was arguable, the defendant was a small firm and the amount claimed was a large sum, and the costs were high due to a CFA. Default judgment set aside.

In Thevarajah v Riordan & Ors[8] the defendant failed to comply with an Unless Order, and then applied for relief from sanctions, which was refused. A second application for relief was made and refused. The Court of Appeal was correct to hold that CPR 3.1(7) applied to the second application for relief, which required the defendant to show a material change in circumstances since the first relief application. This case serves as a reminder of the importance of compliance with an Unless Order, and the need to demonstrate that a second application of the same nature meets the criteria required for a revocation under 3.1(7) "A power of the court under these Rules to make an order includes a power to vary or revoke the order". Late compliance with an Unless Order did not constitute a material change in circumstances.

Where a client has failed entirely to submit a defence, the breach will be very serious, and should only be remedied by the court if there is a very good reason for the breach, and other circumstances that render a set aside just.

2. Why did the default occur?

The court will then consider whether there is a good reason for the application for relief. Incompetence is not a good reason.

In Demetrakis James Themistocles Antoniou v Marios Georgallides[9] the ill health of the claimant's solicitor led to the defence to counterclaim being served late and default judgment entered. The illness of the solicitor was considered a good enough reason to grant relief. Default judgment set aside.

In Billington v Davies[10], a delay of 4 months ascribed to a shortage of funds was not a good reason to grant relief for an extension of time. The defendant should have requested permission to file the defence out of time.

In Blake v Coote[11], the defendant litigant in person waited 6 weeks to set aside a judgment ordering her to pay money to the claimant. The claimant was entitled to finality

notwithstanding that a litigant in person might be afforded additional indulgence. Failure to understand a procedure did not entitle a litigant in person to extra indulgence.

3. Are there any other circumstances to take into account?

For example, was the application for relief made promptly, has the breach led to significant delays or the court having to vacate hearings, has the breach led to additional costs?

In Viridor Waste Management v Veolia[12] the court gave consideration to whether the other party would be able take advantage of a windfall strike out, for example because an administrative error led to particulars being sent by second class post (not an accepted method of service). Application to strike out statement of case dismissed.

In Butterworth v Lang[13], a litigant in person claimant issued proceedings in the County Court, which had no jurisdiction in the matter. The judge transferred the proceedings to the High Court. The defendant appealed. There was a good reason, in that a litigant in person could not be expected to know that he had issued in the wrong court, that s42 County Courts Act 1984 provided for the transfer of proceedings, and that to deny the transfer would result in the claimant issuing another claim, incurring more costs and spending more of the court's time on the case.

6.6 Unless Orders

An Unless Order is way to build sanctions for non-compliance into an order.

Examples of use in practice:

A claimant issues a claim allegedly outside the limitation period. The defendant makes an application to strike out the claim on the grounds it is statute barred. The claimant is put to proof that the claim was issued in time. No proof is provided, and the claim remains outstanding.

By proposing an Unless Order, this situation could be avoided. For example, "The claimant to provide proof that the claim was brought in time by 4pm on (14 days' time), failing the claim is struck out without further order".

- A defendant makes an application to set aside a default judgment pursuant to CPR 13.3 and 3.9. The court is satisfied that there is a good reason why it wasn't defended at

the time, that the application is made promptly, and that there is a reasonable prospect of a defence. The judgment is struck out, and the claim is stayed indefinitely whilst the claimant provides further and better particulars and a witness statement addressing the points raised in the set aside application. 2 years later this has not been provided, and the claim remains outstanding.

An Unless Order that requires the claim to be struck out within a set time will prevent the claim being outstanding for a long time without resolution. An Unless Order can be proposed at any time. Failure to comply will result in the stated sanction being enforced without the need for further intervention by the courts. A failure to comply with an Unless Order is a serious breach of procedure and relief from sanctions will only be granted if there is a very good reason or other circumstances that make granting relief just.

Some notes about requesting an Unless Order:

- They will be reserved for situations in which they are truly required, which is usually to "enable the litigation to proceed efficiently and at proportionate cost" - p144, Denton v White
- The request for an Unless Order should set out the precise time and date by which a party must comply. The time will normally be given as 4pm
- A party can appeal an Unless Order, but it is generally advised to attempt to comply and apply for relief from sanctions if necessary
- Sanctions are imposed by an Unless Order under CPR 3.8, which allows parties to extend the time limit by written agreement for a maximum of 28 days, provided the extension does not put any hearing dates at risk
- If compliance is not going to be possible, a party can apply to vary or amend the Unless Order using the court's general power under CPR 3.1(7)
- The ultimate sanction available is a Mandatory Injunction as seen in JSC BTA Bank v Albyazov[14], normally available only for contempt of court
- An application for relief from the sanctions imposed by an Unless Order is made under CPR 3.9:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders.
> (2) An application for relief must be supported by evidence.

- If no provision to deal with the costs has been made in the Unless Order each side will bear their own costs, they will not be recoverable from the other side.

1. [2000] EWCA Civ 379
2. [2002] EWCA Civ 82
3. [1999] The Times 15-10-99
4. [2016] EWCA Civ 403
5. [2018] EWHC 2786 (Ch)
6. [2014] EWCA Civ 906
7. [2015] EWHC 987
8. [2015] UKSC 78
9. (Central London CC 9/3/17)
10. [2016] EWHC 1919 (Ch)
11. QBD (MacDuff) 13/4/16
12. [2015] (unreported) QBD Comm
13. [2015] EWHC 529 (Ch)
14. [2012] EWHC 455 (Comm)

7. WITNESS STATEMENTS

Witness statements are an important means by which the evidence to support applications, defences, etc may be conveyed to the other party and to the District Judge. In some cases they are required by the relevant legislation, for example, many debt advisers will have noticed the requirement to provide a witness statement to support an application for a stay of enforcement in the High Court.

The specific requirements in relation to witness statements are set out mainly in CPR Practice Direction 32. But first let's look at some general good practice points.

7.1 General Good Practice with Witness Statement

The function of the Witness Statement is to provide evidence to support the case. It should not include legal argument which may be provided in a separate document, if necessary. Think about what evidence is relevant and likely to support your client's case. For example, if you are making an application to set aside a default judgment, you will need to show that the application has been made promptly after the defendant became aware of the judgment. So, you will need to provide evidence to explain any delay between when the defendant became aware of the judgment and when the application has been made.

Avoid including evidence that is not relevant to the matter at hand. This is likely to detract from the overall impact of the statement. However, it may be helpful to put the matter in context and if there is evidence about your client's circumstances that is likely to draw the District Judge's sympathy and get them 'on side' it may be a good idea to include it, even if it is not, strictly speaking, relevant.

A witness statement should be in the defendant's own words "if practicable" – and it almost always will be. However, you can remove expletives and repetitions. If you are going to draw up a witness statement following an interview with your client, try to note down the key things they say in their words; not yours.

7.2 Formatting and Specific Requirements

The court may refuse to admit a witness statement as evidence where it does not meet the requirements set out in PD32. In practice, district judges are not likely to be too concerned

about minor formatting errors, but the requirements are very clearly set out so there's really no excuse to get it wrong!

If you're new to this, you could start by following the Example Witness Statement format and then systematically check through the PD32 requirements. They're readily available online.

Specific requirements that are less apparent from the Example Witness Statement include:

- An indication of which statements are made from the client's own knowledge and which are matters of information or belief, and the source for any matters of information or belief, noting that the court cannot usually take "hearsay evidence" into account
- Where a second or subsequent Witness Statement is provided in proceedings, any exhibits should be numbered consecutively and not start again with each Witness Statement.
- It should be printed single-sided with a 3.5cm margin.
- It should consist of numbered paragraphs, usually following the chronological sequence of events or matters dealt with.
- Any alterations should be signed by the person making the witness statement.
- Although more than one witness statement can be submitted, any contradictions will have to be carefully considered as the maker will have signed a statement of truth. Conflicting witness statements from the same person are likely to attract criticism and may result in proceedings for contempt of court.

7.3 Statement of Truth

A witness statement must include a signed and dated statement that the person making the statement believes the facts are true in the format: "I believe that the facts stated in this witness statement are true."

7.4 Statement of case

A witness statement should not be confused with a statement of case. A statement of case may be the claim form, the particulars of claim, the defence, reply to a defence or information in relation to these.

Generally, legal references, for example to what an application is for and what statutory and case law applies should not be included in a Witness Statement but in a separate document.

7.5 Example Witness Statement

Defendant: Jim Morrison

First [or second if it is the witness's second witness statement, etc]

JM1 and JM2 [this refers to attachments that should be clearly labelled]

5th April 2019 [the date signed]

Case No:xxxx

In the Sheffield County Court

Between

Lollypop Credit (claimant)

and

Jim Morrison (defendant)

Witness Statement

I, Jim Morrison, a musician of 38 Love Street, Sheffield S6 7LG will say as follows:

1. I am the defendant in this matter. Except as otherwise stated, the statements made herein are made from my own knowledge.
2. On 31.3.07 I entered a credit agreement with the claimant.
3. There is now produced and shown to me, marked JM1, a true copy of the credit agreement I signed.

4 – x Supporting evidence in chronological order.

I believe that the facts stated in this witness statement are true.

Signed.....

Date.....

8. APPLICATION OF POST JUDGMENT INTEREST

8.1 Statutory interest

Judgment debts accrue statutory interest at a rate of 8% per year as permitted by the County Courts (Interest on Judgment Debts) Order 1991. The rate of interest is determined by s.17 of the Judgments Act 1838.

The County Courts (Interest on Judgment Debts) Order 1991 specifically excludes the payment of interest where the judgment is:

- For less than £5000 or
- In relation to a Consumer Credit Act 1974 regulated debt or
- In relation to a suspended possession order

By virtue of s.74 of the County Courts Act 1984, statutory interest is enforceable under the judgment or order. Therefore, to satisfy a judgment, the original claim amount plus statutory interest must be repaid.

If there has been a determination that repayment of the judgment is to be made by instalments, statutory interest is only payable when an instalment has fallen due and is unpaid. Therefore, in accordance with s.3 County Courts (Interest on Judgment Debts) Order 1991, an up to date and maintained instalment order will prevent further accrual of interest.

Statutory interest will also not be applied where under the terms of the judgment, payment has been deferred. It is only when this payment falls due and remains unpaid that the application of statutory interest arises.

8.2 Contractual interest

Although legislation does not allow statutory interest to be applied to CCA regulated debts, it is possible for post judgment contractual interest to be charged.

The main issue of charging of post judgment contractual interest being, that where a judgment has been ordered to be paid by instalments, the debt is constantly increasing and even after the original judgment amount has been paid, the debtor will still owe the additional ‘interest’.
In order for a creditor to apply post judgment contractual interest, the agreement must contain a term that permits this.

The House of Lords held, in the case of Office of Fair Trading v First National Bank[1], that a term allowing post judgment contractual interest was not unfair where the agreement has an explicit term allowing this.

As a result of this, it was agreed that debtors should be made aware of possible contractual interest and that time orders under s.129 of the CCA 1974 are a way of dealing with the interest.

The Consumer Credit At 2006 introduced s.130A and this came into effect on 1st October 2008. Section 130A requires creditors to give notice where they are intending to apply contractual interest. After the first notice, creditors must issue notices every 6 months if they wish to continue charging it. Some creditors will state they can charge a debtor for these notices - this is entirely incorrect, and no charge can be made.

The form and content of the required notices is contained within The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, Specifically, Regulation 34 and Schedule 5.

The obligation to service notice applies to all regulated agreements but only to judgments that were entered on or after 1st October 2008. Therefore, for judgments entered before this date, a creditor could continue to charge post judgment contractual interest without issuing notices.
Where judgment was entered pre October 2008 and the creditors have charged contractual interest without notice, it may be possible to raise a complaint to FOS. Please note, FOS can only deal with complaints about CCA regulated debts that arose post 6th April 2007 and therefore, any interest that accrued prior to this date they cannot comment on. Also, it may be possible to bring an unfair relationships argument however, the debtor would require specialist advice to pursue this claim.

Notice of intention to charge contractual interest can only be given once the judgment has been obtained and due to this, post judgment contractual interest cannot be part of the judgment. This is confirmed in the initial s.130A notice which must contain a prescribed term stating the following:
'Interest will be charged from the day you were given this notice (i.e. when the notice is deemed to have been delivered to you in the ordinary course of post) onwards.
This means that even if you pay off the whole amount of the judgment, you may still have a further sum to pay.'

As the interest does not form part of the judgment, it is thought the creditor would have to bring a new claim in the County Court to recover this. In accordance with s35 County Courts Act 1984, it is not lawful for a creditor to bring a second claim relating to the same cause of action. Therefore, a client faced with a secondary claim for post judgment contractual interest may well have a defence to this claim.

1. [2001] UKHL 52

This resource was produced by the Specialist Debt Advice Team. We are here to support you with complex debt cases, offering technical support for anyone providing 'free to client' debt advice in England and Wales. We can offer referencing for complex cases, clarification on new laws, answers to technical queries, or simply a second opinion.

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