



CLIPS – Likely Issues

Chair – Amanda Tipples QC

- Practicalities – Ian Higgins
- Injunctions – Gareth Tilley
- Insolvency applications – Richard Dew
- Possession applications – Martin Young
- Pro bono costs orders – Anthony Pavlovich & Laura Cassidy (Access to Justice Foundation)
- Marshalling – the view from the other side of the court - Amanda Hadkiss



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Practicalities – Ian Higgins

- Overview:
 - Before the day
 - Tasks on arrival – before 10am
 - Triage – 10am – 10.30am
 - The initial hearing – 10.30am
 - Preparations and the substantive hearing
 - After the hearing



Practicalities (1) – The mantra for times of self-doubt

- This is not like a normal hearing.
- You are not expected to be prepared as you would otherwise be.
- You are not expected to know all of the relevant law / procedure.
- However little you know, you are almost certainly making things better for the Litigant in Person and the Judge.



Practicalities (2) – Before arriving

- Very little to do in advance:
 - Read the CLIPS materials
 - Read the relevant parts of the Chancery Guide
 - Consider attending Court 10 or shadowing a CLIPS representative
- Bring a White Book
- Have a good breakfast – you may miss lunch!



Practicalities (3) – Tasks on arrival

- Find your CLIPS-mate, if you have one
- Check in with the usher and get the key
- Set up the room



Practicalities (4) – Triage – 10am to 10.30

- May be quiet, may be manic
- First come first served
- Is there actually a hearing?
- Has the other side been given notice of the hearing?
- Check whether the other side is represented
- What is the gist? (Use your opponent ...)



Practicalities (5) – The initial hearing

- Explain whether the hearing is effective
- Offer a time estimate if possible
- Make clear you are the CLIPS representative and ask to go to the bottom of the list. You will probably succeed.
- If you don't have a client, leave contact details with the usher and return to chambers



Practicalities (6) – Preparations and the substantive hearing

- Use your (legally qualified) opponent:
 - Talk to the other side
 - If you don't have a relevant text, ask to borrow theirs
 - Generally be a bit shameless, but
 - Make sure the client is clear you are on their side.
- Work out with the client what is achievable today and how you envisage matters going forward
- If necessary, ask for the Judge's assistance
- Note down instructions clearly – e.g. if you are to abandon a point / application
- Pro bono costs order?



Practicalities (7) – After the hearing

- Fill out the form and keep a copy
- Point the client towards the Citizen's Advice Bureau
- Drafting the Order
- Sign up for your next session



Injunctions

Gareth Tilley

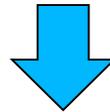
INSOLVENCY

Richard Dew

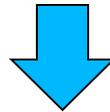


Bankruptcy - Process

Statutory Demand



Presentation of Petition



Order (Bankrupt)



Annulment



Compulsory Winding up - Process

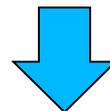
[Statutory Demand]



Presentation of Petition



Advertisement of Petition



Order (Wound Up)



Winding Up

Applications:

- Injunction to restrain presentation of Petition
- Injunction to restrain advertisement
- If post presentation may need validation order to continue to trade



Grounds

- Debt is bona fide disputed on substantial grounds; or
- Exceeded in amount by a cross-claim.



Winding Up

Disputed Debt?:

“Rather, this is one of those cases in which, as Oliver LJ observed ... an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute of fact exists which cannot be determined without cross-examination so that the petition cannot be allowed to proceed. ... anything that the law could do to discourage such behaviour should be done.”

Re a Company (No 006685 of 1996) - [1997] 1 BCLC 639



Winding Up

Examples:

- Company in dispute with former employee re unpaid remuneration, potential claim for breaches of employment terms. Employee serves stat demand. App to restrain petition.
- Claim for unpaid loans and sums advanced whilst a business was being established. Stat demand served. Dispute raised as to the reasons for the payments (investment?) and as to which of a number of companies. App to restrain advertisement.



Bankruptcy: Application to set aside Stat Demand

Insolvency Rule 10.5:

“The court may grant the application if—

- (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand;
- (b) **the debt is disputed on grounds which appear to the court to be substantial;**
- (c) it appears that the creditor holds some security in relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
- (d) the court is satisfied, on other grounds, that the demand ought to be set aside.”



Bankruptcy: Application to set aside Stat Demand

Rule 10.8:

“If the court dismisses the application, it must make an order authorising the creditor to present a bankruptcy petition either as soon as reasonably practicable, or on or after a date specified in the order.”



When is a debt disputed?

- ‘Undisputed’ element must exceed the bankruptcy limit (£5,000).
- Test is “serious triable issue” (i.e. CPR part 24).
- It is not the case that anything works – the court will scrutinize what is and is not genuinely triable



Bankruptcy: Adjourning hearing of the Petition

Rule 10.23 (general power to adjourn)

- “The power to adjourn a petition is unfettered and will be exercised whenever the making of an immediate bankruptcy order would cause an injustice to the debtor ” (Muir Hunter)
- Payment by cheque gives rise to 7 day adjournment
- Agreement to pay (including by instalments)
- “Case Management” Grounds



Bankruptcy : Grounds for dismissal of a Petition

Rule 10.24:

- (1) On the hearing of the petition, the court may make a bankruptcy order if satisfied that the statements in the petition are true, and **that the debt on which it is founded has not been paid**, or secured or compounded.
- (2) If the petition is brought in relation to a judgment debt, or a sum ordered by any court to be paid, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment or order, or that execution of the judgment has been stayed.



Bankruptcy: Annulment and Stay

Annulment: IA s282(1)

- (a) on the grounds existing at the time the order was made, the order ought not to have been made, or
- (b) that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court

Stay: Rule 10.135:

“The court may, in advance of the hearing, make an order staying any proceedings which it thinks ought, in the circumstances of the application, to be stayed.”



Bankruptcy

Examples:

- Long-running matter where applicant can show never received petition. Attempt to stay proceedings pending annulment application, then various case management disputes (etc) re the annulment process.
- Serial LIP seeking to adjourn hearing of bankruptcy petition as various matters (on which the petition is based) are not yet determined. Other side had proposed an adjournment and then decided against.



Possession applications and CLiPS

Common interim applications arise from:

- Enforcement of charging orders
- Enforcement of orders under ToLaATA 1986
- In connection with possession claims: CPR 55
- For a stay of enforcement of warrant

Any other circumstances come to mind ?



Charging order: CPR 73.1 to 73.10C – check jurisdiction

The High Court only has jurisdiction to make a charging order - even in respect of one of its own judgments or orders (other than on a fund lodged in the High Court or a maintenance order - where the amount of the original judgment (subsequent interest and payments on account being ignored) exceeds the county court limit: s1 Charging Orders Act 1979.

For this purpose and despite the various increases in and removal of limitations from county court jurisdiction, the county court limit is £5,000: County Court Jurisdiction Order 2014, SI 2014/503



Application to discharge or vary: s3(5) Charging Orders Act 1979

This has been held to include the wife of the debtor where she is a joint owner or has rights of occupation: *Harman v Glencross* [1986] Fam 81, [1986] 1 All ER 545, CA. A final charging order will not, ordinarily, be discharged in favour of a debtor unless there has been a change of circumstances since the date that the order was made, such as payment of the debt or the setting aside of the judgment.



Enforcement of a charging order by order for sale.

- The County Court has jurisdiction if the amount owed > £350K
- High Court may transfer: s40(2) of the County Courts Act 1984
- Judgment creditor may not apply for an order for sale where the debt relates to an agreement regulated by the Consumer Credit Act 1974 and the amount owed is less than £1,000: see the Charging Orders (Order for Sale: Financial Thresholds) Regulations 2013 (SI 2013/491).
- In the absence of equity it is highly unlikely that any sale will be ordered.



Property subject to a charging order in sole ownership: sale likely to be ordered but there may be viable applications...

- debt can be otherwise repaid within a reasonable time,
- hardship occasioned by a sale is disproportionate having regard to the size of the judgment debt and the circumstances of the judgment debtor.
- all the circumstances, including those of the family likely to be displaced by the order, just as under s5 of ToLaATA 1996 are in play *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch), [2009] 1 FLR 873, [2009] Fam Law 204; may be suspended until the judgment debtor's children are of age: *Austin-Fell v Austin-Fell and Midland Bank plc* [1990] Fam 172, [1990] 2 All ER 455 (order was suspended for ten years).
- Human Rights Act 1998 and EHCR may be engaged
- Rights of a non-owning spouse, having rights of occupation under the Family Law Act 1996, which take effect as an equitable charge, may well have priority over the rights of a subsequent chargee by way of charging order, such that an order of the court terminating those rights will be required before a judgment creditor can obtain possession: *Fred Perry Holdings Ltd v Genis* [2014] EWHC 1365 (Ch), [2015] 1 P & CR D10



... property jointly owned engages s15 ToLaATA 1996

See:

Mortgage Corpn Ltd v Shaire [2001] Ch 743

Bank of Ireland Home Mortgages Ltd v Bell [2001] 2 All ER (Comm) 920.

The position of the judgment creditor is not paramount: where the value of the debtor's interest significantly exceeds the judgment debt (so that the judgment creditor remains fully secured) and, particularly, where there are dependent children and where the monies arising on sale will not, after satisfaction of the secured debt, be sufficient to enable the adequate rehousing of those children and the other joint owner, the court may well postpone the sale; see *Edwards v Lloyds TSB Bank plc* [2004] EWHC 1745 (Ch), [2005] 1 FCR 139, [2004] BPIR 1190.

If evidence, available or likely to be available, supports the case for suspension of an order for sale, with joinder of third party as needed, then this may head off the possession claim



ToLaATA 1996 and s335A Insolvency Act 1986

- If an order has been made under s14 of the 1996 Act suspension of the order for sale will only be ordered if the terms of the substantive order can be met without sale.
- The 1996 Act introduced s335A into the 1986 Act so have regard to that if it is a trustee in bankruptcy enforcing the order for sale and claiming possession. This gives rise to a statutory presumption at s335A(3) that creditors' interests outweigh all other considerations unless circumstances are exceptional.



Possession proceedings under CPR 55 and interim applications

Possession proceedings include claims by:

- Landlords against tenants
- Landlords against trespassers
- Mortgagees against mortgagors but also:

a claim by a tenant seeking relief from forfeiture, which might be allied to an application for an interim injunction to restore the *status quo ante*. That is a not uncommon scenario for an unrepresented business owner whose premises have been the subject of peaceable re-entry by the landlord.



Residential possession claims: likely interim applications

- For a stay of enforcement in the context of an appeal or application for re-hearing under CPR 39.3(5) or both: *Bank of Scotland v Pereira* [2011] EWCA Civ 241.
- Under the terms on which a possession order was suspended when made: CPR 83.2(3)(e) applies to a court order for possession that is suspended so long as the occupier complies with specified conditions. If the occupier fails to comply the claimant may not apply for a warrant of possession under CPR 83.26 without the permission of the court; and this must be applied for in accordance with CPR 83.2(4): *Cardiff County Council v Lee (Flowers)* [2016] EWCA Civ 1034



Common grounds for suspending a warrant of possession: mortgage cases

s36 of the Administration of Justice Act 1970 with s8 of the Administration of Justice Act 1973: the court has extensive powers to adjourn proceedings, to stay or suspend execution or to postpone the date for delivery of possession where a mortgage possession claim relates to land which includes a dwelling house and where it appears to the court that any sums due under the mortgage may be paid within a reasonable time. See e.g. *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, [1996] 1 WLR 343.

s1 of the Mortgage Repossession (Protection of Tenants etc) Act 2010 gives the court power to postpone for a period not exceeding two months the operation of a possession order made in favour of a mortgagee of land which consists of or includes a dwelling-house on the application of a tenant of the mortgagor whose tenancy is not binding on the mortgagee.



Common grounds for suspending a warrant of possession: assured tenancies

- s9(2) of the Housing Act 1988: “On the making of an order for possession of a dwelling-house let on an assured tenancy or at any time before the execution of such an order, the court, subject to subsection (6) below, may...”
- s9(6) of the 1988 Act excludes cases where possession was ordered on a mandatory ground under Part 1 of Schedule 2 and assured shorthold tenancies.
- What if the possession order is silent as to the grounds upon which it was made ?

See: *Capital Prime Plus v Wills* (1999) 31 HLR 926, CA, *Diab v Countrywide Rentals 1 plc* [2001] All ER (D) ChD



Pro bono costs orders

Anthony Pavlovich (3VB)

Laura Cassidy (Access to Justice Foundation)



Pro bono costs orders – how they work

- **CPR 46.7** (underlying jurisdiction in s194 Legal Services Act 2007)
- Available where one party (but not both) has pro bono representation, eg through CLIPS
- Similar to a normal costs order but:
 - Costs are payable to the ‘prescribed charity’ ie the Access to Justice Foundation
 - Costs are assessed on the basis of notional fees, ie hours spent times hourly rate ex VAT
- For guidance and suggested wording see WB 48GP.13 (p1700)



Pro bono costs orders – how the money is spent

- **The Access to Justice Foundation** is a collaboration between the Bar Council, the Chartered Institute of Legal Executives, the Law Society and the voluntary sector
- The AtJF funds Legal Support Trusts across England & Wales
- The Trusts support the provision of free legal help through law centres, advice agencies and citizens advice bureaux



Marshalling – the view from the other side

Amanda Hadkiss



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