

# Debt Recovery

Issue 16

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## Out in the cold...

The worst case scenario for a claimant who has successfully pursued a debt is to discover that the defendant has disposed of all his assets. In order to protect his interests the claimant can, in certain circumstances, apply for an interim order to stop the disposal of assets.

A Freezing Order prevents the disposal of assets, the removal of assets from the jurisdiction, or any other dealing in the assets pending resolution of the dispute.

In order to obtain a Freezing Order in England the claimant must show:

- ▶ A good arguable case against the defendant
- ▶ A real risk of the dissipation of the assets
- ▶ That the assets are located within the jurisdiction

The claimant must identify what assets the defendant owns – for example bank accounts, property or shares – so that all third parties can be informed once the Freezing Order has been obtained. Any third party notified of the Order owes a duty to the Court to comply with its terms. They may be held in contempt of Court should they knowingly assist or allow a breach of the Order and face imprisonment, fines and seizure of assets.

All third parties must do their best to comply with the Order however they do not owe a duty to the claimant, as highlighted in the case of *Her Majesty's Commissioners of Customs and Excise v Barclays Bank Plc*.

## Divorce and Bankruptcy

On 5 December 2007 the Court of Appeal handed down its long awaited decision in *Haines v Hill* reversing a previous landmark ruling and bringing more bad news for creditors.

In 2003 Mrs Haines petitioned for divorce and commenced Ancillary Relief Proceedings. In December 2004 Mrs Haines was awarded the proceeds of the sale of the matrimonial home jointly owned with her former husband. Mr Haines was made bankrupt almost a year later.

The Trustees in Bankruptcy launched court action to obtain the former matrimonial home from Mrs Haines and applied for an Order that the Property Adjustment Order was a transaction at an undervalue.



The Commissioners obtained two Freezing Orders against two defendants in lieu of unpaid VAT. The Orders were served by fax on the Bank but due to an error, the Bank allowed payments of over £2 million to be paid out of the defendant's current accounts less than three hours after receiving the fax. The Commissioners were unable to recover the debt and sought damages from the Bank.

The claim was rejected at first instance but the Court of Appeal found that the Bank did owe a duty of care to the claimant. The House of Lords however, unanimously allowed the Bank's appeal finding that it was not fair, just or reasonable to impose a duty of care to the claimant on the third party.

On a practical level it may be advisable to serve a Freezing Order on any third parties a short time before serving it on the defendant to reduce the risk of dissipation of assets before they have been effectively frozen.

In a landmark verdict, the Trustees succeeded in the High Court however the Court of Appeal has now reversed that ruling.

The Court of Appeal concluded that "it would be unfortunate in the extreme" if every settlement approved in a Divorce Court could be undone for up to five years because the husband was later made bankrupt. It is worth noting that if there has been collusion between the parties to prejudice the bankrupt's creditors, the Ancillary Relief Order transferring the property could potentially be set aside.

The Trustees in Haines' bankruptcy will now petition the House of Lords over the case.

# Tough times for Small Medium Enterprises

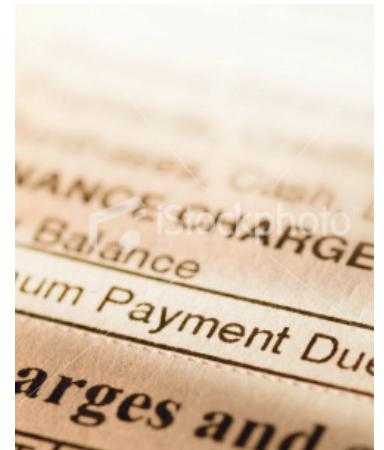
New research commissioned by Bacs Payment Schemes Limited has found that outstanding payments to SMEs have risen by £2.6 billion in the last year to a massive £18.6 billion!

SME owners claimed fewer of them were experiencing late payment problems however the average amount owed to an SME at any one time is £30,000.

The research also found that almost a fifth of SMEs now employ a dedicated person to chase late payments – losing an average of 17 working days a year to this onerous task.

The figures highlighted some stark differences across the UK.

	National Average	North East	North West
Amount of time spent chasing late payment	2.5 hours weekly / 17 days annually	2.7 hours weekly / 19 days annually	1.6 hours weekly / 12 days annually
Average amount owed to SMEs at any one time	£30,000	£12,000	£32,000



For SMEs the crux of the difficulties lie in potential increased challenges in getting payments, and the subsequent effect on cash flow and turnover.

The team at Clough & Willis appreciates the importance of efficient debt recovery and they seek to recover outstanding monies as quickly and effectively as possible. With extensive experience of debt recovery across a large variety of sectors, the team is proud of the successful working relationships it has with clients, offering each client what is, in effect, a bespoke recovery service.

## Attachment of Earnings

A creditor has a number of options available to them should the debtor refuse to comply with a Judgment or Order.

Providing the debtor is behind with at least one payment, owes £50 or more and is employed, the creditor can apply for an Attachment of Earnings Order. This provides that a Judgment debtor's employer has to pay a certain proportion of its employee's salary to the Judgment creditor until the Judgment debt has been paid.

The Order may be made in respect of wages, fees, bonuses, commission, overtime and statutory sick pay but it cannot be made in respect of self-employed income, state pensions, benefits or allowances.

The Court will take into account how much the debtor needs to maintain their family when deciding the rate at which deductions will be made.

The Order places certain duties on the employer and they could be liable for a fine if they fail to comply with the Order unless they can prove all reasonable steps were taken to comply.



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