

Your guide to enforcing financial agreements, orders and undertakings

Overview

This guide will provide you with an overview on how to enforce the terms of a financial agreement as well as an overview on how to enforce a financial remedy order or undertaking.

In this guide we call the party who is defaulting on the terms of the order the 'debtor' and the party entitled to the benefit of the order the 'creditor'.

What can I do if the other party refuses to formalise our agreement?

If an agreement has been reached and one party subsequently changes their mind and refuses to formalise the agreement you can issue what is called 'a notice to show' application.

The party wanting to resile from the agreement will have to show one or more of the following grounds:

- They had no opportunity to take legal advice. It is not necessary for a party to have taken legal advice before entering into an agreement, but it is important to show that they had the opportunity to do so.
- Undue influence or pressure.
- Duress (Exerting of pressure on another party that they feel they have no choice but to enter into the agreement).
- Exploitation of a dominant position to secure an unreasonable advantage.
- Fraud.
- Misrepresentation (the making of a misleading statement that encourages the other party to enter into the agreement).
- Non-disclosure.
- Change in circumstances. The change must be unforeseen and must undermine the basis of the agreement reached.
- Unfairness. The court has a duty under section 25 of the Matrimonial Causes Act 1973 (MCA 1973) to consider whether a draft order represents a fair outcome. Whilst the jurisdiction of the court cannot be ousted, the test of fairness within the context of an agreement is different to the test of fairness applied on a contested financial remedy case.

What does liberty to apply mean?

Your order may include a liberty to apply clause which states 'the parties shall have liberty to apply to the court concerning the implementation and timing of the terms of this order'. This will enable parties to return their case to court if issues arise regarding the timing or implementation of the order. Whilst this clause will allow the court to make directions to assist implementation of the order it does not allow the court to vary the capital awards and make a new order unless it is still an executory order.

Executory orders

If your order has not been implemented, or only partly implemented it can be varied or set aside or the court can decline to enforce it. In *Thwaite v Thwaite* [1981] 2 FRL 280 the Court of Appeal confirmed that the court can adjust a financial remedy order which remains executory if it would be inequitable to hold the parties to the original order in light of a significant change of circumstances.

There is a differing of judicial opinion on whether the change in circumstance must also amount to a *Barder* event. The case of *Barder v Barder* [1987] 2 FLR 480 established that the court can set aside an order if it is satisfied that a new event has taken place that invalidates the basis on which the order was made and the new event occurs within a relatively short time of the order being made. For *Barder* to apply the new event

must also be unforeseen and unforeseeable.

How do I enforce an order?

The court will not automatically enforce an order. The onus is on the creditor to take enforcement action. Whilst the court can make an order following the making of the conditional order of divorce, it cannot be enforced until the final order of divorce has been made (S23(5) MCA 1973).

Before enforcement action is started the debtor must have been given the opportunity to pay the debt. They must have failed to pay the debt when due or failed to pay an instalment under the terms of the order. Enforcement is not possible if the court has ordered a stay or suspension of the order on an application from the debtor.

The enforcement application is started by filing an application notice and statement setting out what the creditor is seeking, i.e. payment of money and any relevant calculations. The application will normally need to be made to the same court in which the original order was made.

Once the court has issued the application, the court will send a notice to each party to attend a hearing. At the hearing, the parties will be questioned on their evidence and the court will decide whether to enforce the order.

Can the court enforce undertakings in a financial order?

A person may be held in contempt of court and punished by imprisonment, a fine or sequestration of assets if they breach an undertaking to do or not to do something other than pay money.

An undertaking to pay money may be enforced as if it is an order under Part 2 of the MCA 1973, provided that the undertaking for the payment of money is endorsed with a notice setting out the consequences of disobedience.

What methods of enforcement are there for enforcing the payment of money?

- Writ or warrant of control – where the court orders an enforcement officer to seize and sell a debtor's good to raise funds to satisfy the debt.
- Third party debt order – where monies owed to the debtor by a third are frozen and seized for the benefit of the creditor.
- Charging order – where the court imposes a charge over a debtor's beneficial interest in land, securities or other assets.
- Attachment of earnings order – a proportion of a debtor's earnings are deducted by their employer and paid to the creditor.
- Bankruptcy – if the amount you are owed is £5,000 or more you can apply to make the debtor bankrupt.
- Writ of sequestration – where sequestrators will take control of property.
- Committal order – an order committing the debtor for prison for contempt of an order.

How can I enforce the sale or transfer of a property?

If your order provides for the sale or transfer of a property and the debtor is failing to comply with the order you can ask the court to:

- Give you sole conduct of the sale.
- Direct that a nominated person (such as a district judge or conveyancing solicitor) executes documents on behalf of the debtor.
- Order your spouse or former spouse to leave the property.

How do I decide what method of enforcement to use?

Deciding what method of enforcement to use will depend upon the debtor's financial position and what assets they have. If enforcement is taking place relatively close to the date your financial order was made you will already have a good idea of the debtor's position. If you are enforcing an order several years later you may need to obtain information about the debtor before deciding what action to take.

You can ask the debtor for information and they may provide it voluntarily or you can apply for an order to obtain information from the debtor. The order will require the debtor to give answers orally on oath to a court officer. Failure to comply will result in the case being referred to a judge who will make a suspended order punishing the debtor for non-compliance.

If you have cause to believe that the debtor will attempt to dissipate assets you will need to act quickly and consider applying for:

- An order for the detention, custody or preservation of relevant property.
- A freezing injunction to restrain the debtor from removing assets located in a jurisdiction or dealing with any assets whether located within the jurisdiction or not.
- An order directing the debtor to provide information about the location of relevant property or assets which are or may be the subject of an application for a freezing order.
- A stop notice and stop orders to prevent people taking steps regarding property or securities.
- Passport orders to stop the debtor leaving the jurisdiction of England and Wales.

Are there any time limits to commence enforcement?

You will need the court's permission to enforce maintenance arrears that are more than 12 months old. This is a separate application and must be made prior to or at the same time as the enforcement application.

Can a debtor apply to vary or set aside the order?

In response to an application for enforcement a debtor may apply to vary or set aside the order. This tends to result in an adjournment of the enforcement application, pending the outcome of the variation or set aside application.

Financial orders that can be varied include periodical payment orders (spousal maintenance), child periodical payment orders (child maintenance), deferred lump sum orders that include provision for pension rights and compensation, lump sums payable by instalments (to include payment of a lump sum by instalments for a child), settlement orders and sale of property orders. Orders that cannot be varied are orders for a lump sum not payable by instalments, a property adjustment order and a pension sharing order after the order has taken effect.

The court has a broad discretion when considering an application to vary. The first consideration is the welfare of any minor child (s.31(7) MCA 1973). The court will also need to consider any change in circumstances since the original order as well the parties' existing financial circumstances. The overriding objective will be fairness.

A debtor who is dissatisfied with the outcome of an order may be able to appeal or set aside the order. A debtor can only appeal if they have proper legal grounds; for example if they can show that the decision was wrong because of a serious mistake or because the procedure was not followed correctly. The timeframe to make an appeal is set by the judge whose order is being appealed, but if no time limit is set, the appeal will need to be made within 21 days.

Grounds to set aside an order can include fraud, mistake or a subsequent event, unforeseeable at the time the order was made which invalidates the basis of the order (the Barder Principle). The court has wide discretion on how to determine an application. The court can strike out the application or the court may decide to set aside the whole or part of the order. Once the court has decided to set aside an order it will usually give directions for a full rehearing to determine the original application. If the court is satisfied that it has all

the information to do so it may decide to re-determine the original application at the same time as determining the set aside application.

For further information on variation and set aside applications see [Our guide to varying or setting aside a financial order or undertaking](#).

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.