

BAILIFF POWERS

AND

CIVIL JUDGMENT ENFORCEMENT

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Case Study

BAILIFF'S POWERS AND CIVIL JUDGMENT ENFORCEMENT

September 2018

1. INTRODUCTION

All civil judgments of the Magistrates Court, the District Court and the Supreme Court are enforced under the same system of law, which is set out in the Civil Judgments Enforcement Act 2004 (CJEA) and the Civil Judgments Enforcement Regulations 2005 (CJER) (CJEA s. 5). Judgments of the Family Court of Western Australia and Federal Courts are enforced under the Acts that govern those Courts.

1.1 SHERIFF AND BAILIFFS

The Sheriff, who is the Sheriff referred to in section 156 of the Supreme Court Act 1935, has the responsibility of enforcing those orders made under the Civil Judgments Enforcement Act which are directed to the Sheriff: CJEA s 3 and 117. The Sheriff can appoint bailiffs who must be natural persons, rather than corporations: CJEA s. 107.

The Sheriff may appoint as a bailiff:

- a) a public servant
- b) an employee of a local government body
- c) a police officer
- d) a natural person with whom the Sheriff has entered into a contract for services
- e) a natural person employed by a person with whom the Sheriff has entered into a contract for services: CJEA s. 107 (2)

With the prior written approval of the Sheriff a bailiff may appoint natural persons to be his assistants: CJEA s. 108.

Since 1 May 2010 enforcement of civil judgments in the southern part of Western Australia has been conducted by Baycorp (WA) Pty. Ltd. The southern part of the state is that area south and west of a line drawn from Kalbarri to Kalgoorlie and Esperance. Baycorp is also responsible for fines enforcement, and service of Department of Transport notices relating to licence suspension in this southern region.

In areas north and east of this line, for example the Pilbara, Kimberley and Eucla there are sixteen multi-function police stations performing these tasks, and in some remote areas police officers may volunteer to perform these functions as a second job.

The intention of the change is to improve efficiency, attain greater uniformity across the state, and to release police for core police duties.

The changes are essentially administrative. The legislative framework set out above is unchanged. The Sheriff continues to have overall responsibility for the whole system.

One benefit to financial counsellors of the change is that in the southern region there is one point of contact. This is 1300 700 397; emails to enquirieswa@baycorp.com.au, and the postal address is Locked Bag 140, St. Georges Terrace Perth WA 6831.

1.1.2 STATE COURT JUDGMENT ENFORCEMENT SUBJECT TO BANKRUPTCY

Due to section 109 of the Australian Constitution state debt collection law ceases

to operate if it is inconsistent with a law of the Commonwealth. If a debtor becomes bankrupt the Bankruptcy Act prevents enforcement action against the bankrupt for most types of civil debt (s. 58).

1.2 LIFE OF JUDGMENTS

A judgment has effect from the time it is given, unless the judgment itself specifies an earlier or later time. Accordingly enforcement proceedings can begin immediately and without any notice: CJEA s. 11. A judgment is operative for twelve years from when it takes effect: CJEA s. 12. If six years have elapsed since the judgment took effect, leave must be sought from the Court that gave the judgment before further enforcement orders can be made: CJEA s. 9 (1) (a) and 13. There is no provision for extending the life of a judgment beyond twelve years.

1.3 INSOLVENT DECEASED ESTATES

There is no provision for a judgment to cease to be in force if the judgment debtor dies (CJEA s. 12 and 13). However, all unsecured creditors of a deceased debtor are ranked equally (1). They can be paid out of the estate of the deceased, if there is enough money to go around. If there is not enough for all creditors to be paid, the estate is insolvent, and the estate is administered in accordance with the rules set out in the Fifth Schedule of the Administration Act (2). The essence of these rules is that funeral, testamentary, and administration expenses have priority, and after that similar rules to those applying in bankruptcy are adopted. Testamentary expenses are the costs incurred by an executor or administrator in winding up the deceased estate.

1.4 INTEREST ON JUDGMENTS

Interest is payable on the unpaid amount of a judgment sum from the date of the

judgment to the date on which it is paid at the rate set by the regulations made under the Act, or at the rate set by the Court. The prescribed rate is currently 6% per annum: CJEA s. 8, and CJER. 4. Interest continues to be calculated whether or not a suspension order has been made, or whether or not there is a time for payment order or instalment order in force, unless the Court otherwise orders: CJEA s. 8 (2). The judgment creditor can waive payment of interest wholly or in part: CJEA s. 8 (3). Any such waiver must be in writing: CJER.4. These provisions do not apply to a judgment registered for inter-state enforcement, or one on which interest is payable under another State Law: CJEA s. 8 (5).

In any negotiations with a creditor, it is very useful for the debtor to try to negotiate the waiver of interest on the judgment sum. A debtor in difficult financial circumstances who is making small payments on a substantial debt will find the amount outstanding will continue to rise, unless an interest waiver is arranged. For example, a debt of \$10,000 will accumulate interest at the rate of \$23.08 per fortnight. [$\$10,000 \times 6\% = \$600 \div 26 \text{ fortnights} = \$23.08 \text{ per fortnight}$]

1.5 SUSPENSION ORDERS

A person against whom a judgment is given may apply to the Court that gave the judgment, or a Court dealing with an appeal against the judgment, for an order suspending enforcement of the judgment: CJEA s. 15. The Court may grant a suspension only if it is satisfied that there are special circumstances that justify doing so: CJEA s.15. An example of a situation in which a suspension order might be made is a judgment debtor who was employed at the time an instalment order was made, but who has become unemployed. Such a person could apply for a suspension order, and a new means inquiry: CJEA s. 15 and 28. An application for suspension of enforcement of a judgment must be supported by an affidavit setting out the special circumstances relied on. A copy of the application and affidavit must be served on the judgment creditor personally at least three working days before the hearing: CJER. 9.

2. TYPES OF ENFORCEMENT ORDER

There are six types of enforcement order for enforcing a monetary judgment of a State Court in Western Australia. (different provisions apply to the enforcement of non-monetary judgments.) These are:

2.1 Time for Payment Order

This is an order that the debtor pay the judgment debt immediately, or on or before a date set by the Court: CJEA s. 32. It can only be made at, or after, a means inquiry: CJEA s. 21 (1) The Court must ensure such an order does not impose unreasonable obligations on the judgment debtor: CJEA s. 21 (2).

2.2 Instalment Order

This is an order that the debtor pays the judgment debt by instalments of amounts and at times set by the Court: CJEA s. 33. It can only be made at, or after, a means inquiry: CJEA s. 21 (1). The Court must ensure such an order does not impose unreasonable obligations on the judgment debtor: CJEA s. 21 (2).

2.3 Earnings Appropriation Order (garnishment of wages)

This is an order directed to the employer of a judgment debtor, ordering the employer to pay a portion of the debtor's earnings to the creditor each time the debtor is paid. An earnings appropriation order:

- 1) Can only be made at, or after, a means inquiry: CJEA s.21 (1)
- 2) Can only be made in regard to a natural person: CJEA s. 18 (2)

- 3) The Court must ensure that the order does not impose unreasonable obligations on the judgment debtor: CJEA s. 21 (2)
- 4) An earnings appropriation order can only be made if an instalment order has been made in regard to the debt, but has been disobeyed and cancelled: CJEA s. 35 (3)
- 5) Only one earnings appropriation order can be in force at any one time, be it in regard to that judgment debt, or another: CJEA s. 35 (4) and (7)
- 6) An earnings appropriation order may be addressed only to one employer: CJEA s.35 (5)
- 7) An earnings appropriation order may be addressed to the State of Western Australia if it is the debtor's employer: CJEA s. 35 (6)
- 8) Earnings appropriation orders are not applicable to self-employed or unemployed people: CJEA s. 4

The Act does not specify any percentage of the debtor's earnings that is protected, or any percentage which may be taken. As mentioned above, there is the general principle that a Court cannot make an order which imposes unreasonable obligations on the judgment debtor: CJEA s. 21 (2). This emphasizes the importance of a judgment debtor preparing thoroughly for a means inquiry.

The word 'Earnings' is defined in the Act to mean wages, salary, commissions, fees, bonuses, overtime pay, leave loadings, payments in lieu of leave, annuities, workers compensation, and compensation for the loss or reduction in remuneration for any office or employment. Earnings **do not** include maintenance or child support, or a pension, benefit or allowance payable to the debtor under the Social Security Act or the Veterans Entitlement Act: CJEA s. 4.

An earnings appropriation order must –

- * be addressed to the employer, and must state the name and address of the judgment debtor and judgment creditor;
- * identify the earnings to which it relates;
- * state the amount of the judgment debt as at the date of the order;
- * direct the employer to pay to the judgment creditor a stated amount or amounts from the pay of the judgement debtor: and
- * state when the amount or amounts are to be paid: CJEA s. 36.

The earnings appropriation order continues until a court order stops or varies it, or until the judgement debt is paid: CJEA s. 37. As noted in 1.1.2 above, any state debt collection order ceases to be effective if the debtor becomes bankrupt.

If an employer treats an employee less favourably because of an earnings appropriation order, the employer can be fined \$5,000. CJEA s. 44.

The employer is entitled to retain as their reasonable expenses in complying with an earnings appropriation order the sum of \$10 for the first payment to the judgment creditor from the earnings of the judgment debtor, and \$5 for each subsequent payment: CJER.24.

2.4 Debt Appropriation Order

This is an order addressed to a person who owes money, or is likely in the future to owe money, to the judgment debtor. The person can be ordered to pay the debt to the judgment creditor rather than the judgement debtor: CJEA s. 49.

2.5 A Property (seizure and sale) Order

This is further discussed below.

2.6 Appointment of a Receiver

This is applicable to situations in which the judgment debtor has an asset which is not readily able to be seized under other judgment enforcement orders, such as a property (seizure and sale) order. One example may be where the judgment debtor has an interest in a partnership business. In this instance a receiver could be appointed by the Court to intercept monies coming to the judgment debtor from the partnership. Another example may be if a judgment debtor has transferred an interest in some property into another person's name in order to evade the effect of an expected property (seizure and sale) order.

To be appointed as a receiver, a person must be appropriately qualified, though no qualifications are yet laid down: CJEA s. 87 (2). The receiver may be a Sheriff: CJER.61. Another person appointed as a receiver must normally give a security: CJER.56. One would expect receivership to be used in relation to matters where substantial amounts of money or property are involved.

2.7 Review of the Amount of the Judgment Debt Sought to be Recovered

If the judgment debtor contends that a judgment sum has been partly paid, and the creditor is seeking to collect an incorrect amount, the Court can request the judgment creditor to demonstrate that the amount it is seeking to recover is correct: CJER.10.

2.8 PEOPLE AND COMPANIES

An earnings appropriation order may only be made in respect of a natural person who is an employee: CJEAs. 18 (2) and 35 (1). The other types of enforcement order may be made concerning any judgment debtor, be it a natural person, a partnership or a corporation: CJEAs. 18 (1).

3. MEANS INQUIRY

3.1 NECESSITY FOR A MEANS INQUIRY

Three of the enforcement orders listed above can only be made at or after a means inquiry. These are a time for payment order, an instalment order, and an earnings appropriation order: CJEAs. 21 (1). It is important for debtors to be aware that other types of enforcement orders, such as a property (seizure and sale) order, can be sought by the judgment creditor without any prior notice to the judgment debtor.

3.2 UNREASONABLE OBLIGATIONS

The Act lays down the principle that in making a time for payment order, or instalment order or an earnings appropriation order, against a debtor who is a natural person, the Court should ensure that the order does not impose unreasonable obligations on the judgment debtor: CJEAs. 21 (2). The same principle is applied if a judgment creditor seeks more than one type of enforcement order against the judgment debtor at the same time. The Court can make more than one enforcement order against the same debtor for the same creditor at the same time, but can only do so if it is satisfied it will not impose unreasonable obligations on the debtor, and that the additional order or orders are justified having regard to the enforcement orders already in effect. CJEAs. 22 (2). If a creditor seeks additional enforcement orders against a judgment

debtor, the Court may invite the judgment debtor to make a written submission in regard to this: CJER.12. The judgment debtor may, for example, point to difficulty in complying simultaneously with multiple enforcement orders, or the hardship that it would create.

3.3 EFFECT OF MULTIPLE ENFORCEMENT ORDERS

If a judgment debtor is subject to more than one judgment in effect at the same time, section 23 of the Act sets out what enforcement orders may be used at the same time. The principles are as follows:

a) If two or more time for payment orders are in effect at the same time, each order 'has effect according to its contents'. That is, each has to be observed:

CJEA s. 23 (2)

b) If two or more instalment orders in are effect at the same time, they have effect concurrently: that is, they must both be obeyed at the same time:

CJEA s. 23 (3)

c) Only one earnings appropriation order can be in effect at the one time:

CJEA s. 35 (7)

d) If two or more debt appropriation orders are in effect at the same time, and are addressed to the same third person, they have effect consecutively according to when they are served on the third person: CJEA s. 23 (4)

e) If two or more property (seizure and sale) orders are in effect at the same time, the priority depends on the type of property concerned. In the case of an interest in real estate, if judgment creditors have registered their property (seizure and sale) orders under the provisions of section 133 of the Transfer of Land Act,

their property (seizure and sale) orders have priority according to the order in which they were registered under section 133. In regard to other property (seizure and sale) orders, they have priority in accordance with the order in which they were received by the Sheriff. CJEAs. 72.

3.4 MEANS INQUIRY HEARINGS

A means inquiry is an inquiry conducted in a Court to determine:

- a) the judgment debtor's means to pay the judgment debt. This involves looking at the income, assets and liabilities of the debtor, and if applicable, the debtor's spouse or de facto partner, and any dependants of either of them;
- b) the debtor's earnings;
- c) whether the debtor is a creditor in regard to any debt which might be appropriated to satisfy the judgment debt; and
- d) the existence, whereabouts and value of any property of the judgment debtor which might be seized and sold to satisfy the judgment debt: CJEAs.26

Both a judgment creditor and a judgment debtor can apply for a means inquiry. Debtors can only do so if they are also seeking a suspension order: CJEAs. 27 and 28.

An application may be made whether or not there has previously been a means inquiry, or an enforcement order: CJEAs. 27 and 28. The Court may summons to attend and give evidence or produce documents any person the creditor or debtor thinks is likely to be able to produce relevant documents or give relevant evidence: CJEAs. 29.

The Act envisages the possibility of a number of means inquiries being held in regard to the same debt: CJEA s 27 (2) and 28 (2).

Suspension orders are mentioned in sections 15 and 16 of the Act, relating to a variety of circumstances, including when the judgment debtor is appealing. The Act says that suspension orders may only be made if there are special circumstances that justify doing so: CJEA s. 15 (3). A suspension order is mentioned also in section 28 of the Act, in the context of a means inquiry. Here the context refers to a debtor unable to pay a judgment debt. This section allows a debtor to seek suspension of enforcement whilst a means inquiry is held: CJEA s. 28. This section may be useful to a debtor who has been paying in accordance with an enforcement order, but becomes unable to do so, perhaps due to a change in circumstances such as ill health or unemployment.

3.5 LOCATION OF MEANS INQUIRY

A means inquiry is normally held in the registry of the Court in which the case has been conducted. Either party can apply for the means inquiry to be conducted at another registry of the Court . The Court can consider the submissions made by the parties, and order the means inquiry to be held at a different registry of the Court if the Court is satisfied that it would be more convenient, or fair to do so: CJER.14.

This provision may be particularly useful to a judgment debtor who lives or works in a rural or remote region, and who does not have the means to travel to Perth for a means inquiry.

If it is difficult for a **judgment debtor** to travel to the place where a **means inquiry** is being held, for example because it is a long way from their home, or they do not have the means to pay for fares and accommodation to get there,

they can apply to the court that issued the summons to move the hearing to a place closer to their home. The court can also hold a hearing by audio link or video link: Magistrates Court (Civil Proceedings) Act 2004. s.16 (1) (l). and s. 22.

3.6 SUMMONS TO ATTEND A MEANS INQUIRY

Both the judgment creditor and the judgment debtor can request the Court to issue a summons to a person to attend the means inquiry to give evidence or produce documents: CJEA ss. 27 (3) (d), 28 (4) and 29 (2). Such a summons must be served personally, at least five clear days before the means inquiry: CJEA s. 29 (3) and CJER. 15. A person required to produce documents but not give oral evidence can deliver the documents to the Court personally or by post at least two clear days before the means inquiry: CJER.16. This provision may be aimed at minimizing the cost and inconvenience to independent record holders such as a bank or finance company. A person who is served with a summons to attend a means inquiry (this may be both the judgment debtor and prospective witnesses) must attend and produce documents in accordance with the summons. If they do not, the Court may issue a warrant for their arrest. The person may be brought before the Court and is guilty of contempt of Court: CJEA 29 (4) and (5).

3.7 STATEMENT OF FINANCIAL AFFAIRS

A summons requiring a judgment debtor to attend a means inquiry may require the judgment debtor to complete and produce at the means inquiry a statement of financial affairs in the approved form. A judgment debtor who fails to do this may be fined \$1,000: CJER. 17.

The statement of financial affairs is a vital document for the judgment debtor. If a debtor is in difficult financial circumstances, a properly completed statement of

financial affairs will make this clear. Because subsection 21 (2) of the Act prevents a Court making orders that impose unreasonable obligations on a judgment debtor, the thorough completion of a statement of financial affairs is likely to prove very valuable for a judgement debtor in financial difficulty. Copies of this form can be obtained from the Court, or downloaded from the internet on www.magistratescourt.wa.gov.au. Go to Online Forms, or google Form 38 Statement of Financial Affairs.

3.8 CHANGE IN CIRCUMSTANCES

Often a judgement debtor may find that illness, unemployment or family breakdown can have a major adverse effect on their capacity to pay a judgment debt. In these circumstances, it is appropriate for the judgment debtor to apply to a Court which has made an enforcement order for a suspension order, under section 15 of the act, and simultaneously for a means inquiry under section 28 of the Act. Such an application must be supported by an affidavit setting out the special circumstances relied on to justify the order sought, and must be served personally on the judgment creditor at least three working days before the hearing. In some circumstances the judgment debtor must give a copy of the suspension order to the Sheriff: CJER. 9.

4. PROPERTY (SEIZURE AND SALE) ORDER

A property (seizure and sale) order authorizes the Sheriff to seize and sell a judgment debtor's property to wholly or partially satisfy a judgment: CJEA s. 59. It replaces the warrant of execution used in Local Court enforcement, and the writ of fi fa used in the Superior Courts. A creditor who has obtained a judgment against a debtor can go straight to seeking a property (seizure and sale) order even though there has been no means inquiry: CJEA s. 21 (1). In some cases a creditor may wish to do a means inquiry to form some view as to what property

might be in existence, and then to use that information as a basis for a property (seizure and sale) order: CJEA s. 26 (d).

4.1 ONLY SUFFICIENT PROPERTY TO BE SOLD

Under a property (seizure and sale) order the Sheriff may sell only as much of the judgment debtor's property as is necessary to satisfy the judgment debt: CJEA s. 65.

4.2 DETERMINING THE VALUE OF A JUDGMENT DEBTOR'S INTEREST IN PROPERTY

Before selling the judgement debtor's interest in either personal or real property, the Sheriff must take reasonable steps to determine its value: CJEA s. 66.

After the Sheriff has received a property (seizure and sale) order the Act empowers the Sheriff to obtain information about the interest of any other person in the property which may be sold under the order. This means a co-owner, a mortgagee, or a public authority can be compelled to disclose to the Sheriff the nature of any interest they have in the property, the nature of any security they have, and the amount of money owing to them in relation to the property. A person refusing to give such information is guilty of a contempt of Court. The Sheriff can disclose any information obtained by these inquiries to any potential purchaser of the judgement debtor's interest in the property: CJEA s. 63. The Sheriff can also request the judgment debtor to give information, and can engage a valuer: CJEA s. 66.

In addition to the powers given by section 63 CJEA, other persons can be compelled to give information by being summoned to a means inquiry. (CJEA s. 27, 28 and 29)

4.3 PRIORITY BETWEEN CREDITORS

When a property (seizure and sale) order is forwarded to the Sheriff the date and time of the Sheriff receiving it shall be recorded because this determines competing priorities between different creditors: CJEAs. 61 and 72.

4.4 PERSONAL PROPERTY TO BE SOLD IN PREFERENCE TO REAL PROPERTY

Under a property (seizure and sale) order a judgment debtor's saleable interest in any real property must not be sold unless the Sheriff is satisfied that the amount that is reasonably likely to be obtained from selling the judgment debtor's saleable interest in any personal property will not be sufficient to satisfy the judgment debt. Real estate and personal property can be sold by the Sheriff at the same time if that is required: CJEAs. 64.

4.5 INTERESTS OF OTHERS

If a person other than the judgment debtor has any legal or equitable interest in the property both interests may be sold together if the Sheriff is of the opinion that such a joint sale is desirable and the other person consents in writing. If the other person consents, they and the sheriff can agree in writing before the sale as to the division of the proceeds of the sale. If the other person does not agree, then the Sheriff can proceed to sell the interest of the debtor alone: CJEAs. 67, 74 and 80.

4.6 LIFE OF A PROPERTY (SEIZURE AND SALE) ORDER

A property (seizure and sale) order remains in effect for twelve months from the day it was issued: CJEAs. 102.

When a property (seizure and sale) order is lodged at Landgate (the Titles Office) it has effect on the title to the land concerned for six months: (definition of 'sale period' in s. 133 of the Transfer of Land Act (WA) 1893). A judgment creditor can apply to the court which made the property (seizure and sale) order for one or more extensions of this period: (Transfer of Land Act s. 133 (13) and (15)). A court can extend the operation of a property (seizure and sale) order from time to time (CJEA s. 102 (2)) by up to twelve months (CJEA s. 102 (4)). The overall life of a judgment of a court is twelve years (CJEA s. 12).

4.7 SHERIFF'S POWER OF ENTRY

Under a property (seizure and sale) order the Sheriff, using any force or assistance that is reasonably necessary in the circumstances, can enter any place where he or she believes on reasonable grounds there is or may be personal property that may be seized under the order, or a record evidencing the title to such property.

4.8 ENTRY TO A DWELLING

Special rules apply if the place the Sheriff wishes to enter is a dwelling. 'Dwelling' is defined in section 3 of the Act as a building, structure or tent (or part of one) ordinarily used for human habitation, and includes a mobile home. This in turn is defined as a vehicle ordinarily used for human habitation which is permanently or semi-permanently stationary in a single location (CJEA s. 3). This definition excludes a camper-van ordinarily used for transport, and occasionally used for accommodation. If the place in question is a dwelling the Sheriff will first seek the consent of the occupier of the building. If the consent is unreasonably withheld or the Sheriff is not able to contact the occupier or owner of the dwelling the Sheriff may force entry to the property at any time between 9.00 am and 5.00 pm: CJEA s. 75.

4.9 PROTECTED PROPERTY

There are a number of types of property that are protected from seizure by the Sheriff under a property (seizure and sale) order. These are:

- a) property the judgment debtor holds in trust for another person and which the judgement debtor does not have a beneficial interest in;
CJEA s. 76 (a)
- b) clothing and shoes of the judgment debtor to the value of \$1,250;
- c) clothing and shoes of a dependant of the judgment debtor to the value of \$1,250;
- d) family diaries, photographs and portraits;
- e) medical and dental aids and equipment;
- f) kitchen and dining furniture and implements to the value of \$1,250;
- g) bedroom furniture and bedding of the judgment debtor to the value of \$500;
- h) bedroom furniture and bedding of a dependant of the judgment debtor to the value of \$200;
- i) laundry equipment to the value of \$200;
- j) electrical goods used for family entertainment to the value of \$300; and

- k) books, software, computers and other equipment used by a dependant of the judgment debtor for educational purposes to the value of \$3,000.
- l) ordinary tools of trade, plant and equipment, professional instruments and reference books to the value of \$2,500 used by the judgment debtor to earn income by personal exertion: CJER. 35

It does seem extraordinary that in the twenty-first century the law provides that the shoes, clothing and bedding of the judgment debtor's children, beyond those monetary limits, can be seized by the bailiff to pay for their parent's debt.

The regulation speaks of the value of items, rather than their replacement value. The value of items is presumably what they would sell for at auction. It is notable that second-hand clothing and furniture are not easy to sell, and bring low prices. A low-income debtor with old and low-value furniture and equipment may have little that a bailiff can seize. Goods which are security for a loan are protected by that security from bailiff seizure, unless the amount owing under the security is low compared with the value of the item. The bailiff can sell goods subject to a secured interest, provided that the rights of the secured creditor are observed: CJE s. 74.

Sometimes family members are concerned about the prospect of the bailiff seizing the goods of the judgement debtor, and wish to help the judgment debtor by offering to pay the debt. Depending on the rest of the debtor's situation, it may be a better strategy for the family members to wait until the debtor's goods are seized, then offer to buy them from the bailiff. The goods are then safe from the creditors because they are no longer owned by the judgment debtor.

Of course, some judgment debtors may find the prospect of having a bailiff come into their home and removing goods valued by the family quite traumatic, and may consider bankruptcy an attractive alternative.

4.9.1 BAILIFF'S POWER OF SEIZURE

As noted in paragraph 4 above, once a creditor has obtained a judgment against a debtor, the creditor can proceed straight to the use of a property (seizure and sale) order (psso) without any intermediate steps such as a means inquiry. A bailiff with a psso can seize property immediately. In practice, a bailiff normally attends the debtor's premises, and requests payment of the required amount. If the debtor cannot pay the amount required, the bailiff can effect a notional seizure of the client's property straight away. Effecting a notional seizure is described as attachment of the property concerned. Section 150 of the Criminal Code makes it an offence punishable by imprisonment to hinder or defeat attachment by receiving, removing, retaining, concealing or disposing of property which has been attached. Accordingly, if a client is the subject of a psso it is important to ensure the client knows to leave property that has been notionally seized where it is. As noted in the paragraph Interpleader below, if a person other than the debtor owns or has an interest in the seized property that person can make a claim to the Sheriff. If a debtor who is the subject of a property (seizure and sale) order becomes bankrupt, action by a bailiff against the debtor relating to any debt provable in the bankruptcy is halted by subsection 58 (3) of the Bankruptcy Act (Commonwealth). This overrides the provisions of the (State) Civil Judgments Enforcement Act, due to section 109 of the Australian Constitution.

4.10 DEFENCE SERVICE HOMES PROPERTY

The Civil Judgements Enforcement Act is a law of a State. Section 109 of the Australian Constitution provides: 'When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

The Defence Service Homes Act 1918 provides in section 45A, that the interest of a person in a home that is subject to a Defence Service Homes advance or contract of sale cannot be taken by a bankruptcy trustee, and cannot be sold in satisfaction of a judgment debt, other than by a mortgagee or other secured creditor, unless the Secretary of the Department of Defence gives permission. This is not readily given.

Accordingly, a home subject to a Defence Service Homes advance or contract cannot be sold by the Sheriff or bailiff under a property (seizure and sale) order.

This section applies to land, a dwelling house on it, and a right of residence in a retirement village.

5. NO CHARGE OVER PROPERTY

A monetary judgment does not create a charge over or interest in real estate: CJEAs. 80 (5). A property (seizure and sale) order does not create a charge over or interest in any real property, whether or not it be registered under the Transfer of Land Act or the Registration of Deeds Act: CJEAs. 80 (6). This makes the legal position clear in a helpful way, which has been uncertain in the past due to the fact that the principal High Court decision in this area of the law was based upon the legislation of a different State. One practical effect of it is that if a debtor is sued, a judgment obtained, and a property (seizure and sale) order made in regard to some real estate and the debtor then becomes bankrupt the creditor is question is not a secured creditor for the purposes of the Bankruptcy Act. There is no parallel principle in regard to personal property. If a property (seizure and sale) order is made in regard to personal property, and the debtor then purports to sell that property, the purchaser takes the property subject to the Sheriff's entitlement unless at the time of buying the property in question the person acquired it in good faith for valuable consideration and with

no notice of the fact that the Sheriff had received the property (seizure and sale) order in regard to that property: CJEAs. 74 (4).

This course of action by a debtor must be seen in the context that a sale or disposal of goods subject to a property (seizure and sale) order constitutes an offence, as set out in 4.9.1 above.

6. Limits On A Bailiff's Sale

6.1 Time Limits

As mentioned above, there is no requirement that a judgment creditor do a means inquiry before requesting the court to issue a property (seizure and sale) order. This could be done on the same date a judgment is entered; CJEAs. 59.

Once the property (seizure and sale) order is given to the Sheriff, the Sheriff may register it at Landgate (the Titles Office). The time provisions relating to this are set out above in paragraph 4.6: Life of a Property (seizure and sale) Order.

Before any sale of property, the Sheriff must advertise the intended sale "in a reasonable manner". Traditionally, this has been a very brief advertisement in the West Australian. The property cannot be sold unless seven days have elapsed since the advertisement, unless the debtor agrees in writing to an earlier sale: CJEAs. 68. As mentioned above, the total life of a judgement is twelve years: CJEAs. 12.

6.2 Fair Value of Property

We have noted above that a Sheriff must take reasonable steps to determine the value of a judgment debtor's interest in property before selling it: CJEAs. 66. A sale of a judgment debtor's interest in property must not be for less than a fair

value of the interest: CJEAs. 69 (1) (c). However, the Sheriff can apply to the court that made the property (seizure and sale) order for an order that the debtor's interest in the property be sold for less than a fair value of the interest: CJEAs. 69 (2) (c).

In passing it is notable that the National Credit Code provides that if a lender repossesses goods, and then sells them, the sale must be for the best price reasonably obtainable: Code s. 104 (1). Unfortunately, this provision applies only to goods, and not real estate. Order 53 Rule 3 of the Rules of the Supreme Court 1971 provides that if the Supreme Court makes an order for the sale of land it is to be "for the best price that can be obtained".

6.3 Place and Manner of Sale

A sale of the judgment debtor's interest in real estate may be conducted on the property, or at any other place, as the Sheriff thinks fit. The sale must be by public auction CJEAs. 69 (1). The Sheriff can apply to the court that made the property (seizure and sale) order that the sale may be conducted by public tender or private agreement: CJEAs. 69 (2).

7. Sheriff v Mortgagee

A monetary judgment and a property (seizure and sale) order do not create a charge over or an interest in real estate: CJEAs. 80 (5) and (6). A property (seizure and sale) order enables the Sheriff to sell the saleable interest of the judgment debtor in real estate: CJEAs. 80 (2).

If a person, whom we shall call the speculator, buys the debtor's interest in real estate from the Sheriff, the interest of the debtor is extinguished – Transfer of Land Act 1893 s. 133 (11) (b).

Once this has happened, there is little point in the judgment debtor paying the mortgage. If the mortgage is not paid, the mortgagee is entitled to take action under its mortgage. If the mortgagee seizes and sells the property, any surplus remaining after the sale goes to the mortgagor, after payment of the costs of the mortgagee's sale, money owing under the mortgage, and in payment of any subsequent mortgages or charges: Transfer of Land Act. s. 109.

8. Sheriff v Trustee in Bankruptcy

As noted above, a property (seizure and sale) order does not create a charge over, or interest in, real estate: CJEAs. 80 (6). Effectively, it is noting the interest of an unsecured creditor.

If judgment debtors are subject to action by a Sheriff under a property (seizure and sale) order, and fear that their interest in the property may be sold for a low figure, they can consider bankruptcy. A trustee in bankruptcy usually seeks the cooperation, or procures the cooperation by use of section 126 of the Property Law Act 1969, of the other owner or owners of the property and sells the whole property. A trustee will normally seek to arrange a normal sale, through a real estate agent. This is likely to bring a much better price than a Sheriff's sale of the debtor's interest alone. Whereas only a speculator is likely to wish to buy the debtor's interest from a Sheriff, a normal sale by a trustee in bankruptcy of the whole property attracts a much wider range of prospective buyers.

If a debtor has an interest in a property, is being pursued by a Sheriff with a property (seizure and sale) order, and has friends or family members with access to some money, the debtor may choose to do nothing, other than alert the friends with money to the Sheriff's planned sale. As noted above, such a sale must be properly advertised, and conducted by public action, unless there is a court order to the contrary: CJEAs ss 68 and 69. The debtor's friends then have the opportunity to buy the debtor's interest in the property.

If the debtor has significant other debt, after the Sheriff's sale, the debtor can consider bankruptcy. Because the Sheriff has sold the debtor's interest in the property, it does not vest in the trustee in bankruptcy. The debtor's friends or family members who have bought the debtor's interest are not affected by the debtor's bankruptcy.

9. COMPELLING COMPUTER OPERATION

One draconian provision in the Act is that a Sheriff with a property (Seizure and sale) order can operate a computer or other thing, and direct a person who has the custody or control of a record, computer or thing to make or print out a copy of the record or to operate the computer or thing: CJEAs. 75 (1) (d) (iii).

10. INTERPLEADER

A person other than the judgment debtor who claims to have a legal or equitable interest in personal or real property subject to a property (seizure and sale) order can make a claim to the Sheriff. The claim must:

- a) be in writing
- b) describe the property or interest claimed
- c) state the basis for the claim
- d) give an address for service of the person making the claim ('the claimant')
and
- e) contain any other information prescribed by the regulations

As soon as practicable after receiving such a claim, the Sheriff must give the judgment creditor a copy of the claim, and a notice requiring the creditor to notify the Sheriff within a specified period whether the claim is admitted or disputed:

CJEA s. 83.

If the judgment creditor disputes the claim the Sheriff may make an interpleader application to a Court: CJEA s. 84 (2).

If the claim relates to personal property, the application is made to the Court that issued the property (seizure and sale) order: CJEA s. 84 (2) (a).

If the claim relates to real estate, and the property (seizure and sale) order was made by the Supreme Court, the application is to the Supreme Court. If the claim relates to real estate, and the property (seizure and sale) order was issued by the Magistrates Court or the District Court, the application is made to the District Court: CJEA s. 84 (2) (b).

10.1 LOCATION OF INTERPLEADER PROCEEDINGS

In the case of interpleader proceedings in the District Court or the Magistrates Court, the proceedings are normally in the registry of the Court closest to where the property in question is located, although the Court can order otherwise: CJER.50.

10.2 DOCUMENTATION OF AN INTERPLEADER CLAIM

The claimant must file with the Court, at least five clear days before the hearing, three copies of the claim, setting out:

- * the name, address and description of the claimant;

- * the particulars of the property concerned;
- * the claimant's grounds for making the claim;
- * information as to whose possession the property is in;
- * information as to the claimant's interest in the property: and
- * details of, and a copy of, any documents that support the claimants claim to possession of or interest in the property: CJER. 51 and 53.

11. DEFAULT INQUIRY

A judgment creditor may apply for a default inquiry to be held if a judgment debtor has failed to pay in accordance with a time for payment order; or has failed to pay in accordance with an instalment order on two or more occasions: CJE s.88. A default inquiry is normally held at the registry of the Court where the documents relating to the matter are held, but both parties can request that the default inquiry be held at a different registry of the Court: CJER. 62. Judgment debtors in rural or remote locations who cannot afford to travel to Perth to attend a default inquiry could request it be held in the registry of the Court nearest to their home, or by audio link or video link: Magistrates Court (Civil Proceedings) Act 2004 s. 16 (1) (l) and s. 22.

If the Court is satisfied, at a default inquiry, that the judgment debtor at the relevant time or times:

- i) had the means to pay the judgment debt, or the two instalments, but did not pay;
- and
- ii) had no reasonable excuse for not paying;

then the judgment debtor is guilty of a contempt of Court. The Court can decide to imprison the person for up to forty days, and can order such imprisonment be suspended for such period and on such terms as the Court orders, to enable the judgment debtor to comply with a new time for payment order, or a new or amended instalment order. Such imprisonment as may be ordered does not extinguish or reduce the judgment debt, nor does it terminate an instalment order, unless the Court otherwise orders: CJEA s. 90.

Under the previous civil judgment enforcement system, the prospect or actuality of imprisonment for default in payment prompted many debtors to petition in bankruptcy. This provision in the new system may have the same effect.

NOTES:

1. Administration Act (WA) 1903 s. 23
2. Administration Act s. 10A

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September 2018

CASE STUDY

Bailiff's Powers and Civil Judgment Enforcement

September 2018

Eddie and Esther have made an appointment to see you, but at the appointed time only Esther arrives. Esther explains that she hasn't seen Eddie for a few days. She understands he is driving to Broome with two of his mates. Her concern is that an Assistant Bailiff has called at their house, and has looked around, and left his card. He wishes to speak to Eddie, and she has explained to him that Eddie has gone north, and she is not sure if he'll be back.

You ask how this started. Esther explains that Eddie was at football practice, and stayed on afterwards to have a few drinks with his mates. He evidently had a few too many. On his way home the car in front of him stopped suddenly. He swerved and missed it, but ran up onto the footpath. He demolished a light pole, and his car ran into the front of a shop. The police came, and charged him with careless driving, and drink driving. He lost his licence, which meant he also lost his job. The insurance company of the shop owner has sued Eddie, and obtained a judgment against him for \$55,000. Eddie made a claim on his insurance, which was refused because of his drink driving conviction. The Assistant Bailiff has a property (seizure and sale) order against Eddie for that amount. Esther's main concern is the house. You ask about that.

Esther explains that she and Eddie bought the house as joint tenants. Esther's parents lent them \$50,000, they borrowed \$300,000, and bought the house for \$350,000. They still owe about \$300,000. Esther works as a receptionist in a real estate company, and says they got a good buy when the real estate market

bottomed after the global financial crisis. She says if the house was tidied up and well marketed, it could bring \$400,000 now.

You ask about other things of value around the house. Esther has a car which she paid off some time ago. It is registered in her name, and is worth \$8,000. Eddie's car, which was damaged in the accident, is in the back yard. The Assistant Bailiff has taken down the details of both cars. The Assistant Bailiff has also taken down details of Eddie's boat and trailer. Esther said that Eddie paid them off before she met him. They are registered in Eddie's name, and are insured for \$35,000. You ask about Eddie's car.

Eddie's car is a recent model Holden utility, with a V8 engine and many extras. Eddie has lost interest in it since the accident, and has stopped making payments. Eddie does not open letters which may contain bad news, but Esther does. She says letters have come addressed to Eddie from the finance company, which has a mortgage on the car. They are demanding \$60,000. Esther says she checked Red Book and a vehicle of this model would usually be worth \$45,000. However, with the accident damage, she expects it would be worth a lot less. You ask about other property.

Esther says there are other things in the house, but she does not want the Assistant Bailiff coming into her house and looking about. She wants to keep the bailiff out. You ask what things there are in the house which the bailiff may wish to take.

Esther says that Eddie has fishing gear and sporting rifles that are insured for \$10,000. There is also a wide-screen surround sound home projection system, which Eddie bought to watch all the football shows. She says that Eddie spoke

of paying \$16,000 for it. She has seen an advertisement from their friendly local electronic dealer advertising twelve months interest free terms, with no deposit, no interest, and no repayments. She has seen things like it advertised recently for \$12,000. She does not know how Eddie bought the equipment, or from whom. The children look at cartoons on it when they come home from school, and she watches cooking shows on it after the children have gone to bed. But she still has a perfectly good television set, which they can watch if the new one goes. As far as Esther is concerned, if the Assistant Bailiff wants to take Eddie's home projection system, he is welcome to it.

Esther asks you:

1. Can the Assistant Bailiff use his property (seizure and sale) order to sell Eddie's interest in the house? She is adamantly opposed to any sale of the house.
2. Can the Assistant Bailiff seize Esther's car? If so, why? If not, why not?
3. Can the Assistant Bailiff seize Eddie's car? If so why? If not why not?
4. Can the Assistant Bailiff seize Eddie's boat and trailer. IF so, why? If not, why not?
5. Can Esther keep the Assistant Bailiff out of her house? If so, why? If not, why not?
6. Can the Assistant Bailiff take Eddie's fishing gear and sporting rifles?
7. Can the Assistant Bailiff take Eddie's wide-screen surround sound home projection system? If so, why? If not, why not?

Esther leaves, because she has to pick up the children.

While you are considering these issues, the phone rings. It is Esther. She is tearful and upset.

When she got home, there was a message on her answering system. It was from the Kimberley police. She phoned them, and they told her that there had been an accident. A vehicle in which Eddie was a passenger has left the road, and overturned several times. Eddie was thrown out of the vehicle, and died at the scene. It appears that he was not wearing a seat-belt.

Esther asks:

8. Will it make any difference that Eddie has died?
9. Should she telephone the Assistant Bailiff? If so, what should she say?

Is there any other information you require? If so, What?

Ian Macdonald
September 2018