Chapter 5 supplementary materials on enforcement of child support

5.4.7 Enforcement of child support

The recent history of the law in this area has been rather tortured. Despite repeated complaints about the under-use by CMS of its existing enforcement options, successive governments have promoted legislation beefing up the arsenal of enforcement powers available in relation to child support, but many of those amendments have never come into force. In particular, plans to remove many enforcement tools from the hands of the court and to place them in the hands of the statutory agency itself (supposedly in order to speed up enforcement) have largely gone unimplemented with no apparent plans to bring them into force (though, messily, the unimplemented amending provision remain on the statute book for the time being). The first few enforcement tools that we consider below are operated by the CMS, but thereafter, the CMS must apply to the court for deployment of the heavier weaponry. For the sake of clarity, we outline here the law as it is in force today.

Deduction from earnings orders

The first tool is the deduction from earnings order (DEO). In some jurisdictions, these are used as a convenient collection mechanism for all employed non-resident parents.[1] There had been plans to move to that standard collection model in the UK, but DEOs have returned to the enforcement rather than collection arena, with a fee payable by the non-resident parent for their use, though the legislation does not require that the non-resident parent be in default before the order is made.[2]

The DEO may be made by CMS without court involvement.[3] The order is addressed to the non-resident parent's employer, requiring them to deduct the sums due from the parent's pay and redirect them to CMS. A portion of non-resident parents' income is protected so DEOs cannot reduce their circumstances unreasonably.[4] A DEO should not be used where there is good reason not to, if specified adverse employment or family consequences might result.[5] Non-resident parents may appeal to the court against a DEO, but only on very limited grounds;[6] the order will not operate until the appeal deadline has passed. Parkinson has argued that in order to respect non-resident parents' dignity, CMS should offer the option of direct debit instead of a DEO wherever possible.[7] Where the non-resident parent is receiving welfare benefits, any child support due may be deducted from those.[8]

[1] They cannot be used against self-employed parents, the most problematic group.
[2] The non-resident parent may choose to have a DEO, but will have to pay the fee of £50.
[3] CSA 1991, ss 29 and 31; and see generally SI 1992/1989, reg 3 and Part III.
[4] Ibid, reg 11.
[5] SI 1992/1989, reg 3(3)–(5).
[6] CSA 1991, s 32(5)(6); SI 1992/1989, reg 22; *Secretary of State for Social Security v Shotton* [1996] 2 FLR 241.
[7] Parkinson (2007).
[8] CSA 1991, s 43; SI 2019/1084.

Deduction orders: bank accounts

CMS can make regular[9] or lump sum[10] deduction orders (addressed to the institution holding the account) from various bank accounts in relation to both arrears and future payments where the non-resident parent is in default.[11] This tool is particularly useful against recalcitrant self-employed non-resident parents to whom DEOs cannot be applied.

These powers are reinforced by CMS's right to apply to court for an anti-avoidance (or 'freezing') order, modelled on powers exercisable by the matrimonial courts. These orders are available on the ground that the non-resident parent has failed to pay and—intending to avoid payment—is about to make or has made a reviewable disposition, that is, a disposition other than one made for valuable consideration to a third party acting in good faith and with no notice of the intention to avoid paying maintenance.[12]

Liability orders and associated remedies

The rest of the enforcement arsenal lies beyond the gateway of the 'liability order',[13] which can only be obtained from the court.[14] However, the courts' discretion not to make liability orders is limited—courts dealing with enforcement issues are barred from examining the correctness of the underlying maintenance calculation, which is a matter for the statutory appeal structure in the Act.[15] References here to the Secretary of State should be read as referring to CMS:

Child Support Act 1991, s 33

Liability orders

(1) This section applies where –
(a) a person who is liable to make payments of child support maintenance ('the liable person') fails to make one or more of those payments; and
(b) it appears to the Secretary of State that –
(i) it is inappropriate to make a deduction from earnings order against him (because, for example, he is not employed); or
(ii) although such an order has been made against him, it has proved ineffective as a means of securing that payments are made in accordance with the maintenance calculation in question.

(2) The Secretary of State may apply to a magistrates' court … for an order ('a liability order') against the liable person.

(3) Where the Secretary of State applies for a liability order, the magistrates' court … shall make the order if satisfied that the payments in question have become payable by the liable person and have not been paid.

[9] Attracting a fee of £50: Fees Regulation, SI 2014/612, reg 10.
[10] For a fee of £200: ibid.
[11] CSA 1991, ss 32A–K, SI 1992/1989, Part IIIA, SI 2018/1279, reg 3.
[12] CSA 1991, s 32L, modelled on MCA 1973, s 37.
[13] See Child Support (Collection and Enforcement) Regulations 1992, SI 1992/1989, Part IV, as amended by SI 2001/162.
[14] Controversial legislation that would move the liability order and associated remedies to the hands of CMS have been left unimplemented.
[15] See 5.4.7; *Farley v Child Support Agency and another* [2006] UKHL 31.

(4) On an application under subsection (2), the court … shall not question the maintenance calculation under which the payments of child support maintenance fell to be made. …

Once the liability order has been made, the Agency may enforce the order by taking control of certain property (goods) for the NRP without further court permission. This is done bailiffs with a view to selling the assets in order to pay the outstanding debt. Regulations identify a wide range of property that is exempt from this process, broadly speaking those necessary for the non-resident parent's earning power or education (up to £1,350 worth), and basic domestic necessities.[16] CMS can also designate the liability order as a county court judgment, which may affect the liable person's credit rating and professional status;[17] and it can supply details of the child maintenance debt to credit reference agencies.[18]

The other two possibilities opened up by the liability order remain with the court:[19]

(i) To make a third party debt order: this would require third parties holding the liable person's funds to pay them to CMS.

(ii) To make a charging order: this would give CMS a security interest in any property subject to the order, so that in the event of sale (which may be expressly ordered for this purpose), a specified sum from the proceeds goes to CMS.[20]

It was unsuccessfully argued in *R (Denson) v Child Support Agency*[21] that the liability order scheme per se was incompatible with non-resident parents' rights under Article 8 and Article 1 of Protocol 1, ECHR. It was held that neither Article was engaged by a liability order: no part of that process by itself could be said to impinge on non-resident parents' private life or on their possessions. But even if either Article were engaged, the consequent interference was lawful:

***The Queen on the application of Denson v Child Support Agency* [2002] EWHC 154**

MUNBY J:

47. In my judgment a liability order is for the following reasons … a 'necessary', reasonable and 'proportionate' part of the overall statutory scheme:

i) it comes into play only when a deduction from earnings order either has proved or is likely to prove ineffective: see s 33(1)(b);
ii) in such cases it serves as a 'gateway' to those various enforcement mechanisms without recourse to which the overall objectives of the statutory scheme are, ex hypothesi, likely to be frustrated;
iii) it is only a 'gateway', and thus in fact affects neither the [non-resident] parent's income nor his credit status [but see now above re credit reference agencies];
iv) in any event it cannot be unreasonable or disproportionate to have some effective machinery for recovering a debt which is properly owing and has not been satisfied by the [non-resident] parent.

[16] CSA 1991, s 35(1); Tribunals, Courts and Enforcement Act 2007, Part 3; Taking Control of Goods (Fees) Regulation 2014, SI 2014/1.
[17] CSA 1991, s 33(5), SI 2015/176 and 2015/338.
[18] Ibid, s 49D(3); cf concerns of Joint Committee for Human Rights under Art 8 (2007), 1.28; cf *R (ota Denson) v Child Support Agency* [2002] EWHC 154, [47], extracted above.
[19] Again, controversial legislation transferring this directly to CMS has not been implemented.
[20] CSA 1991, s 36.
[21] [2002] EWHC 154; [2002] 1 FLR 938.

48. I emphasise this last point because I should not like it to be thought that I am casting the slightest doubt on the efficacy of "designation" or suggesting that the system of "designation" in accordance with s 33(5) of the Act [as a county court judgment] is anything other than fully Convention compliant. It may be (I express no opinion on the point) that "designation" does, even though as I have held the making of a liability order does not, engage Art 8 of the Convention. Even if it engages Art 8, the process of designation, in my judgment, quite plainly passes muster under Art 8(2). To hold otherwise would be to make a mockery of the entire statutory scheme and to enable those, like Mr Denson, who want to play the system for all it is worth, to frustrate what the Strasbourg jurisprudence recognises to be the legitimate aims of a statutory scheme which achieves a reasonable relationship of proportionality between the legitimate aims of the legislation [inter alia, to ensure that non-resident parents fulfil their obligations towards their children and to reduce taxation] and the means employed to that end.

49. In the final analysis this vast edifice of ingenious argument erected by [counsel for Mr Denson] really comes down … to Mr Denson's complaint that a liability order is neither "necessary" nor "proportionate" because it might lead to him being deprived of what he calls a very considerable proportion of his net income'. This argument, which in some measure involves little more than an attempt to re-open in this court matters concluded against Mr Denson by the decisions of the [Child Support Appeal Tribunal] … and of the Court of Appeal …, is wholly devoid of any factual merit. It is also devoid of any legal merit. It is, in my judgment, … manifestly ill-founded.[22]

Sanctions for cases of 'wilful refusal or culpable neglect'

The last set of enforcement powers—the 'Exocet of enforcement'[23]—may be used only when the remedies discussed above have been tried but failed to yield up all or part of the debt,[24] and where the court[25] finds that the non-resident parent has been guilty of 'wilful refusal or culpable neglect' to pay.

'Wilful refusal or culpable neglect'

These terms were explained in a different—but for our purposes similar—context as follows setting a high bar in terms of the degree of blameworthiness require, certainly in the context of committal to prison: 'It is not just a matter of improvidence or dilatoriness. Something in the nature of a deliberate defiance or reckless disregard of the court's order is required.[26] As Bird and Burrows note, outside the context of imprisonment—i.e. driving and travel document disqualification—the threshold might be set less high, although the interference with liberty entailed in all of these measures mean the threshold cannot be lowered too far.[27]

[22] Munby J's reasoning on Article 1, Protocol 1 was similar.
[23] *Karoonian v CMEC* [2012] EWCA Civ 1379, [7].
[24] Ibid, [19].
[25] The controversial changes empowering CMS to act without court sanction in relation to driving licences and travel authorization have not been implemented.
[26] *R (Sullivan) v Luton Magistrates' Court* [1992] 2 FLR 196.
[27] (2009), 9.34.

Sanctions available: disqualification from holding driving licence or travel authorization, and committal to prison

In cases of wilful refusal or culpable neglect to pay, the court[28] on application from CMS has the power to:

- disqualify the NRP from driving for up to two years;
- disqualify the NRP (in new powers implemented at the end of 2018) from holding or obtaining a passport; or
- as a last resort, commit to prison for up to six week.[29]

Before exercising either disqualification powers, the court must consider 'whether the person needs the relevant document in order to earn a living'.[30] While the court is bound by CSA 1991 s 2 to have regard to the welfare of any child likely to be affected by its decision and must act compatibly with Convention rights, there is no specific requirement in the CSA 1991 to consider whether the parent needs to drive or travel on a passport to spend time with the child. However, Article 8 ECHR may be engaged in such cases, so magistrates must consider the impact of any proposed disqualification on the child's living arrangements and time with the NRP, and so justify any interference with parties' right to respect family life under Article 8(2).[31]

The last resort remedy[32] committal to prison for up to six weeks may only be obtained from the magistrates' courts, again following a finding that the non-resident parent is guilty of wilful refusal to pay or culpable neglect to do so.[33] The courts are slow to exercise what is now an anomalous power to imprison debtors; the vast majority of sentences issued are suspended.[34]

[28] Not CMS, again, legislation moving the power to CMS lying unimplemented. For discussion of the controversy surrounding all these unimplemented provisions, see Joint Committee on Human Rights, Legislative Scrutiny: Welfare Reform Bill Fourteenth Report of Session 2008–09, HL Paper 78, HC 414 (2009).
[29] CSA 1991, ss 39A and 39B.
[30] CSA 1991, s 39B(4).
[31] *R (Plumb) v Secretary of State for Work and Pensions* [2002] EWHC 1125, [19]; for unsuccessful argument in this vein, see *Logan v UK* (App No 24875/94) (1996) 22 EHRR CD 178; *Burrows v UK* (App No 27558/95) 27 November 1996, unreported; cf *Battista v Italy* (App No 43978/09), 2 Dec 2014.
[32] *Karoonian v CMEC* [2012] EWCA Civ 1379, [29].
[33] CSA 1991, s 40.
[34] Powers to introduce curfew orders have not been implemented.

