

The content

Debt Advice Handbook 15th edition

Description

With living costs and unemployment rising, budgets squeezed and problem debt on the increase, no adviser should be without this essential guide to the practice and process of giving money advice in England and Wales.

Who's this book for?
It is essential for debt advisers, welfare rights advisers, lawyers, local authority and housing association staff, social workers and union official.

What does it do?
The handbook provides the most comprehensive information needed by advisers on the key stages of money advice, including interviewing clients, establishing liability, prioritising debts, preparing a financial statement, negotiating with creditors and dealing with bailiffs. Fully indexed and cross-referenced to law, regulations and official guidance, and to court and tribunal decisions Includes tactical guidance and examples

What's new?
Fully updated to cover all recent changes to legislation, caselaw and court procedure and practice Emphasis is placed on taking due care of vulnerable clients and making sure that any payment arrangements agreed are appropriate. There is a focus on sustainable credit arrangements that do not affect a client's abilities to pay essential living expenses and priority debts.

Properties

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3. The judgment

'Judgment' is the formal term for the court's final decision in a case. Before judgment, the creditor tries to establish that the client owes the money. After judgment, liability cannot be denied unless the client appeals (see here) or applies to set the judgment aside (see here). Sometimes, the Civil Procedure Rules use the phrase 'judgment or order'. This describes the court document that establishes that the client is liable for the debt. A 'judgment debt' is a sum of money ordered to be paid by the judgment or a court order in civil (ie, non-criminal) proceedings.

The court can order the client to pay the creditor:

- by monthly instalments; *or*
- in one lump sum – eg, within 14 or 28 days; *or*
- immediately ('forthwith'). This means the client is inevitably unable to comply with the order and is automatically in arrears with the judgment.

If a client cannot pay at the rate ordered by the court, they can take action to change the terms of the judgment (see here).

If the creditor does not apply for judgment within six months of the expiry of the client's time for responding to the claim, the action is 'stayed' and the creditor must apply to the court for permission to proceed with it. [1]

After judgment, if the amount required is not paid within a month, details are entered in the Register of Judgments, Orders and Fines. This is publicly available and is used by many credit reference agencies. Entries are cancelled six years after the date of judgment. The judgment can be marked as 'satisfied' if it has been paid off in full. Proof of payment must be supplied to the court.

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1 r15.11 CPR

The creditor's response

When the creditor receives Form N9A (see here), it decides whether to accept or reject the client's offer of payment. If the creditor accepts, it requests the court to enter judgment on Form

N205A/225 for the sum claimed to be paid as offered and the court sends the client a copy (N30(1): judgment for claimant (acceptance of offer)). The creditor is not required to send a copy of Form N9A to the court when accepting the offer, so the court has no information on the client's ability to pay the judgment.

If the client fails to comply with the terms of the judgment, the creditor can decide whether to use one or more means of enforcement to obtain payment (see here). Some creditors request orders for immediate payment ('forthwith') as a matter of course so they can take enforcement action immediately. However, in the case of charging orders, default in payment is no longer necessarily required (see here).

If the client does not 'request time to pay', the creditor may specify the terms of the judgment (including immediate payment) and the court enters judgment accordingly. If the creditor does not specify any terms of payment, the court enters judgment for immediate payment. [1] A 'request for time to pay' can be defined as a 'proposal about the date of payment or a proposal to pay by instalments at the times and rate specified in the request'. So, if the client wants to avoid a judgment for immediate payment, they must make an offer of payment on Form N9A – however small – to trigger the procedure's next step.

If the creditor rejects the offer, it must inform the court and supply reasons for the refusal and a copy of Form N9A. The court then enters judgment for the amount admitted and determines the rate of payment.

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1 r14.4(6) CPR

How courts calculate instalment orders

The amount is not more than £50,000

If the amount involved is not more than £50,000 (including costs), the rate of payment may be determined by a court officer.

Court officers carry out a determination without a hearing. HM Courts and Tribunals Service provides guidance on how to do this. [1] The following is a summary. The references are to the box numbers on Form N9A. The total income (Box 6) is the starting point. To this may be added

any savings (Box 4). From this total income, the following are deducted:

- expenses (Box 7);
- priority debts (Box 8);
- court debts (Box 9);
- credit debt repayments (Box 10).

Court officers are instructed to use common sense when assessing essential items of expenditure and to allow a reasonable amount for items not listed in Box 7, but which are essential to the client's household – eg, payments for a vehicle or childminder to enable the client to work, or the cost of travelling to and from work. Although court officers are not expected to assess whether any amounts are too high, 'frivolous' and 'non-essential' items are disregarded. These are specified as:

- children's pocket money;
- money for gambling, alcohol or cigarettes;
- money for newspapers or magazines (unless essential for the client's work);
- holiday money.

However, the guidance gives the court officer discretion to allow £15 a week for 'sundries' (presumably per household).

The guidance reminds court officers that creditors must state reasons for rejecting offers. Rejecting an offer because of the amount of the debt or the length of time it has been outstanding or because the offer is 'too low' is not sufficient unless the creditor can demonstrate inaccuracies in the information provided by the client.

The client should be allowed sufficient resources and time to pay priority debts, although court staff are instructed to make certain assumptions about what a reasonable period is for clearing such arrears. Although court officers are instructed to take a common-sense approach to credit debts, the guidance also states that 'there is no logical reason why these debts should take precedence over a county court judgment'.

The resulting figures are then transferred to a 'determination of means calculator' contained in the determination of means guidelines and the court officer works out the rate of payment based on the amount of 'disposable (available) income'. In some courts, the creditor is expected to complete the calculator electronically, but this does not mean the creditor decides which figures to allow or disallow, or what order is made. The guidance states that if the disposable income is:

- higher than the offer but lower than the figure the creditor is prepared to accept, the instalment order should be for the amount of disposable income;

- higher than the figure the creditor is prepared to accept, the instalment order should be for the amount the creditor is prepared to accept;
- lower than the offer, the instalment order should be for the amount the client has offered unless this is 'unrealistically high';
- nil or a negative figure, either the instalment order should be for the amount the client has offered (unless unrealistically high) or the matter should be referred to the district judge for advice or a decision.

When the court has decided on the rate of payment, it notifies both the creditor and client of the order made (on Form N30(2)). Either party can apply to the court to reconsider this decision (known as 'redetermination' – see here).

The guidance recognises that Form N9A is designed for individual, rather than business, debts and that, unless a business has provided information about its financial position, it is difficult for court officers to make a decision on the rate of payment. If the creditor has indicated the terms on which it will accept payment by instalments, the court officer can enter judgment accordingly. Otherwise, they are instructed to refer the matter to the district judge.

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1 Lord Chancellor's Department, *Determination of Means: guidelines for court staff*, revised April 2011

The amount is more than £50,000

If the amount involved is more than £50,000, the rate of payment must be determined by a district judge.

A district judge may carry out a determination with or without a hearing (although hearings are very rare). In some courts, claims for less than £50,000 are also referred to the district judge for a determination.

The district judge must take into account: [1]

- the client's statement of means;
- the creditor's objections;
- any other relevant factors. Increasingly, this includes the fact that the client is a homeowner, but the instalment offer is so low that it will not pay off the judgment within a reasonable period.

The district judge is not required to follow the guidelines issued to court staff. If the district judge

decides to hold a hearing, the case is automatically sent to the client's home court (see here).

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1 CPR PD 14, para 5.1

Redetermination by a district judge

Note: if the court makes a decision on the rate of payment without a hearing and the client cannot afford the payment rate, the following procedure (and not the procedure for varying payments on here) should be used. If judgment was entered, either in default or on acceptance of the client's offer of payment, the following does *not* apply and the client should instead use the procedure for varying the rate of payment on here.

If the court has decided the rate of payment without a hearing (a determination), either the creditor or the client can ask for the amount to be reconsidered (redetermined) by a district judge within 14 days of the order being served. No court fee is payable. [1] The client can request a redetermination regardless of whether the original determination was made by a court officer or the district judge (provided there was no hearing).

District judges are not bound by the determination of means guidelines and can make whatever order they think fit. If there is available income, Form N9A should be carefully completed so that a decision can be made from the form alone, and the decision is more likely to be upheld by a district judge if the creditor asks for a redetermination. This is particularly important where large amounts are owed or a creditor is particularly aggrieved for some other reason – eg, the creditor runs a local business which has provided goods or services to the client, but no payments have so far been made under their agreement.

Most forms of enforcement of a judgment require the client to have defaulted on the terms of payment. However, the trend is for district judges to reject low or nominal offers of payment and make an order for immediate payment to enable the creditor to enforce the judgment. Such offers may be seen as unrealistic, and the creditor may not be regarded as being unreasonable in refusing to accept an offer of payment which will take many years to pay off the judgment, if ever. If the client has property, assets or savings, these may be put at risk if no affordable instalment order is in place. On the other hand, if the client's financial difficulties are temporary, it is worth pointing this out to the court as, in these circumstances, the district judge may be more willing to make an instalment order at a low rate on the basis that it will be reviewed. However, in a decision

made in 2018, the Court of Appeal decided that, for the court to make an instalment order, there must be a realistic expectation that the creditor would receive payment within a reasonable time. [2] In a case where a client could not really afford to pay anything, the court considered 'it could not interfere with the judgment creditor's right to seek enforcement of the judgment by whatever means are available to them'. What was a reasonable period would depend on the facts of the case. On the one hand, there would be cases where the creditor had its own cashflow requirements to consider and, on the other hand, there would be cases where allowing a period for full payment would not cause any significant prejudice to the creditor.

A client whose position is unusual may benefit from the wider discretion of a district judge if, for instance, payment could be made from money which they expect to receive in time or if they are seriously ill and likely to gain sympathy. All such arguments should be made clearly, and the application should be made by letter giving reasons why the matter should be reconsidered. The court arranges for the case to be sent to the client's home court.

If a court officers made the original determination, the redetermination may take place without a hearing unless one is requested. If a district judge made the original determination, the redetermination must be made at a hearing unless the parties agree otherwise. There is usually no indication on the judgment as to who carried out the original determination. Although you can establish this by a phone call to the court office, it is usually better to ask for a hearing so that the client's case can be put to the district judge in person. The decision is one for the client, not the adviser.

The request should always refer to redetermination under rule 14.6(5) of the Civil Procedure Rules, specify whether or not a hearing is required and set out why the original determination should be reconsidered – eg, the client cannot afford to pay the judgment at the rate ordered by the court but can pay at the rate of £x a month in accordance with the attached financial statement. If the client asks for the matter to be dealt with without a hearing, the request could be accompanied by a witness statement from the client setting out their case.

If a district judge made the determination at a hearing, there is no right to request a redetermination. If circumstances change, either party can apply for a variation in the payment rate ordered (see here).

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1 Refer court staff who query this to 'What happens next?' in Lord Chancellor's Department, *Determination of Means: guidelines for court staff*, April 2011, item 3.4.5

2 *Loson v Stack* [2018] EWCA Civ 803

Default judgment

If the client fails to reply to the claim form (this includes a 'nil' or no offer of payment), the creditor can request that the court enters judgment in default on Form N205A/225. Provided judgment has not already been entered [1] and even if outside the time limits (see here), default judgment cannot be entered if the client has:

- filed a defence; *or*
- filed an acknowledgement of service; *or*
- filed or served an admission together with a request for time to pay.

If the client has filed an acknowledgement of service, the time for filing a defence is 28 days (instead of 14 days) from the date of deemed service of the claim form. It, therefore, seems to be the position that, if the acknowledgement was filed more than 28 days after the deemed date of service of the claim form, the client's time for filing of any defence would not be further extended and, in the absence of a defence having been filed, the creditor could enter judgment in default of defence.

The creditor must specify the date by when the whole of the debt is to be paid (which may be immediately) or the rate at which it is to be paid by instalments. If none is specified, the judgment is for immediate payment. [2]

If you think that default judgment has been entered, or is about to be, check with the court. If it has not been entered and the client files a defence, the creditor cannot request a default judgment. If the client needs further time to file their defence and is outside the time limit specified in the Civil Procedure Rules, the creditor will not be able to enter default judgment if:

- an extension of time has been granted by the court under rule 3.1(2)(a) of the Civil Procedure Rules; *or*
- the creditor has agreed to an extension of time under rule 15.5 of the Civil Procedure Rules.

However, if judgment has already been entered, the client should apply either to vary it (see here) or set it aside (if appropriate, see here).

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1 rr12.3 and 14.2 CPR. CPR 12.3 was amended from 6 April 2020 to provide that judgment could not be entered in default if an acknowledgement of service or defence had already been filed.

2 r12.5 CPR

Interest charges after judgment

In some cases, no interest is chargeable after a county court judgment is made. This is important, not only because it means that any payments the client can make reduces the amount outstanding, but also because, if the creditor knows that interest charges will have to stop once the matter is taken to court, they may be persuaded to stop charging interest once a client begins to experience difficulties in repaying.

The court can include simple interest in any judgment, at such a rate as it thinks fit, from the date the debt fell due to: 1

- the date of payment, in the case of a debt paid before judgment; *or*
- the date of judgment ('discretionary interest'), in the case of debt for which judgment is entered.

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1 s69 CCA 1984; s35a SCA 1981

Statutory interest

Some judgments automatically carry simple interest from the date of judgment to the date of payment at the rate specified from time to time (currently 8 per cent a year since 1 April 1993; 15 per cent before this date). This is known as 'statutory interest'. 1

Since 1 July 1991, county court judgments for £5,000 or more have carried statutory interest unless:

- under the terms of the judgment, payment is either deferred to a specified date or is to be made by instalments. Interest does not accrue until either the specified date or the date the instalment falls due; *or*
- the judgment arises out of a consumer credit agreement regulated by the Consumer Credit Act 1974; 2 *or*
- a suspended possession order is made; *or*
- an administration order or attachment of earnings order is in force. 3

Since 27 May 2019, county courts have more flexibility over awarding interest and may order that statutory interest shall begin to run from a date before the relevant judgment was given. [4]

Interest ceases to be due when enforcement proceedings (other than charging orders) are started in a county court, but if these do not recover any money, interest accrues as if the enforcement proceedings had never started.

It seems that if the client defaults under the terms of the original judgment and then obtains a variation or suspension of the judgment, interest does not accrue.

For the position where county court judgments are enforced in the High Court by writ of control, see here.

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1 s17 JA 1838

2 Many district judges seem unaware that statutory interest cannot be charged on county court judgments arising out of agreements regulated by the CCA 1974, even if the judgment is for £5,000 or more. They can find confirmation in art 2(3)(a) County Courts (Interest on Judgment Debts) Order 1991 No.1184.

3 CC(IJD)O 1991

4 Art 2A CC(IJD)O 1991

Discretionary interest

Discretionary interest must be claimed specifically by the creditor in the particulars of claim and included in the 'amount claimed' figure on the claim form (Form N1). It cannot be claimed in addition to any other interest being charged at the same time, nor can it be awarded to run after the date of judgment. Provided the creditor restricts its claim to the rate of interest payable on judgment debts (currently 8 per cent a year – see above), the claim for interest can be included in a default judgment or judgment on admission. Such a claim is not subject to the Limitation Act 1980 (see here), but the client can ask the court to reduce the amount of interest included in the judgment if there has been a long delay in starting the proceedings with no satisfactory explanation for that delay. [1]

If a client wants to challenge a claim for discretionary interest, they must file a defence (see here).

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1 *Adamson v Halifax plc* [2002] EWCA Civ 1134; *Socimer International Bank v Standard*

Bank [2006] EWHC 2896 (Comm)

Contractual interest

Some credit agreements contain provisions for lenders to charge interest on the amount borrowed and additional interest in the event of default by the client ('contractual interest'). The general rule is that the right to any further contractual interest ceases once the lender obtains judgment. However, an agreement may contain a clause stating that the creditor can continue to charge contractual interest after a judgment is made. The House of Lords has ruled that such a clause is 'fair'. [1] Following the judgment in *Forward Trust v Whymark*, [2] which allowed lenders to obtain judgment for the outstanding balance of a loan without giving credit for any early settlement rebate, many lenders issue proceedings for the full sum owed (including interest pre-calculated to the end of the agreement). Other lenders (when the interest rate is variable) limit the claim and the judgment to the principal amount outstanding plus accrued interest to the date of judgment, while reserving the right to issue separate proceedings for the ongoing interest.

Clients paying off the judgment can be confused and alarmed to receive statements showing the debt increasing and demands from the creditor for additional payments. The judgment is satisfied once the amount sued for (plus costs) has been paid. Creditors who claim to be able to 'add' contractual interest to the judgment should be challenged, as should creditors who claim that a charging order enables them to recover post-judgment contractual interest, regardless of the position under the judgment. [3] To confirm the sum due under the judgment has been paid, the client could consider applying to court for a certificate of satisfaction on form N443. If the creditor does not agree that the judgment has been paid in full, the matter goes to a district judge to decide. That could be of particular help to clients with charging orders if the creditor refuses to lift the charge because of contractual interest it claims is due.

Before 1 October 2008 (or subsequently, if the judgment does not relate to an agreement regulated by the Consumer Credit Act 1974), if creditors wished to include ongoing contractual interest in a judgment, they should have sought a judgment for the amount of interest to be decided by the court. [4] Although the House of Lords in *Director General of Fair Trading v First National Bank* declared that judgments should take account of accruing contractual interest so that courts could consider making time orders (see here), it declined to decide whether the rules then in force actually allowed such judgments to be made. [5]

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1 *Director General of Fair Trading v First National Bank* [2001] UKHL 52

2 *Forward Trust v Whymark* [1989] 3 All ER 915

3 In *Chubb and Bruce v Dean* [2013] EWHC 1282 (Ch), the High Court held that the enforcing court had no power to add post-judgment contractual interest to the amount recoverable. See also *Parr v Tiuta International Ltd* [2016] EWHC 2 (QB).

4 rr12.7, 12.8 and 14.4 CPR. In the *First National Bank* case, the House of Lords assumed the creditor could take further court action, but the point was not argued and so the issue remains unclear, at least so far as pre-1 October 2008 judgments are concerned.

5 *Director General of Fair Trading v First National Bank* [2001] UKHL 52

Section 130A notices

If a judgment is made on or after 1 October 2008 in relation to a regulated consumer credit agreement and the creditor wishes to pursue a claim for post-judgment contractual interest, it must serve a notice on the client stating its intention to charge interest after judgment and informing of their right to apply for a time order (known as the 'first required notice'). This notice cannot be given until after the judgment has been made.

Subsequently, the creditor must serve further notices, containing details of the interest charged, at six-monthly intervals as well as annual statements (see here and here). The creditor cannot charge post-judgment contractual interest for any period before the service of the first required notice or during any period when the creditor has failed to serve a subsequent notice.

For fixed-sum regulated consumer credit agreements, advisers should also check that the creditor has served the statements required under section 77A of the Consumer Credit Act 1974 and that any statements are compliant (see here).

Although these provisions only apply to judgments made on or after 1 October 2008, they apply to regulated agreements whenever made (provided the agreement contains a provision specifically allowing the creditor to charge interest after judgment). The creditor cannot charge contractual interest after judgment if the agreement does not include such a provision. Default notices served on or after 1 October 2008 (see here) must contain a statement of the creditor's right to claim post-judgment contractual interest.

Once the judgment is paid off, the creditor must issue fresh proceedings to recover any post-judgment contractual interest to which it claims to be entitled. To avoid this, the client could apply for a time order in Box 11 of Form N9A as follows: 'I ask the court (1) to make a time order in the terms of my offer and (2) to amend the loan agreement in consequence so that no further contractual interest accrues after the date of judgment.'

Alternatively, the client can wait until the first required notice is served and then apply for a

time order as above.

In a 2019 survey, the FCA found that no creditors had sent out section 130A notices, suggesting that this issue is unlikely to arise in practice. [1]

Get specialist advice if a creditor threatens to pursue additional interest by taking further proceedings.

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1 FCA, *Review of Retained Provisions of the Consumer Credit Act: Final report*, 2019, Annex 3, para 36, available at fca.org.uk/publications/corporate-documents/review-retained-provisions-consumer-credit-act-final-report