

# RadcliffesLeBrasseur



## Litigation Briefing 2

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### Debt Collection: do we sue or do we petition?

In these troubled financial times, companies and individuals ponder how best to achieve collection of money owed to them. The solicitor will remind the client of the “first past the post” principle. Delay is almost bound to prejudice the creditor who should get on with taking steps to put pressure on the debtor to pay. But what steps? If the debt is undisputed, the advice may be to serve a statutory demand on the company or individual, giving the debtor 3 weeks’ notice of the creditor’s intention to issue and serve a petition. However, in the case of an individual debtor, he may apply to set aside the statutory demand on the ground that the claim is disputed on “grounds which appear to the court to be substantial”. If the individual debtor does nothing, the creditor can issue his bankruptcy petition in the appropriate court, serve it, advertise it (not less than 7 days after service and not less than 7 days before the hearing) and, all being well, the debtor will be made bankrupt. However, all may not be well since, at the cost of the petitioning creditor, the trustee in bankruptcy will in due course make such payment as he can to all creditors who notify him of their claims against the bankrupt.

In contrast to the individual, the company debtor does not apply to set aside the statutory demand. Instead, the company debtor issues an application in the court for an injunction preventing the creditor from presenting a petition (to wind up the company) on the ground that the debt is genuinely disputed for good reasons. Opposing the application for an injunction involves further cost to the creditor.

If the application succeeds, the creditor is thrown back on the claim form route (suing the debtor) with all the cost and delay that that will involve, the matter possibly not coming to trial for up to a year (or even more) after the proceedings are started. But of course the matter does not end with the grant of the judgment following a trial. If the debtor does not pay the judgment voluntarily, the judgment creditor will have to pursue one of the various enforcement routes available to him. The difficulty with these can be that during the time that the creditor is pursuing his claim through the County Court, other creditors are circling the debtor and they may decide to follow the statutory demand/petition route. This can be disastrous for a judgment creditor.

The recent case of *Nationwide Building Society v. Wright and another* [1] highlights the risk. In this case, the building society obtained an interim charging order over Mr Wright’s share in his home prior to another creditor presenting a bankruptcy petition against Mr Wright. After the petition had been issued but before it was heard, the court made the charging order final in favour of the building society. At the time of the hearing to make the charging order final, neither Nationwide Building Society nor the court was aware of the pending bankruptcy petition.



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However, it was only when the matter came before the Court of Appeal that the original order was overturned, the Court of Appeal deciding that the building society should keep the benefit of the charging order, in particular, having in mind that the final charging order was made before the making of the order making Mr Wright bankrupt. Why did the Court of Appeal do this?

The court has a general power under Section 3(5) Charging Orders Act 1979 to discharge or vary a charging order. By Section 346(1) and (5)(b) Insolvency Act 1986, where a charging order is made against the goods or land of a debtor, prior to the making of a bankruptcy order, the creditor is not entitled to retain the benefit of the execution, unless the execution was completed before the commencement of the bankruptcy. Execution against land is completed either by seizure, the appointment of a receiver, or the making of a charging order under Section 1 Charging Orders Act 1979. The Court of Appeal decided that a judgment creditor who has obtained a final charging order is not to be deprived of the benefit of his security by reason of the bankruptcy alone: there have to be other relevant circumstances to justify the setting aside of the final order, see e.g. **C & W Ltd v. Armstrong-Moakes (deceased)** [2].

It is interesting that it was the same district judge that made both the charging order and the bankruptcy order against Mr Wright. He did not notice when he made the bankruptcy order that it was in relation to the same individual concerned with the charging order made by him less than three weeks previously.



It is important to note that when a bankruptcy order is made, it is deemed to have relation back to and commence at the time of the act of bankruptcy being committed. In the case of a winding up petition, the winding up commences on the presentation of the petition. Nevertheless, the key point is that the execution *must be completed* before the commencement winding up proceedings or the making of the bankruptcy order.

In summary, if the creditor is to follow the "suing route", probably in the County Court, speed is of the essence given the risk posed by other creditors petitioning to bankrupt the debtor, if an individual, or to wind up the debtor, if a company.

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## Footnotes

[1] [2009] EWCA Civ 811

[2] [2007] EWHC 2101

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