

QUEEN’S BENCH DIVISION

MASTER McCLOUD

B E T W E E N :

JUST DIGITAL MARKETPLACE LIMITED

Claimant

– and –

(1) HIGH COURT ENFORCEMENT OFFICERS ASSOCIATION

(2) CIVIL ENFORCEMENT ASSOCIATION

(3) MINISTRY OF JUSTICE

Interested Parties

Keywords: enforcement – controlled goods agreements – taking control of goods – entry to premises – High Court Enforcement Officers – High Court Enforcement Agents – statutory construction – technology – Writs of Control – debt – fees – policy – parliament – regulations – delegated legislation – video technology – ECHR Art. 8 – High Court Enforcement Officers

Accessible language summary (not part of judgment).

This summary has a Flesch score of above 50 and was written to ensure accessibility of the judgment to readers with average reading ability.

This decision is about enforcing judgments where people have been ordered by a court to pay money such as if they owe money for bills for utilities or if they owe money to a shop or other business. If they cannot pay the full amount then a person called a High Court Enforcement Agent can visit them and can remove their belongings. Sometimes people can pay and want to pay but they need time and cannot pay all the money at the start. If everyone agrees then the person who owes the money can be allowed to keep their belongings as long as they pay regular amounts to reduce what they owe. If that is agreed

then it is called a Controlled Goods Agreement. If the agreement is broken the belongings can be taken away and sold.

If an agent goes to someone's home or business then a fee is added which increases the money owed by the person. Some people say that making the debt bigger by adding the fees of the Agent makes it less likely the person can pay the debt.

In this case two groups said that an agent must go to the home or business of the person who owes the money and go inside so that a Controlled Goods Agreement can be made.

The other group said that a Controlled Goods Agreement can be legal if it is done by video. They said the agent does not have to go to the home or business and go inside as long as they identify the belongings of the person who owes the money and they obey all the other rules about Controlled Goods Agreements. Then they said they will not charge any fee.

The Judge decided that the act of Parliament means that it is legal to have a Controlled Goods Agreement without physically going inside the home or business. The Act of Parliament allows rules to control how that happens if it wants and Parliament makes the rules. The judge decided that the rules which were made about Controlled Goods Agreements do not deal with some parts of what can happen after a Controlled Goods Agreement is agreed by video. The judge said that it was up to Parliament and the Government to consider if it wants to change the rules to give a procedure for a controlled goods agreement to be fully enforced. It is also up to Parliament and the Government to decide whether there should be any fees if there is a video agreement.

Representation:

The Claimants were represented by Mr Shahram Sharghy instructed by Just Digital Marketplace Limited via Direct Access.

The First and Second Interested Parties were represented by Ms Alison Padfield QC instructed by Feltons Law.

The First Interested Party was represented by Mr Andrew Macnab instructed by the Government Legal Department.

Authorities referred to in Judgment and not referred to in submissions

Stephens v Cuckfield RDC [1960] 2 QB 373 (CA)

Britt v Buckinghamshire CC [1964] 1 QB 77 (CA)

Hanlon v Law Society [1981] AC 124

Authorities referred to in Judgment

Evans v South Ribble Borough Council [1992] 1 QB 757

McLeod v Butterwick [1998] 1 WLR 1603 (CA)

Flora v Wakom (Heathrow) Ltd [2006] EWCA Civ 1103, [2007] 1 WLR 482

Rolls-Royce Plc v Unite the Union [2009] EWCA Civ 387, [2010] 1WLR 318

365 Business Finance Ltd v Bellagio Hospitality WB Ltd [2020] EWCA Civ 588

Authorities not referred to in Judgment

Claire Louise Sandbrook [2020] EWHC 347 (QB) (Regulation 12 proceedings)

Legislation referred to in Judgment

Tribunals, Courts and Enforcement Act 2007

The Taking Control of Goods Regulations 2013

The Taking Control of Goods (Fees) Regulations 2014

The Certification of Enforcement Agents Regulations 2014

Legislation referred to in submission but not referred to in Judgment

The High Court Enforcement Officers Regulations 2004

Other materials referred to in Judgment

Bennion on Statutory Interpretation 7th ed.

Bennion, Norbury and Hanley on Statutory Interpretation, 8th ed.

Explanatory notes to the Tribunals, Courts and Enforcement Act 2007

Explanatory memorandum to the Taking Control of Goods (Fees) Regulations 2014

Independent Review of Bailiff Law by Professor Jack Beatson QC, July 2000

White Paper, Effective Enforcement, March 2003

Government Response to Transforming Bailiff Action, January 2013

The National Standards for Enforcement Agents, 2014

JUDGMENT

Master McCloud:

1. *"The Future of Law Enforcement"* is not an expression one is keen to use too readily for fear of the Hollywood connotations it conjures up, carrying notoriously 'disappointing' results in at least one fictional instance, and which serves as a caution about being careful about what one wishes for. However it is an expression which has also been used regularly in more conventional legal discussion, moving picture history notwithstanding. It can fairly be said at least that this judgment considers the potential for the use of modern technological 'virtual' means, in the near future, to carry out part of the court's enforcement process, and whether doing so would be valid and lawful.
2. We have not yet reached the point of enforcement by robot or drone, but the issues here relate to enforcement by way of video appointment for the purpose of entering into what is known as a 'controlled goods agreement' (a 'CGA') consensually between the parties. The proposals placed before me by way of a claim for declaratory relief may be seen as forming part of a picture which we have seen recently of a move towards such things as remote court hearings, partly as a result of recent necessity but also partly as what was already a trend in the law towards flexible mechanisms and technological solutions. These include remote hearings, and even perhaps before long, technologically assisted Online Dispute Resolution of the sort which I mentioned in *McGill v Stewart and another* [2020] EWHC 3387. In this judgment I will generally refer to the type of CGA under discussion as a 'non-entry' CGA to stress that what is envisioned is a CGA in normal form but without an HCEO agent having entered the premises – often a dwelling – of the debtor.
3. *'Trendiness'* or *'modernity'* are not bases for saying that some new innovation is also lawful, if the law does not permit it any more than 'tradition' or a long history justify a decision that some new interpretation of the law is necessarily wrong. It is important therefore to stress that this judgment deals with narrow questions of law on the basis of construction of the wording of the relevant legislation, and not in a wider sense with matters of desirability of the Claimant's proposals, in other words it is not for this court to create a novel enforcement process if such is not within the scope of the law. Prior to this claim, the Claimants sought the guidance of the Senior Master as to whether she considered that the proposed approach was permitted by the legislation and she gave an indication that having "had the opportunity to consider" the proposals from the Claimants, "in conjunction with the relevant

legislation, I cannot see anything in the legislation which prevents what you propose". My task of course is, with the benefit of detailed adversarial argument, to interpret the law and decide the matter judicially on a more formal basis and the Senior Master's observation was not a ruling.

Enforcement and its role in the law and society

4. Whilst many people respect judgments of the court, without an effective means to enforce them, in other words without there being the ability for the court to require the controlled use of force if need be, this court's orders would become mere requests in the eyes of those set on not obeying them. One would be faced with the late Robin Williams' observation that one would be like the police officer shouting "*Stop, or I'll say stop again.*" The result would be that businesses ripped off by suppliers, and victims of fraud and other wrongdoing would go without remedy and justice would in some instances not be done.
5. The capacity for robust and effective court enforcement, then, is an essential 'limb' of the justice system even if it is often the case that people respect and obey judgments without the need for coercion. When it comes to money judgments, the typical actions taken by High Court Enforcement Officers (I shorten this to HCEO throughout the judgment) relate to the property of the debtor, and to a process which can lead to the seizure of goods and their sale so as to raise money. Certain goods are exempt from seizure such as the debtor's tools of the trade, but many other assets, cash, household items, motor vehicles and so on can be seized and sold if necessary.
6. Much of the time, however, enforcement is more mundane and often very sad. People in the real world are frequently the recipients of judgment debts not because they are serious 'wrongdoers' or to 'compensate' victims, rather they are people who have fallen into debt (say, on utility or credit bills) due to pressure of living expenses, have lost jobs through no fault of their own, or suffered other personal disasters, and have ended up being sued and receiving a judgment against them.
7. These are things which could happen to anyone, judges included, and these are not people which any court or any HCEO acting properly would ever actively prefer to see subject to entry and seizure of property, and often they are people who also want to pay off a judgment debt but who may not have the money to pay it all 'up front'. Courts do not set out to act oppressively, and the potentially heavy hand of enforcement is a last resort given the reality of how many debts arise, and the real lives of many debtors.

8. Enforcement is the ultimate conclusion of the legal process in circumstances where all else has failed, and the High Court relies for much of its enforcement on professionals HCEOs and Enforcement Agents, who are officers of the court acting under direction of the court, but who are nonetheless independent of the Court Service and are instructed by the judgment creditor. They are tightly regulated, there is also Ministry of Justice Guidance advising them as to conduct, and an association called the High Court Enforcement Officers Association which is the relevant professional membership body for HCEOs ('the First Interested Party'). Officers who act unethically can be removed for misconduct. There is an equivalent body relating to bailiffs in the county courts, CIVEA (the Second Interested Party).
9. HCEOs have regular, effectively daily, business with the court and its judges, especially but not solely in the Queen's Bench Division in the form of the Masters of the Senior Courts QBD, as part of the day to day operation of Central Office at the Royal Courts of Justice, but they are not a part of the State, the Court Service, or the Ministry of Justice. HCEOs, once directed by the court to enforce a judgment, then instruct agents to carry out enforcement steps which in extreme cases with court authorisation can include the use of force sometimes accompanied by police. It is the duty of a police constable to assist an HCEO or agent upon request, to execute the writ.

Parties and broad positions

10. Before the court three parties were represented: the Claimant by way of Mr Sharghy of counsel, the High Court Enforcement Officers' Association and the Civil Enforcement Association by way of Ms Padfield QC of counsel, and the Ministry of justice by Mr McNab, also of counsel. I had the benefit of oral and written argument.
11. The Claimants seek declarations declaring (broadly speaking: details appear below) that the proposals they make do not contravene the relevant legislation and are effective, the HCEOA and CIVEA argue that the proposals do not validly give rise to a controlled goods agreement and if making a declaration I should rule broadly negatively in respect of the proposals, and the MoJ remained neutral whilst having filed evidence that they did not see anything in the proposals which necessitated steps by them to oppose the proposals.

The development of the legislation

12. I have adapted this section from the helpful summary of the legislative history provided in Ms Padfield QC's skeleton which is (almost) quoted in what follows and is not controversial.

13. The relevant legislation the Tribunals, Courts and Enforcement Act 2007 and three sets of Regulations made under Part 3 of it: the Taking Control of Goods Regulations 2013 (SI 2013 No 1894), the Certification of Enforcement Agents Regulations 2014 (SI 2014 of 421), and the Taking Control of Goods (Fees) Regulations 2014 (SI 2014 No 1).
14. The TCEA 2007 implemented the main recommendations of a Report to the Lord Chancellor, *Independent Review of Bailiff Law*, by Professor Jack Beatson QC published in July 2000 ('Beatson Report'), and a White Paper, *Effective Enforcement*, published in March 2003 (see the Explanatory Notes to the TCEA 2007). It was not brought into force when it was first made.
15. The Ministry of Justice published a further consultation paper in February 2012 (*Transforming Bailiff Action: How we will provide more protection against aggressive bailiffs and encourage more flexibility in bailiff collections*). This sought views on the implementation of Part 3 and Schedule 12 of the TCEA 2007. The Government Response to the consultation was published on 25 January 2013. This included the need to amend TCEA 2007 in respect of the use of force to enter premises. Following amendment by s 25 of the Crime and Courts Act 2013, Part 3 and Schedule 12 of the TCEA 2007 were brought into force with the three sets of Regulations on 6 April 2014 as part of a package of reforms to civil enforcement.
16. In this judgment where I refer to the Regulations I refer to The Taking Control of Goods Regulations 2013, and when I refer to the Act or the 'TCEA' I refer to The Tribunals, Courts and Enforcement Act 2007. The '2014 Fees regulations' are the Taking Control of Goods (Fees) Regulations 2014, the Certification regulations are the Certification of Enforcement Agents Regulations 2014.

The issues before the court

17. This is a claim for declaratory relief brought by Just Digital Marketplace Limited using the Part 8 Procedure. The company provides enforcement services overseen by High Court Enforcement Officers. There are other such companies (though not very many, the profession is not very large).
18. By its claim it seeks in the Claim form declarations relating to its proposed course of action by its HCEO and agents in future by way of enforcement using consensual 'virtual' visits to premises done by video online, instead of 'physical' attendance by agents at the debtor's property in some cases. The questions raised in the claim form (as to form of declaration see discussion below) are:
 - (1) That subject to the consent of the judgment creditor and the judgment debtor, a High Court Enforcement Officer is not prevented from

conducting/can carry out a 'virtual visit' (as opposed to a physical visit) at the debtor's property pursuant to a Writ of Control.

- (2) A High Court Enforcement Officer is able to enter into a Controlled Goods Agreement ('CGA') with the judgment debtor during the 'virtual' visit.
- (3) Having entered into a CGA with the judgment debtor, the High Court Enforcement Officer takes control of the goods pursuant to the relevant legislation.

19. The above amount to three parts of increasing specificity. The first is simply the question whether on their true construction the relevant legislation there is anything in those regulations which makes it unlawful for an HCEO causing there to be a 'virtual' visit to a judgment debtor.
20. The second part amounts to asking whether on their true construction the provisions of the above legislation would operate so as to permit a Controlled Goods Agreement to be entered into within the meaning of that legislation.
21. The third part amounts to asking whether on their true construction if such an agreement were entered into via a virtual visit, the agreement would be a valid means to 'take control of goods' for the purposes both of the legislation and, by necessary implication, so as to comply with the direction on the Writ which requires the HCEO to do so.
22. At my request the parties after the adjournment sought to agree among themselves precise wording of forms of declaration which they might agree should be made or considered, and proposals were made, in the light of observations to by me that it appeared that the 'real' issue was whether a physical entry or at least attendance at the premises was required for a valid CGA to be entered into. The Claimants proposed the following wording:
 1. *Subject to the Judgment Creditor and the Judgment Debtor consenting, the Legislation does not prohibit an enforcement agent from entering into a Controlled Goods Agreement with the Judgment Debtor, within the meaning of paragraph 13 of Schedule 12 to the 2007 Act, in circumstances where the enforcement agent is not physically present at the Judgment Debtor's premises.*
23. The HCEO and CIVEA, as interested parties, proposed the following alternatives depending on my decision and also stated that they accepted that it would be appropriate for the court to exercise its discretion to make a declaration in those terms but that it would not be appropriate for the court to exercise its discretion to make any wider declaration, including in the terms of the draft proposed by the

claimants, because the wording of that draft went beyond the question of statutory interpretation by introducing a requirement not only of debtor consent (which Ms Padfield QC said is in any event inherent in entering into a controlled goods agreement by any method) but also of creditor consent.

EITHER

1. *An enforcement agent may enter into a controlled goods agreement within the meaning of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 with a debtor whether or not the enforcement agent has physically entered the premises on which the goods are located.*

OR

1. *An enforcement agent may enter into a controlled goods agreement within the meaning of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 with a debtor only if the enforcement agent has physically entered the premises on which the goods are located.*
24. As a matter of principle since entry into a CGA is necessarily a matter of agreement, I think it is right that Ms Padfield QC took the point that a declaration which is 'subject to consent' is not necessary and that a declaration one way or the other in a form close to either side's draft omitting the consent provisions would likely suffice.

Evidence

25. I have the benefit of three witness statements from Mr Christopher Badger, an HCEO, for the Claimant, Mr Paul Caddy of CDER Group for the High Court Enforcement Officers Association and CIVEA, an Authorised HCEO and certificated enforcement agent, Ms Tessa Wearing, MoJ Policy Manager of Civil Enforcement Policy, Mr Stephen Coppard (in the form of a signed written submission) an interested party as Head of the Government Debt Management Function's Centre of Expertise in the Cabinet Office, Mr Peter Tutton, an interested party on behalf of the StepChange Debt Charity and a coalition of related charities supporting debtors, Ms Emma Gervasio of Wyatt Consulting Limited who was formerly the Strategy Lead for the Virtual Hearings programme at HMCTS, and Ms Jane Farrell of the EW Group which deals with advising organisations about equality and inclusive design of business operations (this latter contribution among other material arose out of my request at a case management hearing that I be addressed on any equalities implications of the proposals).

26. In this judgment I focus on the statutory construction of the relevant law but I have considered the evidence provided, and omission to quote passages does not imply disagreement. Much of the evidence provided material relating to matters which relate to policy or desirability factors, for example the experience of the National Audit Office that 'doorstep' visits make problem debts 15% harder to manage (presumably because a doorstep visit leads to significant fees being added to the debt), and increase risks of depression and anxiety by 22% and that applying additional fees made problem debt harder to manage. I will however on the evidence simply confirm, since it is a legally relevant consideration, that nothing in it presented me with material which raised particular concerns as to discrimination arising from the use of video appointments which do not arise in a similar or equivalent form in relation to physical visits provided always that HCEOs as officers of the court and professionals adhere to the law in respect of suitable adaptations where video or audio equipment is not able to be used by a debtor without such adaptations such as large text or subtitles.

Background and law

Writs of Control

27. Once a judgment has been given and a court order sealed, if the matter is being enforced in the High Court, the judgment creditor may obtain a Writ of Control from the court. Sometimes creditors obtain county court judgments and there is then a process by which if the creditor so wishes, the matter can be enforced in the High Court. Either way, the net result is the sealing of a Writ of Control. The predecessor for such Writs was the 'Writ of Fieri Facias' (colloquially Writ of fi. fa.) until the 2000s when more modern language was adopted and the new statutory framework in the 2007 Act was put into place to replace the old arrangements.

28. The opening lines of the Writ of Control leave little room for doubt as to its authority. It is approved by a judge of High Court jurisdiction such as myself, and by it Her Majesty commands the HCEO as follows:

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and territories Queen, Head of the Commonwealth, Defender of the Faith.

TO: "[NAME OF HIGH COURT ENFORCEMENT OFFICER], an enforcement officer authorised to enforce writs of control issued from the High Court"

IN THIS CLAIM a Judgment or Order was made as set out in the Schedule.

YOU ARE NOW COMMANDED to take control of the goods of the [defendant] authorised by law and raise therefrom the sums detailed in the Schedule And immediately after execution pay the [creditor] the said sums and interest.

YOU ARE ALSO COMMANDED to indorse on this writ immediately after taking control of goods a statement of the manner in which you have done so and send a copy of the statement to the [claimant/defendant].

29. The position therefore is that whereas by the judgment, the court has ordered the debtor to pay a sum of money, by the Writ her Majesty through her judges commands the enforcement officer to take control of the goods of the debtor so as to enforce the court order. In fact, legally the HCEO (unless he or she is also a certificated enforcement agent) must make use of a certificated enforcement agent to actually carry out the enforcement steps (s.63 TCEA 2007). Those agents are specialists in the process of enforcement steps 'on the ground', acting on instruction from the HCEO.

Avoiding the removal and sale of goods to satisfy a judgment

30. Rather than the debtor be bankrupted – which often is of little help to the person who has the benefit of the judgment in their favour – it is possible under our legal system for physical enforcement to be avoided in at least two ways. The first is simply for the debtor to pay the debt in full before the first enforcement stage is entered into, in other words once they have been initially contacted by the HCEOs at what is known as the 'Compliance Stage'. The second is to enter into an agreement to pay the debt by instalments, by way of a payment arrangement as long as the creditor agrees.
31. The sealing of the Writ of control triggers a statutory process set out in the Act and regulations already referred to. For the purposes of fees charged by the HCEOs, the process is described in 'stages' but it is important to note that the stages so-called are purely related to fees. However they do provide a useful terminology for description. The proposed virtual enforcement visits about which declarations are sought here would happen only at the second stage.

Compliance stage

32. This stage for fee purposes – and descriptively in this judgment – relates to all stages after the Writ has been sealed, up to the point when the first enforcement steps are taken in Enforcement stage 1. It is common ground that at this stage a **Notice of Enforcement** is served on the judgment debtor in a standard form provided by the Certification of Enforcement Agents Regulations 2014. It warns the debtor that if they do not pay the judgment debt or agree a payment arrangement by the specified

date, an enforcement agent 'will visit' the debtor and may seize belongings. It says "this is called 'taking control'. These belongings may then be sold to pay the money you own". It then warns that those actions will increase the costs payable by the debtor.

33. By Para. 7 of Sch. 12 to the Regulations the debtor's goods may not be taken into control pursuant to the writ unless the notice of enforcement has been given, and at least 7 days' notice has to be given (reg. 6). There is an upper limit in terms of delay whereby the Agent may not take control after 12 months from the date of the notice of enforcement or, where an arrangement is entered into between the enforcement agent and the debtor for payment of the sum outstanding by instalments, after 12 months. It is commonplace however and for the court at the request of the HCEO to make an order extending the 12 month period by up to 12 months in circumstances where the debtor has agreed a payment arrangement and that arrangement is being complied with. It is clear from the wording that notwithstanding the command on the Writ to take control of the goods, the Statutory Instrument foresees the position that a debtor agrees to pay by instalments and assuming the creditor agrees, that taking control can be delayed. It is I think obvious that this is the least coercive outcome from the debtor's point of view but it leaves the creditor without the benefit of a controlled goods agreement and therefore less secured. (In the event of breach, the goods may be taken into control).

Enforcement Stage 1

34. If the debtor does not pay the debt in full, or does not enter into an unsecured¹ agreement to pay in instalments (and/or the creditor will not agree to that), then the first enforcement stage begins. It is important that I summarise the relevant paragraphs of TCEA Sch. 12 and the Regulations relating to this stage since the question whether 'virtual' visits are permissible and give rise to a valid Controlled Goods Agreement turns on their construction. By para. 9 TCEA Sch. 12:

9. An enforcement agent may take control of goods only if they are—

(a) on premises that he has power to enter under this Schedule, or

(b) on a highway.

¹ My term. In fact a Writ provides some security on its own since the goods are bound immediately as soon as the Writ is received by the person commanded to execute (TCEA Sch. 12 para. 4), and can be enforced later even if transferred to another party, as long as not transferred in good faith for value without notice (TCEA Sch. 12 para. 5). By 'unsecured' here I mean merely 'in the absence of a controlled goods agreement'. There is a dispute as to whether in view of the command in the Writ, in a high court case, it is permissible to enter into an instalment agreement in the absence of the goods having first been taken into control. I do not have to decide that.

35. Para 13(1) lists the sole ways in which an enforcement agent may take control of goods:

13(1) To take control of goods an enforcement agent must do one of the following—

(a) secure the goods on the premises on which he finds them;

(b) if he finds them on a highway, secure them on a highway, where he finds them or within a reasonable distance;

(c) remove them and secure them elsewhere;

(d) enter into a controlled goods agreement with the debtor.

(Note in particular that (d), entry into a controlled goods agreement, is separate from ways which refer to ‘securing’ goods on the premises or elsewhere. That is to say, goods may be taken into control by way of a CGA irrespective of the securing of the goods on the premises.)

36. Subpara (4) defines a ‘controlled goods agreement’:

(4) A controlled goods agreement is an agreement under which the debtor—

(a) is permitted to retain custody of the goods,

(b) acknowledges that the enforcement agent is taking control of them, and

(c) agrees not to remove or dispose of them, nor to permit anyone else to, before the debt is paid.

37. Para 14 (entitled ‘Entry without warrant’) authorises the enforcement agent to enter premises to take control of goods (but note the use of the word ‘**may**’):

14(1) An enforcement agent may enter relevant premises to search for and take control of goods.

(2) Where there are different relevant premises this paragraph authorises entry to each of them.

(3) This paragraph authorises repeated entry to the same premises, subject to any restriction in regulations.

38. Para 16 is entitled ‘Re-Entry’:

16(1) This paragraph applies where goods on any premises have been taken control of and have not been removed by the enforcement agent.

(2) The enforcement agent may enter the premises to inspect the goods or to remove them for storage or sale.

(3) This paragraph authorises repeated entry to the same premises.

39. Para 17 under “General powers to use reasonable force” permits the enforcement agent to use reasonable force where (inter alia) para. 19A applies which relates to breach of the Controlled Goods Agreement, ie where:

19A (1) This paragraph applies if these conditions are met—

(a) the enforcement agent has power to enter the premises under paragraph 16;

(b) the enforcement agent has taken control of the goods by entering into a controlled goods agreement with the debtor;

(c) the debtor has failed to comply with any provision of the controlled goods agreement relating to the payment by the debtor of the debt;

(d) the debtor has been given notice of the intention of the enforcement agent to enter the premises to inspect the goods or to remove them for storage or sale;

[...]

40. Paras 23-30 provide ‘Other provisions about powers of entry’ which apply where:

“an enforcement agent has power to enter premises under paragraph 14 or 16 or under a warrant under paragraph 15.”

41. Thereafter paras. 24-29 deal with matters such as allowing the enforcement agent to take other persons onto the premises, what notices must be left where the power of entry has been exercised, and provision for regulations about detail such as permitted times of day for entry.

And I note that para. 30 states that:

“30 The enforcement agent must leave the premises as effectively secured as he finds them.”

42. Turning to the 2013 Regulations which flesh out the operation of Sch. 12 above, I have already referred to the time limit provisions of reg. 9. The regulations otherwise make provision for exceptions to enforcement, permitted hours, prevention of taking control where the debtor is a child, or where the sole person on the premises is a child or vulnerable person, protection of public health in respect of some goods on highways, who may enter into a controlled goods agreement (for example children and those who appears to the enforcement agent not to (or ought to appear to him not to) understand the effect of a CGA).

43. Reg 15 provides for the form of the CGA (in writing and signed) and the information which must appear in the CGA document, including a list of the goods taken under control. Notably unless the signatory is the debtor, (eg in the case of a third party

authorised to sign on behalf of the debtor) the enforcement agent must in addition to providing a copy to the signatory, leave a copy *'in a conspicuous place on the relevant premises, where the enforcement agent has taken control of the goods on such premises'*.

44. Reg. 16 deals with 'ways of securing goods', which as noted above is a separate means of taking control from entry into a CGA (see para. 13(1)(d) of Sch. 12 TCEA). Examples include securing the whole premises, putting goods in a cupboard, remaining on guard in unoccupied premises, etc.
45. Regs. 20-28 cover the mode of entry to premises where the powers of entry are used under the Act (see references to para. 14 and 16 above), ie by way of 'usual means of entry' such as a door, and make provision for the detail of hours of permitted entry, a minimum notice period of notice where it is intended to re-enter premises, form of notices etc. Thereafter the Regulations cover inventory, care, valuation and sale of controlled goods.

Fees Regulations

46. The above summary concerns the operative parts of the Act and Regulations governing the CGA and taking control of goods. HCEOs can charge fees which are also enforced against the debtor, and their fee structure and the actions by them which trigger different levels of fee are set out in the fees regulations. The 'compliance stage' triggers a fee of £75 when the Notice of Enforcement is served. The 'First Enforcement stage' triggers a fee of £190 PLUS 7.5% of the value of the judgment being enforced if it is over £1000. It includes (if appropriate) entry into a CGA. If a CGA is not entered into and/or it is breached and later enforcement steps are needed then the fees rise.
47. It is obvious therefore that entering the First Enforcement Stage can trigger a hefty charge to the debtor, because not only does it comprise a fixed element of £190 but also a right for the enforcement agent to charge a percentage of 7.5% of the judgment, all of which comes from the debtor and increases their indebtedness substantially. Not surprisingly this has been criticised in public discussion as potentially providing a large incentive for officers to press ahead with enforcement so as to gain a fee.
48. Whilst the fees regulations can in principle assist in construing the main governing rules and statute, it does not follow that the 'tail can wag the dog': in other words unless it is clear from the wording, it does not follow that, because the fees regulations only provide a fee to be payable in the event of some forms of physical attendance by enforcement agents, that the law has the effect that such a physical

attendance is mandatory per se, and the terms ‘compliance stage’ and ‘first enforcement stage’ do not appear in the parts of the TCEA and regulations quoted above: they are terms which relate to the fee structure.

49. Regulation 4(4)-4(5) of the 2014 Fees Regulations state:

(4) For the purposes of this regulation, the relevant stage of enforcement is determined according to regulation 5 or 6 as appropriate.

(5) Where the enforcement agent is acting under an enforcement power conferred by a High Court writ—

(a) where the enforcement agent and the debtor enter into a controlled goods agreement which the debtor does not breach, only the first enforcement stage fee may be recovered from the debtor; and

(b) where—

(i) the enforcement agent and the debtor enter into a controlled goods agreement which the debtor breaches; or

(ii) the enforcement agent and the debtor do not enter into a controlled goods agreement,

both the first enforcement stage and second enforcement stage fees may be recovered from the debtor, and the first enforcement stage fee is recoverable where sub-paragraph (ii) applies notwithstanding that the first enforcement stage did not apply.

50. Regulation 6 states insofar as relevant:

6.—(1) The relevant stages of enforcement under an enforcement power conferred by a High Court writ are as follows—

*(a) the **compliance stage**, which comprises all activities relating to enforcement from the receipt by the enforcement agent of instructions to use that procedure in relation to a sum to be recovered up to but not including the commencement of the first enforcement stage, or, where sub-paragraph (c)(i) applies, the commencement of the second enforcement stage;*

*(b) where the enforcement agent and the debtor enter into a controlled goods agreement, the **first enforcement stage**, which comprises all activities relating to enforcement from the first attendance at the premises in relation to the instructions until the agreement is completed or breached;*

*(c) the **second enforcement stage**, which comprises—*

(i) where the enforcement agent and the debtor do not enter into a controlled goods agreement, all activities relating to enforcement from the first attendance at the premises in relation to the instructions up to but not including the commencement of the sale or disposal stage;

(ii) where the enforcement agent and the debtor enter into a controlled goods agreement but the debtor breaches that agreement, all activities relating to enforcement from the time at which the debtor breaches the agreement up to but not including the commencement of the sale or disposal stage;

Parties' arguments

51. I shall set out the construction and other relevant arguments briefly here but the purpose of a judgment is to give reasons for a decision so my summary will be a short one before I turn to my reasons and decision.

Claimant

52. The central points made by the Claimants were really that the provisions of the Act and Regulations make no express statement that a physical 'in person' visit by an enforcement agent is required for entry into a CGA. Sch. 12 para 13 provides the four ways of taking control and the provision for entry into a CGA makes no reference to physical attendance. It refers to an 'Agreement' (the CGA) and agreements can be entered into digitally as a general proposition. The Regulations in relation to taking control likewise make no reference which requires (expressly or by implication) physical attendance so as to enter into a CGA.
53. The Claimants stressed that the CGA was defined by para 13(4) (above) simply as an agreement with the debtor meeting the four criteria listed there, none of which relate to the enforcement agent entering the premises, and use of remote means created no problem with satisfying the requirements of a CGA's terms. Likewise para 34 of the schedule requiring an inventory to be provided to the debtor of the goods taken under control could be satisfied digitally.
54. The Fees regulations of 2014, it was said, were relevant in that firstly reg 4 provides that charging a fee is optional (*'(a) where the enforcement agent and the debtor enter into a controlled goods agreement which the debtor does not breach, only the first enforcement stage fee may be recovered from the debtor'*) and second that the effect was to treat the entry into a CGA as part of the first enforcement stage. The Claimants are proposing **not** to charge the First Stage Enforcement Fee if a CGA is entered into remotely, without attendance at the property, which would often make a significant difference to the burden on the debtor.

55. The information provided to a debtor at the time of proposing and entering into a CGA would be the same whether virtually or in person, Mr Sharghy argued, which includes written information provided as standard and any verbal explanations needed at the time. Such would be feasible whether the process was by way of physical or virtual means (indeed it was said a virtual visit could be less stressful than 'having an HCEO standing over them'). (I accept in general that where a document has to be provided or signed, this can be done electronically in today's world, and I can see nothing in the legislation preventing that save where for example there is an express requirement to leave copies prominently at a property, which I discuss later, in relation to CGAs entered into via third parties and not the debtor).
56. The national standards promulgated by the MoJ it was stressed were not legally binding (this is stated on their face) but nonetheless the standards have been implemented by the HCEOA as best practice and no part of the standards prohibited an officer and agents from entering into a CGA remotely. Addressing part of the HCEOA's evidence in the form of the statement of Mr Caddy, where Mr Caddy indicates that one can enter into an instalment agreement with a debtor without entering the First Enforcement stage, Mr Sharghy pointed out that in fact the HCEOA's Best Practice guidance states that during the compliance stage 'an instalment agreement would not be entered into' and gives as a reason that the HCEO has a duty to attend the premises to assess the reasonableness of any offer to pay in instalments. In its recent Covid guidance it was also stated that a CGA should be entered into at Enforcement Stage 1, or other arrangements to pay, if full payment is not made at compliance stage. No mention is made in the guidance of payment arrangements other than full payment being entered into at the compliance stage. Furthermore the recent Covid guidance, officers were advised by CIVEA to have contactless visits without entry to premises.
57. It was the Claimants' position that the command in the Writ requires the Officer to take control of the goods (which may be by way of CGA) unless payment in full is made at the Compliance stage, and hence the Claimants did not agree with the HCEOA or MoJ's position that payment arrangements falling short of full payment are permissible absent obedience to the command in the Writ, ie that the goods must be taken under control even if 'only' in the form of the CGA rather than physically secured.
58. There was it was said no basis for saying that an audio-visual 'visit' to a debtor would make it impossible to ascertain whether a person fell into any of the categories excluded from enforcement or entry into a CGA, such as where they do not understand, where the debtor is a child or vulnerable person. Indeed many checks done for vulnerability are I was told done prior to contact such as previous judgments, DVLA checks and so forth, and it was the duty of HCEOs to assess vulnerability at all stages not just during first enforcement stage. Communication

with the debtor then assists in assessment of vulnerability. To suggest that a physical visit was essential would be to suggest that the duty of officers to assess vulnerability at all stages could not (or has not) been complied with under present practice in the stages prior to a physical attendance, such as at compliance stage. I was told that recent guidance to CIVEA members was to carry out pre-visit assessments by phone to detect potential vulnerabilities.

Arguments by HCEOA and CIVEA

59. Ms Padfield stated uncontroversially that by s. 62 of the TCEA, the power conferred by a Writ of control is exercisable only by using the procedure in Schedule 12 to the Act and that taking control of goods could only be done by an enforcement agent (s.63). It follows that a process which purports to take control by way of a CGA which does not comply with Schedule 12 is not a valid exercise of the power.
60. The HCEOA and CIVEA argued that the legislation does not permit entry into a CGA without entry to the premises in question, physically. The matter was one of statutory construction and not general desirability. Desirability was a matter for parliament and for consultation and much of the Claimants' evidence was relevant only to desirability.
61. Although the main argument was that the legislation did not permit such virtual enforcement, the common law prior to the reforms of 2007, and the legislative history leading to the present legislation it was argued also pointed to such a mode of enforcement being impermissible.
62. Counsel accepted that in the case of goods on the debtor's premises, entering into a controlled goods agreement under paragraph 13(1)(d) of TCEA Sch. 12 does not 'in and of itself require that the enforcement agent has entered the premises on which the goods are located'. However she argued that prior entry to the premises is required, and that requirement is by way of implication from the definition of CGA in paragraph 13(4). This was said to be because, in order to 'permit' the debtor to retain custody of the goods, the enforcement agent must be able to prevent the debtor retaining custody, and the only methods of doing that in the case of goods on the debtor's premises would be to secure the goods on the premises or to remove the goods and secure them elsewhere under paragraphs 13(1)(a) and (c)), both of which required entry to the premises.
63. Ms Padfield referred in particular to Para. 16 of Sch. 12 which I have set out above, and noted first that the heading above the paragraph was 're-entry', and that the heading indicated that for the circumstances described in paragraph 16 to arise, the enforcement agent must previously have entered the premises on which the goods are located.

64. Bennion on Statutory Interpretation indicated that headings within legislation can be referred to as an aid to interpretation (here a heading of relevance was the expression “re-entry”) above para. 16, which is the power to enter premises to inspect or remove property subsequent to taking control, and the point made was that the heading was suggestive of an interpretation which by implication meant that the taking control in the first place (one of the modes of which is a CGA) must involve an ‘entry’. Headings are not debated and are not amendable. However it was accepted that the meaning of a heading would be unlikely to override the plain meaning of an enactment if it had a plain meaning.
65. Referring first to para. 17, of Sch. 12 (that in certain circumstances an agent can use force to enter the premises), she relied on para. 19A which ensures that one such circumstance where force is permitted is that if a CGA is breached and the agent “*has power to enter the premises under paragraph 16*”, in other words the paragraph below the heading ‘re-entry’. Taking me to para. 28 of Schedule 12, this applies where an enforcement agent has power to enter premises under paragraph 16 and provides among other things that if the agent enters the premises then a notice must be given in the manner form specified. Reg. 30 of the Regulations sets out the required contents of the ‘*Notice after entry and taking control of goods*’, which must be in writing, be signed by the enforcement agent and contain certain information given after entry. Notices were there as protections for debtors which was a further indication that parliament intended that entry was required. The forms of notice in regulations refer to entry and must be served ‘after entry’ and not ‘after taking control’ or ‘after entering into a CGA’.
66. It was said that the above and the details which had to be specified when entry had taken place, and which referred to ‘entry’ were clear indications that ‘entry’ is a mandatory part of the Sch 12 procedure, and that before entering into a controlled goods agreement, the enforcement agent must first enter the premises on which the goods are located. It was said there could be no sensible argument that entering premises means anything other than physical entry by the enforcement agent and the fact that ‘entry’ must be physical entry was reinforced by regulation 20 of the TCG Regulations which provided ways in which the agent could enter such as by a door.
67. Where re-entry was going to take place then the Regulations in various other places also referred to matters of process and notice where re-entry was going to take place (eg reg 25, reg 26). For example Reg. 2 provides that ‘*notice of the enforcement agent’s intention to re-enter premises*’ means “*the notice of the enforcement agent’s intention to re-enter premises required by paragraph 19A(1)(d) of Schedule 12*”.

68. It was argued that these references to the enforcement agent's intention to 're-enter' the premises, and the use of reasonable force to 're-enter' the premises, demonstrated that there must first have been an earlier first entry in order for the controlled goods agreement to be entered into, because only then can there be a 're-entry' on breach of that agreement, and re-entry was the expression used in the regulations.
69. Reference was also made to forms in the Schedule to the Certification Regulations: the '*Notice of enforcement*' states: '*If you do not pay or agree a payment arrangement by the date above, an enforcement agent will visit you and may seize your belongings – this is called "taking control"*'; and the '*Notice of intention to re-enter premises*' states: '*You have been given this notice of intention to re-enter because you have not kept to the repayment terms of the controlled goods agreement and the enforcement agent now intends to re-enter your premises to inspect your goods or remove them for storage or sale*'. Reliance was placed on the use of the expression 're-enter' again, and the reference to a 'visit' taking place.
70. Para 9 of Sch 12 required the goods in question to be on premises which the agent had power to enter, and it was argued that without a physical entry the agent could not be sure that the goods in question were, actually, on those premises rather than some other premises (this in a sense goes to the reliability of a video process in evidential terms versus the agent being physically present to see them on the correct premises rather than some other premises which might be shown on the video).
71. The explanatory note to the Act, produced to assist the reader in understanding it, indicated that the Act implemented the main recommendations of the Beatson Report and White paper and that Part 3 'unified' the law. It was not suggested that the Act was a codifying statute but the expression "unify" suggested that a significant departure from the prior law was not intended. It was an Act intended to modernise and reform procedure and terminology. The Court of Appeal in *Flora v Wakom* (per Brooke LJ at p468) had reiterated that explanatory notes to an Act can be used as an aid to construction. They accompany a Bill and are updated during passage of the Bill. They cannot be amended by Parliament and are intended to be neutral, to explain and not to justify. The text of an Act does not have to be ambiguous before the notes can be considered in order to understand the contextual scene and mischief to which the act is directed, as an aid to construction. However it is impermissible to treat the aims expressed in the notes as being the will of parliament. The will of parliament was to be ascertained from the wording of the Act. The above related to Statutes, and it was accepted by Ms Padfield that explanatory notes to regulations might be treated differently.

Prior case law

72. Section 65 of the Act provides that s62-70 replace the previous common law rules then applicable but Ms Padfield argued (citing Bennion, 7th ed, 24.5) that the previous common law position remains relevant as an aid to construction. Thus she argued that I must consider prior case law which related to enforcement under the system in place prior to the coming into force of the 2007 Act.

73. She took the court to *Evans v South Ribble Borough Council* [1992] 1 QB 757 which concerned a local authority levying distress for failure to pay council tax. Simon Brown J (at 764D-765B) said that distress involved three stages one of which was entry into the premises, and seizure of the goods. Seizure could be actual or constructive, but what amounted to 'constructive' seizure was said to be unclear. Impounding was said to be also unclear as was the effect of what was then called a 'walking possession agreement' (the forerunner of the CGA), and whether it was a substitute for impounding. Simon Brown J concluded (at 768B) that

'In short, it appears to me plain on the authorities that whereas, once entry is made, little in the way of seizure and impounding is required to preclude the debtor, even without a walking possession agreement, from disposing of his goods, there must in the first instance be an entry - save only in the wholly exceptional situations arising in Cramer and Co. Ltd. v. Mott, L.R. 5 Q.B. 357 and Werth's case, 5 T.L.R. 320 where the goods sought to be distrained were on the point of removal and the distrainer directly confronted the removers.'

And (at 769B):

'... it is my clear conclusion that external inspection and posting through the letter box is a course of action insufficient to bring about any of the legal consequences of distress.'

74. In *Evans*, the enforcement agent (who was not enforcing a writ) saw goods through a window and posted a notice through the letter box purporting to distrain the goods. The debtor was not on the premises. Also posted was a proposed draft 'walking possession agreement' which had been signed by a neighbour instead of the debtor, without any consent from the debtor. The effect on appeal was that distraint of goods had not taken place, without entry.

75. Ms Padfield also referred me to *McLeod v Butterwick* [1998] 1 WLR 1603, CA, where Morritt LJ said (at paras 36 and 37):

'36. It is not disputed that the sheriff in execution of a writ of fi.fa. may not make a forcible entry into a dwelling house unless and until he has completed his seizure of the goods in consequence of the first entry. ...

37. Following the initial entry and seizure the rights of the sheriff are very similar to those of the bailiff. He may remain in possession of them without any physical

presence. This is normally, but not necessarily, evidenced by a walking possession agreement. Thus, unless he has abandoned the goods, which is a question of fact, he may re-enter in order to remove the goods for the purposes of sale...'

76. I was referred to *365 Business Finance Ltd v Bellagio Hospitality WB Ltd* [2020] EWCA Civ 588. Lord Leggatt said (at paragraph 96) (in addressing the question whether only tangible property could be taken into control under Sch 12):

'... the ways of taking control of goods available under Schedule 12 ...all involve securing the goods in a particular physical location. (While entering into a controlled goods agreement does not directly involve this, it presupposes that the goods covered by the agreement can be physically removed and secured if the agreement is not made or is not complied with.)'

77. It was argued that it was not the intention of Parliament to change the law in relation to entry to premises, and there were repeated references in section headings to entry and to re-entry. Even where a car is seized, which does not necessarily involve entry to premises, it does involve physically being able to secure or remove the vehicle if a CGA is not made, and that was said also to be a necessary requirement where goods were seized on property. The agent had to be in a position to remove the goods if the CGA was not made, and it was questioned how that could be the case if the agent had not entered.

Queries about the relevance of covid guidance

78. I queried in the light of the above what the impact might be of a then recent letter to Enforcement Officers that, due to Covid, enforcement agents should not enter dwellings and that perhaps that implied that agents might attend but could take control without physical entry, which would suggest an interpretation of the legislation which permitted taking control without entry. However it was correctly said that the Lord Chancellor's letter was not law and could simply represent an incorrect interpretation of the Act.
79. Mr Sharghy replying to Ms Padfield however made the point that the implication was nonetheless that officers could attend premises and take enforcement steps but without actually entering, indeed they were being told not to enter dwellings due to Covid.
80. Guidance by the HCEOA prior to the LC's letter had been to the effect that its members were instructed that enforcement could recommence (as at 24 August 2020) but that in relation to entry, officers should not enter or take control if someone was self-isolating.
81. That position in terms of the LC's request became in effect 'do not enter at all, whether or not someone is self-isolating' after receipt of the LC's letter during the latter part

of 2020 not long before this hearing. Officers remained advised by HCEOA that they should nonetheless enter into CGAs at enforcement stage one. This was suggestive of acceptance by the HCEOA that a CGA could be entered into without physical entry to a dwelling. In reaching my decision, especially in view of the MoJ's expressly neutral position and the unique circumstances of a national emergency in the form of the Covid pandemic, and the non-statutory nature of letters from the Lord Chancellor, and equally non statutory communications from HCEOA, nothing useful can sensibly be inferred from those communications in terms of my interpretation of the legislation.

The legislative history, Beatson Report and White paper

82. Ms Padfield argued that the legislative history was useful and admissible as an aid to construction, at least for the purpose of determining the context or the mischief at which the legislation was aimed, and perhaps also as evidence of the meaning of a doubtful word or phrase (*Bennion on Statutory Interpretation* (7th edition, online), para 24.9). Counsel argued that the mischief at which the legislation was aimed was not the removal of the common law requirement for physical entry to premises as a precursor to taking control of goods on those premises but rather that (per explanatory notes to the TCEA 2007 (para 3)) the Act implemented the main recommendations contained in a series of reports and papers including the Report and the White Paper referred to above in the legislative history summary. The notes to the Act say that Part 3 '*unifies the existing law relating to enforcement by seizure and sale of goods for most purposes. ...*'. It was accepted however that whilst explanatory notes are admissible as an aid to construction for the purpose of casting light on the objective setting or contextual scene of a statute, and the mischief to which it is aimed but the aims or expectations of the government as expressed in explanatory notes are not the will of Parliament. The object is to see what is the intention expressed by the words actually enacted (*Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2007] 1 WLR 482, paras 14-18 (Brooke LJ), referred to).
83. The Beatson report (see summary of legislative history above) considered that entry was the first stage of enforcement (entry, seizure, impounding) albeit the old statutory provisions were silent as to what is required. The report considered *Evans v South Ribble Borough Council*, and summarised its effect thus: '*Simon Brown J held that external inspection and posting through the letter box will not be enough to bring about the legal consequences of distress. The only exception to the entry requirement is in those cases where the goods sought to be distrained were about to be removed and the distrainor directly confronted the removers.*' It was said in the report that most respondents considered that the concept of a 'constructive levy' (the notion that goods could be seized without physical entry to premises) was wrong and inappropriate, and concluded that there was no case for changing the law as laid down in *Evans v South Ribble Borough Council*.

84. Consequently the Report of 2000 recommended in Recommendation 20 that '*(a) The distinction between seizure and impounding should be abolished and replaced by a single simple process called "taking legal control" of goods after entry.*'. (Impounding was a reference to the physical detention or removal or securing of goods, such as one might now see in the forms of taking control set out in para 13(a)-(c) of Sch. 12. Seizure did not necessarily involve impounding, but was a taking of control and could involve an agreement such as a 'walking possession' agreement which did not involve physical impounding).
85. The eventual White Paper of 2003 (under the heading 'Modernising the Terminology') that '*One of the aims of the new legislation is to replace the old-fashioned language which relates to enforcement law. It is intended that the words distress, distraint, execute, levy and walking possession will no longer be used. The phrase taking legal control of goods will replace them.*' And under the heading 'Taking Legal Control of Goods', the White Paper stated '*174. Currently there is, in theory, a distinction between seizure and impounding, however circumstances have changed and the use of "walking possession" has become more widespread, and the distinction between seizure and impounding is less clear. As we seek to rationalise and simplify the law, we accept that this should be replaced by a single simple process called taking legal control of goods, irrespective of the actual form of that control.*' It then provided for three proposed ways to take control of goods one of which was by agreement (which eventually found its way into the legislation in the TCEA as a Controlled Goods Agreement).
86. When referring later to fees chargeable by agents, the White Paper again used the expression '*taking legal control of goods after entry (which includes the practices previously known as levy, seizure, impounding, walking and close possession) as defined in a single piece of enforcement agent law*'. This it was argued implied that the intention was that taking control of goods invariably requires entry to premises. (The expression 'taking legal control of goods after entry' does not however appear in the eventual Act, where the expression is simply 'taking control of goods'. Had the expression in the White Paper been adopted in the Act, which it was not, no doubt we would not be in the position of having to consider what the wording of the Act itself ultimately means and whether 'after entry' is a necessary implication).
87. I was accordingly encouraged to find that the pre legislative history and case law and the legislation itself were to the effect that on its proper interpretation the legislation now in force meant that a valid CGA cannot be entered into without a physical entry to the premises on which the goods are located.

The MoJ's position

88. The MoJ adopted a neutral position in argument, albeit their evidence indicated that they had not seen anything in the proposals which caused them to feel the need to oppose them. One can appreciate the potential difficulty that the MoJ, unless faced with a clearly inappropriate proposal, would wish to retain its neutrality in the event that a consultation takes place with a view to revising any relevant legislative provisions either to allow for, prevent, or make more effective the use of remote means to enter into CGAs if such are lawfully within the scope of the Regulations and hence that the MoJ will no doubt decide its own way forward in the light of my decision here.

89. Mr McNab was at pains to stress the neutrality of MoJ and his skeleton urged me to focus on their evidence which most succinctly was set out at paras 26-28 of the statement of Ms Wearing and which I shall quote in full:

26. At the date of this statement, the MoJ does not have a fixed view on the desirability or otherwise of CGAs being entered into following a virtual visit. It is unlikely that the possibility of virtual visits was considered or contemplated by the drafters of the TCG Regs. In order to be persuaded that the TCG Regs should be amended to make specific and express provision for such visits, further policy work would need to be done to explore the potential benefits and pitfalls of such an approach. It is likely that such work would include consideration of whether the ability to agree a CGA during a virtual visit would undermine the compliance stage and whether the proposal would be fair and accessible to judgment debtors. Views would probably be sought from stakeholders and an Equality Impact Assessment would be conducted. If it were to be decided that CGAs could be agreed via a virtual visit, the MoJ would be likely to want to produce statutory guidance to ensure that virtual visits were conducted fairly and consistently by all enforcement agents. The MoJ may also wish to consider whether a fee could be charged for a virtual enforcement visit and at what level.

27. On the basis of the information that the MoJ has been given to date, however, the MoJ does not consider that there is sufficient concern to justify the MoJ taking any steps to prevent the Claimant from moving forward with its proposal, either by taking steps to amend the legislation to expressly prohibit it or by instigating conduct proceedings against the company's authorised HCEO, Chris Badger. The Claimant has expressed a clear intention to comply with the regulations, in particular by amending its proposal in response to the MoJ's expressed concerns by not charging an enforcement stage fee. The MoJ has not, to date, received any complaints about the proposal from debt advice agencies and it recognises that there are potential benefits to the approach in

reducing the number of door-step visits during the Coronavirus pandemic and more generally.

28. *Whilst the court may wish to exercise its discretion to consider whether the TCG legislation permits a CGA to be entered into via a virtual visit, as opposed to a physical visit, the MoJ contends that it will then be for the Government to decide whether to put legislation before Parliament either to expressly prohibit or permit it. If the Government were to decide to permit it, the MoJ would also want to provide statutory guidance on the processes to be followed. As stated at paragraph 26, further work would first need to be conducted on the desirability or otherwise of CGAs being entered into following a virtual enforcement visit.*

90. Mr McNab therefore summarised his client’s position as being “simply – that the legislation does not expressly permit or expressly prohibit virtual visits as a means of entering into a valid Controlled Goods Agreement (CGA) under paragraph 13(1(d) of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007.” The MOJ neither supported nor opposed any submission in the various statements served. (Though the MoJ did not, however, agree that HCEOs are under an absolute unqualified duty to enforce pursuant to a writ, which was the position of the Claimants but which is an issue not necessary for me to decide for the purposes of this claim).

Decision

Nature of the case and the relief claimed

91. In this case I have heard detailed argument from the key professional ‘players’, and from the relevant Government department (which in turn has public interest duties in relation to equalities duties) and written evidence from bodies who are knowledgeable in the debt enforcement field from the debtor, perspective.
92. This is a ‘friendly’ action and may affect other cases, and it is in the public interest to resolve the questions. I consider that it is appropriate that I entertain a claim for a declaration, and that I proceed one way or the other to answer the questions in the claim and to make a declaration (positively or negatively) since the alternative would be to decline, which would then mean that the industry would not know the legal position, and that if virtual visits then proceeded one would be most unlikely to encounter a suitable contested case where a debtor (who would have agreed to such a visit in the first place) then had both the extensive means and the inclination to go to court to challenge its validity. One cannot reasonably place the burden of such a task on an impecunious debtor.

93. In reaching that conclusion I have considered the guidance given by Aikens LJ in *Rolls Royce v Unite* [2009] EWCA Civ 387, [2010] 1 WLR 318 and I have also had regard to the judgment of Wall LJ at para 51 onwards (the latter to the effect that he was willing to entertain the making of a declaration, and that the matter of construing legislation was a matter of importance and part of the court's proper function. The point was not 'academic' and would if not resolved lead to other disputes). I would echo Wall LJ's words in the *Rolls Royce* case (with which Aikens LJ agreed) that it would be unduly purist not to address the issues which have been argued in such detail by represented and interested parties on a matter of importance.
94. In my judgment the process in this claim is by far the more satisfactory approach to ensure that I am satisfied that all sides of the arguments in relation to construction of the law have been properly put. Clearly, if in any specific case a debtor wished to argue that the process was invalid on the facts of their case or was not properly followed then that would not be prevented by declaratory relief.
95. The original three questions drafted by the Claimants were thus not far wide of the mark in that they simply broke down the task before me into three questions which I must effectively answer before coming to a conclusion on the wording of a declaration.
96. There was originally objection by the HCEOA and CIVEA to me making a declaration at all, as a matter of discretion, however in my judgment the revised approach and provision of proposed precise wording and an acceptance by those associations that such now encapsulates the issues, assists me. The claim did evolve, I think usefully, and now does not amount to more than a matter of statutory construction, with implications for the industry as opposed to perhaps a wider declaration which might have been seen as being a 'blessing' for a specific detailed procedure set out in several witness statements. Argument, therefore, helped to distil the case to its essence which is a matter of statutory construction.

Decision on interpretation of the legislation

97. In this case we have an interesting and lengthy pre- and post- legislative history and this affects my approach to making use of such materials as well as the wording of the legislation. Notably the Beatson report in 2000 was 7 years before the eventual Act was passed, in 2007. The White Paper was 4 years prior to the Act. Once the Act had been passed, the relevant part of it was not brought into force until fully 7 years later in 2014. The Regulations without which Part 3 of the Act could not practicably be commenced were not passed until 2013, some six years, a change of government and an economic crisis after the Act was passed into law.

98. In interpreting the legislation I make use of three principles of interpretation namely that the plain meaning of the words used in an Act must be interpreted, that if a given interpretation suggests an absurd meaning then some other interpretation is preferable, and that in seeking to understand a statute one has regard to what it was intended to achieve (sometimes called the 'mischief' sought to be addressed by the introduction of the legislation), which is informed by other materials outside the Act.
99. The above places most weight on the actual words of the legislation as enacted. Headings can assist but the plain meaning of a statutory section is not likely to be overridden by a somewhat inconsistent heading, not least since headings are not debated and cannot be amended during the legislative process. Pre-legislative materials are of assistance in pointing towards what the aim of the legislation was. The law prior to the passage of the legislation can assist, depending on whether the Act was intended to alter the prior law, consolidate it, or something in between.
100. In the parts of my decision below I shall consider the wording and interpretation of the Statute first, then the Regulations, all in the light of the prior law and the pre-legislative materials. I shall then consider whether the meaning of the post-enactment Regulations can 'reach back' to influence my interpretation of the Statute.
101. It seems to me that if the Act were such as not to prevent, in principle, a CGA without physical entry, but the later Regulations properly understood were not consistent with actually doing so, then one would be in the position that the MoJ would need to consider whether amended or new regulations are needed, and if so what they should say, to deal with 'non-entry' CGAs otherwise, or whether the preferable policy position is that no such Regulations should be enacted and hence no mechanism be provided for non-entry CGAs even if there is a power for the MoJ to enact such regulation if it chose to do so.

The pre-legislative history and case law

102. It is clear in my judgment that the Beatson Report of 2000 proceeded on the basis that the common law (*Evans*, most notably) then in force in relation to distraint was to the effect that physical entry was a requirement for seizure of goods, and it is equally clear that since most respondents to the consultation thought it inappropriate to change that, Prof. Beatson QC's recommendation was that the law in that respect should not change.
103. The tenor of the report is one of modernisation, abolishing the various different categories of distraint and especially the distinction between seizure and impounding. There was to be a modernised and clear set of rules and regulation of

enforcement officers and agents, and a clear fixed fee system. He was in my judgment clearly not recommending codification of the prior law but a replacement with something which was different in some respects, and in relation at least to the issue of physical entry he was not recommending change. He did not specifically deal with the narrow question of validity of a CGA without entry, but adopted the position which appears to be the orthodox interpretation of *Evans* and *McLeod* which is that seizure forms part of all forms of distraint and that entry is required for seizure. By implication since a walking possession agreement at the time involved a legal seizure, then entry may be said to be required for such an agreement under the old law.

104. *Evans* is the central case here and the facts were that an enforcement officer was asserting that he had validly seized goods by way of distraint merely by posting a note through the letter box. There was no argument that there had been any walking possession agreement (merely a draft had been posted) and so the court at appeal stage was not addressing the question directly whether walking possession would always require entry. It was expressly the case for the appellants that there did not have to be a valid walking possession agreement for a distraint to be valid and that distraint in this case was on a 'constructive seizure' basis based simply on service of a notice of distraint (p759 at C). The Magistrates had held (when dealing with the purported walking possession agreement) that it was not valid since it had been signed only by one party (the creditor/agent) and that was not challenged on appeal so that the possible validity of a non-entry agreement was not a matter for the appeal. The questions certified for the appeal were solely "*whether a lawful distraint might be made of goods within a dwelling house by the posting through the letter box in a sealed envelope, a notice of distraint in the form annexed to the case and whether the justices were right to dismiss the complaint*" (p760 at A).
105. Furthermore the case was decided in the early 1990s long before a court would routinely address its mind to matters of proportionality in relation to entry to a dwelling for ECHR Art. 8 purposes. Thus not only was the question for the court not whether physical entry was a mandatory requirement where a debtor was willing to agree a walking possession agreement, but also the picture in domestic law terms was different in its outlook to Art. 8 rights in respect of entry to dwellings.
106. One cannot confidently say in my judgment that as regards a statutory regime enacted in 2007 and regulations in 2013, that case law relating to the previous common law system applying before the advent of the Human Rights Act can be very persuasive by itself as to the intended effect of the 2007 legislation on the points before me. It does however state the law as it was at the time, which is part of the statutory context.

107. In *McLeod*, Morritt LJ dealing also with the former common law system long before the changes in 2007 spoke in the following terms:

“37. Following the initial entry and seizure the rights of the sheriff are very similar to those of the bailiff. He may remain in possession of them without any physical presence. This is normally, but not necessarily, evidenced by a walking possession agreement. Thus, unless he has abandoned the goods, which is a question of fact, he may re-enter in order to remove the goods for the purposes of sale...”

108. However the matter in issue in *McLeod* was not whether prior entry was a requirement for a walking possession agreement, and one cannot fairly understand Morritt LJ as deciding specifically an issue not before him, merely because he proceeded on the assumption that physical entry was something which invariably took place at the outset under the previous common law system, as was the orthodox view under that system. The case related to the power to use reasonable force, under the previous enforcement regime, once an initial seizure had taken place.

109. I find helpful the observations of Leggatt LJ in the 365 Business case at para 22 where he stated (my bold text) that:

*“...when Part 3 of the TCE Act came into force on 6 April 2014, para 4 of Schedule 7 of the 2003 Act was amended by the insertion of a new sub-para (1A) which makes this provision subject to Schedule 12 to the TCE Act in the case of a writ conferring power to use the procedure in that Schedule. The combined effect of that amendment and section 65 of the TCE Act seems to me **unequivocally to be that the exercise of the power to enforce [is], exclusively governed by Schedule 12 to the TCE Act and not by the common law.**”*

110. He then indicates, and I adopt that position, that the old cases may (or may not) be relevant “insofar as they interpreted language used in earlier statutory provisions” re-enacted in Sch. 12. In this instance, unlike the situation in the case before Leggatt LJ, one is dealing with new language in a modernising and reforming statute which on its face ‘replaces’ the common law (s.65) and not a consolidation or a ‘re-enactment’, and that in my view diminishes the assistance derived from the common law authorities applicable under the ‘ancien regime’.

111. The Beatson report of 2000, strictly, was published before the HRA 1998 came into force but the Report does expressly address human rights aspects which by then were at the forefront of many lawyers’ and judges’ minds and prays them in aid in support for the need for enforcement to be both clear (accessible) and ‘in

accordance with the law’, but it does not address any question whether preserving a mandatory requirement for physical entry to a dwelling in all cases so as to enable a CGA to be valid was likely to be sustainable as a proportionate means to achieve the legitimate aim of taking control of goods. The Beatson recommendation appears to be merely that because most respondents felt that the existing case law should not be departed from, then he would not recommend change, and his reference to ‘constructive levy’ in my judgment rather suggests that what was uppermost was the question whether an agent could treat goods as subject to a levy merely by for example posting a note through a letter box.

112. The White Paper of 2003 is not explicit at all about any mandatory requirement for entry prior to a CGA, but Ms Padfield correctly pointed to the use of expressions such as ‘taking legal control of goods after entry’ and to the modernising thrust of the proposals (but I have noted already that ‘*after entry*’ was notably not included in the name of the power once the Bill was drafted). In my judgment the White Paper was, as she argued, effectively proposing a way to implement the Beatson Report. Both the Beatson Report and the White Paper do therefore inform my understanding of the mischief aimed to be addressed and the context in which the Act was drafted.

The Explanatory Notes to the Act and regulations

113. The Notes to the Act in my judgment add little to help me. The notes state that *“The terminology in the various pieces of primary legislation relating to these powers has been amended, and some of the warrants and writs which give these powers, namely warrants of execution, warrants of distress and writs of fieri facias (except writs of fieri facias de bonis ecclesiasticis), are renamed warrants of control and writs of control.”* This does underscore in part the modernising ‘unifying’ purpose of the Act but it does not take matters further in terms of wider points. It is somewhat consistent with a view that the Act did no more than ‘unify’ and ‘modernise’, but must give way to the wording of the Act if clear, and I have well in mind that it is not a part of the Act debated by, or passed by, Parliament. The explanatory memorandum to the Fees regulations proceed on the assumption of a physical visit so that someone has been ‘on the doorstep’. This correlates with points I make below about the regulations and how they approach the CGA process.

The Statute

114. It is self-evident that s. 62 of the TCEA provides that the power conferred by a Writ of control is exercisable only by using the procedure in Schedule 12 to the Act, which includes any Regulations enacted under Sch. 12. It is clear (per Leggatt LJ quoted above) that Sch. 12 and not aspects of the common law, govern the validity of taking control of goods.

115. Para 9 of the Schedule indicates that control of goods can only be taken of goods which are on premises which the agent has the ‘power to enter’ under the Act. I note that the Act does not state that control can be taken only of goods on premises which the agent *has entered*. It is striking in my view that the expression ‘power to enter’ is used and not an expression similar to that consulted on within the White Paper namely ‘[take] control of goods after entry’. It would have been perfectly possible to say that ‘control of goods can only be taken of goods on premises which have been validly entered pursuant to the power to enter’.
116. The power stated expressly is to take control of goods where there is a ‘power’ to enter, ie where the agent may enter but need not have. It is obvious that para 13(1)(a)-(c) necessarily imply physical entry since those are forms of what would previously be ‘impounding’ ie physical securing or removing of goods. But by contrast 13(1)(d) – which provides for a CGA as being one way to take control of goods namely by way of a legal agreement rather than a physical securing – does not itself say anything about necessity to enter premises first (for example it does not refer to entering into a CGA ‘on the premises’). Seeking to enter into a CGA ‘virtually’ does not preclude a physical visit and removal or physical securing if the CGA is declined.
117. Para 14 in my view is also relevant. It states that an agent “may enter relevant premises to search for and take control of goods” – it does not require that he or she ‘must’ or ‘shall’ do so. To my mind this means that entry onto premises to take control of goods and/or search for them is not mandatory. I note that Para 3 of Sch 12 (definition of controlled goods) at (b) is consistent with it being possible to change the mode of control of goods, so that having taken control under a CGA without entry would not prevent taking control of the same goods by later entering and securing them. Para 3 of Sch. 12 says:
- “controlled goods” means goods taken control of that—*
- (a) have not been sold or abandoned,*
- (b) if they have been removed, have not been returned to the debtor (unless subject to a controlled goods agreement), [...]*
118. It is clear I think that the effect of (b) above is that if goods have been taken control of by removal, this does not prevent a later change in the mode of control so that the goods are returned, but subject to a CGA instead. I do not therefore see any obvious reason why, if a CGA was entered into without entry, this would be contrary to the Act to preclude later entry under para 14 for the purpose of taking some other

form of control permitted by the Act but this is not a matter which was argued before me.

119. A certain amount of emphasis was placed on para 16 of Sch. 12 and its heading which is “re-entry”. That heading is entirely consistent in my view with the understanding of the law in the Beatson Report, and hence a starting position by parliamentary counsel that steps after taking control would necessarily be matters of ‘re-entry’ as a descriptive term when drafting the Bill. But a heading is not debated and not amended during passage of an Act and where the wording of the enactment below is clear, the title cannot override the clear wording. What then is the wording of para. 16 and is it clear?
120. I shall repeat what it says:
- 16(1) This paragraph applies where goods on any premises have been taken control of and have not been removed by the enforcement agent.*
- (2) The enforcement agent may enter the premises to inspect the goods or to remove them for storage or sale.*
- (3) This paragraph authorises repeated entry to the same premises.*
121. Does this paragraph state or imply that entry for inspection or removal after an original taking of control must necessarily be a ‘second’ entry (a re-entry) and hence that taking control must always involve an enforcement agent having gained physical entry to the home of the debtor? In my judgment, no.
122. Para 16(1) self-evidently indicates that it applies where goods have been taken control of and not removed. It does not for example say ‘this para applies where the power of entry in para 14 has been exercised’, and I think even more clearly para. 16(2) refers only to “entry” and not to “re-entry”, the effect being that after goods have been taken under control, the enforcement agent may enter to inspect or remove them. It does not require a prior entry.
123. That power to inspect or remove which arises under para. 16 can then take place repeatedly (16(3)). It is thus not wholly inappropriate that the heading is ‘re-entry’ since 16(3) does indeed allow repeated entry and hence part of the subject matter of para. 16 is indeed ‘re-entry’.
124. Para 17 of Sch 12 read with Para 19A also in my judgment do not assist the first and second interested parties. Para 17 it will be recalled allows reasonable force to “enter” (note, not “re-enter” which might be indicative of an assumed previous entry) premises in certain circumstances.
125. The ‘relevant circumstances’ here are in 19A and they are inter alia that

(a) the enforcement agent has power to enter the premises under paragraph 16;

(b) the enforcement agent has taken control of the goods by entering into a controlled goods agreement with the debtor;

(c) the debtor has failed to comply with any provision of the controlled goods agreement relating to the payment by the debtor of the debt;

(d) the debtor has been given notice of the intention of the enforcement agent to enter the premises to inspect the goods or to remove them for storage or sale;

126. Sch. 12 para. 19A was inserted (15/7/2013 for specified purposes, 6/4/2014 in so far as not already in force) by the Crime and Courts Act 2013 ss. 25(4), 61(3); S.I. 2013/1725, art. 2(c); S.I. 2014/830, art. 2. In other words it was an addition to the Act made at about the same time as the Regulations, and several years after the 2007 Act was passed.
127. Again, the paragraph clearly refers to the power to enter, and not to previous entry. If as at 2013/14 the legislators had intended that s.19A should be worded so that it could only ever apply where there had already been an entry then would have expected s.19A to so state or that s.16 would at that stage have been amended to expressly restrict its operation to 're-entry' more consistently with the heading in the text of the Act, but parliament did not do so in the Crime and Courts Act 2013 s. 25(4).
128. Hence if goods have been taken under control by way of a CGA, which is then breached, the agent (who will then have powers of entry under para 16 to enable inspection and removal) may enter using reasonable force if the CGA has been breached and the proper notice has been given that the agent intends to "enter" (note, not 're-enter') the premises to inspect or remove them. I have put that text in bold because para. 19A (2) requires that there must be regulations as to the form and content of notice where para 19A is being used, ie where the agents intend to enter the premises, using reasonable force, after a CGA has been breached. I will return to this when considering the Regulations.
129. By Para 23 of Sch. 12, paras. 24 to 30 apply where an enforcement agent has "*power to enter premises under paragraph 14 or 16 or under a warrant under paragraph 15*" – again the wording adopted is that of a power to enter. However it is obvious that some paragraphs plainly can only apply if the power of entry is, or is about to be, exercised (paras 25, 26, 27, 28, 29). (Paragraph 29 requires a list of goods being removed from the premises to be physically left there if it is the case that some person other than the debtor is in control of the premises, for example, and clearly only applies if there is entry since goods are being *removed*). I cannot spell out from

those paragraphs any necessary implication that entry has to be obtained before a CGA is entered into. Rather they are provisions which ensure that when the serious step of a physical entry to premises takes place, appropriate information is given.

130. They do not have the effect that a person entering into a CGA is unprotected, since when a CGA is entered into with or without entry to premises the Regulations separately require certain information to be provided whenever goods are taken under control by way of CGA. (Reg. 15).
131. Paragraph 30 of this part of Sch. 12 initially causes some hesitation. It states:
“The enforcement agent must leave the premises as effectively secured as he finds them.”
132. I raised in the hearing the query that it was hard to see how, if para 30 arises as an obligation whenever there is a power (exercised or not) to enter premises, an Enforcement Agent could be said to ‘leave’ the premises if he or she had not physically at least attended them in the first place even if not entering. This was not a point I think raised by either side. However on reflection one can appreciate that “leaving” can carry two meanings in everyday use, the first meaning “to depart” in a physical sense and the second meaning to “cause something to be or remain” in a given state.
133. Consider for example the statement *“Master McCloud’s judgment left the Court of Appeal very disappointed”*: the meaning clearly is not that the judgment grew legs and left in a state of some emotion, rather that the judgment caused the Appeal judges (as all too often may be the case), to be and to remain disappointed with McCloud’s judgment when faced with her decision.
134. In my judgment the more common sense reading is that the second meaning applies here, since whether or not an enforcement agent leaves premises in a physical sense (and they need not do so: there is provision if they wish effectively to ‘stand guard’ in some circumstances) the objective must be to ensure the fact of enforcement does not diminish the security of the goods as it was prior to the enforcement. That is not something which necessarily implies physical entry to the premises.
135. My conclusion as to the statute is that there is nothing in it which prevents a valid CGA being entered into without a physical entry onto the premises. Furthermore an interpretation which minimises the intrusion into the homes of debtors whilst still ensuring enforcement takes place is, if there were doubt, one to be preferred given the need for a means to act proportionately within the ambit of Art. 8 ECHR.

The Regulations

136. The 2013 Regulations most directly in point are made under Sch. 12 of the TCEA 2007 and in my judgment they do show inconsistencies with the Act, as do the forms set out in the 2014 certification regulations.
137. This points to one of two things: either such inconsistencies indicate the legislative intention of those who also enacted the Statute, or if they do not do so then it is possible that the Regulations make provision for CGAs with entry to premises but do not presently make provision where a CGA is to be entered into without entry to premises.
138. Reg 15 does have something to say which I think implicitly rules out a “non-entry” CGA in circumstances where the person agreeing to it is not the debtor unless there is at least a physical visit to the premises. It provides that:
- “Where the enforcement agent enters into the agreement with a person authorised by the debtor in accordance with regulation 14(1)(b) or with a person in apparent authority in accordance with regulation 14(1)(c), the enforcement agent must also provide the debtor with a copy of the signed agreement by— (a) leaving it in a conspicuous place on the relevant or specified premises, where the enforcement agent has taken control of the goods on such premises [...]”*
139. Evidently, in such circumstances the agent must be in a position to leave the material on the premises in a conspicuous place, and that cannot be done without at least a physical visit. I think it does not strictly go as far as necessarily implying entry, though one assumes the usual process would be to leave the notice indoors and not solely affixed to the outside. It is fair to say that this paragraph is a signal that the legislature at least in the case where a CGA was entered into with a third party intended that a physical notice must be left at the premises for the attention of the debtor. Such a precaution would not be logically necessary where the CGA is entered into directly with the debtor and the Act does not make provision for leaving notice at the premises in those circumstances.
140. Similarly Reg. 2 provides that ‘notice of the enforcement agent’s intention to re-enter premises’ means “the notice of the enforcement agent’s intention **to re-enter** premises required by paragraph 19A(1)(d) of Schedule 12”.
141. Yet Para 19A(1)(d) of Sch. 12 to the Act says nothing of the sort. It says:
*“(d) the debtor has been given notice of the intention of the enforcement agent **to enter** the premises to inspect the goods or to remove them for storage or sale”.*
 Again, the Regulation is narrower than the Act would allow on its plain wording and hence no form of notice is provided for entry under para 19A unless it is also a re-entry (this applies also to the Certification regulations which annex a form of notice of intended re-entry).

142. Unlike the Regulations, we have seen above that the Act generally uses “entry” even for para. 16 and of course for para. 14 and also in para. 19A, whilst making it clear that such *also* includes multiple entries. The Act on the face of it is wider than the detail of the Regulations has provided for.
143. For example also, reg. 21 states (my bold text):
- “21.—(1) This regulation applies where the enforcement agent is—*
- (a) **entering** or remaining on relevant or specified premises under paragraph 14 or 15 of Schedule 12 to search for and take control of goods; or*
- (b) **re-entering** or remaining on premises under paragraph 16 of Schedule 12 to inspect controlled goods or to remove them for storage or sale.*
- (2) The enforcement agent may enter, re-enter or remain on the premises on any day of the week.”*
144. The above uses only the expression “re-entering or remaining” in relation to para 16 of Sch. 12, not “entering, re-entering or remaining” and likewise symmetrically it omits to refer to “re-entering” under para 14 (which it will be recalled makes provision for re-entry as well as an initial power of entry). Similarly the procedural regulations between 25 and 27 make provision for form and content of notices of ‘re-entry’ but do not provide for a separate form of notice where entry is for the first time but is at a date after the CGA has been entered into.

What is the effect of the Regulations?

145. How is one to approach this inconsistency where the Regulations appear to assume only “re-entry” after goods are under control but the Act uses the expression “entry” or “enter” quite consistently and does not state that entry is a pre-requisite for a CGA made directly with a debtor?
146. In my judgment the first potential relevance of Regulations created under an Act is that, where they are created almost or actually contemporaneously with the Act they form part of the *contemporanea exposito* but do not decide or control its meaning (see eg *Hanlon v Law Society* [1981] AC 124 pp193-4 per Lord Lowry²), in other words evidence of the contemporary understanding of the Act by the same legislature which enacted it. In this case there is a gap of 6 years and a change of

² After circulating a copy of this decision in draft I obtained a copy of the text of *Bennion, Norbury and Hanley on Statutory Interpretation*, 8th edition at 24.18 and I also refer to that as assisting me on the points here.

government between the Act and the Regulations, other than in respect of para.19A which was added by a different statute at about the same time as the Regulations. I do not think that the Regulations here can be treated as showing the intention of Parliament at the time of passage of the Act on the basis of contemporaneity.

147. There is authority that Regulations passed under an Act can be used to inform interpretation of the Act see for example *Hanlon v Law Society*, above (but nb at p193 Lord Lowry set out the proposition that if used in that manner that was acceptable where the Act was ambiguous or the Act provided that it could be amended by Regulations, not the case here), and *Britt v Buckinghamshire CC* [1964] 1 QB 77 (CA).
148. In *Britt*, the Town and Country Planning Act 1947 was interpreted in conjunction with Regulations which came into force, unlike those in this case, contemporaneously with the statute and which also amended the Statute, in 1948. The decision on that point of interpretation hinged on the point that the regulations and the Act were interrelated from the outset as a 'composite instrument' which is not the case here. The court however distinguished its approach and expressed agreement with the view expressed in *Stephens v Cuckfield RDC* [1960] 2 QB 373 where the Court of Appeal (Per Upjohn LJ p381) doubted "*very much whether it is right to construe the words of the section by reference to regulations made under powers therein contained, especially when such regulations are directed solely to procedural matters such as conferring rights of appeal...*"
149. In my judgment the regulations here do not shed light significantly on the wording of the Act. The Act is clear in that the plain words used do not prevent the entry into a CGA without physical entry to premises, and the Regulations were very far from contemporaneous with passage of the Act and are not part of a 'composite instrument' enacted at the same time, nor do the regulations amend or have power to amend the Act. The Regulations however do stand on their own and they impact one's understanding of the extent to which the powers under the Act have been given effect, or not given effect, as the case may be, as at today.
150. The Regulations are also evidence of the view taken by the legislature when passing the regulations in 2013 as to what rules and process it was then thought appropriate to put in place pursuant to the powers in the enabling legislation and what was not thought appropriate to implement under the enabling Act, even if potentially available within the scope of the Act.
151. It is clear that the Regulations make no provision for procedure and notices etc where, for example, the power of entry under Sch. 12 para 16 is used without there having been a prior entry under para. 14 (since the Regulations only provide rules where para 16 operates as a power of 're-entry'), and, importantly, it is clear from the Regulations that they only deal with the power of forcible entry under para 19A

(breach of a CGA) in circumstances where such is a 're-entry', not a first entry, and the definitions section of the Regulations of 2013 make it clear that the notice for which provisions are later provided is a notice of 're-entry'. The same goes for the wording of the Notice of Re-Entry annexed to the 2014 Certification regulations. Furthermore, though less significant given that this claim concerns expressly a CGA entered into with a debtor, reg 15 provides that where a CGA is entered into with a person who is not the debtor, notices must be placed in prominent positions on the premises, which implies that the makers of the regulations were enacting them on the assumption at least of a physical visit more or less contemporaneous with the CGA being entered into.

152. My conclusion is therefore this:

- (1) Sch. 12 to the TCEA 2007 does not prohibit 'remote contact' with a debtor of the sort envisaged here (this was uncontroversial in the hearing).
- (2) Sch. 12 to the TCEA does not prohibit entry into a CGA without physical entry to premises, and such is a 'taking control' for the purposes of the Act.
- (3) The Regulations which have been made do not make provision for forms of notice and procedural provisions for later entry after a CGA has been entered into and/or breached, in the absence of an initial peaceable entry having first been made under para. 14 of Sch. 12. Accordingly if a CGA were entered into without a first entry to premises under para 14 of Sch. 12, the provisions for steps in relation to entry under para 16 and forcible entry under para 19A, would not apply. (See also Paras 19A(1)(d) and (2), and 24, in terms of requirement to comply with the regulations when entering).

153. The Act, in my judgment, permits regulations to be made which deal with the above but in the absence of such regulations having been made, a 'non-entry' CGA would offer limited enforcement options if breached unless (a) a warrant for forcible entry could be obtained or (b) peaceable entry was obtained legitimately under para 14 of sch. 12 after entry into the CGA, meaning that subsequent steps are 're-entry'. The Act, in short, does not forbid a non-entry CGA entry, but the Regulations do not fully enable it to be given effect as they presently stand.

154. The present position is perhaps understandable in that the concept of a forced first entry (as s.19A would permit if a non-entry CGA was entered into, if the regulations had covered it) would be a qualitative departure from the conventional position which is that a recourse to reasonable force at least at a dwelling is not the expected first form of entry as is evident from the Act and regulations.

155. I have not heard argument on the subject of whether, if such a non-entry CGA was entered into, it would be permissible for a first physical (peaceable) entry to take place later, under para. 14 of Sch. 12 so as to render subsequent entries to 're-entries'. I have observed earlier that para. 3 of that schedule arguably implies that one can have both a

taking control by removal and, later, a taking control of the same goods by way of a CGA and hence it may be arguable that one can change the mode of control and is not permanently limited to one form of control in respect of any given goods.

Deemed entry?

156. The possibility that 'entry' might be capable of being satisfied by a form of deemed entry was not a subject of argument. In my view it would be difficult given the words in the legislation about the ways in which entry can take place, (by any of the usual means of entry such as a door) for an electronic video contact taking place on the premises to count as 'entry' for the purposes of the legislation. If such means counted as 'entry' then presumably a mere phone call, which the debtor would have no ability to refuse until answering the phone, realising the enforcement agent was on the phone and then hanging up, would gain entry automatically provided the the phone was on the premises (and query whether they would be ejected from the premises if the call was ended or the phone placed outside). So, until we have drones and robots joining the ranks of the enforcement agents, under the present legislation I think it is clear that 'entry', where required, does mean physical entry. After the events of 2020 one is tempted to say that anything *could* happen, but I think such 'non human' physical entry is unlikely in the very near future even if it would be quite possible today for Mr Badger and colleagues at the Claimants to 'send a drone round' and hover in with the buzz of propellers, through the door (see 'being careful what one wishes for').

157. As we have seen, views between the Claimants and the first and second interested parties differed as to whether debtors should always face physical entry if they cannot pay in full (absent an unsecured instalment agreement with the creditor). The 'industry' in the form of the HCEO and CIVEA take the view that such entry is always required. The Claimants take the view that it is not invariably required. I call to mind that that the consultation document in 2012/3 entitled "Transforming Bailiff Action" which preceded the Regulations was based on a stated view by MoJ that, per the website which presented the document:

"Bailiff action by its very nature is intrusive. It is necessary for a bailiff to be assertive and firm if they are to be effective. There is anecdotal evidence that some bailiffs may veer towards aggression in pursuit of effectiveness. It is these elements we need to address.

This paper sets out the need to balance all of the following objectives:

- *Providing more protection against aggressive bailiffs whilst spelling out the need for effective enforcement.*
- *A fair, transparent and sustainable costs regime that provides adequate remuneration.*

- *Minimising excessive regulation on business whilst ensuring effective protection for the vulnerable.”*

158. In the light of my decision I proposed, when this judgment was circulated in draft, to declare, adopting the first form of wording proposed by the first and second interested parties, and there was no disagreement over that. Accordingly the order will declare as follows (the text of the order is in the Annex to this judgment):

- “1. An enforcement agent may enter into a controlled goods agreement within the meaning of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 with a debtor whether or not the enforcement agent has physically entered the premises on which the goods are located.”

Final remarks

159. I appreciate that this judgment is of interest and importance to the enforcement profession and that views differ within the HCEO community, probably quite strongly. It is a profession of great importance to the effective delivery of justice and the implications of a non-entry CGA if implemented span considerations ranging from making it easier for debtors to pay off debts (thereby recovering money for creditors which may themselves need it, such as small businesses), and concerns about still ensuring effective enforcement if payment is not made, to the reality that a non-entry form of CGA could have implications for the financial aspects of enforcement inasmuch as it could reduce the fees chargeable by enforcement agents, affecting their business models, and that if enforcement businesses were not viable then the enforcement of court orders could be affected.

160. The court’s function, however, is to rule on the interpretation of the legislation, and not to set policy or to make decisions on the basis of desirability or otherwise and it is a matter now for the MoJ and Lord Chancellor to consider this judgment as I know they intend to do, and take a view as to whether policy supports or does not support the amendment or creation of regulations to flesh out the notion of a less intrusive form of CGA entered into without an initial physical entry to the home or business of the debtor, but which would still have ‘teeth’ if breached in the absence of such an initial entry, and to consider what burden of fees there should be, if any, upon the debtor if a non-entry CGA is agreed. Given the ongoing Covid pandemic, it would also be a relevant consideration whether non-entry CGAs are desirable in policy terms in the short term even if the longer term use was to be subject to more in depth consideration, and from the evidence filed before me it appears that the initial consideration of this form of process by the Claimants derived from concerns over the vulnerability of debtors during the Covid pandemic.

MASTER VICTORIA MCCLOUD

8th January 2021

ANNEX
The Declaratory Order

IN THE HIGH COURT OF JUSTICE

CLAIM NO QB-2020-002890

QUEEN'S BENCH DIVISION

MASTER MCCLLOUD

B E T W E E N:

JUST DIGITAL MARKETPLACE LIMITED

Claimant

– and –

(1) HIGH COURT ENFORCEMENT OFFICERS ASSOCIATION

(2) CIVIL ENFORCEMENT ASSOCIATION

(3) MINISTRY OF JUSTICE

Interested Parties

[DRAFT] ORDER

UPON hearing counsel for the Claimant, leading counsel for the First and Second Interested Parties and counsel for the Third Interested Party.

IT IS DECLARED THAT:

1. An enforcement agent may enter into a controlled goods agreement within the meaning of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 with a debtor whether or not the enforcement agent has physically entered the premises on which the goods are located.

IT IS ORDERED THAT:

2. There be no order as to costs.

Dated this 8th day of January 2021