

**CODE OF PRACTICE
ON
LOCAL AUTHORITIES' USE OF BAILIFFS
IN THE ENFORCEMENT OF LOCAL TAXES**

**UPDATE & AMENDMENT SHEET
April 2000**

**(includes a response to review of bailiffs' powers
prepared on behalf of Lord Chancellor's Department
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INTRODUCTION

Since the original code was drafted on the behalf of Public Law Project (PLP), there have been various consultations upon, and amendments to, the law relating the bailiffs' actions, but the situation outlined in the document remains largely unaltered. This is despite the fact that many authorities have adopted codes of practice in respect of the recovery of council tax (and sometimes NNDR). If anything things have worsened, in that further forms of distress have been created, complicating matters for debtors, advisers *and* bailiffs.

The following updates the 1992 document in respect of subsequent legal changes. However the document's criticisms of law and procedure otherwise remain as valid now as when they were first compiled. In the introduction various 'unacceptable practices' are listed. Many of these are said to be of uncertain legality. The situation is no clearer now than 8 years ago.

It is appropriate to reissue the code now in light of the recently published consultation paper from Prof. Jack Beatson QC "*Independent review of bailiff law*" (March 2000, Cambridge Centre for Public Law). Some of the criticisms of the current law made in the report echo those in the model code. The report also raises wider human rights questions and it is appropriate therefore to make some comments upon bailiffs' regulation from a public law perspective.

The current enforcement review

The review examines every stage of the process of distress and execution from the instruction of the bailiff to sale of the goods, and raises issues as to how the law may be reformed. The chief problem to be addressed is that the law is, as Beatson says, of "considerable antiquity" and that there are 17 different forms of seizure of goods, governed by 59 separate items of legislation. There is a desperate need to rationalise and simplify the law, and to make it more transparent and certain. It is implicit in the document that some form of unified 'enforcement code', containing an all-encompassing body of rules on bailiffs' procedure, is what is envisaged.

The Beatson report raises a number of public law issues to which we now turn.

Human rights law The document considers the present law in light of the provisions of the ECHR and associated jurisprudence. In particular reference is made to article 6(1) (*right to a fair trial before an independent and impartial tribunal*); article 8 (*right to respect for private and family life and for the home*); and 1st protocol, article 1 (*right to peaceable enjoyment of possessions*). The conclusion is that enforcement law on the whole is unlikely to be found to be in breach of these provisions. Distress for rent may however be susceptible to challenge because so much of the law is obscure, being found in judicial decisions stretching over centuries, and many of its rules seem artificial and arbitrary. Nevertheless in order to remove uncertainty and to clarify the grounds upon which discretion may be used, Beatson suggests that broader reform may be desirable.

PLP considers that the problem with the current law may be greater than the review suggests. Under the ECHR procedures must be 'in accordance with law'. That law

must be clear and accessible: in terms of enforcement law, a comprehensive written code would be preferable. Outside execution in the civil courts, the statutory regulation of distress tends to be very limited and, as the report frequently acknowledges, recourse regularly has to be made to common law authorities. The partial nature of the legislation is compounded by the sheer number of forms of the remedy, plus any codes of practice or guidance (published or unpublished) that accompany them. From this overall standpoint bailiffs' law in England & Wales falls well short of the accessibility and preciseness required by the ECHR.

Secondly the European Court is concerned with the 'quality' of the relevant law. The legal provisions must comply with the rule of law. Individuals should have clear rights to challenge unfair or improper use of discretion. The fragmented and multitudinous nature of bailiffs' law works against this and leads us to a more general public law criticism of enforcement law.

Access to remedies PLP exists to promote various aims, amongst them access to justice (especially for those disadvantaged by poverty, disability and the like) and improved accountability and quality in public decision making. In bailiffs' law many remedies are *available* in theory, but few are *accessible* in practice. This is often because of their obscurity, potential cost and complexity. It may be questioned how much they therefore comply with article 6(1), and specifically we may note that:

- ◆ there is no coherent or consistent structure to the remedies;
- ◆ some are internal and voluntary complaints resolution schemes;
- ◆ in some cases there are *no* ready opportunities to challenge the bailiff's use of discretion;
- ◆ in some cases the creditor is responsible for hearing the complaint (for example, allegations of illegal charging by bailiffs acting for magistrates courts are heard by those same courts).

PLP therefore supports calls for:

- ◆ *a rigorous licencing system* to authorise, monitor and discipline enforcement agents (though this is not a matter dealt with in this report); and,
- ◆ *a complaints mechanism* that allows speedy resolution of disputes upon such matters as legality of actions and ownership of goods. This should be independent of all parties. At present where this function is exercised judicially it is either the county court or the magistrates court that is responsible. Whether the jurisdiction should be consolidated on just one court or devolved to a more flexible tribunal is open to debate but, whatever the venue, a forum for redress accessible in terms of procedure, cost and time is vital.

The model code of practice

In the context of the issues raised by the Beatson report, a little more may be said about the public law aspects of the model code.

Local authority codes of practice Many of the problems criticised in the draft code arise not from the wrongful acts of bailiffs, but from the fact that they are being instructed in inappropriate cases. If many of those local authorities which have

adopted codes adhered to them more closely in respect of those groups whom they have voluntarily exempted from distress, bailiffs would often not be in the position of seeking to recover from those with no assets and no means. Many councils' codes exempt those on means tested benefits, the elderly, people with disabilities and those who are otherwise seriously disadvantaged. It is still common for bailiffs to be instructed to pursue such groups, their intervention often serving only to exacerbate their financial difficulties, particularly as councils' contracts with their bailiffs often require recovery of the sums due within timescales that are impossible for those on very low incomes. It is arguable that the remedy of distress does have a role to play, particularly against businesses with assets who are refusing to pay. Against domestic debtors on low incomes, it has little to offer. In addition, the code calls upon local authorities to treat distress as a remedy of last resort. In fact it is generally the first remedy tried, and most councils will then proceed to the final sanction of threatening committal without considering any of the other enforcement options provided by the legislation.

The forthcoming implementation of the Human Rights Act 1998 and the incorporation into English law of the European Convention on Human Rights may have consequences for two aspects of the situation described above:

- ◆ increasingly local authorities may have to show that their choice of one remedy in preference to another was 'proportional' in view of their relative impact on the debtor's circumstances; and,
- ◆ the tendency not to publish codes of practice may be challenged as all enforcement should be in accordance with published and accessible law and guidelines. Note that the draft code @ 4.7 requires its publication and distribution (which today could also include dissemination by means of a web site).

The model complaints procedure Whilst the Human Rights Act 1998 may, by means of judicial review, provide another remedy against a public body acting as a creditor, as described above, a non-litigation remedy that is accessible, open and accountable, and involves no risk of costs, is preferable for most of those facing bailiffs' action. The code criticises the existing remedies as useless to debtors on restricted incomes (see for example n13, p17). This is why an effective and efficient complaints procedure as recommended in part 1, section 5 is so important. Although voluntary complaints schemes have been established by the bailiffs' trade bodies (see later), a local authority scheme would be preferable because:

- ◆ the membership of the panel would be public and open to scrutiny; and,
- ◆ as a function of the local authority's decision making process, panel decisions would in turn be open to further review by ombudsman or the Court. The decisions would be expected to comply generally with the principles of public law. These would include the right to a fair hearing and giving reasons for decisions, and would prevent local authorities endorsing illegal actions by their bailiffs.

Finally, Part 2 of the model code makes recommendations as to best practice by bailiffs in the exercise of many of their powers. Many of these issues are proposed as possible reforms in the review document.

AMENDMENTS TO TEXT

There have been changes wrought by case law and also by amendments to the Distress for rent Rules 1988 and Council Tax (Administration & Enforcement) Regulations 1993 as follows.

p5 Forcing re-entry

The law upon the rights of bailiffs to force re-entry to premises in order to remove goods previously seized has recently been clarified. In *Khazanchi v Faircharm Investments; McLeod v Butterwick* [1998] 2 All ER 901 the Court of Appeal held that bailiffs may only force re-entry where they are being deliberately excluded from premises. It will thus be necessary in most cases for the bailiff to notify the debtor in advance of the date and time of the visit in order to remove. If the debtor is then absent from home, or refuses entry, force may be employed.

p5 Walking possession charges

Reference is made here (and at various points later in the text) to the charge exigible by the bailiff for entering into a walking possession agreement with the debtor. The charge has now been amended to a flat rate fee of £10 (for CT by SI 1998/295; & for NNDR by SI 1998/3089), therefore many of the problems identified in the code will not now arise.

p7 Protected goods

Since the writing of the code statute has been amended to specify those goods which may not be seized in levies for council tax (SI 1993/773 amending reg. 45(1)(a)). These are:

- ◆ such tools, books, vehicles and other items of equipment as are necessary for use personally by the debtor in his/her employment, business or vocation; and,
- ◆ such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the debtor and his/her family.

The latter category of exemption also applies to distress for NNDR.

p19 Certification

All bailiffs levying distraint for local taxes must now possess a certificate issued by the local county court under Distress for Rent Rules 1988 (reg. 45(6A) inserted by SI 1998/295 reg. 6). Two important issues arise from this. The 1988 Rules provide a procedure whereby the court may hear complaints about the conduct of certificated bailiffs, with powers to forfeit the certificate and award compensation to the successful complainant. In addition the Rules were amended in 1999 to enable complaints made to and upheld by the local authority employing the bailiff's services to be fed into the county court complaints procedure. A new form (Form 5) has been created to enable the council to notify the court of a successful complaint- this will

then be considered by the circuit judge in the same manner as a complaint made straight to the court by an aggrieved person (r8(1)). This provides another relatively quick and cost-free form of redress, though there are shortcomings in the certification process.

As the draft code says, certification provides a *degree* of supervision and protection. However, to be an effective licencing system we would recommend that:

- ◆ more active and rigorous checks on the truthfulness of applications are made by the Court Service;
- ◆ there is a clearer tying in of magistrates and local authority complaints procedures to require that complaints which are upheld are referred for consideration of the certificate by the court; and,
- ◆ a better formulated procedure for hearing complaints is devised so that:
 - ◆ the exact role of the complainant is defined. At present there is no requirement for him/ her to be notified or present (though it would of course be expected) and as a result the hearing is a trial without a plaintiff and with the judge being placed in the undesirable position of prosecutor and inquisitor rather than arbitrator;
 - ◆ there is clarification both of the situations in which the court may hear complaints (i.e. the procedure is contained within the Distress for Rent Rules: can local tax and road traffic penalty complaints be heard?) and of the circumstances in which compensation may be awarded (again, is it rent cases only?); and,
 - ◆ details of decisions upon complaints are publicised as guidance to bailiffs, creditors and advisers.

p27 Complaints

Please also note that since the publication of the code two voluntary complaints schemes have been adopted in the bailiffs' industry. The Association of Civil Enforcement Agencies (which represents the large employers of bailiffs) has devised a complaints procedure culminating in an independent adjudication panel hearing the matter, and the Certificated Bailiffs' Association has adopted a very similar procedure linked to its own members' code of practice. For details contact ACEA at Chesham House, 150, Regent Street, London, W1R 5FA, and CBA at Ridgfield House, 14 John Dalton St, Manchester M2 6JR.

These schemes are to be welcomed as examples of self-regulation by an industry seeking to raise standards, and as extra remedies for debtors, but various comments may be made:

- ◆ these are only voluntary schemes. They therefore depend on the two-fold co-operation of bailiffs, both in publicising them to debtors and in adhering to their results. Though it is extremely unlikely that a member of either association would reject the conclusions of a complaint upheld against them, there is no means of 'enforcing' awards other than the threat of expulsion;

- ◆ as private schemes operated by trade bodies, their results are not publicised for the benefit of others involved in the field; and,
- ◆ each scheme has an intermediate phase where officers of the association adjudicate on the complaint. These are open to potential criticism from two opposing perspectives- firstly, that complaints may be rejected because of a tendency for the industry to 'close ranks' and prefer the bailiff's version of events. Alternatively, that complaints may be upheld by officers for purely commercial reasons of 'having a go' at the competition.