



# Methods of Enforcement of Revenue Debts – Part I



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The following article originally appeared in the *Irish Tax Review* over fifteen years ago in May 1991. I was approached by the editor with a view to updating it and it has been a privilege to do so. The original article appeared in two parts, as it does now. It has been republished because it has remained, for some time, the most comprehensive article on this area and is still being referred to in text books today; a testimony to the work done by the original authors.

**Dylan Macaulay & Lyndon MacCann May 1991 updated by Frank Mitchell 2008**

The purpose of this article is to examine the various methods of debt collection open to the Revenue Commissioners when a taxpayer is in default in the payment of taxes owing by him/

her. In Part I the two main procedures for debt collection are outlined, they are:

1. The issue of a certificate of indebtedness pursuant to section 962 of the Taxes Consolidation Act 1997 (hereinafter "TCA"); and
2. The institution of legal proceedings.

Under these two headings, we will examine the various means of execution available to the Revenue Commissioners. "Execution" is the term used to describe the process for enforcing or giving effect to the s962 certificate, or the judgment of the court, as the case may be. The methods of enforcement available depend upon whether the Collector-General is proceeding on foot of a certificate issued pursuant to s962 TCA

1997, or is proceeding pursuant to the terms of a judgment obtained in court.

Part II examines in detail one particular form of execution which is available to enforce either a s962 certificate or a court order, namely, that of the Sheriff. His/her powers of seizure will be critically analysed, and the rights of parties affected by the seizure will be discussed.

First, however, we will examine the two procedures for debt collection.

## **I. The Section 962 Certificate**

Section 962(1) effectively allows the Revenue Commissioners to sidestep the need to institute legal proceedings in respect of income tax owed in the event of the issue of a certificate by the Collector-General. The subsection provides that:

*“(1) Whenever any person makes default in paying any sum which may be levied upon him in respect of income tax, the Collector-General may issue a certificate to the County Registrar or Sheriff of the county in which the defaulter resides or has a place of business certifying the amount of the sum so in default and the person upon whom the same is leviable.”*

Finance Act 2004 inserted a new subsection (1A) into s962 empowering the Collector-General to issue electronic certificates.

Although s962 refers to income tax in particular, (which would include PAYE and PRSI), section 24 of the VAT Act 1972, and section 132 of the Stamp Duty Consolidation Act 1999 expressly apply s962 to the recovery of VAT and stamp duty respectively.

Furthermore, it would seem by virtue of s973 TCA 1997, that s962 also applies to the recovery of corporation tax. Section 973(2) states that:

*“All such powers as are exercisable with respect to the collection and levying of sums of income tax under Schedule D...shall extend with respect to sums of corporation tax...”*

Section 64 CAT Consolidation Act 2003 is in similar terms and extends s962 to the collection of unpaid CAT.

### Constitutionality

The constitutionality of the issue of a s962 certificate (or s485 of the Income Taxes Act 1967 as it then was) was confirmed by the Supreme Court in *Deighan v Hearne* [1990] IR 499. Mr Dehigan had argued that the issue of the certificate amounted to the administration of justice, in breach of Act 34 of the Constitution. The Supreme Court, in affirming the decision of Murphy J, rejected the contention that the issue of the certificate constituted the administration of justice, on the grounds that:

- (i) there was not, at the date of the issue of the certificate, a justifiable controversy about whether any tax had been paid;

- (ii) the decision to issue the certificate did not impose a liability on the taxpayer nor affect any of his/her rights, those being affected by his/her default in payment of a levied tax; and
- (iii) the issue of the certificate did not invade or oust any of the functions vested in the judges by Article 34, since even if a certificate were issued to the Sheriff in error, as it was in this case, the courts were empowered to intervene immediately to resolve the issue between the taxpayer and the Collector-General.

### Methods of enforcement

The issue of the s962 certificate merely creates the legal authority on which the debt can be collected. In order to collect the debt we need to consider the methods of enforcement available to us. The methods of enforcing a s962 certificate are as follows:

1. Seizure of assets by a Sheriff;
2. Proceeds of fixed charge on book debts;
3. Attachment of debts;
4. Insolvency proceedings.

#### 1. Seizure of assets by Sheriff

Where a s962 certificate has been issued, section 962(2) provides that immediately upon receipt of the certificate the Sheriff or County Registrar, as the case may be, must:

*“levy the sum certified in the certificate to be in default by seizing all or any of the goods, animals and other chattels within his or her bailiwick belonging to the defaulter, and for such purposes the County Registrar or Sheriff shall (in addition to the rights, powers and duties conferred on him by this section) have all such rights, powers and duties as are for the time being vested in him or her by law in relation to the execution of a writ of fieri facias in so far as those rights, powers and duties are not inconsistent with the additional rights, powers and duties conferred on him or her by this section.”*

From this section it appears, therefore, that the power of the Sheriff/County Registrar to levy execution on foot of a s962 certificate is similar to that vested in him/her when enforcing a judgment of the court. These powers will be examined in detail in part II of this article.

### 2. Proceeds of fixed charge on book debts

If the defaulter is a limited liability company it is common to find that most, if not all, of the company's assets have been charged in favour of a bank pursuant to the terms of a fixed and/or floating charge. The creation of a fixed charge or the crystallisation of a floating charge, acts as an equitable assignment of the charged property in favour of the secured creditor, (see *Tempany v Hynes* [1976] IR 101) and such circumstances may prevent the Sheriff from levying execution against these goods.

If the company goes into receivership or liquidation then, pursuant to the respective terms of ss98 and 285 of the Companies Act 1963, certain arrears of taxes owing to the Revenue Commissioners, known as “preferential debts”, rank for payment in priority to the claims of any floating charges, but not fixed charges. Therefore, in order to prevent the Revenue Commissioners from obtaining priority in insolvency situations, banks have attempted, so far as is possible, to obtain fixed rather than floating charges over the assets of their corporate clients.

For a number of years there was uncertainty as to whether a company could validly create a fixed charge over book debts, but this uncertainty was resolved by the Supreme Court in the case of *Re Keenan Brothers Limited* [1985] ILRM 641, where it was determined that it was possible to have a fixed charge over a company's present and future book debts, provided that certain restrictions are imposed upon the use of those debts by the terms of the charge itself.

By obtaining such a charge, the bank could avoid the disadvantage of a floating charge, whereby the preferential creditors – including the Revenue

Commissioners – could be paid in priority to the charge holder.

### Section 1001 notices

To get around the consequences of this decision, s115 of the Finance Act 1986 (now s1001 TCA 1997) was introduced. In effect, it purports to make the holder of a fixed charge for book debts liable for the unpaid taxes of the charger. The section provides that where a fixed charge is created over the book debts of a company and the company fails to pay any PAYE, interest or VAT for which it is liable, the Revenue Commissioners may serve a notice of the company's default on the chargee. Such a notice could, for example, be issued where the Collector-General has issued a s962 certificate but the Sheriff or Revenue Sheriff, upon trying to levy execution, discovered that all the corporate taxpayer's assets had been effectively mortgaged, thus putting them out of reach of the Revenue Commissioners. The reason why the scope of this section is limited to PAYE and VAT only, appears to be that these are amounts of tax which the defaulting company has collected from the other parties on behalf of Revenue.

After receipt of a notice issued pursuant to s1001, if the chargee receives any payment directly or indirectly from the company in respect of any debt due by the company to the chargee, then the chargee is obliged to pay to the Revenue Commissioners – up to the amount of any payment so received by the chargee from the company – the full amount demanded by the Revenue Commissioners in respect of any unpaid PAYE, interest and VAT liability of the company.

This section may be used while the company is a going concern. It is not necessary that the company be in liquidation or receivership and is therefore a significant extension of the rights of

the Revenue Commissioners. It also puts them in a super-preferential position in a liquidation or receivership. They do not have to participate rateably with other preferential creditors out of floating charge realisations. In a liquidation or receivership their preferential status extends to no more than one year's taxes under s285 Companies Act 1963. Section 1001, however, contains no such limitation and Revenue may

**It should be noted that s1001 relates not only to the receipts of book debts by the chargee, but also to any other payments made by the company to the chargee from any other source. It is unclear as to whether or not s1001 applies to floating charges which crystallise and become fixed charges, but in principle this would seem to be the case.**

therefore seek to recover all arrears no matter how they arise. There is no limit to the number of claims that can be made under the section.

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The dramatic effect of s1001 (or s115 of Finance Act 1986 as it was then) was ameliorated by the amendments made by the Finance Acts of 1995 and 2007.

A holder of a fixed charge may now protect himself against the full force of s1001 by notifying the Revenue Commissioners of his charge. Section 1001(3) provides that the holder will not be fixed with liability for the charger's Revenue debts unless the charge holder is notified in writing by Revenue of its potential liability. The charge holder may only be held liable to account for any amounts received after the receipt of that notice and, where the charge holder notifies Revenue of details of the charge within 21 days

of its creation, he/she may only be held liable to account for debts which the chargee becomes liable to pay after the date of service of the Revenue Notice – i.e., he/she can have no liability for pre-existing debts.

Therefore, where a charge holder does not inform Revenue of the existence of the fixed charge, he/she may become liable for all of the chargee's PAYE and VAT debts whenever accrued. In this case, however, the charge holder only remains liable up to the extent of monies received from the chargee after the date of the Revenue Notice.

### 3. Attachment of debts

It should be noted that this method of enforcement does not require that a s962 certificate is issued. It is therefore a method of collection in itself.

Section 1002 (introduced by Finance Act 1988) empowers the Revenue Commissioners to attach monies due from third parties to individual or corporate taxpayers in discharge of that taxpayer's unpaid income tax, capital gains tax, corporation tax, VAT, PAYE, PRSI, health and employment levies, customs duty, excise duty and stamp duty, together with interest and penalties. The section allows the Revenue Commissioners to garnishee debts owing to the taxpayer (including amounts due by financial institutions) without the need to first obtain a judgment for the debt and a subsequent garnishee order.

#### What Debts Can Be Attached?

The power of attachment under s1002 applies to virtually any debt payable to the taxpayer. For example, it would include ordinary trade debts, monies payable to the taxpayer pursuant to a judgment, monies held by solicitors, accountants or auctioneers on behalf of their clients, the winnings of lotteries, legacies and bequests and rents payable by a tenant to his landlord. Section 1002(1)(b) expressly provides that monies held on deposit in an account to the credit of the taxpayer in a licensed financial institution – including banks, building societies and the Post Office – is a debt due by that institution to the taxpayer which comes within

the scope of s1002. This is stated to include monies held in an account, whether a deposit or current account, and whether the monies were payable on demand or at some future date, provided that they are deposited in the account to the credit of the taxpayer, either for his sole benefit or for the joint benefit of the taxpayer and another person. Where monies are held in a joint account there is a statutory presumption that they are owned equally. Once the joint account-holders are informed of the receipt of the notice by the financial institution, they have 10 days in which to satisfy the institution that the monies are held other than on an equal basis.

Where there is a dispute as to the amount of money due by the third-party to the taxpayer, Revenue can only attach the undisputed portion of the debt.

It is also expressly provided that s1002 does not permit the attachment of any amount of money due by a third-party to an employee as emoluments under a contract of service. Monies payable to an independent contractor, however, under a contract for services, may be liable to attachment.

Under s1002(4), the Notice of Attachment applies not only to debts due and owing by the third-party to the taxpayer at the date of receipt of the notice, but also to any additional debt which becomes due by the third-party to the taxpayer up to the amount of the arrears of tax due.

### Service of the Notice of Attachment

Section 1002 can only be brought into operation when the taxpayer has been in default in relation to the payment of his taxes for a period of at least 14 days (prior to Finance Act 2001 this was one month), and the Revenue Commissioners have given the taxpayer a notice in writing not later than seven days before the date of the receipt by the third-party of the Notice

of Attachment, stating that if the amount is not paid, it may be specified in a Notice of Attachment and recovered under s1002 from a debtor of the taxpayer.

**The Revenue Commissioners are entitled to issue more than one Notice of Attachment in respect of each taxpayer. Where this is done, the aggregate of the amounts set out in such notices of attachment cannot exceed the aggregate amount of tax actually in default.**

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The Notice of Attachment, which is issued to the taxpayer's debtor, must be in writing and must state the taxpayer's name and address as well as the amount of tax due. It must also direct the third-party to deliver to the Revenue Commissioners, within 10 days of receipt of the Notice of Attachment, a return in writing specifying whether or not any debt is due by him to the taxpayer and if any debt is due, specifying the amount of the debt. The notice must also direct the third-party to pay the amount of any such debt to the Revenue Commissioners, up to a sum equal to the amount of tax stated to be owing in the notice. Payment must be made within 10 days of receipt of the notice.

Where the debt owing to the taxpayer exceeds the amount of tax due, the third-party need only make a return and payment of such sum as is equal to the arrears of tax. If the tax is less than the amount due, he/she must pay the full amount of this debt. Should any further sums become

A Notice of Attachment may only be sent to a person who the Revenue Commissioners have reason to believe may be indebted to the taxpayer. A copy must also be sent forthwith to the taxpayer. The Revenue Commissioners are entitled to issue more than one Notice of Attachment in respect of each taxpayer. Where this is done, the aggregate of the amounts set out in such notices of attachment cannot exceed the

due and owing by him/her to the taxpayer, the third-party must make an additional return and payment of such sums up to the amount of the balance of tax owing unless he/she has beforehand received a Notice of Revocation of the Notice of Attachment from the Revenue Commissioners.

### Notices of Attachment and Bankruptcy

Attachment of debts or additional debts are not permitted where the taxpayer or the third-party is declared bankrupt, or in the case of a company that goes into liquidation. Furthermore, if the bankruptcy or liquidation occurs after the issue of the Notice of Attachment, the notice will automatically expire on the occurrence of such an event.

Notably, no reference is made as to what would happen if the third-party or taxpayer were a company which was placed under the protection of the court pursuant to the terms of the Companies (Amendment) Act 1990. Section 5 of that Act provides that, after the presentation of the petition for the appointment of the examiner, no attachment shall be put in force against the property of the company except with the leave of the court. Consequently, where it is the third-party which is placed under the protection of the court, the Notice of Attachment can be issued by the Revenue Commissioners (as the company is not in liquidation), but cannot be enforced without the court's consent.

On the other hand, if it is the taxpayer rather than the debtor who is under the protection of the court, this would not seem to place any bar on the issue of a Notice of Attachment by the Revenue Commissioners under s1002. A successful attachment of debts, if sufficient to discharge all arrears of tax, would mean that the Revenue Commissioners would not have to participate in any proposals for the rescue of the taxpayer. However, the consequences of the attachment for the other creditors of the taxpayer could be disastrous. If the attached debt was of significant value (as, for example, monies owing to the company under a lucrative contract), the payment of it directly to the Revenue Commissioners could leave

the examiner without any cash to implement a rescue package and could result in the collapse of the company.

### Duties of the third-party

While the Notice of Attachment is in force, the third-party cannot make any disbursements out of the debt or additional debts owing by him/her to the taxpayer, to the extent that such disbursements would reduce the sum of money below the aggregate of the tax stated to be owing by the taxpayer in the Notice of Attachment, except with the leave of the court. Where the third-party makes such an unauthorised disbursement, he/she remains liable to pay that sum to the Revenue Commissioners under s1002(6).

If a third-party delivers, either fraudulently or negligently, an incorrect return or further return, he/she is deemed, by s1002(5), to be guilty of an offence under s1078 with the potential for a significant fine and/or imprisonment for a term not exceeding five years. If the third-party, when the Notice of Attachment has been given, makes the required return but fails to pay the amount of the debt to the Revenue Commissioners, they may institute legal proceedings against him for the recovery of the amount of the debt specified in the return, up to the amount of the tax due.

### Revocation of Notice of Attachment

A Notice of Attachment given to a third-party pursuant to s1002 may be revoked by the Revenue Commissioners by notice in writing. It must be revoked forthwith if the taxpayer has paid the amount of the arrears stated to be due and owing in the Notice of Attachment. Where a Notice of Revocation is given to the third-party a copy must also be given forthwith by the Revenue Commissioners to the taxpayer.

If the third-party has paid to the Revenue Commissioners the amount of any debt or additional debt pursuant to s1002 and, at the time of the receipt of this amount by the Revenue Commissioners, the taxpayer has already paid the balance of the specified sum which is due and owing by him/her, the Revenue Commissioners must forthwith refund such monies, not to the third-party him or herself but to the taxpayer.

This is, of course, due to the fact that the monies in question already constituted a debt owing by the third-party to the taxpayer.

Where the third-party pays any monies to the Revenue Commissioners pursuant to the terms of a Notice of Attachment issued under s1002, he/she must forthwith give the taxpayer a notice in writing specifying the payment, its amount, and the reason for which it was made. On receipt of the sum, the Revenue Commissioners must then notify both the taxpayer and the third-party in writing of such receipt.

Importantly, from the point of view of the third-party, s1002(13) provides that the payment of monies by the third-party to the Revenue Commissioners pursuant to the Notice of Attachment constitutes a good discharge of that amount of the debt, in the same way as if it had been paid by the third-party directly to the taxpayer. Furthermore, where a third-party is prohibited by virtue of the service of a Notice of Attachment from reducing the amount of any debt or additional debt due to the taxpayer below the amount of any tax stated to be owing by the taxpayer to the Revenue Commissioners, no action may be taken by the taxpayer against the third-party for non-payment to him/her of that amount of the debt.

### 4. Insolvency proceedings

If the Sheriff has tried to levy execution pursuant to the s962 certificate, but all or part of the sum so certified remains outstanding, the Collector-General may choose to issue insolvency proceedings against the taxpayer. The considerations brought to bear on whether to pursue unpaid tax through the Revenue Sheriff by attachment, or by way of legal proceedings in the courts, is the subject of a separate article by

Gerry Harrahill elsewhere in this month's *Irish Tax Review*.

Perhaps one of the most significant practical changes to this area since the original version of this article was published in 1991 is the outsourcing of legal proceedings to independent legal firms. According to the Office of the

Comptroller and Auditor General, the value of cases referred to external solicitors firms in 1997 was €36.5million. Unfortunately, no more recent statistics are available but one would expect this number to have grown significantly in the past decade.

If the taxpayer is an individual he/she may be placed in bankruptcy provided the sum owing is at least €1,900. The procedure for placing an individual in bankruptcy is governed by

the Bankruptcy Act 1988 and Order 76 of the Rules of the Superior Courts. Essentially, a notice form demanding payment is issued. If payment is not made within four days after service of the notice, application may then be made to the High Court for the issue of a bankruptcy summons. If the debt is not paid, secured or compounded to the satisfaction of the creditor within 14 days of service, the Collector-General may then present a bankruptcy petition. If, on hearing the petition, the court is satisfied that the sum demanded is still outstanding, a bankruptcy order will be made.

If the taxpayer is a limited liability company registered under the Companies Acts 1963 to 2006, the appropriate procedure is to place the company in a compulsory winding-up. The procedure is similar, although not identical, to that involved in placing an individual in bankruptcy. The minimum debt on foot of which a petition may be presented is currently €1,269.74. Inability to pay debts is proved either by the service of a letter of demand which remains

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unsatisfied within three weeks of service, or alternatively, by the return, unsatisfied in whole or in part, of an execution order or other process issued on foot of a judgment, decree or order of the court or by proving, in any other way, the insolvency of the debtor to the satisfaction of the court. It is submitted that insolvency could be adequately proved where execution on foot of a s962 certificate remains unsatisfied and the Sheriff makes a return of the certificate in these terms.

Once inability to pay debts has been proved in one or more of the above ways, the Collector-General may present his petition to have the judgment debtor wound up. If the court, on hearing the petition, is satisfied that the debt remains outstanding, an order will be made placing the judgment debtor in compulsory winding-up.

Once the taxpayer has been placed in bankruptcy or liquidation, as the case may be, the Revenue Commissioners may then prove against the estate as preferential or ordinary unsecured creditors.

Now that we have completed our examination of the s962 certificate and the methods for enforcing it, we can now move on to examine the second Debt Collection Procedure available to the Revenue Commissioners – the institution of legal proceedings.

## II. Legal Proceedings

In pursuing a debt through the courts, the Revenue Commissioners are in no different a position to any other individual or corporate body. Once the debt falls due – in this case the tax – legal proceedings can be initiated in an effort to secure a court judgment against the debtor. Enforcement of judgments received from the court is dealt with further below.

Proceedings can be taken in the District, Circuit or High Court, depending on the amount of tax owed. The District Court has a jurisdiction up to €6,348.69, the Circuit Court to €38,092.14 and the High Court is of unlimited jurisdiction. The proceedings in each court are, however, similar in that the amount claimed is a “liquidated sum”.

In other words, Revenue will not be claiming for unevaluated damages or any other amount which the court would have to value. The initiating summons will therefore state the amount of tax that the Revenue Commissioners claim to be owing.

### (a) District Court

A Civil Process demanding that the tax overdue will be served on the defendant. The Civil Process will instruct the defendant either to file his/her Notice of Intention to defend the claim or, alternatively, to admit that the amount is due. If the defendant defends the claim, the case will be heard in the District Court. If the defendant is unsuccessful the court will probably award costs against him/her. In the District Court, the costs are limited to a published scale. If the debtor ignores the Civil Process served on him/her, judgment can be obtained for the full amount claimed without further reference to him/her.

### (b) Circuit Court proceedings

The initiating summons in the Circuit Court is known as the Civil Bill. Once again, this will state the amount claimed by the Revenue Commissioners. The defendant is given the opportunity to file an appearance to the Civil Bill. If he/she wishes to defend the claim the case will be heard before the Circuit Court. If the defendant chooses to ignore the Civil Bill once again Revenue can simply apply to have judgment marked against the debtor “in the office”.

### (c) High Court

In the High Court, proceedings are initiated by way of Summary Summons. Once again, the summons will set out the amount claimed by the Revenue Commissioners. The summons will require the defendant to enter an appearance within eight days of it being served on him/her. If the defendant simply chooses to ignore the summons Revenue will quickly obtain judgment. If an appearance is entered, the plaintiff must apply to the Master of the High Court for liberty to enter judgment for the amount claimed, together with the Grounding Affidavit on which the plaintiff will rely to prove the amount due. If the debtor feels that he/she can make a case to

defend the claim made by Revenue, they should file a Replying Affidavit. This should set out the reasons why he/she believes the sum or part of it to be due. There is provision for either party to demand that the person who has sworn the affidavit be present in court at the application before the Master for the purposes of cross-examination; the Master, in this case, has the power, pursuant to Order 37 Rule 3, to hear oral evidence.

Upon the hearing of the application by the Revenue Commissioners, the Master, in an uncontested case, (i.e., where no Replying Affidavit has been filed or alternatively, if filed, discloses no defence) may allow judgment to be entered for the amount claimed.

If the defendant is contesting the amount claimed (i.e., a Replying Affidavit has been filed which discloses an arguable defence) the Master must transfer the case for hearing by the High Court. The Master also has the power, on consent, to adjourn the case for plenary hearing as if the proceedings had been originated by Plenary Summons.

Where the matter has been transferred to the court, the court may give a judgment for the claim by the Revenue Commissioners. Alternatively, the case may be adjourned for plenary hearing. If the defendant is only defending part of Revenue’s claim, Revenue will be allowed to have judgment immediately for such part of the claim as to which the defence does not apply or as is admitted.

## Methods of Enforcing Judgments

Where legal proceedings have been taken against the defaulting taxpayer and judgment issues in the Collector-General’s favour, there are a number of ways in which the judgment can be enforced:

1. An order of *feri facias*;
2. An order of garnishee;
3. Appointment of a receiver by way of equitable execution;
4. Charging orders and stop orders;

5. Judgment mortgages;
6. Examination and instalment orders;
7. Discovery in aid of execution in proceedings under the Debtors (Ireland) Act 1872;
8. Insolvency proceedings;
9. Proceeds of fixed charges on book debts;
10. Registration of judgments.

We will now examine each one in turn.

### 1. Order of *feri facias*

Where a judgment has been obtained by the Collector-General in the High Court, an order of *feri facias* or “*fi. fa.*”, (meaning “cause to be made”) may be obtained by application to the Central Office pursuant to Order 42 of the Rules of the Superior Courts 1986. A *fi. fa.* is an order of execution addressed to the Sheriff or (outside Dublin)

to the County Registrar directing him to levy against the goods of the judgment debtor the amount of the judgment debt with court interest at 8% and costs. The application is by way of a document known as a *praecipe*, which must be in the prescribed form and must be accompanied by a copy of the judgment or order, together with a certificate signed by the party or his solicitor detailing the amount of the judgment debt plus costs in respect of which execution is being sought. The order of *feri facias* is for both the judgment debt and the legal costs or, alternatively, the Collector-General may obtain separate orders for both the judgment and costs respectively.

In the Circuit Court, application is made to the County Registrar under Order 36 of the Circuit Court Rules 2001 for an “execution order”. The procedure is similar to that involved in obtaining

an order of *feri facias*. In the District Court a warrant is attached to the decree on foot of which the judgment debt may be levied.

Under s7 of the Enforcement of Court Orders Act 1926, the Sheriff or County Registrar (as the case may be) is entitled to seize all the

judgment debtor’s moveable property – with the exception of the necessary clothing and bedding of the debtor and his family – and tools and equipment of the debtor’s trade not exceeding, in the whole, the value of £15. The Sheriff or County Registrar can also seize cash, bills of exchange and promissory notes together with the debtor’s leasehold property. There is some doubt as to whether he is empowered to seize freehold property. The question of the Sheriff or County Registrars’

powers of seizure will be considered in more detail in part II of this article.

If the judgment debtor has property in several counties, Revenue may have orders of *feri facias* sent out to Sheriffs or County Registrars in the respective counties, provided, of course, that execution may not be levied for a sum in excess of the total amount of the judgment debt together with interest and costs.

Under Order 43, once goods have been seized pursuant to an order of *feri facias*, Revenue may then obtain an order of *venditioni exponas* directing the Sheriff or County Registrar, as the case may be, to sell the goods which he/she has seized. Upon receipt of such an order the Sheriff or County Registrar may then sell sufficient goods to discharge not only the amount of the judgment debt together with interest and

costs, but also his/her own costs in levying the execution (known as “poundage”). In the case of a deficiency after realising the goods, the Sheriff’s costs take priority over those of the judgment creditor. Where it is company property which has been sold, section 292 of the Companies Act 1963 requires the Sheriff to retain the proceeds of sale for a period of 14 days to allow for the service of any notice for the winding-up of the company. If such a notice is served, the Sheriff is obliged, on request, to deliver the goods and any money seized to the liquidator but the Sheriff’s costs are a first charge on the goods or money so delivered.

Once the Sheriff has completed the execution he must file a return, which is essentially a report regarding his activities. He will file a *feri feci* where he has seized and realised sufficient goods to satisfy the amount of the debt, together with interest and all costs, including the costs of execution. However, if the proceeds of sale have been insufficient to satisfy all claims and costs he must file a return of *nulla bona* (“no goods”).

### 2. Order of garnishee

Where a judgment has been obtained against the defaulting taxpayer by the Collector-General, it would seem on principle that the judgment could be enforced by use of the attachment of debts machinery contained in s1002 TCA 1997 and described above in relation to s1086 certificates.

Attachment of debts may also be effected pursuant to an order of the Circuit Court or High Court under Order 45 of the Rules of the Superior Courts 1986, or Order 38 of the Circuit Court Rules 2001, as the case may be. If the Sheriff or County Registrar has made a return of *nulla bona*, the Collector-General may apply *ex parte* to the court upon affidavit for a conditional order of garnishee. (A “garnishee” is a person to whom the judgment debtor is indebted.) The affidavit must give details of the judgment and indicate that the judgment remains unsatisfied and that a return of *nulla bona* has been made thereon. The name will also be given of the person against whom the order of garnishee is being sought,

**If the judgment debtor has property in several counties, Revenue may have orders of *feri facias* sent out to Sheriffs or County Registrars in the respective counties, provided, of course, that execution may not be levied for a sum in excess of the total amount of the judgment debt together with interest and costs.**

detailing the amount of the debt owing by him to the judgment debtor.

If the *ex parte* application is in order, the court will make a conditional order attaching the debt. The conditional order, which must be served on the garnishee, will call upon him to appear before the court on a stated date to show cause as to why the order should not be made absolute – i.e., the garnishee must show cause as to why he/she should not pay to the person who has obtained the judgment/or order the debt due from the garnishee to the judgment debtor or so much of it as will satisfy the judgment/or order. Once the garnishee has received notice of the making of the conditional order of garnishee, if he/she should disperse any portion of the debt, they may be held liable to make good the amount discharged to the judgment creditor and may also be committed for contempt of court.

If the garnishee does not dispute the debt, or fails to appear in court on the day in question, or fails to show cause as to why the order would not be made absolute, then the court will make the conditional order absolute. The garnishee is then obliged to pay to the

Revenue Commissioners, as judgment creditor, the amount of the debt owing by him/her to the judgment debtor, but not exceeding the amount of the judgment debt together with interest and costs. The court may also order that the costs of the application for the order of attachment be discharged out of the monies owing by the garnishee.

The payment made by the garnishee pursuant to the order attaching the debt constitutes a valid discharge as against the judgment debtor in respect of the amount so paid.

If the garnishee intends to dispute his/her liability to the judgment debtor, or for any other reason wishes to show cause against the making of an absolute order of garnishee, he/she should file an affidavit in court for the date when the application is due to be heard, setting out the grounds of the objection. In particular, if he/she is disputing his/her liability, the court may order that this issue be determined before it considers making any absolute order of garnishee.

If the garnishee fails to make a payment to the judgment creditor pursuant to the order of the court attaching the debt, then the judgment creditor may levy execution for the sum in question in the same manner as if the judgment creditor had obtained an ordinary judgment against the garnishee directly.

**If the garnishee does not dispute the debt, or fails to appear in court on the day in question, or fails to show cause as to why the order would not be made absolute, then the court will make the conditional order absolute.**

### 3. Appointment of receiver by way of equitable execution

This mode of execution involves the appointment of a receiver (normally the judgment creditor or a solicitor) to receive monies payable by a third-party to the judgment debtor. The form of application is similar, although not identical, to the garnishee proceedings described above, and is governed by Order 45 of the Rules of the Superior Courts or Order 39 of the Circuit Court Rules, as the case may be. The order of garnishee can relate

only to actual debts owing to the judgment debtor at common law. However, a receiver appointed by way of equitable execution may enforce some claim of the judgment debtor, which is enforceable only in equity such as a debt payable in the future, or a debt which arises solely by virtue of some equitable interest (such as monies payable to a beneficiary pursuant to the terms of a trust).

A recent example of an appointment of a receiver by way of equitable execution occurred in the case of *O'Connell v An Bord Pleanála* [2007]

IEHC 79. In that case an order for costs in the amount of €58,000 had been awarded against the plaintiff. Ms O'Connell also had proceedings in being in which she was suing a Mr Troy for damages arising from an alleged assault. As Ms O'Connell had not paid the costs awarded, the notice parties to the 2007 decision sought to have a receiver appointed by way of equitable execution so that any sum which Ms O'Connell received in her damages claim would be recoverable by the notice parties in satisfaction of their award of costs. No other procedure was available to the notice parties, since Ms O'Connell's receipt of damages was a future right to which she may or may not become entitled and so the court agreed to appoint a receiver over much of the damages which Ms O'Connell would receive in her claim. However, readers should note that there is a question mark over whether such an order should be made where the future source of income comprised wages or salary – see *Soinco S.A.C.I. v Novokuznetsk Aluminium Plant* [1988] 1 QB 406.

Application for the appointment of a receiver by way of equitable execution will normally be made only where execution by some other means is not possible – see *National Irish Bank Ltd v Graham* [1994] 1 IR 215. Accordingly, it will be necessary to show the court that the Sheriff or County Registrar, as the case may be, has made a return of *nulla bona* as against the judgment debtor.

The procedure is by way of an *ex parte* application grounded on an affidavit. In some circumstances, however, the court will require the application to be made by way of notice of motion as where the fund (in respect of which the receiver is to be appointed) is made up of regular payments such as salary, pension, etc. For example, in the case of *Central Hotel Company Limited v Griffin* 75 ILTR 132, the court held that the application should be by way of notice of motion where it was sought to appoint a receiver by way of equitable execution over an annuity payable to the judgment debtor under a deed of separation.

The affidavit must give details of the amount of the judgment debt along with any interest and costs and it should also state that the judgment remains unsatisfied and that the Sheriff or County Registrar, as the case may be, has made a return of *nulla bona*. The affidavit should also specify the sum of money, although not necessarily a debt, which is held or about to be paid by some other person to, or on behalf of, the judgment debtor, and that the judgment debtor has a beneficial interest therein. The court will only make an order appointing a receiver where it is just and convenient to do so, and in this respect the court must have regard to the amount of the debt claimed by the judgment creditor, to the amount which may be obtained by the receiver, and to the probable costs of his/her appointment.

Payment of the debt by the third-party to the receiver, pursuant to the terms of the order of the court, will give the third-party a good discharge in respect of same as against the judgment debtor.

#### 4. Charging orders and stop orders

##### (a) Charging orders

A charging order is an order of the court charging the amount of the judgment debt upon stocks or shares held by the judgment debtor in a public company, or Government stock held by him/her whether in his/her own name or in the name of a trustee. A charging order can also be made in respect of funds in court, in respect of which the judgment debtor has an interest. This application is made pursuant to the terms of the Common Law (Amendment) Procedure Act (Ireland) 1853 and is governed by the rules provided in Order 46 of the Rules of the Superior Court. It is made *ex parte*, although any interested party can subsequently apply to have the terms of the order discharged or varied. The order is served on the secretary of the company in the case of stocks and shares, and on the accountant of the High Court in the case of funds in court.

Once the property in question has been charged, the judgment creditor may then take steps to realise same. This involves an application to court by way of notice of motion, which is served

on the judgment debtor together with all other persons and companies whose acts or consent are necessary to transfer the property into the name of the Sheriff or County Registrar and, in the case of stocks and shares, whose consent is necessary to make payment of any dividends. Once the charged property has been transferred into the name of the Sheriff or County Registrar he/she can then take steps to realise same and apply the proceeds of sale in discharge of the judgment debt.

##### Partnerships

If the judgment debtor is a member of a partnership then, under s23 of the Partnership Act 1890, a writ of execution cannot be issued against any partnership property unless the judgment is against the firm itself. If the judgment is against the judgment debtor alone, then the appropriate procedure is to apply for an order pursuant to s23 charging the judgment debtor's interest in the partnership property and profits. The court may, by the same or a subsequent order, appoint a receiver of the judgment debtor's share of partnership profits (whether already declared or accruing), as well as of any other money which may be coming to him in respect of the partnership, and direct all accounts and enquiries and give all other orders and directions which might have been directed or given if the charge had been voluntarily made in favour of the judgment creditor by the judgment debtor, or which the circumstances of the case may require. The application made under s23 is governed by Order 46 RSC and is, by way of notice of motion, served on the judgment debtor and all other members of the partnership as are within the jurisdiction. Under s23(3) the other partner, or partners, are at liberty at any time to redeem the interest charged, or in the case of a sale being directed, to purchase it.

##### (b) Stop orders

Any person who has a derivative interest (whether by way of assignment, charge, lien or otherwise) in any funds or security standing in court (or directed to be brought into court) may apply to the court for an order ("stop order") staying the transfer, sale, payment out, or other

disposition of the funds or securities without notice to the applicant. This procedure may therefore be useful where the judgment creditor has obtained a charging order against funds in court in respect of which the judgment debtor is interested. The application is governed by Order 46 Rules 14 to 18 and is made *ex parte* unless the court is of the opinion that any other person who is interested in the funds or securities ought to be put on notice.

##### (c) Notice restraining transfer of stock

If the judgment creditor has obtained an order charging the debtor's interest in stocks or shares he/she may, by filing in the central office an affidavit outlining his/her beneficial interest in those shares, obtain an order restraining the company from transferring the shares or paying any dividends in respect of same. The making of such an order will thus give the judgment creditor time in which to have the shares transferred to the Sheriff or County Registrar, or to have any dividends paid over to that officer in order to discharge the judgment debt. Such applications must be made in accordance with the rules as set out in Order 46 Rules 5 to 13.

#### 5. Judgment mortgages – see Order 42

This is a method of enforcing a judgment against the debtor's land and is governed by the Judgment Mortgage (Ireland) Act 1850 as amended by the Judgment Mortgage (Ireland) Act 1858. The effect of this legislation is to enable the judgment creditor to register his judgment against the debtor, thereby converting it into a mortgage against his/her property. The judgment mortgage can be registered in respect of a wide range of legal and equitable estates in land held by the debtor, whether freehold or leasehold.

Section 6 of the 1850 Act provides that registration of the judgment mortgage is affected by filing an affidavit in the Central Office and either the Registry of Deeds or Land Registry as the case may be. The statutory rules governing the affidavit must be strictly observed – failure to do so will render the judgment mortgage invalid (see *Beere v Head* (1846) 9IR Eq R 76). The affidavit is made by the judgment creditor and

must contain details of the title of the proceedings, the names and addresses of the parties, their titles, trades or professions and the location of the judgment debtor's lands. Details must also be given of the amount of the judgment debt and any interest or costs awarded as part of the judgment. Finally, the affidavit must state that "to the best of the knowledge and belief of the deponent" the judgment debtor is, at the time of the swearing of such affidavit, so seized or possessed, or has such disposing power over the land in question.

The consequences of the registration of a judgment mortgage against the defaulting taxpayer are potentially drastic. The Revenue Commissioners will be entitled to sell the property without the consent of the debtor, in much the same way as a bank or building society may foreclose on a mortgage where the borrower is in arrears. Furthermore, it has been held that even if the property (against which the judgment mortgage is registered) is a family home within the meaning of the Family Home Protection Act 1976, the consent of the non-owner spouse will not be required in order to enforce the judgment mortgage, since such a mortgage does not constitute a conveyance of "any interest in the family home" by the owner or spouse for the purposes of s3 of the 1976 Act (see *Murray v Diamond* [1982] ILRM 113).

A judgment mortgage, like any other mortgage, can be redeemed by paying the judgment creditor the full amount charged on the property. Otherwise the judgment creditor is entitled to apply for what is known as a "well charging order" and seeks: (a) a declaration that the judgment mortgage is well charged on the lands in question; (b) an order for the payment of the sums due; and (c) an order that, in default of payment of the sums due within a specified time, the lands be sold by the court.

## 6. Examination and instalment orders

The Enforcement of Court Orders Acts 1926 and 1940 (as amended by the courts No.2 Act

## The consequences of the registration of a judgment mortgage against the defaulting taxpayer are potentially drastic.

1986) provide a code of procedure under which a judgment creditor is entitled to apply to the District Court for an order directing that the judgment debtor be examined as to his/her means and, if appropriate, that an order be made directing him/her to pay the amount of the judgment debt by instalments. In the past the Sheriff would have to make a return of *nulla bona* before the examination order would be allowed. However, if the applicant knows that the debtor has insufficient goods to satisfy the judgment he/she may state this in their affidavit grounding the application and the examination order will issue without the judgment ever being in the Sheriff's hands. The matter is heard before the District Court, regardless of the court in which the judgment was originally granted.

The application for the examination is made *ex parte* by the judgment creditor and, if satisfied that the application is in order, the District Justice may make an order that the debtor attend on a specified day to be examined as to his/her means and that, not less than one week before the date of the examination, the judgment debtor lodge with the court a written statement of his/her means, detailing both his/her assets and liabilities, income both earned and unearned, the means by which it is earned, and the persons whom he/she is legally or morally liable to support (e.g., family members). The judgment creditor is entitled to inspect and take copies of this statement of means. In practice, however, the statement of means is rarely lodged until the day of examination, if at all.

On the date of the examination the judgment debtor may give further evidence on oath as to his/her means. If the District Justice is satisfied that the judgment debtor is capable of paying the judgment debt in one lump sum, he/she may make an order to that effect. Alternatively, he/she may make an order directing that the judgment debt be

paid in such instalments as are reasonable, having regard to the judgment debtor's means.

## 7. Discovery in aid of execution and in proceedings under the Debtors (Ireland) Act 1872.

It is not possible to obtain an Examination Order/ Instalment Order against a limited company. However, if the judgment was obtained in the High Court, the Collector-General, as judgment creditor, can apply to court pursuant of Order 42 Rules 36 - 39 for an order directing that the debtor, or in the case of a corporate debtor, any officer thereof, or any other person, be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any property or means of satisfying the judgment. The court may make an order for the attendance and examination of such person, and for the production of any books or documents. There is no similar provision in the Circuit Court Rules and therefore Order 67 Rule 16 of the Circuit Court Rules applies. This provides that where the Circuit Court Rules are silent on a matter, the High Court Rules are to be followed instead.

## 8. Insolvency proceedings

These have already been considered in relation to s962 certificates.

## 9. Proceeds of fixed charges on book debts

It would seem that s1001 TCA 1997 can be applied equally to enforce a judgment obtained by the Collector-General as it can to enforce a s962 certificate.

## 10. Registration of judgments

Although not technically a method of enforcement, registration of a judgment leads to the publication of same in *Stubbs* and other trade gazettes. The creditor, by threatening registration of the judgment, must therefore have an indirect means of enforcing the judgment debt.

This concludes the examination of the framework within which Revenue may seek to recover unpaid assessments. In Part II of this article we will consider in detail one of the most commonly used enforcement methods – the appointment of a Sheriff.