

Can't Pay or Won't Pay?
A review of creditor and debtor approaches to the non-payment of bills
by
Nicola Dominy and Elaine Kempson

Executive Summary

This research was commissioned by the Lord Chancellor's Department to explore the following questions that arose from the Report of the First Phase of the Enforcement Review:

- Why don't debtors pay?
- What features, if any, indicate a '*can't pay*' debtor?
- How effective are different bodies responsible for enforcement at identifying and responding to 'can't pay/won't pay' distinctions amongst debtors?

The research was essentially qualitative and based on depth interviews with both debtors and creditors.

A typology of can't pay won't pay

It became clear that whether people pay their creditors is dependent on two factors: their **ability** to pay and their **commitment** to doing so.

Ability to pay

People owing money fall into one of three groups, according to their ability to pay. First there are those who have the money to pay when they fall into arrears and are still in a position to pay when their creditors reach the late stages of debt recovery. At the other extreme are people who do not have the money either when they fall into arrears or when their creditors seek to recover the money owed. In between is a third group, who are able to pay when they fall into arrears but, as a result of a change in circumstances, can no longer afford to do so when their creditors reach the late stages of debt recovery.

Commitment to pay

The situation with regard to the commitment to pay is more diverse.

The majority of people who fall into arrears with credit or household commitments have every intention to pay on time, but simply lack the money to do so. These include: people on low incomes who face unexpected expenditure; people who have had a sudden substantial fall in income leaving them unable to meet all their commitments; and people with mental health problems which impair their ability to manage their finances. These are the archetypal '**can't pay**'s.

Then there are three further groups of people who are not appropriately considered as either can't or won't pay, regardless of whether they have the money or not. They are: people who have a genuine dispute with their creditor and are withholding payment until the dispute is resolved, and people who are disorganised in their approach to bill payment. This leads to irregular payment of their bills and they often fall into arrears. The third group who should be considered neither won't nor can't pay are tenants taken to court for rent arrears where the main cause is an administrative failure in the payment of Housing Benefit by the local authority direct to the landlord.

That leaves four groups of people who have little or no intention of paying their creditors on time:

People withholding money on principle - These people do not routinely withhold payment of their bills but object to paying a particular bill out of principle. This is usually linked to the customer's belief that they are not receiving a satisfactory service or that they are getting poor value for money from their creditor. Examples of withholding payment on principle can be found across all bills, but it is most common for council tax and water bills. Multiple debt is not common among this group of debtors.

Ex-partners withholding payment - This group includes ex-partners who retain responsibility for paying some or all of their bills in their former family home but withhold these payments. Here multiple debt can be quite common.

People 'working the system' - These are people who deliberately and routinely wait until late in the debt recovery cycle before paying just about all their bills. Some will attempt to avoid payment altogether if they possibly can. These people usually have a long history of arrears and county court judgements on a variety of commitments.

People 'ducking responsibility' - This group of people have spent freely and owe very large sums in consumer credit – often owing many tens of thousands of pounds on credit cards and other forms of unsecured credit. They blame the credit companies for having lent them the money and feel no responsibility for repaying the money they owe.

In each of these four groups who have little or not intention of paying, some people have sufficient money to pay their arrears and we have classified these as '**won't pays**'. Others do not have the ability to pay and we refer to these, as '**won't but can't pays**'.

Creditors' approaches to arrears management

Creditors adopt one of three approaches to arrears management and debt recovery: a holistic approach; a hard business approach; and a one-size-fits-all approach.

Holistic approach - Creditors adopting a holistic approach invest heavily in systems and staff to enable them to discover the circumstances of the people who fall into arrears and their reasons for not paying their bills. They then use this information to adapt their arrears management and debt recovery approaches. Their primary objective is to maintain the customer relationship, and they aim only to use the courts

when they believe a customer has the ability to pay but is deliberately avoiding doing so. Throughout this whole process they endeavour to work closely with money advisers and go beyond requirements set out in industry codes of practice for dealing with customers in financial difficulty. The holistic group are, therefore, best able to identify can't from won't pays.

Hard business approach - Ensuring that any money is recovered at minimum cost is the main concern of creditors adopting a hard business approach to arrears management. The underlying philosophy of this approach is that if customers fail to make contact then they should be treated as won't pays. So these creditors are not proactive in trying to establish the circumstances of customers in arrears. Their debt recovery systems are intended to reduce company costs, and they avoid using any action where there is little chance of success. These creditors, by and large, work to the letter rather than the spirit of their industry code of practice on financial hardship, and often view money advisers as a hindrance to the arrears process. This group are less successful than holistic creditors at identifying can't from won't pay debtors.

One-size-fits-all - These creditors adopt a standard set of procedures for arrears management for all customers. Standard letters are issued at set time intervals, and debt recovery is seen as a continuation of arrears management. They have no systems for distinguishing can't from won't pays and often rely on the courts to provide background information on the circumstances of those who are in arrears.

All types of creditors are represented in the holistic and hard business approaches. These include: financial service providers, utility companies, local authorities and housing associations; priority and non-priority creditors; and creditors in both the prime and sub-prime credit markets. Those adopting a one-size fits- all approach tend to be drawn from a more limited range of creditors, including:

- Some telephone companies, who were interviewed before the Oftel guidance on debt and disconnection was published in October 2002.
- Some local authorities, who have yet to revise their approach following a Best Value Inspection.
- Some housing associations, whose code of practice does not include detailed guidance on dealing with tenants in financial difficulty.
- Some sub-prime lenders, especially those offering secured loans, who either are in breach of the industry code of practice or have not signed up to one at all. They differ from other creditors taking a one-size-fits-all approach in that they deliberately take a harsh stance on arrears, having lent purely against the equity in their home.

Which debtors is it appropriate for creditors to take to court?

Most people would agree that is appropriate for creditors to take court action against **won't pays** – that is people who have the ability to pay their arrears, but are withholding payment on principle, working the system or ducking responsibility for their debts.

Similarly there would be general agreement that it is quite inappropriate to initiate court proceedings against anyone who has every intention of paying but is unable to

do so – the **can't pays**. Most would also believe that court action is inappropriate in cases of genuine dispute over payments, where people intend to pay but are disorganised in their approach to bill payment, and where the administrative errors with Housing Benefit payments have led to rent arrears.

The situation with regard to people who **'won't but can't pay'** is more complex. Here the most sensible solution seems to be to pursue the debt once their financial circumstances have improved.

Whose responsibility is it to determine the circumstances of debtors and ensure that inappropriate cases don't reach the courts?

Responsibility for ensuring that inappropriate cases do not come to court must rest with the creditor. At the same time, it is important to acknowledge customers' responsibility to pay the money they owe when they have the money to do so, and the important role that independent money advisers can play.

Creditors adopting a holistic approach to arrears management and debt recovery have already developed systems to ensure responsibility when using the courts. Other creditors should be encouraged to do the same. Ways of achieving this include:

- **Industry guidance and codes of practice** All creditors ought to be covered by principle-based codes of practice, supplemented by detailed guidance on dealing with customers in financial difficulty. These should reflect best practice as illustrated by the holistic approach to arrears management as described in this report and compliance should be monitored by independent bodies.
- **Pre-action protocols** Creditors who decide to use the courts to enforce payment should be required to state in pre-action protocols that they have complied with their industry code of practice and guidance in the handling of the case.
- **Money advisers** Money advisers have an important role in helping to identify people who are unable to pay, and people with mental health problems. Yet the level of investment in money advice is far from adequate. The importance of creditors working with money advisers should be incorporated into industry codes of practice and guidance on dealing with customers in financial difficulty.

Which are the most effective methods of debt enforcement

There has been a general fall in the use of the courts by creditors. This almost certainly reflects changes in the way some creditors are approaching debt enforcement. They are undoubtedly consistent with the shift away from one-size-fits-all approach and particularly with the expansion of the holistic approach amongst creditors. These creditors take far fewer cases to court, and if they do so, usually apply for attachment of earnings orders in preference to warrants of execution.

There is a general feeling of dissatisfaction with the efficiency of warrants of execution among many creditors. This may also explain the fall in use of this method of enforcement.

Garnishee orders are not widely used. Indeed, none of the creditors who took part in this study reported using them. It may be the fact that they are usually preceded by an oral examination, which deters creditors from using this approach.

In fact, some creditors have taken a decision to use debt collection agencies in preference to the courts. This raises the need to ensure that such agencies work to the same high standards as the best practice in the credit industry. Draft guidance issued by the Office of Fair Trading, coupled with improvements in the code of practice issued by the Consumer Services Association will go a long way to achieving this.