GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: DECEMBER 2016

This document is published by Practical Law and can be found at: uk.practicallaw.com/**w-004-9972**
Request a free trial and demonstration at: **uk.practicallaw.com/about/freetrial**

RESOURCE INFORMATION

RESOURCE ID

w-004-9972

RESOURCE TYPE

Article

PUBLISHED DATE

14 December 2016

JURISDICTION

United Kingdom

James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the December column, Thomas Samuels considers key consumer credit-related issues under the Data Protection Act 1998 (DPA) and suggests how they might be best rebutted.

Thomas Samuels, Gough Square Chambers

CONSUMER CREDIT AND DATA PROTECTION

Overview

The question of how companies and advertisers use consumers' data, particularly in their online interactions, has been a hot topic in 2016. Perhaps unsurprisingly given the general media attention, it has also increasingly become a theme in consumer credit litigation. Although compliance teams will be familiar with the requirements of the Data Protection Act 1998 (DPA), claims brought under the DPA can often be an unexpected and unhappy surprise for lenders and debt-purchasers.

This month's column sets out some of the key consumer credit-related DPA arguments and suggest how they might be best rebutted.

Key provisions of the DPA

The DPA imposes a series of data principles on the data processors it governs. These are broad requirements as to the use of individual's data, as set out at Part I of Schedule 1 and explained in Part II. They include, for example, that data is processed *"fairly and lawfully"* (para 1), shall be *"adequate, relevant and not excessive"* (para 3), or shall not be kept for *"longer than is necessary"* (para 5).

"Personal data" is defined by section 1(1) of the DPA as any from which the data subject *"can be identified"* and *"includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*. Thus, not only do obvious data such as names and contact details come within the DPA, system comments or diary notes about the customer and the performance of their account may also be caught.

Under section 7 of the DPA, a data subject has a right to access personal data on written request and payment of a statutory fee (the familiar *"subject access request"*). In particular, a data subject has the right to be informed about what data is held and processed by the controller. Where an automatic process takes place, the data subject is entitled to be informed of *"the logic involved in that decision-taking"* (*section 7(1)(d), DPA*).

Sections 10 to 14 of the DPA are of particular importance in the context of litigation. They include the right of a data subject to prevent processing *"causing or... likely to cause substantial damage or substantial distress to [the data subject] or another"* which *"is or would be unwarranted"* (*section 10(1)(a)-(b), DPA*). In effect, it is a statutory right to injunctive relief.

Reproduced from Practical Law Financial Services with the permission of the publishers. For further information visit practicallaw.com or call 0207 542 6664. Copyright © 2016 Thomson Reuters (Professional) UK Limited. All Rights Reserved.

Section 12 of the DPA relates to automatic data processing and gives the example of a creditworthiness assessment. Where there is a creditworthiness assessment, the individual is "entitled at any time, by notice in writing" to require the data controller to ensure that no further decision is made by automatic means which *"significantly affects that individual…"* (*section 12(1), DPA*). A right to compensation for failure to comply with the requirements of the DPA is provided by section 13. Although it had previously been thought to allow general compensation only where the individual had suffered "damage", the validity of the provision is doubtful (*Vidal-Hall v Google inc [2015] 3 WLR 409*). Finally, section 14 of the DPA allows a court to order the rectification, blocking, erasure or destruction of inaccurate data or data "which contain an express of opinion which appears to the court to be based on the inaccurate data".

Examples: McGuffick v Royal Bank of Scotland and Grace v Black Horse Ltd

The most notable consumer credit decision addressing the DPA is *Grace v Black Horse Ltd [2015] Bus LR 1*. The central question there was whether registration of a default in relation to an irredeemably unenforceable credit agreement was a breach of the DPA.

In dismissing the allegation, the trial judge relied upon *McGuffick v Royal Bank of Scotland [2009] EWHC 2386 (Comm)* in which Flaux J. concluded that unenforceability did not mean that the debt did not exist; as such, a creditor was free to continue to report to credit reference agencies (CRAs). However, the Court of Appeal distinguished *McGuffick* on the basis that the judge there was considering remediable unenforceability under section 77(4)(a) of the Consumer Credit Act 1974 (CCA) and expressly refused to go further.

The specific argument before the Court of Appeal was that reporting a default in such circumstances was a breach of the fourth data principle (that personal data must be processed accurately). It was accepted that it was not accurate to stigmatise a debtor as a defaulter, who had declined to make payments under an irredeemably unenforceable agreement, without at least clarifying that the agreement was unenforceable (para 34). That conclusion was reached on the basis that default registration was a stigma with potentially serious consequences for the consumer's credit rating. However, Parliament had decided that the debt in question should be unenforceable such that the customer should not have to pay.

Approach to DPA

The DPA is largely concerned with subjective concepts such as what is *"fair"*, *"substantial"*, *"unwarranted"* or *"accurate"*. It is natural that a consumer may have a very different idea of those concepts than a lender and disputes are likely to arise.

As was the case in *McGuffick* and *Grace*, most DPA challenges to consumer credit agreements will come in relation to default reports. Aside from the obvious issues around unenforceable agreements, a likely grey area is the effect of withdrawing from a consumer credit agreement under section 66A of the CCA. Although section 66A(7)(a) provides that the effect of withdrawal is that *"the agreement shall be treated as if it had never been entered into"*, that does not necessarily mean that the loan should not be reported to CRAs.

Guidance issued by the Department for Business, Industry and Skills (BIS) (in August 2010) on implementing the Consumer Credit Directive (*2008/48/EC*) (CCD) notes (para 11.21) that CRAs and lenders could: *"…treat agreements where the borrower has exercised the right of withdrawal as never having existed, removing the agreement from their database"*. Alternatively, however, they could *"record the agreement as having been repaid. The important thing is that the consumer should not be disadvantaged in any way by having withdrawn from and repaid a credit agreement"*.

While that emphasises accuracy, it may not prevent damage or distress. Equally, it does not necessarily mean the processing was *"fair"* under the first data principle. For example, the mere presence of payday lending on a consumer's credit file can affect their ability to obtain further lending. In those circumstances, should data provided by payday lenders be treated differently to other equivalent data from high street banks on the basis of the difference of impact on the consumer? Arguably, yes.

Reproduced from Practical Law Financial Services with the permission of the publishers. For further information visit practicallaw.com or call 0207 542 6664. Copyright © 2016 Thomson Reuters (Professional) UK Limited. All Rights Reserved.

Simply obtaining consent to general data processing as part of the application process is unlikely to be sufficient to rebut a serious challenge under the DPA. Lenders must consider the broader ideals and, given the concepts involved, perhaps decide what is appropriate on a case-by-case basis.

The FCA's Consumer Credit sourcebook (CONC) also provides some useful guidance. For example, in relation to default and arrears situations, CONC 7.13 notes the importance of accurate data for ensuring that the correct party is pursued for the correct amount (7.13.2G). Equally, that accurate information is made available to collections agents in relation to vulnerability, financial difficulty or the existence of a payment plan (7.13.5G).

Conclusion

Data processing in the context of consumer credit is a particularly sensitive issue. Negotiating the general requirements of the DPA in conjunction with the more specific requirements of the CCA and the CONC rules can be a minefield for lenders. When challenges are raised by customers (as an increasing number are) they must be seriously considered and appropriate steps should be taken. Rigid reliance on an initial consent given by the customer during the application process, or a standard-form DPA notice in the agreement terms and conditions, may not be sufficient.

Reproduced from Practical Law Financial Services with the permission of the publishers. For further information visit practicallaw.com or call 0207 542 6664. Copyright © 2016 Thomson Reuters (Professional) UK Limited. All Rights Reserved.