GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: SEPTEMBER 2017

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 September column, Thomas Samuels considers the key provisions of the new Pre-Action Protocol For Debt Recovery Claims, which applies from 1 October 2017, and some of the issues that may arise in its application

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PRE-ACTION PROTOCOL FOR DEBT RECOVERY CLAIMS

Introduction

The new *Pre-Action Protocol For Debt Recovery Claims* (Protocol) has been finalised by the Ministry of Justice and comes into force from 1 October 2017. The Protocol must be followed by those involved in consumer debt-recovery litigation, including in claims relating to loans regulated by the Consumer Credit Act 1974 (CCA). This article provides an overview of the key provisions and some of the issues that may arise in the Protocol's application.

Scope of the Protocol

The Protocol applies to any business "claiming payment of a debt" from an individual (paragraph 1.1). Despite the general breadth of its title, it does not apply to business-to-business debts. Although the Protocol's aims are identical to those which appear in all other pre-action protocols (see paragraph 2.1), in fact its primary purpose appears to be to afford further protection to potential defendants in debt-recovery claims. Such safeguards are presumably not thought necessary for most business debtors. However, it should be noted that a sole trader falls within the definition of both "business" and "individual" for the purposes of the Protocol. Thus, in certain limited circumstances, the Protocol will apply to claims between individuals and/or commercial debt-recovery claims.

It is "intended to complement any regulatory regime to which the creditor is subject". In cases where the regulatory regime is inconsistent with the requirements of the Protocol, the "regulatory obligation will take precedence" (paragraph 1.3). That is particularly important in the context of consumer credit litigation where a creditor will be subject to the pre-action requirements of the CCA and Chapter 7 of the FCA's Consumer Credit sourcebook (CONC). For example, the mere fact that a creditor has sent a default notice under section 87 of the CCA will not excuse them from also sending a letter of claim in compliance with the Protocol.

Letter of claim

The requirements of the letter of claim are set out at paragraph 3.1(a) of the Protocol. Among other matters, it must include information about:

- The debt.
- Any continuing interest/charges.

- The underlying agreement.
- Any assignment by the creditor.
- How the debt can be repaid.

The letter of claim must also enclose the pro-forma documents at Annex 1 and Annex 2 to the Protocol. These are an "Information Sheet", a "Reply Form" and a "Standard Financial Statement" (as used by the Money Advice Service).

The Protocol requires a full explanation of all interest, and administrative or other charges, levied on the account since the debt was incurred, either by way of an up-to-date statement of account or full breakdown in the letter before action (paragraph 3.1(b)). Presumably this emphasis is because interest and charges often escalate quickly, resulting in a total amount payable that is far larger than the original loan. In consequence, they are often the focus of challenge in consumer debt litigation. No doubt it is hoped that by requiring would-be claimants to give a proper breakdown of such sums, litigation solely on that basis can be much-reduced or avoided.

The letter of claim must be sent by post, although it can also be sent by some other means if the creditor has the relevant contact information (that is, by e-mail). The creditor may start proceedings if no response is received from the debtor within 30 days of the date of the letter (paragraph 3.4). To ensure that the debtor has the maximum available time to do so, the letter of claim must be sent either on the day it is dated or, if not "reasonably possible", the next day (paragraph 3.2).

Debtor's response

There are relatively few fixed requirements imposed on the debtor upon receipt of a letter of claim. He/she needs to simply complete as much of the Reply Form and Standard Financial Statement as is possible. Receipt of partially completed forms must be taken by the creditor as an attempt by the debtor to engage (paragraph 4.5). If the debtor indicates they are seeking debt advice, the creditor must allow "a reasonable period" to do so. In any event, proceedings must not be started within 30 days of receiving the Reply Form (paragraph 4.2). If the debtor indicates that such advice cannot be obtained within 30 days of the Reply Form, the creditor should "allow reasonable extra time... where it would be reasonable to do so in the circumstances" (paragraph 4.3). Accordingly, even without agreement of a payment plan, there could potentially be two or more months from the letter of claim to the commencement of proceedings.

In the event that a payment plan is reached by the parties, the creditor must not start proceedings "while the debtor complies with the agreement" (paragraph 6.4). In the event that the creditor subsequently wishes to start proceedings, an updated letter of claim must be sent and they must "comply with this Protocol afresh". Thus, if multiple payment plans were agreed and then breached by the debtor, compliance with the Protocol could potentially continue ad infinitum.

On a practical level, limitation may become relevant in those circumstances. It is dealt with at paragraph 17 of the Practice Direction on Pre-Action Conduct and Protocols (Practice Direction). In short, the Protocol does not affect statutory time limits. If limitation is a concern, the correct course is to issue protective proceedings and to request an immediate stay to allow compliance with the Protocol.

In any event, a pattern of repeated payment plan agreements and breaches by the debtor would probably be sufficient reason for the creditor to proceed straight to issue. In doing so, 14 days' notice must be given to the debtor (paragraph 8.2).

Disclosure

The debtor is also entitled to pre-action disclosure. The Protocol imposes an obligation on creditors to provide any document or information requested by the debtor, or to give an explanation as to why the document or information is not available (paragraph 5.2).

It is in much broader terms than the disclosure requirements in other pre-action protocols, which explicitly warn against "fishing expeditions" by would-be defendants. As such, the interaction between this and CPR 31.16 (Disclosure before proceedings start) is unclear. However, it seems unlikely that it was the intention to simply disregard the usual approach. As such, a creditor could no doubt legitimately refuse to provide a document or information that is disproportionate or irrelevant to the likely dispute between the parties.

Moreover, although the documentation provided may be the same, disclosure under the Protocol is obviously not the same as an information request under sections 77 to 79 of the CCA. The key feature of a statutory information request is the payment of £1 by the debtor. It is that which triggers the statutory timescale for a response and the sanction of unenforceability in default (see *Carey v HSBC Bank plc [2010] Bus LR 1142*).

Compliance

As set out above, the requirements of the Protocol are rather different from those applicable to other types of claim. It focuses upon the actual or perceived inequality between creditor and debtor in many consumer debt cases. It is noteworthy that it imposes no particular obligations on a debtor to respond with detailed information about the nature of their dispute. Rather, its aim is to achieve agreement between the parties allowing the debtor further time to pay.

However, compliance with the Protocol does not assume the same importance as statutory obligations, for example under the CCA or the FCA's rules set out in CONC. As with all pre-action protocols, the court will "expect" compliance but is "not likely to be concerned with minor or technical infringements..." (paragraph 7.1).

Further detail is given at paragraphs 13 to 16 of the Practice Direction. The focus is on failures that do not enable the general objectives of the Protocol to be met, for example, a lack of information or failure to engage, and unreasonable behaviour. In making appropriate case management directions in the light of a failure to comply with the Protocol, the court may waive the requirement to comply, stay proceedings to facilitate compliance or impose sanctions upon one or both parties (most notably, adverse costs orders).

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