

GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JUNE 2020

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In the June 2020 column, Lee Finch considers time orders under section 129 of the Consumer Credit Act 1974 (CCA).

by *Lee Finch, Gough Square Chambers*

TIME ORDERS

Introduction

COVID-19 continues to have an unprecedented impact on every aspect of our lives. In the context of regulated consumer credit, lenders and the FCA have moved quickly to protect those most in need of assistance, including by setting up payment deferrals for people in temporary financial difficulty as a result of the pandemic. The situation continues to develop and further guidance from the FCA and action from lenders is likely over the coming months: on 19 June 2020, the FCA published further draft guidance which extends payment deferrals and other measures to 31 October 2020.

However, these temporary measures are likely to come to an end long before the financial impact of COVID-19 has subsided and there will be an inevitable increase in the number of customers who cannot meet their obligations. Lenders will need to ensure that they treat those customers fairly, in accordance with FCA Principle 6, and comply with the rules on arrears, default and recovery in chapter 7 of the Consumer Credit sourcebook (CONC 7) (for more on this, see the March 2020 [column](#)).

Nevertheless, as night follows day, there will be an increase in debt recovery litigation as a result of the economic damage caused by COVID-19. It is therefore worth reconsidering some of the protections built in to the Consumer Credit Act 1974 (CCA) and, in particular, time orders.

What is a time order?

Under section 129(1) of the CCA, the court is granted the power to make a time order if it appears to the court just to do so:

- On an application for an enforcement order.
- On an application made by a debtor or hirer, under this paragraph, after service on them of:
 - a default notice; or
 - a notice under section 76(1) or 98(1).
- On an application made by a debtor or hirer, under this paragraph, after they have been given a notice under section 86B or 86C.
- In an action brought by a creditor or owner to enforce a regulated agreement, or any security, or recover possession of any goods or land to which a regulated agreement relates.

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Section 129(2) of the CCA states that a time order shall provide for one or both of the following, as the court considers just:

- The payment by the debtor or hirer or any surety of any sum owed under a regulated agreement or a security by such instalments, payable at such times as the court, having regard to the means of the debtor or hirer and any surety, considers reasonable.
- The remedying by the debtor or hirer of any breach of a regulated agreement (other than non-payment of money) within such period as the court may specify.

As is clear from section 129(1) of the CCA, the power to make a time order is discretionary and that discretion is wide. However, some useful guidance has been provided by the Court of Appeal.

When will it be just to make a time order?

In *First National Bank plc v Syed* [1991] 2 All ER 250, the court held that to determine whether it was “just” to make a time order, a judge must consider the interests of the lender as well as the interests of the debtor. The court continued to explain that where there is a history of default, merely sporadic payments by the debtor and a merely speculative (as opposed to realistic) prospect of improvement in the debtor’s finances, it was not just to require the creditor to accept instalments that were too small to even prevent interest from accruing.

A few years later, in *Southern and District Finance plc v Barnes* [1995] 27 HLR 691, the court held that time orders should normally be made for a stipulated period of time to take account of temporary financial difficulty. The court felt that if, despite the giving of time, the debtor was unlikely to be able to resume the full contractual payments, no time order should be made and it would be just to allow the enforcement of the agreement.

Taking account of the authorities, it is clear that time orders will not be available to debtors in every case and debtors who qualify may be few and far between; although it is possible that the courts will adopt an expansive definition of “realistic prospect of improvement” to the debtors’ finances in light of COVID-19 and the hoped for economic recovery.

Further, consumer credit regulation has developed significantly since *First National* and *Southern and District Finance*, and it may be that debtors who would have qualified for time orders will have already been granted sufficient opportunities to remedy their position through their lenders’ compliance with CONC 7. In such cases, it may not be just to grant a further opportunity through a time order.

Consequential orders

If a court makes a time order, it also has the power to make an order under section 136 of the CCA to give effect to the time order. Such consequential orders can include the reduction of the interest rate and the extension of the term. Importantly, the power to make such amendments to the agreements is limited to steps “in consequence of a term of the [time order]” and, as a result, amendments will usually be relatively minor and short term.

Additional considerations for secured lending

In the context of secured lending, in addition to the steps taken by the FCA, Practice Direction 51Z was introduced to the Civil Procedures Rules, which stayed possession claims for 90 days from 27 March 2020. The stay has now been extended until 23 August 2020.

Further, the scope of time orders made in possession proceedings may also be more extensive than those in respect of unsecured debts. Whilst subsection 129(2) of the CCA only provides for time orders to be made in respect of sums “owed”, in *Southern and District Finance*, the Court of Appeal held that where possession proceedings have been started, the creditor is essentially seeking repayment of the full debt and a time order can therefore be made in relation to the full outstanding balance.

Finally, whilst regulated mortgage contracts generally fall outside the scope of the CCA, consideration should be given to section 126(2) of the CCA. This provides that if, notwithstanding the exemption for regulated mortgage contracts, the agreement would have been a regulated credit agreement under the CCA, Part IX of the CCA (including the power to make time orders under section 129 and the power to make consequential orders under section 136) shall nevertheless apply.

It remains to be seen whether, if the lender has already complied with the strict requirements in chapter 13 of the Mortgages and Home Finance Conduct of Business sourcebook (MCOB 13), the availability of time orders actually provides the debtor with any practical additional protection above that available under section 36 of the Administration of Justice Act 1970.

Conclusion

When time orders were originally introduced in the 1970s, they provided consumers in temporary financial difficulty with valuable protection against overzealous lenders. However, today, time orders are rarely sought and even more rarely granted and, since the introduction of the detailed rules in CONC 7, their continued value has been drawn into question. In the FCA's final report on its review of retained provisions of the CCA, it acknowledged this, but considered that time orders still provided valuable consumer protection. Given the likely significant increase in enforcement litigation over the next few years, that conclusion may be tested rather sooner and more vigorously than the FCA might have been expected.

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