

Gough Square Chambers' consumer credit column: December 2020

by Sabrina Goodchild, Gough Square Chambers

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

In the December 2020 column, Sabrina Goodchild considers the recently published Consumer Credit (Enforcement, Default and Termination Notices) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/1248). The Regulations amend the form and content requirements for default notices under the Consumer Credit Act 1974 (CCA).

Fundamental change or minor tweaks: the changing form of default notices

On 2 December 2020, the [Consumer Credit \(Enforcement, Default and Termination Notices\) \(Coronavirus\) \(Amendment\) Regulations 2020 \(SI 2020/1248\)](#) (2020 Regulations) came into force, amending the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1567) (1983 Regulations).

In short, the form and content requirements for default notices are changing. With only a six-month transitional period up until 2 June 2021, the clock is counting down for necessary change, significant or otherwise, to lenders' standard documents.

Requirement for a default notice

Section 87 of the Consumer Credit Act 1974 (CCA) necessitates service of a default notice on a debtor, or hirer, before a creditor, or owner, can become entitled by reason of any breach by the debtor, or hirer, of a regulated agreement to do any of the following:

- Terminate the agreement.
- Demand earlier payment of any sum.
- Recover possession of any goods or land.
- Treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred.
- Enforce any security.

The content and form of default notices, which is highly prescriptive and includes requirements as to the precise form of wording to be included, the requisite prominence of specified parts of the notice and ordering of the prescribed wording, is governed by section 88 of the CCA and the 1983 Regulations. While minor tweaks have been made over the years, significant swathes of the requirements remain the same as when the 1983 Regulations came into force.

Appetite for change?

Change was first placed on the table by the FCA's March 2019 final report on the review of retained provisions in the CCA. This recommended that the requirement to serve a default notice was retained in the CCA, but the informational requirements, or prescribed wording, be moved into the FCA's rules. The following high-level suggested changes were made:

- Providing firms with more flexibility as to the inclusion of information to allow shorter, more targeted notices.
- Removing reference to the specific section of the CCA under which the notice must be served to remove technical language.
- Considering the necessity of prescribed wording, as opposed to simple information requirements.
- If prescribed wording is to be retained, reviewing its content to make it more readily comprehensible and to encourage greater consumer engagement.
- Presenting content on a single topic together to enhance the readability of the notice.

The full name of the 2020 Regulations, which expressly refers to Coronavirus, is perhaps indicative of a further driver behind the change. Whilst not directly linked to the pandemic, the increased numbers of default notices anticipated to be sent as a result of the economic conditions caused by the pandemic, coupled with the more general package of relief throughout 2020 aimed at customers of regulated credit, may have precipitated the change.

On announcing the 2020 Regulations on 7 October 2020, the government stated that:

“The new rules will make debt letters less threatening by restricting the amount of information that must be made prominent and requiring lenders to use bold or underlined text rather than capital letters. Lenders will also now be able to replace legal terms with more widely understood words and letters will clearly signpost people to the best sources of free debt advice.”

What's new and what remains?

The changes effected by the 2020 Regulations are principally directed to the prescribed wording, as opposed to the form and non-prescribed wording of the notices. In this regard, the most significant changes are:

- The removal of all words written in capital letters from the prescribed wording.
- Reducing the amount of wording that is required to be made prominent. Prominence may only be achieved by bold print or underlining, and capital letters and large print are no longer permissible.
- Reordering the prescribed wording.
- Removing the reference to “ENFORCEMENT ACTION”.
- Explaining the role of a surety or guarantor.
- Advising borrowers to contact creditors if they are unsure about whether they have repaid at least one-third of the total price of the goods.
- Advising borrowers on where to access advice on how to obtain a time order.
- Toning down the prescribed wording relating to post-judgment interest.
- Updating the institutions that can provide assistance to refer to the government's Money Advice Service and the institutions identified on the FCA's default information sheet.

Aside from the above, the content of the default notices remains substantively the same, with none of the FCA's suggested changes being implemented.

Comment

Any hopes for major change to the substantive content of default notices and the transfer of the information requirements into FCA rules are, for the foreseeable future, unlikely to be fulfilled. The 2020 Regulations at best tinker around the edges, as opposed to creating fundamental change, and most are likely to question whether the 2020 Regulations go far enough.

That being said, the impact of the changes for creditors could be significant if not properly embedded into their standard documents. It has always been the case that a failure to provide a default notice that complies with section 88 of the CCA and the 1983 Regulations, except for de minimis failings, renders the notice ineffective and is relevant when considering the fairness of any relationship between a creditor and a debtor.

Further, since the decision of the Court of Appeal in *Doyle v PRA Group (UK) Ltd [2019] EWCA Civ 12*, default notices are a substantive ingredient of a creditor's cause of action. Therefore, sending out a default notice governed by the unamended 1983 Regulations, or failing to implement the necessary changes required by the 2020 Regulations, including the correct letter case, post 2 June 2021, is likely to cause significant difficulty.

In amongst the changes to default notices, it must not be overlooked that the 2020 Regulations also amend, in an even more limited way, the prescribed wording and prominence requirements of notices sent under section 76(1) (notices to enforce a term) and section 98 (termination notices) of the CCA.

The question also remains as to whether the 2020 Regulations mark the start of a wave of change to CCA notices more generally. Are notices of sums in arrears and notices of default sums next? And will the FCA be making changes to its statutory information sheets? Only time will tell.

Gough Square Chambers' consumer credit columns

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