GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: FEBRUARY 2019

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In the February 2019 column, Thomas Samuels considers the recent judgment in *Doyle v PRA Group (UK) Ltd [2019] EWCA Civ 12*. In this case, which involved consideration of when limitation began to run in relation to a debt claim under a credit card, the court considered the status and effect of a default notice served pursuant to sections 87 to 89 of the Consumer Credit Act 1974 (CCA).

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DOYLE V PRA GROUP (UK) LTD

Introduction

On 23 January 2019, the Court of Appeal handed down judgment in *Doyle v PRA Group (UK) Ltd [2019] EWCA Civ 12*. In considering when limitation began to run in relation to a debt claim under a credit card, the court considered the status and effect of a default notice served pursuant to sections 87 to 89 of the Consumer Credit Act 1974 (CCA).

This column considers the court's analysis and whether it represents a change for creditors or debtors.

Decision

PRA was the assignee of Mr Doyle's credit card account opened in 1997 pursuant to a running-account credit agreement regulated by the CCA. The agreement was of no fixed or minimum duration. As is common in such agreements, clause 8f of Mr Doyle's contract required payment of the entire balance upon breach subject to "us sending you any notice required or taking any steps required by law...".

Mr Doyle's last payment on the account was in April 2009. The default notice required payment of the arrears by 21 December 2009 and warned that if he failed to do so further action may be pursued. Proceedings were issued by PRA on 31 October 2005. Mr Doyle's defence was that the six-year limitation period under section 5 of the Limitation Act 1980 began to run from the date of his default rather than from the later date on which the default notice expired. As such, the claim was statute-barred.

The Court of Appeal proceeded from the well-established definition of "cause of action" (for example, *Central Electricity Board v Halifax Corporation [1963] AC 785, 806*). It noted that where a cause of action arises under statute, whether a requirement is merely procedural versus an inherent element of the claim is one of construction (citing *Swansea City Council v Glass [1992] QB 844, paragraph 27*). The fact that similar notices served pursuant to different statutory provisions did not form part of a claimant's cause of action was irrelevant.

In this context, the court concluded that time began to run from the date on which the default notice expired and not from the date of the debtor's breach. Unlike the notices in Glass, a default notice was more than a

mere procedural requirement. Since there is no right to treat an agreement as ended, or to demand accelerated payment of sums outstanding without one, it "qualifies the substantive legal rights of the creditor" rather than "merely imposing a procedural constraint" (*paragraphs 22-23*). That analysis was supported by the wording of clause 8f of the credit agreement and section 89 of the CCA, which has the same effect in reverse.

The Court of Appeal also dismissed two policy arguments advanced by Mr Doyle's counsel, including that if time ran from the date of non-compliance with a default notice the creditor could postpone the limitation period by delaying serving the notice. However, that criticism was rejected robustly (*paragraphs 36-41*).

Analysis

The Court of Appeal's conclusion that a default notice is not merely "procedural" may be of some initial concern to creditors under regulated agreements. The academic analysis in Guest and Lloyd's *Encyclopedia of Consumer Credit Law (Sweet & Maxwell, 1st ed, 1975, Vol 1, and subsequent editions) (paragraph 2-088)* has always been that a default notice is a mere procedural requirement, citing *Swansea City Council v Glass*. Its purpose was said to be "to remind the debtor or hirer that he is in breach" and to provide an "opportunity to remedy it (if capable of remedy)...". In further support of that analysis, the editors raised upon the policy argument cited by Mr Doyle's counsel and expressly rejected by the Court of Appeal.

The analysis of the editors of the *Encylopedia* has historically been relied upon by creditors to remedy defective default notices during the course of proceedings and/or to avoid strike out on that basis. The question is the extent to which it has been undermined by Doyle. It is submitted that the answer must be very considerably, if not entirely.

First, at the very least, the analysis in the *Encyclopedia* is no longer sustainable. The Court of Appeal considered the exact same cases and arguments and unequivocally dismissed their application to section 87(1) of the CCA. Both Glass and the policy argument about delay to the limitation period were both relied upon in support of Mr Doyle's arguments and rejected. Further, the judgment confirmed that the function and effect of a default notice are far wider than simply reminding the debtor that he is in breach and providing an opportunity to remedy it.

Secondly, the conclusion that a default notice is an ingredient of the creditor's cause of action has the inevitable result that a claim cannot be brought unless a valid notice has been sent (and adequately pleaded). Whereas strike out of a claim on the basis of a defective default notice was previously unlikely insofar as the defect was remediable, the position is now less certain. Post-*Doyle*, a creditor's reliance on a defective default notice means that the cause of action is incomplete and the claim must fail.

Remedial action post-Doyle

However, that is not necessarily to say that a defective default notice cannot be remedied. Certainly, any error in the notice could be fixed prior to the date of issue of proceedings (per obiter comments in *Harrison v Link Financial Ltd [2011] EWHC B3 at [75]*). Further, in those circumstances it seems likely that limitation will not begin to run until the expiry of the first compliant notice, since a defective notice is probably not a "default notice" at all for the purposes of section 87(1) of the CCA. By analogy, see *JP Morgan Chase Bank NA v Northern Rock (Asset Management) Plc [2014] 1 WLR 2197* at paragraph 36.

Once proceedings have been issued, a creditor's ability to effectively correct errors in the default notice will now probably depend upon a successful application to amend its statement of case. As a substantive element of any debt claim under a regulated credit agreement, service of a default notice must be pleaded. Thus, proceedings based upon the first (erroneous) notice would be bound to fail and, therefore, liable to strike out.

That being so, the best route for a creditor to remedy a defective notice post-issue may be to serve a corrective default notice. If the debtor complies, the proceedings will have to be discontinued. If not, an application to amend the particulars of claim can be made pursuant to CPR 17.1(2)(b). Whether or not such an application is successful is likely to be dependent upon several factors, including the nature of the original defect, why it was not corrected sooner, the stage the proceedings have reached, prejudice to the debtor and the particular judge's view.

However, lest the above make it seem as though *Doyle* makes no real difference to a creditor's position, two notes of caution should be struck. First, the fact that a default notice is such a key substantive element of a cause of

action may be enough to persuade some district judges that permission to amend should not be granted. Rather, the creditor must go away and start again. Secondly, as noted in *Doyle*, how and when a default notice is served may give grounds for an unfair relationship allegation depending upon "the precise circumstances of the case" (*paragraph 44*).

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