News and legal updates

DRO Newsletter – July 2019
The DRO Team has released their July 2019 newsletter, which should have been sent to DRO Intermediaries by their competent authorities.

The newsletter includes an update on creditor contact addresses, information about deductions from benefits, what information is required, discusses how to deal with creditors chasing for debts, creditor address changes and more.

Ombudsman News Issue 149
The latest Ombudsman News Issue 149 has been published, which discusses the latest trends in complaints, new resources on affordable lending, and new resources on PPI to help with the PPI deadline of 29 August 2019.

You can read previous issues of the Ombudsman News, which often have articles of interest to debt advisers. The Financial Ombudsman Service also publishes all its decisions on its website, and these can be searched for relevant cases similar to clients'.

Insolvency Service insolvency statistics Q2 April – June

The Insolvency Service has published insolvency statistics for April – June 2019 (Q2). One of the key points to come out of the report is that total individual insolvencies decreased in Q2 2019, which is a continuing trend from Q1.

New 'one month' timescale for responding to a subject access request
The Information Commissioner's Office has announced that they have updated their guidance on timescales for responding to a subject access request (SAR) under the General Data Protection Regulation (GDPR). The timescale has now changed to reflect the day of receipt of the SAR as 'day one', as opposed to the day after the SAR is received. For example, a SAR received on 3 September should be responded to by 3 October, not 4 October.

Statutory Declarations in the Magistrate Court
The government has released a guide to The Criminal Procedure (Amendment No. 2) Rules 2019. The key change for debt advisers: From 07 October 2019, Rule 6 of the Amendment Rules will allow magistrates' courts staff to provide a more efficient service to the client and to the court if the declaration could be taken by an appropriate staff member, without needing to interrupt a justice of the peace or a District Judge (Magistrates' Court) and without needing to send the defendant away to find a solicitor. At present, the declaration can be made before a magistrate or a solicitor.

See our October 2018 Spotlight "Unpaid Magistrates Court fines and what you can do" for the current position regarding the use of statutory declarations where the defendant did not know about proceedings.

Case law

FOS publish two decisions on unaffordable lending

Ref: DRN2108651 **– borrower (Miss G)**

FOS has published a decision upholding the borrower's complaint stating:

"This means that having carefully thought about the three overarching questions, set out on page ten of this decision, I find that:

- *Amigo didn't complete reasonable and proportionate checks on Miss G to satisfy itself that she was able to repay any of these loans;*
- *reasonable and proportionate checks would more likely than not have individually shown Miss G was unable to sustainably make the repayments for loans one and two;*
- *Amigo ought fairly and reasonably to have realised that the loans from loans three onwards were unsustainable or otherwise harmful for Miss G and were unfairly and excessively increasing her overall indebtedness;*
- *Amigo didn't act unfairly or unreasonably towards Miss G in some other way.*
- *the above means that Amigo didn't act fairly and reasonably when providing Miss G with all five of her loans."*

FOS ordered Amigo to do the following:

- To refund all the interest and charges Miss G paid including interest of 8% per year;
- To correct the information recorded on Miss G's credit file.

Ref: DRN3847539 **– guarantor (Miss W)**

FOS has published a decision upholding a guarantor's complaint stating:

"This means that having carefully thought about the four overarching questions, set out on page thirteen of this decision, I:

- *make no finding on whether Amigo completed reasonable and proportionate checks to satisfy itself that the borrower would be able to repay this loan in a sustainable way;*
- *find that Amigo didn't obtain Miss W's properly informed consent before binding her to the guarantor and indemnity agreement;*
- *find that Amigo didn't complete reasonable and proportionate checks on Miss W to satisfy itself that she was able to repay the loan in the event the borrower did not and that such checks would have shown that Miss W was unable to do so;*
- *find that Amigo did act unfairly and/or unreasonably towards Miss W in some other way.*

These findings lead me to conclude that Amigo unfairly and unreasonably accepted Miss W as a guarantor on this loan. As Miss W is being expected to make repayments on a loan she shouldn't have been accepted as a guarantor for, I think that she stands to lose out because of what Amigo did wrong."

FOS ordered Amigo to do the following:

- To remove Miss W from all obligations as guarantor;
- To refund any loan payments Miss W made including interest of 8%;
- To remove any information recorded on Miss W's credit file as a result of this loan;
- To pay Miss W £500 compensation

For more information on both decisions, see Debt Camel website and template letters.

Ombudsman News 149 above has detailed guidance on how FOS deals with unaffordable / irresponsible lending.

Second application to annul a bankruptcy order is an abuse of process

In the case of *Lambert v Forest of Dean District Council & Ors* [2019] EWHC 1763 (Ch), the court considered whether a second application brought by a bankrupt to annul his bankruptcy was an abuse of process.

Background
Mr Lambert (Lambert) was adjudged bankrupt by the local authority Forest of Dean District Council (LA) following their bankruptcy petition based on arrears of council tax and business rates.

Lambert applied to annul the bankruptcy under s282(1)(a) of the Insolvency Act 1986 on the basis that the order ought not to have been made. Lambert contended that he was not liable for the petition debt and that the statutory demand and bankruptcy petition had not been properly served. Lambert also applied to seek a stay of his bankruptcy and an injunction preventing the bankruptcy trustee and the LA from dealing with his assets.

The court struck out Lambert's annulment application for failure to comply with an unless order which directed Lambert to pay various costs orders imposed following dismissal of the stay and injunction applications.

Lambert then made a second application to annul the bankruptcy on identical grounds as those in the initial application.

The court's decision

Abuse of process

The court dismissed Lambert's second application to annul as an abuse of process, commenting that a sanction (the striking out of the first annulment application) had been imposed and that he should have sought relief from that sanction under CPR 3.9. Through making the second annulment application he had tried to avoid the relief from sanctions process.

With reference to the three stage test established in *Denton v TH White* [2014] EWCA Civ 906. Had Lambert made the required application under CPR 3.9, it would have been dismissed – the non-compliance of the unless order was serious, there was no good reason for non-compliance with the unless order and all the circumstances of the case counted against relief from sanction. See paragraph 40.

While the first annulment application was not itself abusive, and Lambert was not seeking to re-litigate issues which had been decided, or should have been included in earlier proceedings, the second annulment application was an abuse of process, nonetheless. See paragraph 37.

Discretion to annul the bankruptcy under s282(1)

The court also considered the second annulment application on its merits should the abuse of process finding be incorrect. Whilst the court acknowledged that its discretion to annul was engaged it declined to do so on the basis that the petition debt was owing and applications to set aside the liability orders could not succeed.

If the bankruptcy were annulled a second statutory demand and petition would very likely be served and bankruptcy would be inevitable.

Lambert's failure to cooperate with the trustee and LA was also a relevant factor and the court considered it inappropriate to further frustrate the administration of the bankruptcy estate.

Comment

This case is a reminder of the importance of complying with the unless orders and/or applying for relief from sanctions for non-compliance. For further discussion of these issues see sections 6.5 - 6.6 of our resource 'Dealing With Judgment Debts' resource in the Network and Information section of the IMA website (registration is free).

It is also a useful illustration of the court's approach to exercising its discretion to annul a bankruptcy and its reluctance to do so where the petition debt is indisputably owed.

Court held judgment in default cannot be entered when the defence is served late

In the case of *Clements Smith v Berrymans Lace Mawer Service Co* [2019] EWHC 1904 (QB), the court considered whether filing a defence late prevented the defendant from setting aside a default judgment.

Background
This case was concerned with the relevance of CPR 12 and CPR 13 to an application for relief from sanctions. The claim was for personal injury damages in a sum to be determined, but likely to be in excess of £3m. The numerous delays in processing applications and breakdown in communications compounded the difficulties in unpicking the events and determining the relevant rules under which an application for relief should be made.

The timeline –

- 30/09/18 - Defendant makes an application for an extension of time to file a defence
- 17/10/18 - Claimant requests judgment in default
- 7/11/18 - Court staff refuse to issue extension application, request Private Room Appointment (PRA) with the Master
- 26/11/18 - Court staff issue application for an extension of time to file the defence (almost 2 months after it was made) – also draft a note to be provided to the Master asking whether to enter judgment. This note was not provided to the Master until 2/01/19
- 15/01/19 - Judgment in default entered – no defence on court file
- 13/02/19 - Defendant's application to set aside judgment lodged
- 12/07/19 - Hearing of the application to set aside to which this judgment relates

The defendant made an application to set aside the judgment invoking the mandatory grounds in CPR 13.2 and the discretionary grounds in CPR 13.3. The claimant contended that CPR 13.2 did not apply and that the defendant's application did not meet the test in *Denton v TH White* [2014] EWCA Civ 906, which comprises the standard test imposed by the Court of Appeal for considering applications for relief from sanctions.

The judgment
The Master followed the principles in *Cunico Marketing v Daskalakis* [2018] EWHC 3882 (Comm), commenting that the judgment of Andrew Baker J is in certain respects obiter (persuasive) because "*it goes wider than the narrowest consideration necessary as a matter of legal logic to decide the case which presented itself to him*". In *Cunico,* the first defendant filed a late acknowledgment of service an hour *before* the claimant filed the request for judgment in default, filing the defence *after* the request for judgment was made. In the present case, the request for an extension of time to file the defence had been made *before* the request for judgment was filed.

In *Cunico* at para 13 Baker J comments "*whether an acknowledgment of service filed late, but before a request or application for judgment in default under CPR 12.3(1), precludes the grant of such a judgment, is an important issue of principle. It is the subject of conflicting first instance decisions and obiter dicta*".

The Master referred to the words of CPR 12.3, that a claimant may obtain judgment only if the defendant has not filed the defence AND that the time for doing so has expired. The Master also noted, as did Baker J in *Cunico*, that CPR 3.10 provides that an error of procedure does not invalidate any step in the proceedings unless the court so orders.

The court's decision
The court held that a defence, within CPR 12.3, does not have to be a timely defence. Where a defence was filed prior to the point at which the court came to apply CPR 12.3, the court does not have jurisdiction to enter default judgment. Therefore, the judgment had to be set aside as of right – CPR 13.2.

Comment
Following this decision (which Master McCloud gives permission to appeal) and that of Baker J in *Cunico*, the Civil Procedure Rules Committee have approved changes to CPR 12 which are scheduled to come into effect in October 2019 that will have the same effect as this judgment and that in *Cunico*. No Statutory Instrument has been passed as of writing.

Spotlight

In this month's **Spotlight**, we discuss where a tenant might still be liable for council tax after moving out.

For our previous 3 spotlight article topics here:

- **Jul 19** Contingent liabilities and insolvency
- **Jun 19** Complaining to the Financial Ombudsman Service (FOS)
- **May 19** Charging Orders – Attaching conditions

To see our other Spotlight articles please go to our website.

Celebrating Success

Thanks to Michael Agboh-Davidson from Bradford Citizens Advice who provided us with the following success story.

When I first saw my clients, they were facing eviction by a mortgage lender due to arrears on a secured loan. They had borrowed £20,000 in 2006, and even though they had already repaid more than double this amount there was still over £65,000 outstanding, mainly due to default interest and charges. The husband was suffering serious health problems and they had an elderly dependant relative living with them. The wife suffered from anxiety and depression and had attempted suicide in the past. I contacted their lender who said that my clients' payment proposal would not be acceptable as it would not clear the arrears within the remaining term of the loan and so the court would not be able to suspend the warrant.

I contacted the Specialist Debt Advice Service (SDAS) at Shelter, who told me that the lender was applying the wrong test to the period for repaying the arrears. The loan had been regulated by the Consumer Credit Act 1974 (CCA) when it was executed, and the transitional provisions meant that a Time Order would be available. I drafted an application to suspend the warrant with their help, asking the court to engage the Time Order provisions, which meant there was no time limit on repaying the arrears. Following advice from SDAS, I also made a Subject Access Request to see whether the lender had served the correct mandatory notices under s77A and s86B CCA - another of the transitional requirements for "back book" secured loans.

I went to court with the clients and successfully argued that the CCA could be applied to the warrant suspension. The judge adjourned the case to allow me to consider whether the right notices had been served, as this could impact on the level of arrears. I finally received the copies of the notices and went through them all to see whether they contained the correct wording prescribed by the regulations, contained the right amounts and were served at the right time. This was time consuming work, but it demonstrated that the notices were defective (or missing entirely), and this meant my clients could argue that they were entitled to a large sum of interest to be refunded to the account.

Section 86B requires a lender to send a Notice of Sums in Arrears to a borrower within 14 days of falling 2 months in arrears. For agreements that precede the implementation date of 1 October 2008, only the arrears that accrue after that date are counted. There is a specific form and content for the notice* and it must include an arrears information sheet under s86A. If the lender does not comply, they cannot enforce the agreement and they are not entitled to charge interest for the period of the breach.

I wasn't able to go back to court with the clients, but Shelter arranged for representation and they came out with a £55,000 reduction in contractual interest and £12,000 written off in other charges and legal costs. The claim for possession was adjourned generally and the warrant was discharged. My clients will be able to pay the principal that is still due under the loan in just over 2 years before they reach retirement age.

*Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, Regulations 19-23 and Schedule 3

If you have any successes that you've achieved for clients, we would love to hear about them and share them with other advisers. Please email us any success stories to SpecialistDebt@shelter.org.uk.

Networking & information sharing project

As part of our Networking and Information Sharing partnership with the Institute of Money Advisers (IMA), the Specialist Debt Advice Service produce a range of resources which are available to free sector money and debt advisers. IMA membership is not required, you can sign up or log in to access these resources via a dedicated area of the IMA website. Under the 'Shelter resources' section you will find our monthly ebulletins and spotlight articles, quarterly debt updates, video recordings, technical resources and webinars.
Including:

- All of our previous ebulletin Spotlight articles
- Dealing with Judgment Debts – a recording of our recent webinar & comprehensive 40 page resource document

- April's DRO update, detailing issues which may not be included in the DRO A-Z document. **An updated version will be available soon**

A member of the team will be attending the **East Midlands Money Advice Group** meeting on 12 September.

The Networking & Information Sharing Project is funded by the Money and Pensions Service.

Sign up for our monthly e-bulletins

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Please remember to add specialistdebtbulletin@shelter.org.uk to your email address book to ensure that our emails are not placed in your junk mailbox.

Archived newsletters & spotlight articles

On this page, you will be able to access our library of monthly e-bulletins and Spotlight articles.

Who we are

We help millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that one day, no one will have to turn to us for help.

Web enquiries can be made 24 hours a day, 7 days a week.
Click on this link to submit a web enquiry

Our telephone service is open 9am – 5pm Monday to Friday.
Call us now on **03300 580 404.**

Find us at www.shelter.org.uk/debtadviceservice
Thank you for reading,
The Specialist Debt Advice team