Service update

The Specialist Debt Advice Team are exhibiting at the AdviceUK's 2019 – 40th Anniversary Annual Conference on 10th October. Please visit our stall for a chat and say hello!

Did you know that reading the Specialist Debt Advice Service ebulletin and Spotlight articles can count towards your CPD points for reading? Points for general reading are capped, please refer to your CPD guidance for further details.

News and legal updates

Eligibility for universal credit
DWP has published Memo ADM 15/19, which outlines the rules around transitional payments for claimants previously entitled to the severe disability premium who are being migrated onto universal credit as part of the managed migration pilot.

You can find out more on Shelter Legal "Eligibility for universal credit"

Civil Justice Council proposes recommendations to assist vulnerable claimants and defendants in civil courts
The Civil Justice Council (CJC) has published a consultation with recommendations on how to support all vulnerable claimants and defendants. It considers issues arising from the vulnerability of parties and witnesses in all types of litigation. The consultation closes on 11 October 2019.

Money Advice Trust updated research – Stop the Knock 2019
The Money Advice Trust have released their latest report "Stop The Knock 2019", which shows (amongst other things) that:

- There has been a further overall increase in local authority bailiff use, driven by a surge in bailiff referrals for parking debts.
- Local authorities in England and Wales passed 2.6 million debts to bailiffs during 2018/19.
- Parking debts were passed to bailiffs on nearly 1.1 million occasions – a 21% like-for-like increase on the same period in 2016/17.
- The number of council tax debts passed to bailiffs remained stable for the first time – compared to a 10% surge in the preceding two year period – but remains high at more than 1.4 million referrals in 2018/19.

Enforcement agent firms sign up to a new industry code
The Civil Enforcement Association (CIVEA) has announced that all their members have signed up to an independently-monitored code of practice, which involves a detailed compliance audit and review by a newly-formed independent panel, the Compliance, Adjudication and Review of Enforcement (CARE) Panel. Steps taken by CIVEA include the use of mandatory use of Body Worn Video technology (laid out in their revised Code of Practice).

Enquiry of the month

Challenging a transfer of a CCA regulated debt to the High Court for enforcement

Jurisdiction

If a creditor obtains a county court judgment (CCJ) against an individual, and if that debt is regulated by the Consumer Credit Act (CCA), it must not be transferred to the High Court for enforcement, regardless of the amount outstanding.

There are two pieces of legislation to cite:

Article 8(1A) of The High Court and County Court Jurisdiction Order 1991

The text of Article 8(1A) on legislation.gov.uk is out of date and has altered since but has the same effect. The updated wording is below (taken from our subscription service Lexis Nexis):

"8
*(1) [Subject to paragraph (1A)] a judgment or **order** of [the **County Court**] for the payment of a sum of money which it is sought to enforce wholly or partially by execution against goods—*

*[(a) . . . shall be enforced only in the **High Court** where the sum which it is sought to enforce is £5,000 or more;]*

*[(b) shall be enforced only in [the **County Court**] where the sum which it is sought to enforce is less than [£600];]*

*(c) in any other case may be enforced in either the **High Court** or [the **County Court**].*

*[(1A) A judgment or **order** of [the **County Court**] for the payment of a sum of money in proceedings arising out of an agreement regulated by the Consumer Credit Act 1974 shall be enforced only in [the **County Court**].]"*

Section 141(1) of the Consumer Credit Act 1974

Section 141(1) and s141(2) state:

"141 Jurisdiction and parties.

(1)In England and Wales the county court shall have jurisdiction to hear and determine—

(a)any action by the creditor or owner to enforce a regulated agreement or any security relating to it;

(b)any action to enforce any linked transaction against the debtor or hirer or his relative, and such an action shall not be brought in any other court.

(2)Where an action or application is brought in the High Court which, by virtue of this Act, ought to have been brought in the county court it shall not be treated as improperly brought, but shall be transferred to the county court."

Therefore, it is clear from the above that CCA regulated agreements cannot be enforced by a High Court writ.

Next steps:

Complain that the HCEO firm / original creditor acted in error of the law

Your client can make a formal complaint to the HCEO firm citing the above pieces of legislation including a breach of paragraph 66(1)(a) of Schedule 12 of the Tribunals Courts and Enforcement Act 2007 (TCEA), which states a debtor may 'bring proceedings' against the HCEO for breach of the Act or for acting on a writ that is defective.

The complaint should request that the High Court writ is set aside immediately and for any money already paid to be refunded, plus statutory interest of 8%. Any amount they used to reduce fees should not be allowed as they had no jurisdiction. However, if they have passed on all monies to the creditor, then the issue of a refund of money paid towards HCEO fees is resolved.

Your client could consider copying in the High Court Enforcement Officers Association (HCEOA), which would normally be the next step in the complaints process where the client is not satisfied with their response or the HCEO firm does not respond within 8 weeks. However, page 3 of the HCEOA complaints procedure states that they will consider complaints over the legality of a writ. The HCEOA is unlikely to accept the complaint either but at least they are made aware.

If the HCEO firm refuse to provide any refund, plus statutory interest of 8%, then follow it up with the HCEOA. Again, their process states they will not consider fees complaints, but will consider whether the correct stage was reached to add a particular fee (see para 14(d) of their complaints procedure). If the writ was invalid, then no fee should ever have been charged.

For general information on complaining about enforcement agents, you can find Graham O'Malley's very useful articles published in Adviser online "Complaining about enforcement agents — part 1" and "Complaining about enforcement agents — part 2".

You should also write to the original creditor attaching a copy of the letter sent to the HCEO firm requesting that the account is withdrawn immediately citing the above legislation.

Where the account is withdrawn by the original creditor or sent back to the original creditor by the HCEO firm, any HCEO fees added to the balance would be removed as per Regulation 17 of The Taking Control of Goods (Fees) Regulations 2014. See also paragraph 31 of the Taking Control of Goods: National Standards.

Successful outcome

Glen Harrison from Tameside Citizens Advice has successfully argued that a CCA regulated debt should not have been transferred to the High Court, which resulted in enforcement action ceasing and all HCEO fees removed from the outstanding balance. A refund of £200 was made for payments made towards HCEO fees. This enabled the client to set up a direct payment arrangement with the original creditor.

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.

Spotlight

In this month's **Spotlight** we will cover Direct Earnings Attachments (DEA), how they are made and what an adviser needs to do when dealing with a client that has a DEA in place.

For our previous 3 spotlight article topics here:

Aug 2019 - Council Tax liability when tenants move out
Jul 2019 - Contingent liabilities and insolvency
Jun 2019 - Complaining to the Financial Ombudsman Service (FOS)

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

Case law

The court considers when a statutory demand can be set aside

In the case of *Martin v McLaren Construction Ltd* [2019] EWHC 2059 (Ch), the court held that if the statutory presumption of insolvency required by ss267 and 268 of the Insolvency Act 1986 (IA 1986) is not established the statutory demand is likely to be set aside.

Background

The applicant (Martin) applied for an order that a statutory demand served on him by the respondent be set aside under Rule 10.4 of the Insolvency (England and Wales) Rules 2016 (IR 2016).

The statutory demand was expressly made under section 268(1)(a) IA 1986 (debt for liquidated sum payable immediately). The applicant's ground for his application to set aside was that the debt was not 'payable immediately' as required by section 268(1) IA 1986.

The applicant had provided a personal guarantee to the respondent (McLaren) which was payable immediately on demand. The terms of the guarantee provided that the guarantor (the applicant) is only liable to make payment when he has been served with a written demand for payment.

The applicant argued that such a written demand for payment was not served by the respondent and therefore the requirements of section 268(1)(a) IA 1986 were not met. The respondent argued that a prior statutory demand served for a different sum, which was later withdrawn, constituted a written demand for payment which satisfied the requirement in the guarantee agreement. The respondent also claimed that an email sent was a written demand for payment.

In addition to this the respondent argued that even if a written demand had not been served the court should not set aside the statutory demand because there would be no injustice / prejudice to the applicant that would be rectified by the statutory demand being set aside. The service of a written demand for payment would have made no difference and was merely a technicality.

The Court's decision

The court (Insolvency and Companies Court Judge Barber) did not accept the respondent's argument that the prior statutory demand constituted a 'written demand for payment' that fulfilled the contractual obligation under the guarantee. Judge Barber cited the judgment of David Richards J (as he then was) in the case of *TS & S Global Limited v Fithian-Franks* [2007] EWHC 1401, in support of this: the document was 'clearly not intended as a means of fulfilling contractual preconditions to making a debt immediately payable'. The earlier Statutory Demand was also withdrawn.

The court held that an email was not enough to constitute a written demand for payment as under the contract written demands by email were not permitted.

The court rejected the respondent's argument that the statutory demand should not be set aside because there was no prejudice and no injustice to be rectified. They found that the respondent had not established the statutory presumption of insolvency required by sections 267 and 268 IA 1986 and that any discretion to set aside the statutory demand under r10.5(5)(d) IR 2016 must be exercised in a manner consistent with primary legislation. The court found that the failure to serve the written demand for payment was therefore of substance and not simply of form. The court relied on the decision of Morgan J in *Wallace LLP v Yates* [2010] EWHC 1098 (Ch), and the reasoning of Lloyd LJ in *White v Davenport Trust Ltd* [2011] BPIR 1187 in support of his decision.

For these reasons the statutory demand was set aside.

Comments

The implications of this decision are that if a creditor wants to issue a statutory demand under IA 1986, s268(1)(a) against a guarantor where the guarantee is payable on demand, they must ensure that they have served a necessary written demand for payment under the guarantee agreement. If they have not done this, the statutory demand is likely to be set aside because the statutory presumption of insolvency required by sections 267 and 268 IA 1986 will not be met.

If your client is a guarantor that is served with a Statutory Demand, it will be worth checking the guarantee agreement to see what is required to have been done / served in order for the debt to become payable. If this has not been done the statutory demand could be set aside.

Networking & information sharing project

As part of our Networking and Information Sharing (NIS) partnership with the Institute of Money Advisers (IMA), the IMA and the Specialist Debt Advice Team have produced a range of resources which are available to free sector money and debt advisers.

IMA membership is not required, and you can sign up or log in to access these resources via a dedicated area of the IMA website.

Under the 'Shelter Specialist Debt Resources' section you will find a variety of resources produced by the team. The Insolvency Service DRO A-Z guidance is also available on the NIS site. We have produced additional DRO resources which complement the A-Z:

- DRO Update document – updated last month
- Recorded webinar: DROs - approaching the grey areas.

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

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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