

Payment holidays and deferred payment arrangements

Introduction

As the COVID-19 crisis escalates, many businesses and individuals face acute financial pressure. Wherever possible, lenders and suppliers of goods and services are being asked to accommodate requests for payment holidays and forbearance.

In this bulletin, Lucy Walker considers some of the issues and problems that arise under the consumer credit regulatory regime in connection with offering payment holidays and/or payment plans under existing regulated credit and hire agreements, together with a discussion of the pitfalls to be avoided by suppliers when agreeing deferred payment schemes in relation to invoices for goods and services.

Regulated credit and hire agreements

In recent days, there has been much publicity regarding lenders under regulated mortgage and credit facilities offering concessions and payment holidays to customers. The Government has reached agreement with mortgage lenders to offer customers a three-month payment holiday. Separately, several high street banks, with varying degrees of generosity, have advertised concessions relating to overdraft interest and charges for customers with arranged overdraft facilities.

Against this background, customers under credit and hire/lease facilities regulated by the Consumer Credit Act 1974, (the “CCA”) including personal loan agreements, credit card facilities, vehicle lease and vehicle personal contract purchase agreements and hire purchase and conditional sale agreements in respect of goods, are likely to expect similar levels of flexibility and understanding from their lender. Lenders under regulated credit and hire agreements are required to treat customers fairly, particularly if the customer is experiencing financial difficulty. So how should the parties proceed?

Unfortunately, the prescriptive nature and complexity of the CCA means that there are several obstacles to overcome before a lender can simply agree revised payment terms with a customer.

The starting point is that a lender could offer, on a non-binding basis, to waive late payment interest and charges and/or to accept reduced repayments or offer a payment holiday, such that the lender made it clear that the forbearance did not operate to amend the contractual terms of the existing credit or hire agreement and was offered on a discretionary basis only.

An informal approach poses obvious risks for both the lender and the customer as any agreed payment plan would not be contractually enforceable. This is far from ideal: if the parties agree a revised payment profile, it is obviously essential for the parties also to agree how any resulting deficit in payment should be made up and within what timescale. Additionally, the parties should agree the effect, if any, of a revised repayment profile on the customer's credit rating. Arguably, an agreed plan without contractual force runs contrary to the principle of 'treating customers fairly' to which all businesses authorised and regulated by the Financial Conduct Authority ("FCA") are subject.

Notwithstanding the existence of an agreed, but non-binding, payment plan, technically the customer would be in default of the strict terms of their regulated credit or hire agreement. Consequently, various duties imposed on the lender under the CCA to send the customer statutory notice of sums in arrears ("NOSIA") and notice of default sums, ("NODS") would be triggered. These statutory notices are required to reflect the contractual position, rather than the situation resulting from any forbearance or informal agreement with the customer.

The receipt of NOSIAs and NODS would be confusing and potentially alarming to a customer who otherwise thought that they had reached an accommodation with their lender. From the lender's perspective, the duty to send NOSIAs and NODS is unavoidable as failure to do so would prevent the lender from enforcing the credit or hire agreement if necessary and from charging *any* (not just late payment) interest.

The obvious alternative would be for the lender and the customer formally to document any revised payment terms, payment holiday and/or suspension of the accrual of interest and charges. However, a variation of the terms of a regulated credit or hire agreement demands a regulated modifying agreement under the CCA, otherwise the lender risks being unable to enforce the agreement against the customer. The rules and requirements relating to regulated modifying agreements are notoriously complex and most lenders do everything they can to avoid having to use a modifying agreement.

There are no easy answers at this stage, which is unfortunate given the gravity of the current crisis and the need for flexibility. The financial services industry is currently lobbying the Government urgently to effect the necessary legislative changes to the CCA to provide lenders with the room for manoeuvre that is so obviously needed. Hence, watch this space.....

Invoices for goods and services

Suppliers of goods and services in all sectors, from goods retailers and service providers through to professional services firms and private schools are likely to be asked by customers to allow time to pay,

or to offer instalment payment schemes in relation to outstanding and forthcoming invoices for the supply of goods and services.

A supplier may do this may way of forbearance and simply allow the customer time to pay on a non-binding basis where the supplier makes clear that there is no waiver of the right to demand immediate repayment in full under their standard invoice terms.

However, there is a fine line between the situation outlined above and the situation where the parties reach a revised agreement between them, (whether expressed orally or in writing) on terms where the supplier agrees not to sue on the relevant invoice in consideration of payment by instalments or payment of a lump sum by a certain date.

The position is highly fact sensitive and will vary from case to case, but such agreements are capable of varying the supplier's invoice terms and forming a new contract between the parties for credit by way of financial accommodation. Quite often, the formation of a new contract is inadvertent. A more obvious example of an agreement for credit between the parties would be the situation where, in exchange for a promise by the supplier not to sue on the relevant invoice, the customer offered to pay interest or offered security for their deferred payment obligations.

In the above circumstances, if the relevant customer is an individual natural person, a small partnership (comprising three partners or fewer) or an unincorporated association (such as a members' club) then the agreement will be a regulated credit agreement for the purposes of the Financial Services & Markets Act 2000 (Regulated Activities) Order 2001, (the "**RAO**"), unless an exemption category can be found. It is regulated activity for the purposes of the RAO to enter into a regulated credit agreement as lender and to exercise a lender's rights and duties under a regulated credit agreement.

Fortunately, there are ways of structuring deferred and instalment payment schemes so as to take advantage of the exemption categories available under the RAO (which would take the agreement outside the scope of regulated activity). However, the availability of exemptions is subject to the fulfilment of strict conditions and advice should be sought.

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30th March 2020.