13: unlucky for some?

The latest pre-action protocol for debt claims creates extra hoops for creditors to clear, says Peter Thompson QC

Pre-action Protocol No 13, in force since 1 October 2017, provides extra hoops through which financial institutions and other creditors are expected to jump before having recourse to the courts. The broad aim is to deter creditors from using the courts for debt recovery. Since April 2015, Protocol No 1 has covered the same ground less prescriptively: it laid down that 'litigation should be a last resort' and a creditor should be expected, before issuing proceedings, to allow the debtor 14 days to respond to a detailed statement of the claim, a summary of the facts and the disclosure of relevant documents. Protocol 13 goes further and requires, in addition, the delivery of 10 pages of documents including an information sheet, a response form and a statement of income and expenditure and allowing 30 days for the debtor to respond. This must be the biggest turn-off for creditors since the Grayling hike in court fees.

What is the reason for it?

The default process for obtaining a judgment requires little judicial input and, if obtained through Money Claim Online, it is managed almost entirely by computer. One would have thought that the collection of court fees for this line of business was easy money that ought not to be turned away. But maybe there is simply too much of it for the courts to handle administratively. The civil judicial statistics show that in 2017 there was a year-on-year increase in caseload of 17%. Since the great majority of claims issued are for less than £10,000, the main impact of the increase will be on the small claims track. Also, there are more of these claims to come because unsecured consumer debt—mainly on credit cards, store cards, loans and overdrafts—has increased by £135bn in the past five years and is predicted by the Office for Budget Responsibility to reach the pre-crash level of 45% of household income by 2021. So, something needs to be done, if not to reduce the toxic debt within the economy at least to relieve the pressure on the administration of justice.

The purpose

The declared purposes of Protocol No 13 are:

- to encourage early engagement and communication between the parties to help clarify whether there are any issues in dispute;
- to enable the parties to resolve the matter by agreeing a reasonable payment plan or using ADR;
- to discourage the parties from running up costs; and
- to support the efficient management of proceedings that cannot be avoided.

These are all worthy aims but the Consumer Credit Act 1974 and the Financial Services and Markets Act 2000 already put the creditor on the straight and narrow path: the consumer has to be provided with statements of account, notices of sums in arrears, information sheets, opportunities to settle etc once repayments have become unaffordable. Even after the contract has been terminated, the policy of financial institutions is not to sue until they have first engaged with the debtor. Indeed, they sometimes try so hard to engage with the debtor that it amounts to harassment, as in *Roberts v Bank of Scotland plc* [2013] EWCA Civ 882 where debt-collectors engaged by the bank made 547 telephone calls. The Court of Appeal said that the bank should rather have had recourse to the courts because 'they are there to ensure that creditors do not resort to the remedy of self-help'. The most recent protocol seems to be going in the opposite direction and encouraging self-help, and at the same time denying the debtor the protection of the Small Claims Court. The protection includes a fair hearing of points in dispute and a manageable instalment order if the debt is admitted, without liability in either case for legal costs. Alternative dispute resolution, like arbitration, is relatively expensive and unlikely to appeal to a struggling debtor. The excellent court mediation service is free.

An additional chore

Will a two-page information sheet plus a four-page reply form plus a four-page financial statement of income, outgoings and debts elicit the sort of positive response from the debtor that is going to lead to settlement? We must wait and see. But it is certainly an additional chore for the creditor, the cost of which cannot be recovered in any subsequent proceedings. If it comes to court, a completed protocol reply will hardly help with case management because the debtor has to provide all the same information over again in a form N9 (response pack).

What if this latest protocol is simply ignored? There is a threat of sanctions in costs for non-compliance but the creditor's legal costs are not recoverable anyway and the debtor will be unrepresented. However, my guess is that the protocol will not be ignored and that if its main purpose is to deter creditors from using their right of access to the courts it is likely to be effective. But it won't do anything to reduce the mountain of toxic debt. NLJ

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