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Protocols not proceedings – or how to keep a creditor out of his money

KEY POINTS

- On 1 October 2017, the "Pre-Action Protocol for Debt Claims" comes into force.
- The Protocol provides the debtor with endless opportunities for time-wasting in the hope that the creditor will go away.
- The Protocol is additional to any other requirements to provide a debtor with pre-action information.

Richard Mawrey QC comments on the "eye-wateringly prescriptive" requirements of the new pre-action protocol for consumer credit claims.

'You see that merchantman, Mr Bush? I'll trouble you to fire a shot across his bows and signal him to heave to.' 'Aye aye, Sir'.

Though one may doubt whether all Nelson's captains were as chivalrous as Captain Hornblower, the Navy's principle of laying a shot across the bows before firing in earnest was adopted by litigation lawyers and it became customary, before commencing litigation, to send what was called a "letter before action". Such a letter would set out the claim being advanced and specify how that claim could be met, backed up by the threat of proceedings if the other side did not comply. The letter was never compulsory. If it was blindingly obvious to the intended defendant that he owed money and that failure to pay would lead to a writ, or if the issues between the parties had already been argued over in correspondence, then a formal letter before action would be unnecessary. Furthermore, there would be occasions when surprise was of the essence (eg freezing injunctions), but then even Hornblower would omit the formalities if the other vessel turned out to be a French frigate.

A practice grew up in the courts, though not at that time incorporated into the Rules of the Supreme Court or the County Court Rules, that failure to send a letter before action could result in a reduction in the costs awarded to a successful plaintiff. It was not rigid and, in general, only if the proceedings really did take the defendant by surprise in the absence of a letter before action, or if the defendant would have acted differently had he received one, would the court penalise the plaintiff in costs. All fairly civilised.

Then came the Civil Procedure Rules (CPRs) and what was formerly a courtesy became a set of highly complex and utterly prescriptive regulations, setting out the pre-action interchanges with all the intricacy of an eighteenth-century gavotte. Rather charmingly, these rules were to be known as protocols – a somewhat odd use of a word borrowed from diplomacy but one which did point up the formality of the exercise. Failure to comply was to be punished.

The ostensible purpose was to reduce the risk of litigation. If the proposed claimant sent the full details of his claim with all the supporting documentation, experts' reports and the like, the defendant would, at the least, come to the negotiating table. The fact that the cost of preparing and serving a pre-action protocol might well be considerable and the chances of recovering those costs by no means certain even if successful litigation ensued was merely part and parcel of the CPR's (unstated) objective of increasing the costs of litigation exponentially and front-loading as much of them as possible.

The original pre-action protocols, back in 2000, made sense. Construction and engineering and professional negligence are technical subjects where a clear exposition of the claim might well lead to a meeting of minds or, at least, a narrowing of the issues. In both cases and in that of the other 2000 protocol, defamation, the protocols might also serve to diminish the risk of reputational damage likely to occur once proceedings were in the public domain. What began as a good idea, however, has now got completely out of hand.

THE DEBT PROTOCOL

On 1 October 2017, the Pre-Action Protocol for Debt Claims comes into force and the asylum will be firmly in the hands of its inmates. Debt collection used to be a straightforward matter. Claims were issued for liquidated sums for ascertainable debts – "Goods sold and delivered as per invoice 1234 – £257 10s 6d". More than 90% went undefended – indeed were indefensible. The local solicitor would turn up at the County Court, rattle through a list of 100 claims by coffee time and he and the County Court Registrar would reckon they had done a good day's work before heading out for the golf course. *Nous avons changé tout cela*. The consumerists are in town and things are going to be done a whole heap differently around these parts.

The Debt Protocol is nothing if not expansive: 'This Protocol applies to any business (including sole traders and public bodies) claiming payment of a debt from an individual (including a sole trader). … This Protocol does not apply to business-to-business debts unless the debtor is a sole trader.' Well, it is nice to know that you don't need to be a consumer to benefit from the Protocol; provided you are an individual, even if it is a business debt, you must be served with the Protocol. But why stop there? Why should an individual sole trader be protected but not a business partnership of two individuals? The only exemptions are where the claim is already covered by another protocol or (surprise! surprise!) where the claimant is the taxman. No shot across the bows from HMRC, then.

What is more the Protocol is additional to any other requirements to provide a debtor with pre-action information: 'The Protocol is intended to complement any regulatory regime to which the creditor is subject. To the extent that compliance with this Protocol is inconsistent with a specific regulatory obligation (such as a principle, rule or guidance contained in the Financial Conduct Authority's Handbook) that regulatory obligation will take precedence'. In other words, unless the Protocol actually clashes with the requirements of, say, the Consumer Credit Act 1974 (CCA) or CONC (Consumer Credit Sourcebook), it must be served on top of all the other obligatory documentation (eg a notice under CCA s 87).

PROCRASTINATOR'S CHARTER

The stated aims of the Protocol are, naturally, those of Motherhood and Apple Pie; It is intended to promote 'engagement and communication', foster recourse to ADR (alternative dispute resolution) and 'encourage the parties to act in a reasonable and proportionate manner in all dealings'. One sometimes feels the spirit of Lord Baden-Powell hovering over us all. But then it gets down to business, and one cannot do better than to quote the eye-wateringly prescriptive requirements for the "Letter of Claim". Under paragraph 3, it must:

'(a) contain the following information –

(i) the amount of the debt;

(ii) whether interest or other charges are continuing;

(iii) where the debt arises from an oral agreement, who made the agreement, what was agreed (including, as far as possible, what words were used) and when and where it was agreed;

(iv) where the debt arises from a written agreement, the date of the agreement, the parties to it and the fact that a copy of the written agreement can be requested from the creditor;

(v) where the debt has been assigned, the details of the original debt and creditor, when it was assigned and to whom;

(vi) if regular instalments are currently being offered by or on behalf of the debtor, or are being paid, an explanation of why the offer is not acceptable and why a court claim is still being considered;

(vii) details of how the debt can be paid (for example, the method of and address for payment) and details of how to proceed if the debtor wishes to discuss payment options;

(viii) details of how the debt can be paid (for example, the method of and address for payment) and details of how to proceed if the debtor wishes to discuss payment options;

(ix) the address to which the completed Reply Form should be sent;

(b) do one of the following –

(i) enclose an up-to-date statement of account for the debt, which should include details of any interest and administrative or other charges added;

(ii) enclose the most recent statement of account for the debt and state in the Letter of Claim the amount of interest incurred and any administrative or other charges imposed since that statement of account was issued, sufficient to bring it up to date; or

(iii) where no statements have been provided for the debt, state in the Letter of Claim the amount of interest incurred and any administrative or other charges imposed since the debt was incurred;

(c) enclose a copy of the Information Sheet and the Reply Form at Annex 1 to this Protocol; and

(d) enclose a Financial Statement form (an example Financial Statement is provided in Annex 2 to this protocol).'

The letter must be clearly dated at or near the top of page 1 and must be posted on the same day or the next, and, by "posted" we mean "posted", using the dear old Royal Mail. Only if the debtor makes an "explicit request" that correspondence should not be sent by post and has given alternative contact details can the creditor avoid the first class stamp. And don't think that you can get away with a sneaky agreement to accept non-posted correspondence tucked away in your terms and conditions, because this is expressly outlawed by the Protocol.

If the debtor does not reply within 30 days then the creditor "may" start proceedings but only subject to other obligations that he might have under (eg) the FCA Handbook.

Very foolish, though, of the wily debtor to do nothing. Paragraph 4 contains a Procrastinator's Charter. The debtor should start by responding, using the prescribed Reply Form. He can then ask for copies of any documents he wishes to see and can send copies of his own documents to the creditor. This starts the clock ticking

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again. If the debtor does request documents or information, under paragraph 5.2 the creditor must either provide the documents or information or give an explanation as to why they are "unavailable". There seems to be no thought given to the situation where the debtor demands documents which are undoubtedly available but irrelevant to the dispute or privileged from disclosure.

The debtor can than inform the creditor that he is seeking "debt advice": good plan this, because the creditor must allow a 'reasonable period for the advice to be obtained' (see under 'string and how to estimate its length') and in any event cannot start proceedings less than 30 days from receipt of the Reply Form or the creditor supplying the documents requested whichever is the later.

If our well-informed debtor tells the creditor that debt advice will take longer than 30 days, the creditor must allow 'reasonable extra time' for this advice to be obtained.

Assume the debtor then asks for time to pay. The debtor should supply details of his income and expenditure in the prescribed "Standard Financial Statement" (Annex 2 to the Protocol) and the creditor must have regard to what is in that statement in negotiating with the debtor. If the creditor does not accept the debtor's offer he must give reasons in writing.

Let us assume that our, by now weary, creditor has jumped through all these hoops, can he trot down to the local court and issue his claim form? Dream on, ducky. We turn to paragraph 6. If the parties cannot agree about the debt, their next move is to 'take appropriate steps to resolve the dispute without starting court proceedings', namely to turn to ADR. There may be discussion and negotiation but a smart move (paragraph 6.2) is for the debtor to make a complaint to the Financial Ombudsman Service which should delay things nicely. Or there is always mediation.

The, by now desperate, creditor manages to cobble together some sort of agreement whereby the debt is discharged over an eternity of time by modest instalments. But if you thought that, in this situation, were the debtor to default on the instalment agreements, the creditor could go to court, you have not been reading this so far. Of course, the creditor has to start the Letter of Claim process all over again.

If the negotiations do not resolve the matter, the parties must conduct a review of their respective positions to see if proceedings can still be avoided – paragraph 8.1 – and, in any event, the creditor must give the debtor at least 14 days' notice of the intention to start proceedings (though this can be abridged, the Protocol says kindly, if the creditor might become statute-barred in the meantime, a telling, though unconscious, acceptance of just how long the Protocol process can be spun out if you really try.)

Paragraph 7 states sternly that if the matter ever does get to litigation (assuming both parties have not died of old age) the court 'will expect the parties to have complied with this Protocol' and will take non-compliance into account when giving directions.

DEBTOR AS VICTIM

What a farrago. Take the average consumer credit case, regulated by the Consumer Credit Act 1974 (CCA). The debtor gets into arrears. The creditor must service a Notice of Sums in Arrears, together with the prescribed information sheet. This is a highly detailed document with lengthy and often very obscure requirements and any but the most trivial error will vitiate the process and render the agreement temporarily unenforceable.

Next, in the majority of cases, the creditor will have to serve a notice under CCA s 87 – more formalities and information sheets. The debtor must be allowed at least 14 days to cure any breach of contract and, if it does, it is as if the breach had never been. Only if he does not, can proceedings be contemplated. And that is just the CCA, before you even start on the requirements of CONC.

From October 2017, however, in addition to all this material sent by the creditor to the debtor, the creditor has to start again under the Protocol and the debtor has endless opportunities for further time-wasting in the hope that the creditor will (a) go away or at least (b) accept 25p in the £.

And who pays for this stately gavotte? Not the debtor, that's for sure. Little of the costs of running the debtor to earth will be able to be passed on in the litigation. Any order for costs against a debtor will always represent less than the actual outlay – that is the nature of costs in England – but in this case the shortfall will be considerable. And, if the creditor has missed or faltered in one step in the gavotte he may end up with less than a full order for costs anyway.

Perhaps the smart creditor ignores the Protocol, gets a quick judgment against the debtor and simply takes the costs hit as being cheaper in the long run than abiding by the Protocol. One cannot think that this was what the Rules Committee had in mind but it has its attractions.

How did we get into this mess? It wasn't that the Rules Committee failed to consult: it consulted but simply did not listen to the answers. Almost every debt recovery business in the UK protested volubly and in detail but, like the Deaf Adder, charm ye never so wisely… The *on dit* is that the driving force behind the drafting was the Which? organisation. This would certainly account for things. Which? is the High Priest of the movement that preaches the Debtor as Victim – victim of a harsh capitalist society where debts voluntarily incurred are legally enforceable. Clearly in an ideal society debt repayment would be entirely voluntary at the good will of the debtor. The creditor could ask for his money back (but only once and must say 'please') but, if the debtor says 'No', that should be the end of the matter.

It must be admitted that the Debt Protocol is a big step along the road to that ideal society. ■

Further Reading:

- LexisPSL: Banking & Finance: Pre-action Protocol for debt claims