HENDERSON CHAMBERS

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Banking, Finance and Consumer Credit

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Further Consumer Credit Debt Moratorium.

By Richard Mawrey QC

Following last week's moratorium imposed by the Financial Conduct Authority in relation to credit card debts, overdrafts and personal loans, the FCA is imposing a similar moratorium on hire-purchase (annoyingly referred to by the trendy term 'rent-to-own'), high-cost short-term credit (payday loans), buy-now-pay-later deals (BNPL) and pawn agreements.

FCA Guidance

1. The financial hardship resulting from the Coronavirus lockdown has prompted the FCA into reviewing all the consumer credit sectors and imposing moratoria where appropriate. The latest guidance was finalised on Friday 24 April and came into force on Monday 27 April 2020.

Guidance not rules

2. So far, the FCA is preferring to proceed by guidance rather than by rules. We must reiterate, however, that the FCA expects that its guidance will be followed to the letter and threatens regulatory action against those who might be tempted to disregard it. As the FCA puts it 'This guidance sets out our expectation that firms should provide, for a temporary period only, exceptional and immediate support to consumers facing payment difficulties due to circumstances arising out of coronavirus.' The FCA makes it clear that this guidance is based on PRIN 6 'A firm must pay due regard to the interests of its customers and treat them fairly' and follows it up with 'The guidance is potentially relevant to enforcement cases and the FCA may take

it into account when considering whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by Principle 6'.

3. Given the existence of PRIN 11 which obliges offenders to self-report to the FCA and penalises them further if they don't, it would be a bold lender who decided to disregard the 'guidance'.

Motor vehicles

4. Though there is separate guidance for hire-purchase generally (see below), special provision is made for finance concerning motor vehicles involving transaction regulated by the Consumer Credit Act 1974 (CCA). The guidance makes clear that the guidance applies to hire-purchase, conditional sale, credit sale and regulated consumer hire contracts.

5. As with the guidance issued for credit cards, what the FCA has in mind is, essentially, a three month moratorium on payments where the debtor or hirer can show that he has been put into financial difficulties as a result of the lockdown. As before, it is for the debtor to request it and to satisfy the creditor that he really is in financial difficulties. It is not for the creditor to be proactive and the FCA has expressly disapplied CONC 6.7.18R and 19R to make this clear.

6. The guidance excludes those who were already in difficulties before Covid-19 struck because they are covered by the normal rules and guidance on forbearance contained in CONC.

7. What is envisaged is a deferral not a writing off of the debt. The lender can still charge interest during the period of deferral but if, at the end of the period, the debtor is still in difficulties, then the ordinary rules for

forbearance will kick in. In those circumstances the FCA would expect that the interest accruing during the three months deferral would be waived.

8. The moratorium will often lead to the term of the agreement having to be extended. In this case 'firms should bring to the attention of the customer the need to consider wider implications of the extension – such as potential knock-on effects on insurance, warranties, breakdown cover or MOT'.

9. The FCA is clear that such deferrals are not to be entered as adverse items on the debtor's credit record and that no additional charge or fee should be levied for granting the deferral.

10. Where the agreement is renegotiated or novated, then the new terms must not be more onerous than those of the old agreement. In particular, where there is a guaranteed minimum future value or a stated residual value these should not be recalculated based on the temporary depression of the car market, and the FCA points a significant finger at CCA ss 140A-140C (unfair relationships).

11. Where the agreement is due to end during the lockdown and the hirer cannot afford the balloon payment, the creditor should negotiate a solution with him and the FCA counsels against a further credit agreement to finance the balloon payment. If the hirer wishes to return the car but cannot because he is locked down, he should be told not to use it and to treat it as 'off road'.

12. Though the FCA is a mite more circumlocutory, you can take it that termination and repossession during the lockdown are OUT.

13. The full text of the guidance can be found at:

https://www.fca.org.uk/publications/guidance-consultations/motor-finance-coronavirus

High-cost short-term credit

14. The guidance applies to lenders under high-cost short-term credit (HCST) agreements. As with the other forms of moratorium such as car finance (above) and credit cards (see our earlier alerter), it is for the borrower to contact the lender and establish that he is suffering financial difficulties as a result of the lockdown. As before the lender is not obliged to make detailed enquiries and those already in difficulties before the crisis will continue to be subject to the forbearance provisions in CONC 6.7

15. Again, the lender is expected to grant a moratorium of at least three months, characterised as a 'payment deferral', itself defined as 'an arrangement under which a firm permits the customer to make no payments under their regulated credit agreement for a specified period, or extends the period until payments are due, without being considered to be in arrears'.

16. The guidance continues 'no additional interest arising as a result of the deferral should be charged to the customer and the payment deferral should have no impact on the amount of the balance that was outstanding at the time when the payment deferral was granted.' No fee may be charged for the deferral and, once more, the deferral must not adversely affect the borrower's credit rating. What is more, the lender should make the right to seek a deferral clear in its communications with the borrower and on its website.

17. Lenders are referred to the provisions of CONC 7.3.10R 'a firm must not pressurise a customer:

- to pay a debt in one single or very few repayments or in unreasonably large amounts, when to do so would have an adverse impact on the customer's financial circumstances;
- to pay a debt within an unreasonably short period of time; or
- to raise funds to repay the debt by selling their property, borrowing money or increasing existing borrowing.'

18. The full guidance on HCST agreements can be found at https://www.fca.org.uk/publications/finalised-guidance/high-cost-short-term-credit-and-coronavirus-temporary-guidance-firms

Other hire-purchase and pawn

19. The guidance for non-motor hire-purchase (RTO), BNPL finance and pawn pretty much follows that for motor finance set out above. The guidance makes clear that if a straightforward deferral is not appropriate, the lender should find other means of helping customers in difficulties.

20. As with the other moratorium provisions, interest will continue to accrue during the deferral and if the appropriate solution involves a waiver of interest either during the moratorium or after it ends, then the waiver is not to affect the lender' calculation of the total cost of the agreement for the purposes of CONC 5B.2.11R. The term of the agreement should be extended where necessary.

21. Where self-isolation and social distancing prevent collection or repossession of goods, the lender should not charge interest or fees and if the debtor is in financial difficulties, any attempt to repossess goods that he needs will put the lender in breach of PRIN 6. If the customer cannot make a payment either because he is locked down or the place of payment (eg a pawnbroker's

shop) has closed during the crisis, no interest, fees or charges may be levied. Forced inability to redeem a pawn in these circumstances should put the matter on hold until the lockdown ends and again, no interest, fees or charges can be imposed.

22. This section can be found at https://www.fca.org.uk/publications/finalised-guidance/rent-own-buy-now-pay-later-and-pawnbroking-agreements-and-coronavirus-temporary-guidance-firms

Duration

23. The initial duration of this guidance is expected to be three months but the FCA has indicated that it will keep the situation under review and will extend the provisions should this prove necessary.

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