The content

Debt Advice Handbook 15th edition

Description

With living costs and unemployment rising, budgets squeezed and problem debt on the increase, no adviser should be without this essential guide to the practice and process of giving money advice in England and Wales.

Who's this book for?
It is essential for debt advisers, welfare rights advisers, lawyers, local authority and housing association staff, social workers and union official.

What does it do?
The handbook provides the most comprehensive information needed by advisers on the key stages of money advice, including interviewing clients, establishing liability, prioritising debts, preparing a financial statement, negotiating with creditors and dealing with bailiffs. Fully indexed and cross-referenced to law, regulations and official guidance, and to court and tribunal decisions Includes tactical guidance and examples

What's new?
Fully updated to cover all recent changes to legislation, caselaw and court procedure and practice Emphasis is placed on taking due care of vulnerable clients and making sure that any payment arrangements agreed are appropriate. There is a focus on sustainable credit arrangements that do not affect a client's abilities to pay essential living expenses and priority debts.

Properties

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2. Using contract law

A contract is an agreement between two parties that becomes binding (ie, legally enforceable) because it specifies, for example, that goods or services are to be exchanged by one party in return for a 'consideration', usually money, from the other.

The most common situation in which an amount of money claimed under a contract may not be due, or may be reduced, is when one party has not kept to their side of the agreement – eg, the supplier has sold defective goods. Sometimes, nothing is payable because a contract has not been made correctly, or any of the rules on how the creditor can demand money have not been complied with. In other cases, it may be possible to reduce the amount owed because the law says that a term of the contract is 'unfair' or, in the case of credit agreements, there is an 'unfair relationship' (see here) or there has been irresponsible lending or other grounds for complaint (see here).

Even if you have established that a debt does exist, the client may not be liable to pay it, either because someone else is liable or because the contract is not enforceable – eg, if the creditor is outside the time limit for taking court action to recover the debt (see here).

Joint and several liability

If more than one person enters into a credit agreement, they are each liable for the whole debt. This is known as 'joint and several liability'. If it is a regulated credit agreement (see here), it must be signed by all parties in the form required by the Consumer Credit Act 1974 (including if the client is the sole borrower). If they have not all signed such an agreement and it was made before 6 April 2007, none are liable because the agreement is 'irredeemably unenforceable'. If the agreement was made on or after 6 April 2007, the creditor cannot enforce the agreement against any of the parties without a court order (see here).

Joint and several liability can also apply to rent arrears on joint tenancies, arrears on joint mortgages, water and sewerage charges, and council tax on a property jointly owned or occupied by a couple.

Guarantors

A creditor sometimes asks for a guarantee before agreeing to lend money or provide goods or services. The guarantor agrees to make the necessary payments should the actual customer or borrower fail to do so, and is bound by the terms of the guarantee they have given. [1] If these terms are part of a regulated credit agreement, they are governed by the Consumer Credit Act 1974, but not the unfair relationship provisions if the agreement is exempt because it is a regulated mortgage contract (but if it is also a consumer credit 'back book' mortgage contract, it is covered by these provisions – see here). If the loan agreement is unenforceable, so is the guarantee.

A guarantee must be in writing and signed by the guarantor (including guarantees entered into online for which clicking on, for example, an 'I accept' button can be a signature). [2] Guarantors should be given copies of the original agreement and also any notices required to be sent to the borrower on default. If this is not done in relation to a guarantee of a regulated credit agreement, the guarantee is only enforceable against the guarantor with a court order. The creditor must also supply the borrower with a copy of the guarantee on request (there is a prescribed fee of £1) and the guarantor can also request a copy of the credit agreement itself, again on payment of the prescribed fee (£1) (see here). [3]

If the creditor has not properly explained to a guarantor that they are equally liable for the total debt, there may be a way of challenging liability if it can be shown that the guarantor has been either misled or coerced. In any case, if there is a non-commercial relationship between the debtor and the guarantor (eg, they are cohabitees), the creditor must take reasonable steps to satisfy itself that the guarantor understands the transaction and the risks they are taking by entering into it. The creditor can either do this itself or require the guarantor to see a solicitor. If the creditor fails to take either of these steps, but the guarantor has seen a solicitor anyway, the creditor cannot assume the solicitor has advised the guarantor appropriately when no such advice was in fact given.

If the creditor fails to take these steps and the guarantor's consent to the transaction has not been properly obtained, the creditor may not be able to enforce the guarantee. [4] The client should get specialist help.

The Financial Conduct Authority's (FCA's) *Consumer Credit Sourcebook* makes specific provisions for guarantees given for regulated credit agreements on or after 2 November 2015.

- To enable the prospective guarantor to make an informed decision as to whether to act as guarantor or not, the creditor must provide an adequate explanation of the circumstances in which the guarantee may be called in and the implications of this for the guarantor (CONC 4.2.22R).

- Rules and guidance that creditors must follow in relation to both borrowers and guarantors include (CONC 4.2.17G–4.2.21G):
  - requiring the creditor to continue with explanations (see here) even if the prospective guarantor states they do not need them (CONC 4.2.9R);
  - guidance on how creditors can provide adequate explanations online (as this is how many guarantees are made), including providing a local rate number for further explanations and comprehensive FAQs.
- If a prospective guarantor is to provide a continuous payment authority (see here), the creditor must supply them with the same explanations that it is required to give to a prospective borrower, including (CONC 4.6.5R and 4.6.2R):
  - how a continuous payment authority works;
  - how the creditor will apply it;
  - how the prospective guarantor can cancel the continuous payment authority; *and*
  - the consequences of there being insufficient funds in their account on the due date.
- The creditor must consider sufficient information to reasonably assess the impact the guarantee may have on the guarantor's financial situation. The FCA makes it clear that the fact the credit agreement is guaranteed does not relieve the creditor of its obligation to assess the loan's affordability for the potential borrower (CONC 5.2A). [5]
- Most of CONC 7 (arrears, default and recovery) applies to guarantors as well as to borrowers (CONC 7.1.4R). CONC 7.6.15A provides that, if both the borrower and the guarantor have provided continuous payment authorities and the borrower has defaulted, the creditor may only make up to two requests for payment under the borrower's continuous payment authority and, if those requests are unsuccessful, only up to two requests for payment under the guarantor's continuous payment authority. [6]

If a guarantee has not been properly made, it can only be enforced with a court order. This includes if the guarantor has not been provided with a copy of the executed credit agreement as well as a copy of the guarantee. If a default notice has been served on the borrower by the creditor but a copy has not been served on the guarantor, the guarantee is only enforceable with a court order. The legislation does not provide for 'late' service of copies. [7] If the guarantor requests a copy of the credit agreement and/or guarantee and/or a statement of account and has paid the prescribed fee (£1), but the creditor fails to provide this within 12 working days, the guarantee is unenforceable unless and until the creditor complies with the request. [8]

The creditor must serve a default notice on the borrower before it can enforce any security. [9]

The guarantee is, in effect, security for the loan and so, in this context, 'enforce any security' includes 'enforce any guarantee'. The FCA has provided guidance on what constitutes enforcement of the security. There is more to enforcing security than just obtaining a court judgment. Demanding payment from the guarantor or taking payment from them by using a continuous payment authority or direct debit without appropriate prior notification to the guarantor is also enforcement (but not if the guarantor is given at least five days' notice before the payment is taken and is reminded that the continuous payment authority or direct debit can be cancelled). Voluntary payment by the guarantor does not count as enforcing the security nor does requesting payment (eg, a reminder), provided it made clear that this is not a demand. You can read the guidance at fca.org.uk/publication/finalised-guidance/fg17-01.pdf.

Guarantors who have debts of their own and are considering an insolvency option should bear in mind the effect of these options on their potential liability under the guarantee. In bankruptcy, that liability will be a 'contingent liability' and, therefore, included in the bankruptcy even if the borrower has not defaulted and the creditor has made no demand for payment under the guarantee. Any contingent liability should, likewise, be included in an individual voluntary arrangement proposal in which, by default, it will have a value of £1. [10] On the other hand, the liability under a guarantee will only be a qualifying debt for a debt relief order if that liability has crystallised following default by the borrower and service of a default notice and/or demand for payment. You should check the terms of the guarantee to establish whether the liability is a qualifying debt and, if so, the extent of the client's liability under its terms. That is, has the client become liable to pay the whole amount outstanding under the agreement (in which case, the whole amount is a qualifying debt) or have they only become liable to pay the payments missed by the borrower so far (in which case, only this amount will be a qualifying debt)? You may need to obtain specialist advice to establish liability.

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1 For a discussion on guarantees, see L Groves, 'Guarantors and Rent arrears', *Adviser* 140, and G Skipwith, 'Guarantees, indemnities and CCA 1974', *Adviser* 149

2 See s7 Electronic Communications Act 2000 and *Bassano v Toft and Others* [2014] EWHC 377 (QB)

3 ss110 and 111 CCA 1974

4 *RBS v Etridge (No.2)* [2002] HLR 37; see also G Skipwith, 'Banks, solicitors, husbands and wives', *Adviser* 95

5 For a Financial Ombudsman Service decision relating to affordability checks made by Amigo Loans on a borrower, see ombudsman-decisions.org.uk/viewPDF.aspx?FileID=215809 and for a further decision relating to affordability checks made by Amigo Loans on a guarantor, see ombudsman-decisions.org.uk/viewPDF.aspx?FileID=215813

6 See G O'Malley, 'New FCA rules to protect guarantors', *Quarterly Account* 39, IMA

7 ss105-11 CCA 1974

8 ss107-09 CCA 1974

9 s87 CCA 1974

10 r15.31(3) I(E&W)R 2016

Agents

An agent sells goods or collects money on behalf of someone else – eg, they may show or distribute mail order catalogues to their friends and neighbours, take orders and pass them on to the supplying company. They collect money from the customers over a number of weeks, and are liable to pay any money collected, regardless of whether or not the creditor can enforce the agreement against the customer – eg, because the customer has not signed a contract. An agent is obliged to create a separate account for each customer. If they do not do this, they can become liable for money not paid by customers for whom they have failed to create an account. If there is a separate account, the agent is not liable for money that customers do not pay.

An agent may lose commission with which they have already been credited (and so their own personal account may go into arrears) if someone does not keep up the payments on items bought and supplied. However, an agent is not liable for the customer's default, except in the situation discussed above.

When advising an agent about liability, it is important to check whether the amount owed includes other customers' debts. If so, provide the creditor with a clear breakdown of the accounts, and the names and addresses of customers in arrears, and ask the creditor to invoice them separately. If a client has not obtained signed agreements from their customers, or has received payments but not accounted for these to the creditor, they may be personally liable for any debt. Seek specialist advice in these circumstances.

The wrong person

A payment request may be sent to the wrong person or to the wrong address, and the person who receives the request for payment is not liable. If there is any doubt about this, check any documents relating to the debt and ask the creditor to produce original invoices, agreements and details of the money lent or the goods or services supplied. Full initials and addresses are obviously important in this process, as are reference numbers.

Using the wrong name, however, does not invalidate a debt and, if a name is shown incorrectly, particularly if it has always been inaccurate but both parties know who is intended, the debt can still be valid.

Forged signatures

If a signature on an agreement has been forged, the person whose name has been forged is not liable for any debt arising from that agreement. [1] A signature may have been forged with that person's knowledge. For example, a person who wants a loan but has reached their credit limit with a particular creditor may use a relative's name to obtain the loan, receive the money and make repayments. The relative knows and agrees to this. In such cases, proceed as though the signature was valid and the beneficiary of the loan should continue to maintain repayments.

A partner or close relative's signature may have been used without their consent – eg, if a person obtains credit by using their parent's name and signature without the knowledge of the credit company. If there is any accusation of fraud, the client should obtain legal advice. Fraud is a serious criminal offence and a solicitor specialising in criminal law may be required.

In some cases, the use of a more creditworthy relative's name may have been sanctioned by the credit company. If a representative of a creditor has allowed a false name to be given knowingly, that representative may be either conniving with a fraud or, if the signing occurred on their advice, creating a situation in which the creditor accepts that the borrower is allowed to use another name. A broker is not usually regarded as a representative of the credit company for this purpose.

You should advise the person whose name has been used that they do not owe the money because they have not signed the agreement. Be aware of the possible repercussions for the person who has signed and explain these to the client, as they may prefer to accept liability for the debt rather than risk, for instance, the person who has signed being prosecuted and/or a breakdown in family relationships.

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1 Ombudsman's complaint 47/1, *Adviser* 113

Liability after a death

Jointly owned property

Although contracts end on an individual's death, their debts do not usually die with them because creditors can make a claim against their estate – ie, their money, personal possessions and property. It is possible, however, that creditors will attempt to hold a partner or close relative responsible for an individual's debts, particularly if they lived with the person who has died, although this could involve a breach of the FCA's *Consumer Credit Sourcebook*. [1]

If someone is dealing with the estate of a person who has died, they have no personal liability for any debts that cannot be paid from the estate. Debts that may still have to be paid include:

- those for which someone had joint and several liability (see here) with the person who has died. The co-debtor remains liable for the full outstanding balance owed;
- those covered by a guarantee. The guarantor remains liable for any debt covered by a guarantee if it is not paid by the estate;
- any debts if the estate has been passed to beneficiaries (including if the person handling the estate is the only beneficiary) without first paying creditors. If a client in this situation is being held personally liable by the creditors, they should get specialist advice;
- a mortgage remaining on a property, even if the property passes to a new owner by inheritance;
- rent arrears if someone has taken over a tenancy by succession, if these cannot be paid by the estate. A tenant by succession can lose their home if they do not pay the arrears owed; [2]
- council tax by couples with joint liability. Although a person's liability ceases at the date of death, the estate and the surviving partner remain liable for any arrears.

Note: some debts are paid off on death by insurance policies. Many mortgages and some regulated credit agreements are covered, and you should check these.

If the person who died owed money under a regulated credit agreement that was for a fixed term which had not already expired and the agreement was fully secured at the date of their death, the creditor cannot:

- terminate the agreement;
- demand earlier payment;
- recover possession of goods or property;
- treat any right under the agreement as terminated, restricted or deferred (other than the right to draw upon any credit); *or*
- enforce any security on the grounds that the borrower has died.

If the agreement is only partly secured or unsecured, the creditor must obtain a court order first.

If a person's debts were 'statute-barred' (see here) at the date of their death, the estate can be distributed without taking that creditor's claim into account. However, if the claim has become statute-barred since the date of death, the question of whether the debt must be paid should be referred to a solicitor, as it depends on trust law.

If a client is living in the home of a person who has died and uses services (eg, fuel and water) for which the person who died was previously billed, they should open a new account in their own name as soon as possible after the death. It is important to ensure they do not agree to take responsibility for any debt when they open the new account (although the estate of the person who died, of which the house may be part, is liable). All the occupiers of a property are jointly and severally liable for water charges. [3] However, it becomes the client's responsibility if the person who was billed has failed to pay and the water company has demanded payment from the client. Up until that point, it is still the debt of the person who died and the estate is responsible for its payment. Only if there is no estate or the estate is insolvent and cannot pay in full should the client be required to pay. If the person who has died was the person who was contractually liable for any fuel bills, any arrears outstanding at the date of death were their responsibility, and the other occupier(s) should not be required to pay those arrears if either there is no estate or the estate is insolvent and cannot pay in full.

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1 *FCA Handbook*, CONC 7.5.2R states that creditors must not pursue an individual who they know or believe may not be the borrower under the credit agreement

2 *Sherrin v Brand* [1956] 1 QB 403

3 s144 Water Industry Act 1991

Jointly owned property

A share in a joint bank account or jointly owned property is not part of a person's estate and passes directly to the other co-owner when they die, regardless of whether they made a will or died intestate. [1] It is therefore not available to creditors unless, for example, a creditor has obtained a charging order on the beneficial interest in the property of one of the owners (see here), one of the joint owners was made bankrupt or the ownership of the property was originally set up in unequal shares because, for instance, one party contributed a lump sum to the purchase. [2]

Joint owners in this situation are known as 'tenants in common'. The effect of this is that each has a potential estate against which their creditors (including unsecured creditors) can claim on their death. Advise joint owners to obtain legal advice on the most appropriate method of protecting themselves against potential claims on the estate by a co-owner's creditors, which could result in the loss of their home.

Even if the co-owners were not tenants in common, if a creditor with a debt of at least £5,000 presents a bankruptcy petition against the person who has died and an order is made, a court can require the surviving owner to pay the value of the deceased's share on the date of death to the trustee. The petition must be presented within five years of the death. It is advisable for a client faced with this possibility to make a payment arrangement with the creditor if they do not want the property to be sold. They should get specialist advice.

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1 In *Whitlock v Moree* [2017] UKPC 44, following the death of one of the two joint account holders, it was held that the standard bank form signed by the account holders which stated that all money was 'joint property with the right of survivorship' overrode the presumption that the balance in the account was the property of the deceased's estate because he had provided all the funds in the account

2 Refer clients to gov.uk/joint-property-ownership

Under 18 year olds

If a client was under 18 (a 'minor') when a contract was made, check whether it was for necessaries. If not, a court may decide the contract is not enforceable.

Necessaries

'**Necessaries**' are defined as 'goods suitable to the condition in life of a minor and their actual requirements at the time of sale and delivery'. Examples include fuel, clothes and possibly mobile phones. The client is expected to have paid no more than was 'reasonable' for such goods.

Note: a creditor who has given a loan to a minor to purchase 'necessaries' can recover the amount actually spent on those necessaries from them. [1]

Young people under 18 are often asked to provide a guarantor who is liable to pay if they cannot (see here). If there was no guarantor and the goods were not necessaries, the client need not pay and the creditor cannot use the courts to claim repayments. However, a court could order any goods to be returned if the supplier has experienced a loss.

If the client specifically informed the creditor that they were 18 or older on the date of the contract, although they may not be liable for the debt, they could be prosecuted for fraud if they attempt to challenge liability.

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1 See 'Q&A', *Quarterly Account* 24, IMA

Contracts made under undue influence

If a contract has been made under 'undue influence' (ie, if a person has taken unfair advantage of their influence over another person), it may not be enforceable. Undue influence may be actual – eg, if a person has been subjected to domestic abuse. Domestic abuse includes financial abuse, which is a form of controlling behaviour and includes controlling or interfering with the person's benefits, controlling their access to income, bank accounts or savings, and getting them to take out credit. **Note**: the Financial Ombudsman Service has published guidance on complaints involving economic and domestic abuse, including the types of complaints they see and their approach (with case studies). [1]

An Economic Abuse Evidence Form (EAEF) has been rolled out by Surviving Economic Abuse (SEA) in partnership with Money Advice Plus (MAP) following a successful pilot. The purpose of its use is to support victim-survivors who have debts. It can only be used by advisers trained by MAP and SEA. As of September 2024, 10 organisations have been trained, but no further training is currently being offered. Other organisations can, however, make contact to agree referral routes: see the SEA website. According to UK Finance, 25 creditors have currently agreed to accept the form.

In addition, UK Finance has published a new *Financial Abuse Code* which provides guidance to lenders on supporting victim-survivors of economic abuse. The Code is structured around a seven-pillar framework which is aligned to to the FCA's Consumer Duty requirements (see here). It provides principle level guidance on how to support victim-survivors of financial and economic abuse and it is for participants to determine to implement the Code's requirements. According to UK Finance, 40 members have signed up to it.

Undue influence may also be presumed – eg, if a person is persuaded to enter into a contract by someone on whom they rely for advice and guidance and the transaction is explainable only on the basis that undue influence was used, because it puts the person at a substantial disadvantage. This issue can often arise with guarantees (see here). Another example is one person taking out a loan for the benefit of another person but the loan is in the sole name of the first person.

A situation that commonly arises is one partner in a couple applies for a loan for their own purposes (eg, to pay off debts or fund a business), which the creditor requires to be in joint names so that it can be secured on jointly owned property or so that the income of the other partner can be taken into account as part of the creditor's lending process. If it appears that the second borrower's agreement to taking out a joint loan was only given because the first borrower used undue influence (eg, by saying, 'we'll lose our home if you do not sign' or by misrepresenting the effect of the transaction – see below), the second borrower may not be liable and should get specialist advice.

Although examples of creditors actually being aware that a contract has been entered into as a result of undue influence are rare, in certain situations, the law deems the creditor to have notice of the possibility of undue influence (known as 'constructive notice') and requires the creditor to take certain steps to counter any undue influence to which the client may have been subject. Failure to take those steps may mean that a client who has been subjected to undue influence can challenge their liability. [2]

As well as having a potential defence to any court action taken by the creditor, the client may also be able to make a complaint which can be escalated to the Financial Ombudsman Service, which may be able to relieve the client from liability in appropriate cases. Advisers should, however, bear in mind that the outcome of a successful undue influence argument could be a pyrrhic victory in the case of a secured creditor who may still be able to enforce their charge against the partner's beneficial interest in the property. [3]

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1 financial-ombudsman.org.uk/businesses/complaints-deal/complaints/complaints-involving-economic-domestic-abuse

2 *RBS v Etridge (No.2)* [2002] HLR 37; see also G Skipwith, 'Banks, solicitors, husbands and wives', *Adviser* 95. There is a useful summary of the position: see A Walker, 'Undue influence', *Quarterly Account* 53, IMA.

3 *Santander v Fletcher* [2018] EWHC 2778 (Ch)

Misrepresentation of the terms of the contract

If a creditor misrepresents the terms of a contract to a client (ie, does not explain the transaction accurately), the transaction may be void. For example, if a creditor persuades a client to sign a legal charge by stating that a secured loan does not put their home at risk, the loan may not be enforceable as the client has the right to cancel the legal charge.

The client can seek compensation for any loss suffered as a consequence of a misrepresentation. As it is difficult to prove oral misrepresentation, it is important that you obtain copies of all relevant correspondence. Alternatively, if the misrepresentation can be established, the creditor may decide not to pursue the debt to avoid bad publicity.

In the case of regulated credit agreements (see here), if the finance is arranged through the supplier or dealer, the lender is jointly liable with the supplier or dealer for any misrepresentations made by the supplier/dealer about both the goods or services supplied and the credit agreement.

Capacity to make a contract

A contract is only valid if someone has the 'capacity' to make it. [1] The Mental Capacity Act 2005 contains the following principles.

- A person lacks capacity if, at the time the contract is entered into, they are unable to make a decision for themself about it because of an impairment of, or a disturbance in the functioning of, their mind or brain. The impairment or disturbance may be permanent or temporary.
- A person is assumed to have capacity unless it is established that they do not.
- A person should not be treated as unable to make a decision merely because they make an unwise decision.
- A person is unable to make a decision for themself if they are unable to:
    - understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another; *or*
    - retain that information, although the fact that they are only able to retain the information for a short period does not prevent them from being able to make the decision; *or*
    - use or weigh up that information as part of the process of making the decision; *or*
    - communicate their decision, using speech, sign language or some other means.

In a disappointing decision that raised the bar for establishing that a person lacks capacity, in 2016 the High Court held that what is important is whether the person has the ability to understand the transaction and not whether they actually understand it. [2] Previous guidance was wrong insofar as it looked at the understanding that the person actually has. The court decided that the correct test for incapacity is whether the person has the capacity to absorb, retain, understand, process and weigh information about the key features and effects of the transaction and its alternatives, if explained in broad terms and simple language. It is not necessary for the person to have the capacity to understand every aspect of the transaction. The court confirmed that, if the person lacked capacity, the transaction may not be enforceable provided the creditor knew, or ought to have known, of the person's incapacity.

Advisers sometimes assume that, because a client has a mental health issue or learning difficulties, any agreement they have entered into is automatically unenforceable. Do not assume this; medical evidence is usually needed to establish the client's lack of capacity. In many cases, the client's lack of capacity can be established, but not the creditor's knowledge or presumed knowledge. However, it is often possible to ask the creditor to write off the debt on the grounds that there is evidence of inappropriate lending and/or the client's situation is such that setting up a debt repayment programme is not a realistic strategy. [3]

The FCA has said that creditors should take reasonable steps to ensure they have suitable business practices and procedures in place for the fair treatment of clients with limited mental capacity. [4]

Specialist advice should be obtained if the enforceability of a contract on the grounds of incapacity is being considered or if someone who appears to lack capacity is involved in court proceedings.

For information on dealing with clients with mental health issues, see here.

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1 For a more detailed discussion, see 'Lack of mental capacity to contract' in the 'Spotlight' article section of Shelter's SDAS ebulletin, March 2021

2 *Fehily and Fehily v Atkinson and Mummery* [2016] EWHC 3069 (Ch)

3 See *Ombudsman News* 50 for details of some complaints which illustrate the approach of the Financial Ombudsman Service (*Adviser* 114 abstracts)

4 See *FCA Handbook*, CONC 2.10.10G

Housing disrepair

In many cases involving rent arrears, landlords have not always fulfilled their obligations in connection with repairs. The amount of rent arrears claimed by the landlord can then be reduced by either a 'set-off' or a 'counterclaim' by the tenant. A **'set-off'** is money the tenant spends to carry out repairs required by law and is, therefore, owed to the tenant by the landlord. A **'counterclaim'** is money the tenant claims as compensation for a failure to repair and the resultant loss. [1] Obtain specialist housing advice if this applies.

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1 For more information, see J Luba and Others, *Defending Possession Proceedings*, Legal

Action Group, 2016

Faulty goods and services

If a client owes money on faulty goods or unsatisfactory services, they may be able to avoid paying all or part of the bill. A client may be able to obtain a refund on goods that are not of satisfactory quality or not as described. [1] The goods must be rejected immediately or very soon after purchase. Similarly, services should be carried out with reasonable care and skill and within a reasonable time. [2] In addition, the client may be able to claim for expenses they have incurred due to the fault. Report dangerous goods to the local trading standards department.

1 s14 SGA 1979

2 s13 SGSA 1982

Mistaken payments into bank accounts

A client's bank account may be mistakenly credited with money to which the client is not entitled. Although the creditor or bank has made a mistake, a client is generally legally required to repay money that does not belong to them. However, a client does not have to repay money if they have 'changed position' through believing in good faith that the money was theirs. Spending money on ordinary day-to-day living expenses or repaying a debt is not a change of position, but buying something they would not otherwise have bought is.

It must be unfair for the client to have to repay the money. It is *not* unfair if:

- they have acted in bad faith – eg, they were aware of the mistake; *and/or*
- full or partial repayment is possible because all or some of the money is still in their possession.

The bank should not pay the money back to the party that made the mistaken payment into the account without the client's permission. [1]

1 *Crantrave Ltd v Lloyds Bank* (*Adviser* 87 abstracts); see also P Madge, 'Consultancy Corner', *Adviser* 101. Also, for the Financial Ombudsman Service view of this issue, see *Ombudsman News* 87 (*Adviser* 142 abstracts).

Default charges

What is an unfair term

What action to take

Many credit agreements (as well as mortgages and secured loans) allow the creditor to add charges to the client's account in certain circumstances. These are sometimes referred to as 'arrears charges' or 'penalty charges'. Usually, the amount of the charge is fixed. Often, such charges accrue interest while they remain unpaid. Examples of situations in which charges are imposed include:

- late or missed payments;
- exceeding a credit limit;
- dishonoured cheques or direct debit payments.

All of these situations involve a breach of contract by the client and the charges are supposed to reflect the damages or financial loss for the creditor from this. The courts only enforce them if they are seen as a genuine attempt to estimate in advance the loss the creditor will face for the additional administration involved as a result of the client's breach of contract. The provisions are then enforceable as what is known as 'liquidated damages'.

Refused payment fees – ie, fees charged by a payment services provider (eg, a bank) for refusing to make a payment because of lack of funds – are permitted by the Payment Services Regulations 2017 so long as they are provided for in the agreement between the bank and its customer and 'reasonably correspond to the payment service provider's actual costs'.[1] FCA guidance states that payment service providers should:

- identify the actual costs that are reasonably referable to the refusal of payments; *and*
- set their charges so as to reasonably correspond to those costs over a period of time; *and*
- not derive a profit from those charges.[2]

It may be possible to challenge such default charges, arguing that they are:

- an unfair term under the Consumer Rights Act 2015 (see here); *or*
- in the case of regulated credit agreements, under CONC 7.7 of the FCA's *Consumer Credit Sourcebook,* higher than necessary to cover the creditor's reasonable costs.

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1 reg 66(1)(c) The Payment Services Regulations 2017 No.752

2 See fca.org.uk/firms/high-cost-credit-consumer-credit/high-cost-credit-review

What is an unfair term

A term is unfair if 'contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer', [1] provided:

- the client is a 'consumer' – ie, they did not make the contract in the course of business; *and*
- the agreement was made on or after 1 July 1995; *and*
- the contract is in the creditor's standard form – ie, it has not been individually negotiated.

An unfair term is not binding on the client and so cannot be enforced against them by the creditor. The remainder of the agreement is unaffected, provided it is capable of continuing without the unfair term. [2] Examples of unfair terms include those: [3]

- requiring clients who fail to fulfil their obligations to pay a disproportionately high sum in compensation; [4]
- that irrevocably bind clients to conditions which they had no real opportunity of becoming acquainted with before the conclusion of the contract. [5]

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1 s62(4) CRA 2015

2 s67 CRA 2015

3 Sch 2 CRA 2015

4 Sch 2 para 5 CRA 2015

5 Sch 2 para 10A CRA 2015

What action to take

If you believe a default charge is an unfair term, first check the relevant terms of the agreement and, if it allows the creditor to make the charge(s) in question, write to the creditor.

- Point out that the default charges do not reflect the creditor's actual or anticipated loss in the circumstances of the client's breach of contract and are, therefore, not recoverable.
- State that the default charges are also an unfair term contrary to Schedule 2 paragraph 1(e) to the Unfair Terms in Consumer Contracts Regulations 1994/1999 because they require the client to pay a disproportionately high sum in compensation for their failure to perform the obligations under the contract.

- Ask the creditor either to refund these charges to the client's account or to justify the level of default charges.

If the client is not satisfied with the creditor's response, they could take the matter through the creditor's complaints procedure to the Financial Ombudsman Service (see here) or part defend any court action taken by the creditor (see here). [1]

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1 See 'Penalty charges on credit cards and current accounts', *Quarterly Account* 78, IMA; G Skipwith, 'Penalty shoot-out', *Adviser* 113