

# Specialist Debt Advice Service

## Resource

Checking Post Contractual Information

Compliance under the Consumer Credit Act 1974

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# Introduction

Notices and statements under the Consumer Credit Act (CCA) 1974

The Specialist Debt Advice Service have produced a **webinar** to accompany this resource.

Luke Oliver and Alexa Walker will explain how to use this information to check your clients have received the correct notices and statements under the CCA.

## The importance of checking notices and statements

It is not realistic for advisers to request and check notices and statements in every case involving a CCA regulated agreement. However, if you have a case involving possession proceedings for a CCA “back book” secured loan or you’re looking for ways to challenge a creditor adding large amounts of interest, identifying a breach in the post contractual information requirements can bring impressive results.

You’ll need to ask the creditor for copies of all the notices and statements. Your client has a right to this information – see the [Information Commissioner's website](#) for more information about the right of access to data.

When you get the notices and statements back you can use our **guides to document checking** to help you identify whether the correct notices and statements have been sent out at the right times.

You can then use our **template letters** to complain, asking for interest and charges to be written off.

If the creditor issues a court claim you can use the **template defence** which contains all the relevant law. We’ve adapted this from real cases to help you defend money or possession claims and reduce the amount of interest that can be claimed.

You can get a second opinion and extra support from the **Specialist Debt Advice Service**.

# A guide to checking Consumer Credit Act 1974 post contractual information compliance - General points that apply for Annual Periodic Statements and Notices of Sums in Arrears

## Introduction

This guide should be read in conjunction with the accompanying guides on checking annual periodic statements (APSs) and notices of sums in arrears (NOSIAs).

On 1 October 2008, new provisions introduced by the Consumer Credit Act 2006 amended the Consumer Credit Act 1974 (CCA) by inserting post contractual information requirements for creditors under s77A, and s86A-s86F amongst other provisions.

The Shelter Specialist Debt Advice (SDAS) team have assisted advisers to achieve multiple successful outcomes using these provisions.

Most recently we advised and assisted Shelter solicitors to represent a client in a successful application to set aside a 10-year-old possession order in the County Court at Bradford. The court accepted that the creditor had not served notices of sums in arrears (NOSIAs) correctly under s86B, set aside the eviction warrant and possession order and adjourned the claim generally. It disallowed £55,000 of interest and default charges and £10,000 in legal costs as a result of non-compliance with these provisions.

Previously, with pro bono help from a barrister via Advocate, the 2<sup>nd</sup> tier service delivered by the Citizens Advice Debt Expert Advice Team successfully challenged possession proceedings issued by a secured lender based on a failure to serve compliant NOSIAs. The same barrister subsequently successfully defended a similar possession claim at the County Court in Bristol resulting in interest and charges spanning a 10-year period being removed from a secured loan.

We have also helped clients to successfully defend interest on county court claims for credit cards, due to a failure to serve NOSIAS and have drafted successful complaints to secured lenders who failed to provide compliant annual periodic statements (APs) and NOSIAS and subsequently refunded thousands in interest and charges.

In summary, it is worthwhile and indeed essential to check that post contractual information has been served correctly and that the form and content complies with the regulations, particularly where the borrowing is secured.

### **Secured loans – Consumer Credit Back Book Mortgage Contracts**

With effect from 21 March 2016 CCA regulated secured loans became Regulated Mortgage Contracts under the European Mortgage Credit Directive. These formerly CCA regulated loans became Consumer Credit Back Book Mortgage Contracts (back book agreements).

The transitional provision: article 29 of the Mortgage Credit Directive Order 2015, provides that creditors must comply with these post contractual requirements (s77A, s86D, and s86E), before a creditor can enforce their 'back book' agreement.

So, a breach of the provisions prior to 21 March 2016, if unremedied, will continue after this date until it is remedied by the creditor. In our view the provisions do not impose an ongoing duty for creditors to provide ongoing post contractual information for back book agreements for the period after 21 March 2016.

### **Accessing the post contractual documents**

Firstly, ask your client if they have received the required documents and whether they have kept them. If they have then this may save some time. However, if there are any documents missing from the client's own records it may be difficult to know with certainty if this is because the client has not kept them, or the creditor failed to send them. For this reason, it is always advisable to request the documents from the creditor via a subject access request (SAR).

A SAR is made under [articles 12, 15 and recital 63 of the General Data Protection Regulation](#). The data must be provided free of charge and within 1 month of the request being received. It will be important therefore to submit the SAR asap where there is pending enforcement or court deadlines.

Where time is particularly tight SARs can be made by phone. In this situation it will be important to make a note of the date and time of the call, the name of the person taking your request and whether the call is being recorded. See the [Information Commissioner's website](#) for more information. The sooner the SAR response is received the more time there will be to consider the documents and identify any possible challenge.

### **Organising the documents received in response to the SAR**

Receiving the response to the SAR can seem quite daunting as creditors will provide a copy of all personal data they hold on the client and this will often run into many pages! No need for panic though as with a methodical approach we can easily pick out the important information.

1. The key documents we want from the SAR response are the copies of APSs and NOSIAS sent to the client. Copies of default sums notices (DSNs) and the default notice will also be important.
2. Each of these 3 different types of documents should be clearly marked as such on the front page and so it should be possible to sort through the papers to isolate and separate all the APSs, NOSIAs and DSNs.
3. Next sort each document type into chronological order starting with oldest first. Once you have 3 separate bundles of APSs, NOSIAs and DSNs in date order you are ready to check through each bundle starting with the oldest document first.
4. The agreement will contain the required information about the amount of credit and the interest rate.

## **The ‘Domino Effect’**

If you identify an APS or NOSIA for the relevant period and after checking it seems to be compliant, move on to the next year’s statement (for APSs) or for NOSIAs the next required notice.

Note that APSs must be for consecutive periods with no gaps whatsoever. The dates should lead into one another and the opening balance of the next period statement should match the closing balance of the last. (s77(1A)).

For NOSIAs there may be an error in the calculations in the first required notice. Or, a notice might be based on incorrect information in a previous notice. The period of non-compliance will be triggered with the first defective notice and continue whilst subsequent notices rely on that incorrect calculation.

If you identify that a document is missing or does not comply with the requirements this will trigger a period of non-compliance which will continue indefinitely until a compliant document is issued.

The non-compliant document will effectively create a ‘domino effect’ meaning that all subsequent documents (APSs and NOSIAs) which may have been issued will also be non-compliant, as they will include interest and default sums wrongfully charged during the period of non-compliance which first the non-compliant document triggered.

This means that if you can identify the absence of a required APS or NOSIA early in the post 1 October 2008 history of the account, it may not be necessary to trawl through all the subsequent documents. This can potentially significantly reduce the time spent checking over the documents. Whilst it is preferable, where possible, to identify every single breach in the documents to ensure the strongest possible challenge (particularly where some may be minor enough to be saved by reg 41, see below), in some cases (for example where court deadlines loom) this may not be possible. In such cases identifying one significant breach (e.g. an entirely missing document or missing required form of words) may be enough to challenge enforcement and the application of interest.

## **Regulation 41 and minor errors and omissions in documents**

It is important to note that regulation 41 states:

*‘41. Where a notice or statement contains an error or omission which does not affect the substance of the information or forms of wording which it is required by these Regulations to contain, that notice or statement shall not breach these Regulations on this ground alone. ‘*

Consumer credit specialist Guy Skipwith discusses the application of reg 41 in his Consultancy Corner article published in Adviser issue 162. A barrister has confirmed in written opinion provided pro bono that ‘Only in truly negligible cases should reg 41 be deployed to assist the Lender. The court’s discretion to apply reg 41 is far narrower in scope than, and should not be conflated with, the much broader power under s127(1).’ The authoritative legal text Goode: Consumer Credit Law and Practice similarly distinguishes the courts powers under these respective provisions.

If the information required or forms of wording are omitted completely (as opposed to being present but with omissions), then regulation 41 is not engaged. This is because there is no required information or forms of wording for it to apply to.

So, omissions of information or errors of forms of wording will render documents non-compliant, as may even apparently minor errors. Only where the error is considered trifling will it likely be saved by reg 41. Therefore, it is important to check over the documents carefully as in our experience there are frequently errors.

## **Default sums notices due under s86E**

In addition to the requirement to serve and NOSIAs and APS creditors must also provide default sums notices (DSNS) for fixed sum and running account credit agreements. These notices may be incorporated in another notice or statement which the creditor gives the debtor in relation to the agreement. This is permitted by s86E(3).



If a compliant DSN is not served, then the agreement will remain unenforceable until it is served. In addition, the the debtor will only be liable to pay interest in connection with the default sum from the 29<sup>th</sup> day after which they are given the DSN.

However, a failure to serve a DSN does not trigger a period of non-compliance with the resulting relief from liability for interest and default sums in the same way as a failure to serve a NOSIA or APS. For this reason, checking that NOSIAs and APSs have been correctly served should generally be given priority.

The information required to be in the default sums notices is contained in regulations 27–32 and Schedule 4 of the The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007.

### **Seeking further advice and next steps**

If you identify what you think amounts to non-compliance with the provisions you may wish to seek a second opinion and further advice. The Shelter Specialist Advice Service is happy to offer such support through our usual consultancy channels.

Once you are confident of your client's challenge you will need to consider options such as a formal complaint with a view to escalation to the Financial Ombudsman Service or possibly court action. The template draft pleadings which accompany this guide and webinar will prove useful for structuring these arguments.

# A guide to checking that creditors have issued annual periodic statements (APSs) for fixed sum credit agreements compliant with s77A Consumer Credit Act 1974

## **Introduction**

This guide should be read in conjunction with the accompanying guides on checking post contractual Information - general points and notices of sums in arrears (NOSIAs).

## **S77A – Annual Periodic Statements (APSs)**

This guide will focus on the requirement to provide annual periodic statements (APS) under s77A for fixed sum credit agreements.

S77A imposes a duty on creditors providing fixed sum credit agreements with a term of more than 12 months to provide debtors with APSs within 12 months of the date of the agreement and every 12 months thereafter until the duty ceases in accordance with s77A(4).

S77A applies to agreements made on or after 1 October 2008 and, under transitional provisions, to agreements made before this date.

Note there is a similar provision to provide annual statements under s78(4) for running account credit. However, there is no sanction for non-compliance with s78(4).

## **The effects of non-compliance**

Importantly for debtors, if a required APS is not provided or does not comply with the requirements, then under s77A(6) the agreement will enter a 'period of non-compliance' during which:

- the creditor cannot enforce the agreement

- the debtor is not liable to pay any interest relating to the period of non-compliance
- the debtor is not liable to pay any default charges that have become payable during the period or that relate to any breach of the agreement by the debtor during that period.

Note that s65(2) of the CCA confirms 'enforcement' includes repossession of land (i.e. mortgaged property). Non-compliance can therefore be a defence to possession proceedings.

This means that if a lender fails to provide a compliant APS, the period of non-compliance will continue until consecutive compliant APSs are provided for the whole relevant period of non-compliance.

If the creditor later provides compliant APS, the agreement will become enforceable against the debtor, but the interest and default charges added during the period of non-compliance will be lost forever as they would have been unlawfully charged.

### **When must the first required APS begin?**

As stated above this document is focusing on checking APSs.

The first task is to check that there was a required APS issued by the relevant date and covering the relevant period, and if there is, that it contains all the information prescribed by the regulations.

For agreements entered into **after 1 October 2008** the first APS must relate to a period of no more than a year, beginning with the date of the making of the agreement and ending on a date not more than 30 days before the date the statement is given. (s77A 1B and reg 11).

For an agreement entered into **before 1 October 2008** the first APS must begin no later than **1 October 2008** and end no later than **30 September 2009**. It must be issued to the debtor within 30 days beginning the day after the end of the period to which the periodic statement relates, thus by **30 October 2009** for agreements entered into before 1 October 2008 (s77A(1E)).

If there is no statement for the relevant period, or if there is a statement but it is non-compliant because it was served late or the prescribed information required by the regs has been misstated or is missing, then this error will have triggered a period of non-compliance under s77A(6) subject to regulation 41. See the guide 'checking post contractual information – general points' for further discussion of reg 41.

### **When does the duty end?**

The duty ends when there is no sum payable under the agreement.

### **Required form and content of APSs**

The required form and content of APS's is set out in regulations 3 –12 and Schedule 1 of [The Consumer Credit \(Information Requirements and Duration of Licences and Charges\) Regulations 2007](#) (the regs).

There are extensive requirements. These are slightly less onerous for agreements entered into before 1 October 2008 which means for these agreements that the creditor can omit certain information from the statements (see regs 45 –50 for transitional provisions). Note however that if a creditor chooses to include information which they are permitted to omit under the transitional provisions, it must be correct.

These transitional provisions expired on 1 October 2008. Advisers will therefore need to check that periodic statements issued after this date are compliant with all the requirements on form and content rather than only the transitional provisions (reg 49).

### **Example of non – compliance with s77A**

For an example APS with a breach resulting in non-compliance for please see the accompanying webinar 'Post Contractual Requirements Under the Consumer Credit Act 1974'.

# A guide to checking that creditors have issued notices of sums in arrears (NOSIAS) for fixed sum and running account credit agreements in compliance with the s86B and s86C Consumer Credit Act 1974

## **Introduction**

This guide should be read in conjunction with the accompanying guides on checking post contractual information - general points and annual periodic statements (APSs).

## **S86B – Notices of sums in arrears (NOSIAS)**

This guide will focus on the requirement to provide NOSIAS under S86B for fixed sum credit agreements. There are similar provisions for running account credit (e.g. credit cards) under s86C which are discussed below. However, we have chosen to focus on fixed sum credit because this type of credit is more often secured on property.

S86B imposes a duty on creditors to provide NOSIAS to debtors with fixed sum agreements within 14 days of the date when the debtor first falls into arrears by the equivalent of at least 2 months payments.

S86B applies to agreements whenever made.

## **The effects of non-compliance**

Importantly for debtors, if a required NOSIA is not provided or does not comply with the requirements, then under s86(D) the agreement will enter a 'period of non-compliance' during which:

- the creditor cannot enforce the agreement
- the debtor is not liable to pay any interest relating to the period of non-compliance

- the debtor is not liable to pay any default charges that have become payable during the period or that relate to any breach of the agreement by the debtor during that period. We would argue that legal costs would fall within the definition of legal costs under s187A CCA

Note that s65(2) CCA confirms 'enforcement' includes repossession of land (i.e. mortgaged property). Non-compliance can therefore be a defence to possession proceedings.

This means that if a lender fails to provide a compliant NOSIA, the period of non-compliance will continue until compliant NOSIAS are provided for the whole relevant period of non-compliance.

If the creditor later provides compliant NOSIAS, the agreement will become enforceable against the debtor, but the interest and charges for the period of non-compliance will be lost forever as they would have been unlawfully charged.

### **When must the first NOSIA be served?**

As stated above this document is focusing on checking NOSIAs.

The first task is to check that there was a first required NOSIA issued by the relevant date and covering the relevant period, and if there is, that it contains all the information prescribed by the regulations.

The first required NOSIA for debtors with fixed sum credit agreements must be served within 14 days of the date when the debtor first falls into arrears by the equivalent of at least 2 months payments (or 4 weeks if payments are to be made weekly). NOSIAs must then be given at 6 monthly intervals until the duty ceases in accordance with s86B(3).

For an agreement entered into **before 1 October 2008** the duty for a NOSIA to be served will only apply if the 2 (monthly) or 4 (weekly) payments the debtor is required to make fell due *after* that date.

If there is no NOSIA for the relevant period, or if there is but it is non-compliant because prescribed information required by the regs has been misstated or is missing, then this error will have triggered a period of non-compliance under s86D subject to regulation 41. See the guide 'checking post contractual information – general points' for further discussion of reg 41.

### **When does the duty under s86B end?**

The duty ends when the debtor ceases to be in arrears or when a judgment is given in relation to the agreement under which a sum is required to be paid by the debtor. Note however that if the requirement for a NOSIA is triggered and the debtor clears the arrears or the creditor obtains judgment in the interim period before it is served, the creditor must still serve the notice but does not have to serve further notices in respect of those arrears.

### **Required form and content of NOSIAs for fixed sum credit**

The required form and content of NOSIAs for fixed sum credit is set out in regulations 19–23 and Schedule 3 parts 1–3 and 5 of The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (the regs).

There are extensive requirements which differ for the first required notice and subsequent notices.

Note that any error in the prescribed wording would arguably render the NOSIAs non-compliant.

### **S86C arrears notices for running account credit**

S86C imposes a similar duty to s86B on creditors to provide NOSIAs to debtors for running account credit. The duty to provide a notice is triggered when the debt with running account is triggered when the debtor first falls into arrears by the equivalent of at least 2 months payments (unlike for s86B there is no provision for agreements with weekly payments).

Instead of the 14 day period for creditors to provide the notice for fixed sum credit agreements, for running account credit the creditor shall, no later than the end of the period within which he is next required to give a statement under s78(4) in relation to the agreement, give the debtor a notice under this section.

The duty to provide a notice under s86C simply ends when the required notice is given (s86D(6)). There is no equivalent provision to s86B(2)(b) requiring ongoing statements to be provided every 6 months until all the arrears are cleared (s86B(4)(a)&(5)).

A notice under s86C may also include notice of a default sum under s86E, or notice of post-judgment interest payable under the agreement under s130A

### **The effects of non-compliance**

The effects of non-compliance for s86C and the related provisions are the same as those for s86B (see s86D(2)).

### **Required form and content of NOSIAs for running account credit**

The required form and content of NOSIAs for running account credit is set out in regulations 24–28 and Schedule 3 parts 4 and 5 of The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (the regs).

### **Example of non – compliance with s86B**

For an example NOSIA with a breach resulting in non-compliance for please see the accompanying webinar ‘Post Contractual Requirements Under the Consumer Credit Act 1974’.



# Template letters

## Template letter for complaint – fixed sum (including “back book” secured loans)

xx/xx/xxxx

Account reference:

I am writing regarding the breach of post contractual notice requirements on the above account.

We have identified the following breaches of notice and/or statement requirements (delete as necessary):

- A failure to provide annual statements in accordance with s77A Consumer Credit Act 1974 within 12 months of the execution of the agreement and every 12 months thereafter
- A failure to provide notices of sums in arrears in accordance with s86B CCA within 14 days of 2 months arrears falling due and at every 6 months thereafter
- A failure to provide notices of default sums in accordance with s86E CCA within 35 days of the default sum becoming payable
- A failure to provide information sheets under s86A CCA

According to our examination of the account records, the breach first occurred xx/xx/xxxx. The breach is continuing/the breach was remedied on xx/xx/xxxx.

We request that you recalculate the interest and charges on the account to reflect the fact that our client is not liable for any interest during the period of non-compliance by virtue of s86D.

We have advised our client that this agreement remains unenforceable until such time as the breach is remedied.

Yours faithfully

## Template letter for complaint – running account

xx/xx/xxxx

Account reference:

I am writing regarding the breach of post contractual notice requirements on the above account.

We have identified the following breaches of notice and/or statement requirements (delete as necessary):

- A failure to provide annual statements in accordance with s78(4) Consumer Credit Act 1974 at intervals of not more than 12 months
- A failure to provide notices of sums in arrears in accordance with s86C CCA upon 2 months payments falling due, no later than the date when the next statement is due under s78(4)
- A failure to provide notices of default sums in accordance with s86E CCA within 35 days of the default sum becoming payable
- A failure to provide information sheets under s86A CCA

According to our examination of the account records, the breach first occurred xx/xx/xxxx. The breach is continuing/the breach was remedied on xx/xx/xxxx.

We request that you recalculate the interest and charges on the account to reflect the fact that our client is not liable for any interest during the period of non-compliance by virtue of s86D.

We have advised our client that this agreement remains unenforceable until such time as the breach is remedied.

Yours faithfully

## Notes for completion

These are the notes for completing the template pleadings below.

All sections of legislation referred to correspond to the Consumer Credit Act 1974 apart from where stated.

### When and where to file

The statement of case should be filed alongside or shortly after the defence form issued by the court. In most cases this will be an N9B (defence to claim for money). If the claim is for possession relating to a secured loan agreement that was regulated by the Consumer Credit Act 1974 at the point it was executed (a CCA “back book” secured loan) the defence form is the N11M.

For a money claim issued in the County Court Money Claims Centre, the defence must be filed within 14 days of service of the particulars of claim. This can be extended to 28 days upon filing of the acknowledgement of service within 14 days.

For a possession claim issued in the court nearest the property, the defence should be filed within 14 days of service of the particulars of claim. A defence may be filed late if necessary.

See [CPR 15.4](#).

If you need more time to file the statement of case, for example because you are waiting for the results of a Subject Access Request, you can ask the claimant to extend the time by agreement for up to 28 days. If they won't agree or you need longer send the defence form back to the court before the deadline along with a written request for more time.

### Fixed sum or running account credit?

If the agreement is for a fixed sum, including back book secured loans, use the pleadings as they are set out below for breaches of s86B. If the agreement is for running account credit you will have to adapt these to reflect the requirements of s86C. Contact the Specialist Debt Advice Service for help with this.

There may also be situation where the claimant has failed to provide annual statements as required by s77A (fixed sum) or s78(4) (running account). The pleadings for breaches of

s77A annual statements are included below, for s78(4) this document will have to be adapted.

#### Joint defendants

Make the statement of case on behalf of one defendant. If you are helping joint defendants, the second defendant can provide a short statement that says their statement of case is the same as the first. Set the statement out in the same way and follow the form of the first paragraph.

Then include a paragraph that states “I will seek to rely on the statement of case provided by [client’s name], the first defendant in this matter”.

#### Witness statement

You’ll have to help your client to prepare a witness statement. We’ve included a template witness statement in our “Dealing with Judgment Debts” resource. You’ll find that resource in full, containing information on completion of the witness statement, on the IMA Networking and Information Sharing section of the website.

The witness statement should explain the following:

- That the client has had advice from your agency
- When the agreement was taken out, and what for
- That it was affordable at the time, and if not, whether affordability checks were properly undertaken
- What happened to make the agreement fall into arrears
- Any other important information, in chronological order where possible

Remember that the witness statement should be in your client’s own words (although you can remove repetitions and expletives). It should always contain a Statement of Truth (see our template).

#### Grounds of defence

1. This assumes the claimant has not remedied the breach. This paragraph should be amended if the claimant has remedied the breach and the defendant is disputing the amount of the debt as a result of the non-compliance.
2. Delete as necessary.

3. Retain.
4. Retain.
5. Retain.
6. Retain – delete recovering possession if not applicable.
7. Retain if the agreement is a CCA back book secured loan.
8. Retain.
9. Complete this using the information from the agreement. If that is not available you can use information provided by your client, but it should be qualified by saying “I believe the contractual monthly instalment to this agreement...”.
10. Try to give an overview of the payments made, including gaps where no payments were made.
11. Include the date the first notice should have been served.
12. Try to be as accurate as you can with amounts and dates.
13. See our guide to document checking for full details of breaches that might have occurred and include them as necessary.
14. Retain, with dates.
15. Retain, with dates.
16. You can specify the gaps here.
17. This engages the “domino effect” where a defective notice has a knock-on effect on other notices, where the subsequent notices don’t acknowledge the breach – see the document checking guide section for more details.
18. Remove reference to Mortgage Credit Directive if the agreement is not a back book secured loan.
19. Retain if the breach is continuing.
20. This section of the pleadings refers to breaches of annual statement provisions. See the guide to checking annual statements required in accordance with s77A CCA.
21. Retain.
22. Retain.
23. Retain.
24. Retain.
25. Activity on the account refers to the first time the account was used. For fixed sum credit this will generally be the date the agreement was executed, so the first notice will be due no later than 12 months after that.
26. Consider the specific breach and delete as appropriate

Final para: delete as appropriate

# Template Pleadings

Claim number: 8PBXXXXX  
Defendant's statement of case  
Date: xx/xx/xxxx

IN THE XXXXXX COUNTY COURT  
BETWEEN

The claimant's name

Claimant

AND

The defendant's name

Defendant(s)

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Defendant's statement of case

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I, [your client] of [your client's address], currently employed as an [job title, or change to unemployed] and the defendant in this matter, make this statement of case in support of my defence to the possession claim/money claim issued on xx/xx/xxxx.

An N9B/N11M was filed with the court on xx/xx/xxxx [or has been filed with this statement of case].

I have received help in drafting this application from my adviser, [your name] of [your agency] and Shelter's Specialist Debt Advice Service.

## Grounds of defence

1. The requirement to serve statutory Notices of Sums in Arrears (hereafter named "NOSIAs") pursuant to s86B Consumer Credit Act (hereafter "the Act") 1974. Full details of the claimant's non-compliance are laid out below. At the point these proceedings were issued the claimant was in a period of non-compliance and this is still the case at the time of writing.
2. The requirement to serve Statutory Notices of Default Sums pursuant to s86E of the Act despite including default sums in the amount claimed. Full details of the claimant's non-compliance are laid out below.
3. The requirement to serve Annual Statements pursuant to s77A of the Act. Full details of the claimant's non-compliance are laid out below.

### **Requirement to serve Notices of Sums in Arrears**

4. The provisions under s86B Consumer Credit Act 1974 commenced on 1st October 2008. S86B requires a NOSIA in a prescribed format to be provided

by a creditor when a regulated fixed sum credit agreement falls more than 2 months in arrears. A s86B notice must be provided within 14 days of the arrears reaching 2 months of payments and must thereafter be provided at least once every 6 months until the arrears are repaid or judgment is obtained.

5. For agreements entered into before 1 October 2008, transitional arrangements are included in para. 6 Schedule 3 Consumer Credit Act 2006. This states as follows that the requirements of s86B do not include arrears preceding 1 October 2008, so the obligation to serve NOSIAs only begins when 2 months payments have been missed after 1 October 2008:

*6(1) Section 86B of the 1974 Act applies in relation to agreements whenever made.*

*(2) In the application of section 86B in relation to an agreement made before the commencement of section 9 of this Act, the conditions under subsection (1) can be satisfied only if the two payments mentioned in paragraph (c) were not required to have been made before the commencement of section 9.*

5. Failure to provide NOSIAs at the correct intervals and in the prescribed format has 2 consequences:

- a. The creditor cannot enforce the agreement – section 86D(3)
- b. The debtor is not liable for any interest during the period of non-compliance – section 86D(4)

6. For the purposes of section 86D(3) ‘enforcement’ includes **entering judgment/recovering possession of land**. This was confirmed in *McGuffick v The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm) in which Flaux J confirmed that the actions listed under sections 76(1) and 87(1) of the Act amount to enforcement. These actions are demanding earlier payment, recovering possession of goods or land, treating any right conferred on the debtor by the agreement as terminated, restricted or deferred, enforcing any security and terminating the agreement. This position is confirmed in the FCA handbook at CONC 13.1.6:



*(1) Failure to comply with the provisions means that the agreement becomes unenforceable while the failure to comply persists, and the courts have no discretion to allow enforcement.*

*(2) In such cases, a firm should in no way, either by act or omission, mislead a customer as to the enforceability of the agreement.*

*(3) In particular, a firm should not in such cases either threaten court action or other enforcement of the debt or imply that the debt is enforceable when it is not.*

*(4) The firm should, in any request for payment or communication relating to a payment (other than a statement issued in accordance with the CCA or regulations made under it which does not constitute or contain a request for payment) in such cases, make clear to the customer that although the debt remains outstanding it is unenforceable.*

*(5) In the judgment of McGuffick -v- The Royal Bank of Scotland plc [2009] EWHC 2386 (Comm) Flaux J held in a case under section 77 of the CCA that passing details of a debt to a credit reference agency and related activities do not constitute enforcement under the CCA. He also held that steps taken with a view to enforcement, including demanding payment from a claimant, issuing a default notice, threatening legal action and the actual bringing of proceedings, are not themselves 'enforcement' under the CCA. On the other hand he confirmed that the actions listed under sections 76(1) and 87(1) of the CCA did amount to enforcement notwithstanding that some of the actions 'less obviously' amounted to enforcement. These actions are demanding earlier payment, recovering possession of goods or land, treating any right conferred on the debtor by the agreement as terminated, restricted or deferred, enforcing any security and terminating the agreement.*

*(6) While Flaux J agreed with the decision of HHJ Simon Brown QC (sitting as a Deputy High Court Judge) in Tesco Personal Finance v Rankine [2009] C.C.L.R. 3 that commencing proceedings was not enforcement, but a step taken with a view to enforcement, both he and HHJ Simon Brown appear to have been drawing a distinction between commencing proceedings and entering judgment in those proceedings.*

*(7) This guidance deals only with the question of whether an agreement is unenforceable in relation to sections 77, 78 and 79 of the CCA.*

*A lender's rights to enforce an agreement may be restricted for a variety of reasons, by the Act, by or under the CCA and by virtue of the general law.*

*(8) However, where a firm is aware that an agreement is unenforceable because of non-compliance with an information request under section 77, 78 or 79 of the CCA, a firm should make it clear when communicating to a customer about a debt that the debt is in fact unenforceable. Failure to do so, in that case, would in the FCA's view unfairly mislead the customer by omission. Any communication that implies expressly or otherwise that a debt is enforceable when it is known that it is not, would be misleading. One way to avoid this would be for the firm to explain to the customer the full meaning of 'unenforceable'.*

7. [If the agreement is a CCA “back book” secured loan] Art. 29(7) The Mortgage Credit Directive Order 2015 came into force from 21 March 2016, and states that if a creditor was not compliant with section 86B of the Act, they are only entitled to enforce the agreement if the period of non-compliance is ended:

*(7) If a creditor would not be entitled to enforce a contract because a period of non-compliance applies to the contract under section 86D of the Consumer Credit Act 1974 (failure to give notice of sums in arrears), but for the amendments to legislation made by this Order, then for the purposes only of bringing the period of non-compliance to an end, the contract is treated as if it were a regulated agreement and the creditor may enforce the contract only if the period of non-compliance has ended.*

Where the arrears remain, unless a valid NOSIA under section 86B of the Act has been provided, the creditor continues to be unable to enforce the agreement after 21 March 2016.

8. The content of NOSIAs is specified in reg. 19 and Schedule 3 of The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (hereafter ‘the Regulations’).

### **Summary of the claimant's non-compliance with s86B of the Act**

9. The contractual monthly instalment to this agreement was fixed at £xx, so 2 months' arrears is £xx. Based on the available annual statements provided, the defendants have been in more than two months of arrears continuously since [1 October 2008/actual date].

10. Detail payments made here if known including the last payment.

11. The first point at which a NOSIA should have been served on this account would have been 14 days after the account reached two months of arrears incurred since 1 October 2008, being xx/xx/xxxx.

12. [If applicable] The first arrears notice was provided on xx/xx/xx. This states that the arrears at that point were £xx, equivalent to xx months of missed payments. [If no notices have been provided say so here].

13. [If applicable/amend as required] The content of the arrears notices provided on/between xx and xx did not meet the requirements for NOSIAs under section 86B of the Act, as specified in reg. 19 and Schedule 3 of the Regulations.

Examples of this non-compliance include:

- a. The opening balance under the agreement at the date on which the duty to provide the NOSIA arose is not present as required under para 3(b) Schedule 3 of the Regulations.
- b. The paragraphs of text required to be included in a NOSIA which is set out in paras. 4 and 5 of Schedule 3 of the Regulations are not present.
- c. No confirmation has been provided to show that the Office of Fair Trading information sheet required under Part 5 Schedule 3 of the Regulations was sent. The text in the NOSIA relating to this required by Part 5 Schedule 3 of the Regulations is not present in any of the notices.

14. Based on the above, the arrears notices served between [1 October 2008/the date the account fell into arrears] and the issue of this claim were not served in time and were not in the correct form. They are therefore not valid NOSIAs for the purposes of section 86B of the Act.

15. The claimant was not entitled to charge interest for the period of non-compliance, which began on xx/xx/xx.

16. The copies of arrears notices provided include a gap/gaps.

17. The arrears notice provided on xx/xx/xxxx is not valid because it mis-states the balance owed as £xx. This sum does not take into account that interest could not be charged for the period of non-compliance beginning on xx/xx/xxxx.

18. None of the arrears notices sent after xx/xx/xxxx correct the error in the balance owed. This means the claimant's non-compliance with section 86B of the Act has not been ended [as required by Art. 29(7) The Mortgage Credit Directive Order 2015] by provision of an accurate NOSIA.

19. This means that to date, under section 86D(3) of the Act the claimant is still not entitled to enforce the agreement until a valid NOSIA is provided which correctly states the balance, taking into account the non-compliance from xx/xx/xxxx.

### **Requirement to service Annual Statements under s77A of the Act**

20. The provisions under s77A commenced on 1<sup>st</sup> October 2008. The provisions require the claimant to serve an annual statement within a year of either:

- a) the day on which the agreement is made, or
- b) the day the first movement occurs on the debtor's account with the creditor relating to the agreement.

21. Each statement under this section must be given to the debtor before the end of the period of thirty days beginning with the day after the end of the period to which the statement relates.

22. The claimant's duty to give notices under this section ends once the following conditions are satisfied:

- a) that there is no sum payable under the agreement; and
- b) that there is no sum which will or may become payable.

23. A failure to give notice under this section has the following consequences:

- a) the creditor shall not be able to enforce the agreement during the period of non-compliance;
- b) the debtor shall have no liability to pay any sum of interest to the extent calculated by reference to the period of non-compliance or to any part of it; and
- c) the debtor shall have no liability to pay any default sum which:
  - i) would have become payable during the period of non-compliance; or

ii) would have become payable after the end of that period in connection with a breach of the agreement which occurs during that period (whether or not the breach continues after the end of that period).

24. In *JP Morgan Chase Bank v Northern Rock* [2014] EWHC 291 (Ch) it was held the references to “a statement under this section” meant a statement that was compliant in its form and content with the requirements of the section and the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007.

**Summary of the claimant’s failure to comply with s77A**

25. The agreement was executed on xx/xx/xxxx and the first activity on the account was xx/xx/xxxx. The first notice should have been given by xx/xx/xxxx.

26. The claimant has failed to give the notices as required. Notices have been given as described in the table annexed. The notices were defective in that they misstated the amount of interest/misstated the level of arrears/were not given in respect of the prescribed periods.

The claimant's failure to give notices under s86B/s86E/s77A of the Act renders the agreement unenforceable.

I believe that the facts stated in this defence are true.

Dated: .....

Signed: .....

To the court and to the claimant