Notice of Undertaking

Capital Financial Management Limited

Summary

Capital Financial Management Limited (the firm) has made changes to terms in its Pre-Contract Information, Debt Management Agreement and Agreement Conditions.

The firm has given us an undertaking, under the Consumer Rights Act 2015 (the CRA) and the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs) in relation to:

- Two cancellation charge terms which had the potential to be considered unfair. They gave the firm sole discretion in respect of the costs it could charge, if consumers cancelled the contract; and
- A third term where it was not clear what notice period consumers had to give to cancel the contract.

We summarise below our concerns with these three terms and the action the firm has taken.

Why did we have concerns?

Two of the terms stated, if consumers chose to cancel their debt management plan *"we will lose the time we have spent on your case and we reserve the right to charge you an amount which is sufficient to cover any losses and costs suffered."* As drafted, the terms had the potential to give the firm the ability to charge consumers unspecified amounts, at the firm's discretion, should a consumer cancel the contract, in addition to the service fees already paid. We were concerned that if the firm had chosen to do this, it would result in consumers paying unexpected high costs.

The third term stated consumers may end the contract by providing one month's notice. However, when read together with the other two terms, it was not clear if consumers could cancel the contract immediately or if they were required to give one month's notice. We were concerned that this could cause confusion to consumers.

What has the firm done?

Capital Financial Management Limited has:

- Agreed that the two cancellation charge terms had the potential to be considered unfair. It has amended these two terms to state that the maximum fee consumers will be charged on cancellation will not exceed the initial set-up fee plus one month's service fee, less any amount already paid.

- Agreed that the term setting out the notice period had the potential to be unclear. It has deleted the term and amended the two cancellation charge terms to make clear

that consumers must provide one month's notice, if they wish to end the contract outside of the 14-day cooling-off period.

- Told us it is writing to all its existing consumers to provide them with a copy of the new contract terms.

- Agreed not to rely on the original wording of the terms in respect of existing consumers.

- Carried out a review of former consumers, who had cancelled their agreements with the firm and provided redress where it was appropriate to do so.

- Fully cooperated with us in resolving our concerns.

What does this mean for consumers?

The changes that the firm has made, should ensure that consumers are clear about how they can cancel their contract and the maximum charges they will need to pay if they cancel.

Undertaking from Capital Financial Management Limited

Capital Financial Management Limited has given this undertaking to the FCA under the Consumer Rights Act 2015 (the CRA) and, in respect of terms marked '1' and '2' below, also under the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs) concerning its Pre-Contract Information, Debt Management Agreement and Agreement Conditions.

Capital Financial Management Limited Terms and Conditions

Cancellation charge terms:

Term 1 - A term in the 'Pre-Contract information sheet', at the end of the first page stated: *"If you wish to cancel your Debt management plan you can do so at any time. However, as our commitment to you will begin when you enter into an agreement with us, if you do subsequently cancel the agreement we will lose the time we have spent on your case and we reserve the right to charge you an amount which is sufficient to cover any losses and costs suffered due to your cancellation."*

Term 2 - Term 6 in the Debt Management Agreement stated: *"Our commitment to you begins when you sign this agreement. If you cancel this agreement we will lose the time we have spent on your case and we reserve the right to charge you an amount which is sufficient to cover any losses and costs suffered because of your cancellation. If you cancel this agreement with 14 days, which is known as the cooling off period, we will refund all fees paid. If you wish us to commence work before the 14 day period expires you may elect to waive the cooling off period."* [sic]

Notice period term:

Term 3 - Term G in the Agreement Conditions stated: *"The Client(s) may terminate this agreement at any time by given CFM one months notice of their intention to do so."* [sic]

Applying the CRA and the UTCCRs

We considered the fairness of terms 1 and 2 in light of the CRA, the UTCCRs and relevant case law.

Under section 62(4) of the CRA and Regulation 5(1) of the UTCCRs, a term is unfair if:
"…contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

In our view, terms 1 and 2 as drafted were likely to be considered unfair under the CRA and the UTCCRs. This was because we considered that the terms caused a significant imbalance to the detriment of consumers, since they had the potential to allow the firm to charge disproportionately high fees if the consumer cancelled the contract. In our view, the significant imbalance was caused contrary to the requirement of good faith, since the firm could not reasonably have assumed that a consumer would have agreed to such terms in individual negotiations. Consumers would not agree to terms that gave the firm sole discretion to charge unspecified amounts should the consumer cancel the contract, over and above the retention of the service fees already paid by the consumer.

We were concerned that this could result in consumers paying more to cancel the contract than they would expect to pay.

We considered whether term 3, when read with terms 1 and 2, was in plain and intelligible language in light of the CRA, the UTCCRs and relevant case law.

Under section 68(1) of the CRA: *"A trader must ensure that a written term of a consumer contract…is transparent".* Under section 64(3) a term is transparent if: *"it is expressed in plain and intelligible language".* Similarly, Regulation 7(1) of the UTCCRs states: "A *seller or supplier shall ensure that any written term of a contract is expressed in plain and intelligible language."*

In our view term 3 was not drafted in plain and intelligible language. This is because, when read in conjunction with the other two terms, it was not clear if consumers could cancel the contract immediately or if they were required to give one month's notice.

This could have caused confusion to consumers about how much notice they were required to give if they wanted to cancel the contract. Under section 69 of the CRA and Regulation 7(2) of the UTCCRs, where a contract term in a consumer contract could have different meanings then it must be applied in the way that is most favourable to the consumer.

How the terms have been changed

The firm has agreed:

- that terms 1 and 2 had the potential to be considered unfair under the CRA and the UTCCRs. The firm has amended both terms, to state that the amount it may charge consumers on cancellation will not exceed the consumer's initial set-up fee plus one month's servicing fees, less any sum already paid by the consumer.

- that term 3 had potential to be considered insufficiently transparent under the CRA and not in plain and intelligible language under the UTCCRs. The firm has removed the potential confusion in respect of the period of notice consumers need to provide if they choose to cancel the contract by: (a) amending terms 1 and 2 to state that consumers must provide one month's notice if they wish to cancel the contract outside of the 14-day cooling-off period, and (b) deleting term 3 from the contract.

- not to rely on the original wording of terms 1, 2 and 3 in respect of existing consumers.

Other information

The firm was fully cooperative in providing this undertaking.

Undertaking published 23 May 2019.

Legal information

As a Regulator, we, the Financial Conduct Authority (FCA), can challenge firms using terms that we view as not being fair under the UTCCRs and the CRA or not transparent under the CRA. We review contract terms that we come across in our supervision of firms. This includes contract terms that are referred to us by consumers, enforcement bodies and consumer organisations. This has led to Capital Financial Management Limited's undertaking to replace

the terms that we consider are likely to be unfair and to delete the term that we consider is likely to lack sufficient transparency.

The FCA has a duty under Regulation 14 of the UTCCRs and Schedule 3 of the CRA to notify the Competition and Markets Authority (the CMA) of the undertakings we receive. The CMA may publish details of these undertakings, which it puts on www.gov.uk. We also publish the undertakings on our website. Both publications will name the firm and identify the specific term and the part of the UTCCRs and the CRA that relate to the term's fairness.

Even if firms have not given an undertaking or been subject to a court decision they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These will be of potential value in showing the likely attitude of the courts, the FCA, the CMA or other regulators to similar terms or terms with a similar effect.

Ultimately only a court can determine the fairness or transparency of a term and, therefore, we do not recommend terms that have been revised by a firm to address our concerns as being definitely fair or transparent. We cannot approve terms for the purposes of the UTCCRs and the CRA; it is for firms to assess the fairness and transparency of their terms and conditions under the UTCCRs and the CRA and in the context of the product or service in question.

It is important to bear in mind that wording that is fair or transparent in one agreement is not necessarily fair or transparent in another. Where we accept an undertaking given to us from a firm to revise a term, this means that, on the evidence currently available we consider the term to be improved enough that further regulatory action is not required.