

## **The complaint**

Mr R complains Link Financial Outsourcing Limited have misled him into making payments for a debt they knew was unenforceable.

A representative is supporting Mr R in bringing this complaint.

## **What happened**

Mr R held a credit card, and his representative has said a first section 78 (s78) request was made around December 2012 / January 2013 to the original credit card provider who I'll call B. This s78 request was made when Mr R was using a different representative who said they'd take over the debt and become the legal owners – meaning Mr R would no longer be responsible for it. This didn't happen and the debt remained in Mr R's name.

The s78 request means the owner of the account must provide a copy of the original Consumer Credit Act (CCA) agreement, together with a history of repayments. If these can't be provided, then the debt isn't enforceable – meaning the owner of Mr R's debt can't take court action. They also can't mislead Mr R into thinking the debt is enforceable, when it's not, and when asking for payments need to specify the debt isn't enforceable.

It's unclear whether the s78 request was satisfied by B – Mr R's current representative hasn't said it was, but this also seems to have been a number of years before they became involved.

I understand Mr R's credit card was then defaulted by B in July 2013. After this default on 14 August 2013 the account was sold to a debt purchaser. That debt purchaser asked Link to manage the account for them.

The information I've received from Link show Mr R entered into a payment plan – and made his first payment in August 2017.

On 17 May 2018 Mr R's current representative contacted Link to raise concerns over two issues. The first was regarding a section 75 request – which doesn't form part of this complaint. And the second was to ask for the information Mr R is entitled to under s78. Link replied the next day but didn't address the s78 request. The response was sent to Mr R's representative.

The next contact was on 30 January 2020, with Mr R's representative saying the s78 request hadn't been satisfied. Because of that, they were advising Mr R not to make any further payments as they understood the debt to be unenforceable.

Link replied to this contact the next day and explained when processing a s78 request the rules allow them to ask for a £1 fee – and as that fee hadn't been received, they weren't able to comply with the request. Link added that, at this time, the agreement remains enforceable, but upon receipt of the fee they'll get the documents as soon as possible.

Mr R's representative wasn't happy with this. They explained when they'd contacted Link on 17 May 2018, they were prepared to pay the statutory fee if asked for – but Link's response on 18 May 2018 made no reference to this. They also thought Link were being a bit presumptive by saying the account was still enforceable when they didn't hold the relevant details. They enclosed the £1 fee this time.

Following this, Link seem to have contacted B (the original owner of the credit card) to ask for the relevant documents. On 2 May 2020 B wrote to Mr R to explain they didn't hold them, so his debt was unenforceable.

Mr R's representative then contacted Link. They said as Link couldn't satisfy the s78 request, and were never in a position to do so, it follows Mr R never should have made any payments to the debt. Because of this, they asked for a refund of payments Mr R had made after the s78 requests of £1,600, plus interest. Mr R's representative was also unhappy Link had written to Mr R directly, when he'd asked them to write to the representative – and that Link had asked for a letter of authority, when they already had it.

Link replied to this. They said sorry for sending a letter direct to Mr R, and for asking for a signed letter of authority when they already had one. They also said they were sorry for saying the account remains enforceable when they'd not received the £1 fee – they should have said they weren't able to comment on the enforceability of the account at this time. They explained that when they first receive a s78 request they're not aware of the enforceability of the account, because they're not provided with the documents when buying accounts. They added that as the documents hadn't been provided, then the account is unenforceable. But, they said the balance of the account remains owed, so they're unable to agree any monies have been paid in error. And finally, they said the enforceability status of Mr R's account doesn't remove his liability for it, and any refund for money paid won't be considered.

Mr R's representative asked us to look into things. They provided a substantial amount of information, so I've summarised in my own words what I think are the key arguments from them:

- Because B didn't satisfy the s78 request, by the law of assignment Link were responsible for it. They quoted section 136 (s136) of the Law of Property Act 1925 and Halsbury's Laws of England which they say proves this.
- The Consumer Credit Sourcebook (CONC) rules set out by the regulator the Financial Conduct Authority (FCA) show Link haven't acted fairly – specifically that Link have misled Mr R into thinking the debt was enforceable when it wasn't.
- As a result of Link being responsible when they bought the debt, or by misleading Mr R directly later on, any payments made since the payment plan started should be refunded.

Mr R's representative added that as a result of this all payments made should be refunded, plus 8%. They also asked for £750 compensation for the stress and anxiety caused by this.

Across a number of responses our investigator explained he didn't think it'd be fair and reasonable for Link to be responsible for a s78 request made to the original lender. He said he couldn't see Link had been made aware of it, so didn't think they were required to do anything further here. And, he didn't think Link needed to refund any payments, because although they'd explained the debt was enforceable when it wasn't at one point, no payments had been made after this error. And he said the relevant time limits for Link to have replied to the s78 request didn't apply until the £1 fee had been paid.

Mr R's representative said they didn't agree with this. They said the effect of s136 of the Law of Property Act 1925 permitted the assignment of debt "subject to equities". And, this is explained by Halsbury's Laws of England to say when Link bought the debt, they also bought the unsatisfied s78 request which was made to B in December 2012 / January 2013. Because of that, effectively, Link bought an unenforceable debt which they knew about.

Mr R's representative also said under CONC, by continuing to accept Mr R's payments Link were misleading him about the enforceability of the debt. Additionally – after the second s78 request on 17 May 2018 Link didn't say the debt was unenforceable, and there was a further letter dated 29 June 2018 which also didn't say the debt was unenforceable. So, they've misled Mr R by omission about the enforceability of the debt.

Mr R has said had he been told the debt was unenforceable, then he wouldn't have entered into a payment arrangement. As a result, Mr R's representative thinks payments should be refunded, plus interest and compensation. They've also asked us to direct Link to confirm the debt has been written off, and no adverse reports will be made to the credit reference agencies. As our investigator didn't agree with this, the complaint's been passed to me to decide.

### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The key questions in this case, is whether Link have been fair in asking Mr R to make payments towards an account where he properly owes the money – and whether they should refund anything Mr R has paid. I realise Mr R's representative is focusing on whether the account was unenforceable or not – but that isn't something I can decide, as that can only be decided by a court.

I think it's important to explain my role is to decide things on a fair and reasonable basis. I'm required to take into account the law but I'm not bound by it.

#### *Payments Mr R has made towards the outstanding debt*

There's no dispute, as far as I can see, that Mr R borrowed and spent the money that's currently the subject of this dispute. So, I'm satisfied Mr R does properly owe the money Link have asked him to repay.

With that in mind, I'm satisfied Link have acted fairly in asking Mr R to repay the debt. He owes the money, hasn't disputed this, so any payments he's made have been made towards a debt he does properly owe.

With that in mind, whether Mr R has or hasn't made payments towards a debt Link knew was enforceable, I wouldn't be asking them to refund those payments with interest.

#### *Should Link be held responsible for the s78 request made to B, Mr R's original lender*

Mr R's representative has pointed to s136 of the Law of Property Act 1925, and Halsbury's Laws of England as evidence why Link are responsible for the s78 request made in December 2012 / January 2013 to B.

I think it's important to explain that our role is that of an alternative to the court – and our overarching remit is to consider what's fair and reasonable in all the circumstances of the case rather than being bound by what the law necessarily says.

Mr R's representative hasn't definitely demonstrated that Link are responsible for the s78 request made to B because we've not had sight of the terms of sale. It's not our role to make a complaint on behalf of the parties – particularly where it'd involve a detailed analysis of a commercially sensitive business to business agreement that Mr R wasn't party to.

There's nothing preventing Mr R raising his concerns about B's actions directly to them – which would seem more fair, reasonable and appropriate. This is regardless of whether Link could technically be held liable.

### *Are Link responsible for refunding payments from 18 May 2018*

I also note Mr R's representative is concerned that Link didn't respond to his s78 request when it was made in May 2018.

I do think that's poor – but Link did reply to the s75 issue raised in the same letter the following day which was sent to Mr R's representative.

And, in the contact Mr R's representative made with Link, he mentioned the £1 to look into the issue of enforceability – but didn't enclose it saying Link could ask for it. Because he didn't enclose it, this meant Link weren't required to complete a s78 request – though I do think they should have responded to this point. But neither Mr R or his representative seemingly followed up with Link until January 2020 – over a year and a half later. So, even if they had replied to say the £1 fee was due, I can't know if Mr R or his representative would have provided that any earlier – as they didn't give the fee initially and didn't follow up on the issue until January 2020.

And I've not seen anything to show Link were aware in May 2018 the debt was unenforceable. Mr R's representative has said that the amount Link would most likely have paid for the account would be a clear indicator. But there's not enough evidence to say the price of Mr R's account is relevant information in deciding whether it was or wasn't enforceable. After the fee was paid, Link then asked B for the documents they'd usually need to provide – which B didn't have. It's at this point B and Link both said they couldn't enforce the debt and communicated this to Mr R which is what I'd usually expect.

### *Summary*

Overall then, I'm satisfied any concerns regarding the initial s78 request would be more fairly directed to B, I can't see Link knew the account would be decided it was unenforceable before the £1 fee was paid – and all payments Mr R has made are towards a debt he seemingly owes. Because of that, I won't be telling Link to refund any payments or pay any compensation – and that Mr R remains responsible for the outstanding balance Link are collecting.

### **My final decision**

For the reasons I've explained above I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 30 August 2021.

Jon Pearce  
**Ombudsman**