DRN-3309129

The complaint

Mr E has complained that The Co-operative Bank Plc ("Co-op") has unfairly declined his claim under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

In September 2017, Mr E attended a sales presentation by a business I will call "Business P". In the presentation, he was told about a way of getting out of an existing timeshare he and his wife held. Mr E says he was told that Business P would arrange the termination of the timeshare, but at the same time he had to purchase other holiday products through Business P. Mr E made payments to Business P using both his Co-op credit card and another credit card issued by different bank. He also paid a different business (which I will call "Business S") by a bank transfer and Mr E said this was all part of the same deal.[1]

Mr E wrote to Business P in January 2018 to say that he was still a member of his old timeshare, so liable to continue to pay management fees. He said that the agreement with Business P had failed, so he asked for a refund of what he had paid.

In June 2018, Mr E made a claim to Co-op under s.75 CCA, using the services of a professional representative ("PR").[2] The claim was set out in detail and I will summarise it here. It was said that Mr E was contacted by someone from a company I will call "Business I" about exiting his timeshare membership, something he was interested in doing. It was alleged that Mr E was told the termination of the timeshare would also mean he could recover everything he had paid toward it. Mr and Mrs E were offered the opportunity to discuss these services at a meeting in Tenerife, with free hotel accommodation.

When Mr E attended the meeting, he actually met with someone from Business P. As well as talking about timeshare relinquishment, Business P also gave a presentation about holiday products it provided. In particular, Mr E said that he was told:

- It was guaranteed that Business P would terminate the existing timeshare agreement.
- It was guaranteed that the termination service would take 60 days.
- It was guaranteed that Business P would also make financial recovery for Mr E and he would receive most, if not all, of what he had paid toward the timeshare.
- Mr E had to purchase the other holiday products as the termination service was only available to Business P's customers.

PR alleged that the first three of those statements were misrepresentations and that the final one was an aggressive sales technique. In reality Mr E's timeshare was not terminated and he received no money back. So PR claimed for a sum equivalent to what was paid to Business P.

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[1] Although Mr E paid Business S, for reasons I will come on to, it is not entirely clear what services were to be supplied by that business

[2] Mr E is no longer represented by PR

In January 2019, Co-op initially responded to Mr E's claim. It said that as Mr E's claim was for more than £30,000, that fell outside of the criteria needed to make a s.75 CCA claim. It also said that there were not the right sort of arrangements in place between all of the businesses involved for s.75 CCA to be engaged.

PR responded to explain that, although the value of the potential claim was over £30,000, the amount paid for the services was under that, so s.75 CCA did apply. PR also said that Business S and Business P were linked as they were based in the same apartment complex and one was used to market the other's products. Both had been discussed together in a consumer protection television programme.

In March 2019, Co-op further responded to Mr E. It said it could not find any error in its initial decision to turn down the claim. Co-op told Mr E that if he was not satisfied with the outcome of its investigation, he could refer a complaint to our service, which he did.

In February 2020, Mr E received an email from a third party to say that Business P had ceased trading and that options would be given to him to recoup any money paid (it was not clear whether this was money to be recovered under Mr E's timeshare claim or money paid to Business P for its services). At that time, Mr E had not taken any of the holidays purportedly available thought the purchases he had made in September 2017.

In June 2021, one of our investigators gave their view on part of Mr E's complaint. She noted that Co-op thought that, as Mr E's credit card had been used to pay only Business P and not Business S, any s.75 CCA claim could only be considered against that part of the contract that was funded by the credit card, i.e. the agreement with Business P. Our investigator thought that the sale was undertaken by Business P, with Business P providing an accommodation contract and agreeing to instigate a claim on Mr E's behalf to relinquish the existing timeshare. She thought that Business P and Business S were 'associates' for the purposes of the CCA and, for parts of the sale, Business P were acting as agents for Business S. She thought there were the right arrangements in place to consider a s.75 CCA claim and invited Co-op to reconsider such a claim.

Before Co-op responded, a second investigator issued a second view on Mr E's complaint. He explained that he had seen evidence that Mr E had made two payments to the purchases detailed above – one by credit card and one by bank transfer – but they were to two different companies, Business P and Business S. Our investigator thought that all of the benefits under the agreement were sold to Mr E by Business P and, although payments were made to two parties, both payments arose out of the same purchase. He thought that the main reason Mr E met with Business P was to claim back money from his existing timeshare rather than to purchase further holidays. He thought Business P had no reasonable basis to say it could recover monies from his existing timeshare within 60 days, and it misled Mr E that this would happen if he purchased the package of products. This was a misrepresentation that induced him to take out the agreements and it was recommended that Co-op pay to Mr E the value of the Co-op credit card transaction and bank transfer, plus interest.

Co-op responded to say it accepted that there may have been a breach of contract by Business P as it did not provide any of the accommodation paid for. So it offered to repay to Mr E what he had paid on his Co-op credit card, along with the associated credit card interest and charges, plus interest for the time Mr E was out of pocket. It also offered to repay anything further for that part of the agreement if more evidence was provided of payment.

Co-op did not think it was liable to refund anything paid to Business S by bank transfer. It said this as it was not clear what this payment was for – the evidence was that the cost of

the services provided by Business P was £5,000, so it was unclear why this further payment was made. It was also paid around a month after the agreement was entered into and the Business P documentation said that everything was paid for on 11 September 2017.

Co-op also pointed out that the letter talking about relinquishment said that 20% of any claim monies received would be paid to Business P and there was no reference to an upfront payment, so it was fair to assume that this was how the claim fees would be paid. There was no evidence of a formal agreement with Business S showing why any payment was made to it and, in any event, the payment was made by bank transfer, so was not covered by s.75 CCA.

Following this, Mr E sent more documentation. He provided evidence of a further payment made to Business P using a different credit card that he said was part of the same transaction. Also, a letter on Business S headed paper, dated 11 September 2017, providing details of Business S's bank account and saying the transfer value was £4,960. Another Business S document, dated on the same day, said that Mr E paid £5,000 by bank transfer for an 'Exclusive Service' subscription.

Our investigator considered the new information and sent a further view. He explained to Co-op that the new information did not change his opinion on the outcome of the complaint, but it did change his thoughts on the recommended payment that needed to be made. He thought the evidence showed that Mr E was sold a package of things by Business P, including the services from Business S, and the evidence showed that no claims or other services were actually provided, nor were they intended to be provided. He said that he thought Mr E entered into an agreement to buy a package of things:

- An accommodation contract with Business P.
- A contract for Business P to instigate a claim on his behalf concerning his old timeshare.
- A subscription with Business S.

These were all sold by Business P in one meeting. He pointed to the fact that the references were the same across the agreements and the accommodation referred to in the Business S agreement was to be provided by Business P, so the contracts were intrinsically linked. As the misrepresentation made to Mr E induced him to enter into all of these agreements, and make the associated payments, he thought Co-op was liable to Mr E for all of the cost under s.75 CCA.

Mr E accepted our investigator's view. Co-op disagreed. It now offered to refund the extra amount paid by Mr E on his second credit card, but not the amount paid by bank transfer to Business S. It did not agree things were sold as a single package and pointed to a view sent by a different investigator on a different complaint that it said backed up its position. As the parties did not agree with our investigator, the complaint was passed to me for a decision.

What I have 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.

When evidence is incomplete, inconclusive, incongruent or contradictory, I have made my decision on the balance of probabilities – which, in other words, means I have based it on what I think is most likely to have happened given the available evidence and the wider circumstances.

There is no evidence from Business P or Business S, and the only evidence there is from the time of sale is from Mr E. He has provided all of the documentation from the time of sale, along with his memories. So when considering this claim, that is the only evidence there is available. I am mindful that his memories may not be an accurate representation of the precise sales process as memories are imperfect. So I have had to weigh all of that up when deciding what I think most likely happened. I do not think it is unfair to Co-op for me to do this – ultimately I must decide the complaint in front of me based on the evidence available.

When considering this complaint, I think it is important to set out what I find Mr E agreed to and with which business. I will then consider any legal claims that Co-op needed to consider, given the legal relationships between the parties. Finally, I will consider whether Co-op's existing offer is a fair way to resolve this complaint.

The available documents

I have seen an email from Business I to Mr E dated 22 June 2017. It contains an offer of one week of accommodation in Tenerife. The email contains the following passage:

> *"1. You would expect to receive back no less than the original purchase price as discussed.*
> *2. The procedure will take a maximum of 60 days and only on receipt of refunded monies into your bank will you be invoiced for the companies percentage of 20%.*
> *3. The relinquishment of any timeshares or points would then follow to eliminate any further maintenance bills."*

The email does say:

> *"We can offer you a variety of accommodation which will be arranged at your discretion, and we shall look forward to speaking to you again soon as arranged."*

However, it is unclear whether this sentence related to the accommodation being offered in Tenerife for Mr E to use when attending the meeting to talk about timeshare relinquishment or if it related to the accommodation contract later taken out with Business P – no mention of Business P is made in this email.

There is a document on Business P headed paper, dated 11 September 2017, that says:

> *"Please take this as written confirmation [Business P] will instigate a claim on your behalf for the amount of £45,496 (subject to all maintenance payments being up to date and all paperwork in order).*
>
> *All claims will be settled in full directly to yourselves, at which point you will be expected to pay back 20% of the total claim…*
>
> *Please note, from registering the claim, to having the monies paid into our client account, will take a maximum of 60 days.*
>
> *[Business P] is not a finance company, and is currently working with a third party firm of Solicitors, and various advisory companies, who specialise in reclaim, to enable us to offer our customers this intermediate service."*

This reflected the conversation PR set out in the letter of claim and, I find, corroborates Mr E's recollections of what he was told about the timeshare relinquishment service.

There is a document on Business P headed paper called an 'Accommodation Contract'. An extract reads:

> "*Included in the initial subscription fee is 1 week of accommodation in Tenerife pre booked and paid for today 11th September 2017, and the choice of 2 additional week [sic] of accommodation in any of the Canary Islands of your choice, reserved and paid for today, which can be modified if required.*"

The reservation details show that the 'Tourist Agent' was Business P and the price and other offers were agreed by Business P. The total price as £5,000 and it said payment was received on 11 September 2017. There is also a contract on Business P headed paper that gives more terms about how the accommodation was offered, including that it was prepaid and therefore could not be cancelled. Finally, the reference on this agreement was "*PST/1705*".

I have seen a document titled "*Terms &* Conditions" on Business S headed paper dated 11 September 2017 and signed by Mr and Mrs E. It says that once the balance due was paid, Mr and Mrs E were entitled to full usage of Business S's facilities. The agreement does say:

> *"The week of accommodation in the Canary Islands is to be used before the Exclusive use of the Travel Agency."*

Other than that, the scope of services offered by Business S are not clear, although it appears to be a form of travel agency.

There is a document titled "*Subscription for the Exclusive Service*" on Business S headed paper and it states that a payment of £5,000 was due to be paid by bank transfer by 11 October 2017. Details of Business S's bank are given, although this was given with a different transfer value of £4,960 and reference of "*1705*".

Payments made

Mr E's Co-op credit card statement shows that a payment of £1,972.59 was made to Business P on 12 September 2017, alongside a non-sterling transaction fee of £54.24.

Mr E's other credit card statement shows a payment of £2,983.02 was made to Business P on 12 September 2017 (the transaction date was the day before), alongside a non-sterling transaction fee of £89.19.

On 16 October 2017 a payment was made from Mr E's Co-op bank account to Business S's account in the amount of £4,960. The payment reference was "*1705*".

I do not think this is in dispute, but I find it more likely than not that these payments related to the agreements detailed above as they were to the same businesses and the bank transfer had the same reference number.

What were the agreements?

I think Mr E contracted with Business P to make a claim on his behalf in relation to his existing timeshare. It is not clear what that claim was actually for, but it appears that Business P said Mr E was entitled to get back everything he had paid toward the timeshare,

which at that point was in the region of £45,000. In exchange for this, Business P would receive 20% of the amounts recovered and I cannot see that any payment for this service was made upfront, albeit that other sums were paid to Business P at the time.

Mr E also purchased some accommodation from Business P, for one week in Tenerife and for two further weeks in accommodation within the Canary Islands. This was paid for by the two credit card transactions.

Mr E also purchased a service of some kind from Business S. I find this was arranged by Business P, most likely acting as agents for Business S, as Mr E only recalls one meeting on 11th September 2011 when he agreed to go ahead with the agreements. I also think these purchases were linked as they had a similar reference number (PST/1705 and 1705). Further, Mr E could only use the travel agency services of Business S after he used accommodation in the Canary Islands. But the only reference to such accommodation was in the agreement with Business P. It follows, I find that these agreements were entered into at the same time and at the same meeting.

Mr E has said that he had to buy the other holiday products to get the timeshare claim services that Business P offered. He says that he was first contacted about the timeshare claim services and that was the reason he travelled to Tenerife. I think this is reflected in the email of 22 June 2017 that was focused on that service, so I think that was a service he was interested in. I have not seen that there was any mention of the other services offered by Business P or Business S in that email, so I think the timeshare claim service was the primary motivation for him to meet with Business P.

I also accept that Mr P was told that he had to take out the holiday products to get the timeshare claim services. That is the evidence presented by Mr E and I have nothing to contradict that. In coming to that conclusion, I note that all of the things Mr E signed up to were sold at the one meeting and that there is nothing to suggest Mr E was interested in the holiday products in their own right – in fact Mr E was trying to exit an existing holiday product. I think it is most likely that Mr E attended the meeting to find out about the timeshare claim, was told that there was a guaranteed large pay out and agreed to purchase the other products to be able to get that pay out.

Was Co-op jointly responsible for any breach of contract or misrepresentation?

S.75 CCA states that in certain circumstances, when a debtor has a claim against a supplier in respect of a misrepresentation or breach of contract, they will have a like claim against the creditor. So here, Mr E (the debtor) was asking Co-op (the creditor) to answer his claim for the misrepresentations set out above.

But this does not apply to every claim Mr E may have. Co-op is only responsible for claims when there is a debtor-creditor-supplier ("DCS") agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit card. In Mr E's case, he paid Business P directly with his credit card and it is not in dispute that Co-op could be held jointly responsible for any claim of a breach of the contract with Business P that arose from that transaction or of a misrepresentation that led Mr P into entering into agreements with Business P.

However, I do not think Co-op had to answer any claim for breach of contract by Business S. That was because anything supplied by Business S was outside of the arrangements between Mr E, Business P and Co-op. Under the CCA, it is possible Co-op would have to answer a claim if it could be shown Business P and S were 'associates' (s.184 and s.187 CCA). Our first investigator thought the two businesses were associates, but I am not sure

that this is the case. In any event, for the reasons I will come to, that does not make a difference in this case.

Did Co-op properly consider the claims?

In response to our second investigator's views, Co-op accepted that there had been a breach of contract by Business P and offered to pay back what Mr E had paid on his two credit cards – that was on the basis that he had not received any of the holiday products he had paid for. But Co-op said that it would not pay anything in respect of the payment to Business S. For the reasons set out above, I agree that Co-op are not responsible for any breaches of Business S's agreement. And the damages normally paid for a breach of contract would mean that Business P's breaches would not mean anything paid to Business S would need to be returned.

However, I do think Co-op needed to properly assess any claim for misrepresentation. The normal way to remedy any such claim would be recission of the contract entered into and damages to put Mr E in the position he would have been in had the misrepresentation not been made. So I first need to consider whether Business P, and hence Co-op, could be liable for a misrepresentation.

Business P made a number of assertions about how it could make a claim in respect of Mr E's timeshare. In particular it said a claim could be made for £45,496, that the claim would be settled in full and that it would be paid within 60 days of the claim being made.

For there to be a misrepresentation there needed to be an untrue statement of fact or law made by one party to another, which induces the party receiving the statement to enter a contract, thereby causing them loss. A statement of opinion can be a misrepresentation if the opinion amounts to a statement of fact and it can be proved that the person who made it did not hold that opinion or could not reasonably have held it.

Here Mr E alleged several misrepresentations as set out in the letter of June 2018. The specific things Business P said would happen with any claim were clearly representations made to Mr E of things that it could cause to happen. But that is a statement of fact that I do not think was true. I think Business P must have known it could not guarantee such an outcome or that it had no reasonable grounds for believing it could do so. Any claim made to Mr E's timeshare provider was simply that, a claim, with no guarantee it would be paid or how much. Further, claims like that take time, so it was fanciful that anything would be paid within 60 days. I cannot see how Business P had any reasonable grounds to believe it could procure the outcome it said it would. It follows, I think that amounted to a misrepresentation.

If I think about what would have happened had Business P not misrepresented that it could get Mr E a sum of money within 60 days, I do not think he would have entered an agreement with Business P to make a claim. But I also found that Mr E was told he had to buy the other holiday products to make such a claim. I think the central reason he entered into any of these agreements was the guarantee of a large sum on money in the near future. And, had he known the reality that there was no guarantee of a successful claim, I do not think he would have entered into any of the agreements. For the reasons set out above, I find the primary motivation for him to buy anything, was the possibility of the claim and not because he wanted further holiday products. I do not think it is likely that at the same time Mr E separately and coincidently wanted to purchase an additional holiday product, as he was actively trying to terminate a different holiday product. It follows, I think Co-op also needs to pay the amount paid to Business S as part of Mr E's s.75 CCA claim.

Putting things right

Co-op has offered to do the following for Mr E:

- Rework his credit card account as if the payments made to Business P on 11 September 2017 had not been made and pay him the extra amounts paid to the credit card account due to this transaction. It agreed to pay 8% per annum simple interest on any extra amounts he paid, from the date of the overpayments to the date of settlement.

- Pay Mr E the sum he paid Business P using his other credit card, plus 8% per annum simple interest on that amount from the date paid to the date of settlement.

I think that offer is fair in relation to the payments he made to Business P, so I direct Co-op to make those payments. But in addition, I direct it pay:

- A sum equivalent to what was paid to Business S from Mr E's bank account on or around 16 October 2017, plus 8% per annum simple interest on that amount from the date paid to the date of settlement.

By law, Co-op needs to take tax from any interest payments, so it should provide Mr E a certificate setting out how much tax has been paid should he ask for one.

My final decision

I uphold Mr E's complaint against The Co-operative Bank Plc and direct it pays compensation as set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr E to accept or reject my decision before 13 July 2023.

Mark Hutchings
Ombudsman