DRN-3554149

The complaint

Mrs M complains that NewDay Ltd trading as House Of Fraser ("NewDay") unfairly declined her claim under the Consumer Credit Act 1974 ("CCA").

What happened

In September 2015, Mrs M, along with her husband, bought membership with a holiday club called "E"[1]. The total cost of the membership was £3,950 and Mrs M paid £2,500 using her NewDay credit card and the rest by bank transfer. The payment did not go to E directly, but rather it went to another company called "RS".

Under the terms of Mrs M's membership she was provided with 'credits' from E that could be used to purchase services that E provided under its "Concierge Lifestyle & Leisure service". Those services included discounted holidays, travel benefits and access to tickets for entertainment. Mrs M says she did not use any of her credits.

In May 2018, E stopped offering services to its customers. EEL applied to be struck off the Companies House register in June 2018[2] and that happened in October. Further, in March 2019, the Chief Executive of E (DR) and the Managing Director of E (SR) were sentenced in Birmingham Crown Court for various consumer protection offences related to E. Finally, in December 2019, RS was declared to be insolvent.

Mrs M, using a professional representative, made a claim under s.75 CCA arguing that E had breached its contract with her and the nature and benefits of membership had been misrepresented to her. As the purchase had been partly funded by using a credit card, Mrs M said NewDay were equally liable for what she said had happened.

NewDay responded to the claim, but said that as Mrs M did not pay E directly using her credit card, that meant there was not the right type of arrangement in place to be able to make a claim under the CCA.

One of our investigators looked into the complaint and thought NewDay should have accepted the claim Mrs M made. He thought that there was the right sort of link between E and RS so that the relevant provisions of the CCA applied to this purchase. Our investigator thought there was evidence to suggest the contract had been breached and so NewDay was jointly liable for this under s.75 CCA and needed to repay a proportion of the purchase price. He did not think there was sufficient evidence to suggest that the membership had been misrepresented or that there was an unfair debtor-creditor relationship under s.140A CCA.

NewDay disagreed with the view, noting that the corporate structure of RS indicated that it was not sufficiently linked to EEL so that s.75 CCA did not apply to the purchase. As NewDay did not accept the view, the complaint was been passed to me for a decision.

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[1] In this decision I will use E to describe a group of related businesses. But Mrs M actually contracted with EEL (a registered British company) and paid RS (a registered Spanish company). This is important when discussing the arrangements in place at the time of sale.
[2] This was the formal process to bring the company to an end.

I issued a provisional decision ("PD") as, although I came to the same overall conclusion as our investigator, I thought the compensation needed to be different. After setting out the background to the complaint, I set out what I considered to be the relevant law and then how that applied to Mrs M's claims.

The law

s.75(1) CCA states:

> *"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."*

s.12(b) CCA states that a debtor-creditor-supplier ("D-C-S") agreement is a regulated consumer credit agreement being:

> *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier."*

An agreement is a s.11(1)(b) restricted-use credit agreement if it is a regulated CCA agreement used "*to finance a transaction between the debtor and a person (the "supplier") other than the creditor*".

s.187(1) CCA states:

> *"A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between [the creditor and the supplier, one of them and an associate of the other's or an associate of one and an associate of the other's]."*

s.184 CCA deals with what an associate is under the CCA. It reads:

> *"(1) A person is an associate of an individual is that person is –*
>
> *…*
>
> *(b) a relative of –*
>
> *(i) the individual, or*
>
> *(ii) the individual's husband or wife or civil partner, or*
>
> *…*
>
> *(3) A body corporate is an associate of another body corporate –*
>
> *(a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other; or*
>
> *…*

> *(5) In this section "relative " means brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, references to a husband or wife include a former husband or wife and a reputed husband or wife, and references to a civil partner include a former civil partner and a reputed civil partner and for the purposes of this subsection a relationship shall be established as if any illegitimate child, step-child or adopted child of a person were the legitimate child of the relationship in question."*

Finally, "*controller*" is defined in s.189 CCA as:

> *"controller", in relation to a body corporate, means a person –*
>
> *(a) in accordance with whose directions or instructions the directors of the body corporate or of another body corporate which is its controller (or any of them) are accustomed to act, or*
>
> *(b) who, either alone or with any associate or associates, is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the body corporate or of another body corporate which is its controller"*

For the reasons I set out in my PD, I did not need to set out the details of s.140A CCA.

<u>What arrangement was in place at the time Mrs M took out E membership?</u>

I noted that it was not in dispute that Mrs M used a credit card to purchase something and the use of a credit card can give rise to a claim under s.75 CCA.

Mrs M (along with her husband) entered into an agreement with EEL and it provided a subscription to "EE" at "Ruby Basic" level. So the services provided to E members were to be provided by the company EEL.

However, the payment was not made to EEL and Mrs M's credit card statement shows it went to RS. I could not see that Mrs M entered into any contractual relationship with RS. So the question I considered was what was the arrangement between RS and EEL? Having considered the law as set out above, if RS and EEL were "associates", I thought the right arrangement was in place for Mrs M to make a claim under s.75 CCA.

The sole director of EEL was SR.

RS was incorporated in Spain in 2007. DR was appointed as "Apoderado" at that stage. Several different appointments and resignations are recorded, but in November 2011, DR and another person called DV were both appointed as "Apo Sol". And in June 2012, DV was appointed as "Administrador Unico".

NewDay argued that "Apo Sol" means "apoderad sol", which means legal representative and not director. I looked at the basis upon which NewDay said this, however it had asked me to look at a website on which translators can help each other with questions of translations. It had not provided me with any legal basis for its assertion.

It seemed to me that the different terms were likely to be "Administrador Unico" meaning sole director and "administradores solidarios" meaning joint and several directors. But I made no firm finding on that point, as I did not think I needed to.

I noted that SR is DR's step-daughter, so they are relatives, and therefore associates, for the

purposes of s.184 CCA. As sole director SR was a controller of EEL under part (b) of the definition of “controller” in s.189 CCA.

Based on what I had seen, I was not sure whether DR was a controller of RS under part (b) of the definition of “controller” in s.189 CCA, however I did think he was a controller of RS under part (a). Under part (a) of the definition, a controller is not simply a registered director of a company, but also someone who can direct or instruct a company’s directors to act. This is a question of fact.

DR described himself as the CEO of E. In March 2019 he and his step-daughter, SR, were sentenced for consumer protection offences at Birmingham Crown Court. The sentencing remarks include the following:

> *“[SR[and [DR], you pleaded guilty to consumer protection offences in respect of your roles as Chief Executive in your case [DR], and as Managing Director [SR], of [E] Group Limited.”*
>
> *“It was through your efforts and others that the company went to considerable efforts to try and circumvent regulations which were intended to protect the clients or consumers, and you were seeking to avoid the need to engage in cancellation rights. So long as the document was signed by the customer or client, by any sales tactics, the money could be demanded. By your plea [DR}, and by my findings [SR], I find that that was done with your consent.”*
>
> *“Your basis of plea [DR] was put on a basis which was not acceptable to the Crown initially but before the case was called on in December for the trial of the issue to take place you accepted that as far as your involvement was concerned, the basis of your plea was on the understanding that in relation to all matters the actions were taken with your knowledge and consent.”*
>
> *“Customers' cards were used to make payments. The payments were made to a separate corporate entity, that was [RS] in Tenerife. This was done deliberately to avoid bank card fees, and customers indicated in the course of their individual transactions in some cases that they were surprised and concerned to find that their payments were being taken in that way.”*
>
> *“[EEL] was one of a group of companies that traded under an umbrella of the [E] Group. One of the other companies in the group was [RS] which was operated out of Spain or Tenerife. You [DR] were the Chief Executive Officer of the group, but over the period from 2012 to 2018 you were directly involved in the management in addition of [EEL].”*

I said it was plain that DR was a controller of RS, no matter who its registered officers were. The sentencing judge found as fact that he was the chief executive officer of the group that included that business, so I found it more likely than not that any directors of RS would have been accustomed to act after his directions or instructions.

The judge also found that DR was directly involved in the management of EEL between 2012 and 2018, so for the same reasons he is likely to have been a controller of EEL too in addition to being related to a controller of EEL. It follows I thought the two body corporates, EEL and RS, were associated under s.184(3)(a) CCA and there were the requisite arrangements in place for a s.75 CCA claim to be made.

<u>Was there a breach of contract?</u>

I thought that, once E stopped offering its services to its customers, Mrs M was unable to use any of her 'points' to purchase services. I had not seen that E (or any other business) had been able to provide anything to her under the agreement, so I thought it was plain the contract was breached when Mrs M was not able to access any benefits of the E membership that she paid for.

I thought that, had NewDay properly assessed Mrs M's claim, it would have said a breach of contract had taken place.

What does NewDay need to do?

Under s.75 CCA, NewDay is jointly liable for any damages that follow the breach of contract.

Mrs M says that she was unable to use any of the credits she bought before E went under. As she was no longer able to make use of these credits, I thought she had lost everything that she paid for membership.

So I proposed to direct NewDay to pay Mrs M £3,950 in compensation, with interest.

Was there a misrepresentation or a claim under s.140A CCA?

Mrs M says that E made statements to her that turned out to be untrue and induced her to take out membership. A lot of the allegations are around the availability or otherwise of discounts and I had not seen any evidence of what discounts were actually available to her. So, on the face of it, I did not think there was sufficient evidence to suggest a misrepresentation had taken place. But I made no firm finding on that, as I thought the claim for breach of contract was made out and the compensation for that was adequate to resolve the complaint.

For the same reasons, I made no finding on whether the relationship between Mrs M and NewDay was unfair under s.140A CCA.

NewDay's response to my PD

NewDay responded to say it did not agree with my PD. It argued that there was not a valid s.75 CCA for the same reasons it previously gave. NewDay did not accept that DR had any controlling position at RS, saying again he was a legal representative and not a director. It thought I had based my findings on what DR described his role as when sentenced by the court, rather than a finding upon what his legal role was at the Spanish company.

Mrs M's response to my PD

Mrs M acknowledged that the PD was received, but provided nothing further for me to consider.

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.

Under the rules that govern how I assess complaints, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice, when I make my decision.

When evidence is incomplete, inconclusive or contradictory, I reach my decision about the

merits of this complaint on the balance of probabilities. In other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Having considered everything again, I have come to the same conclusion as in my PD for the same reasons.

When considering s.189 CCA, there are two definitions of '*controller*' for the purposes of the CCA. One part is a question of law (part (b)) and one part is a question of fact (part (a)). I did not make a finding under part (b) as I could not determine the precise legal effect of DR's status within RS. However, I was satisfied that, under part (a), DR was a person "*in accordance with whose directions or instructions the directors of the body corporate*[3] *or of another body corporate which is its controller (or any of them) are accustomed to act*". I say that as it was found by a judge that DR was the Chief Executive of the E Group and that one of the companies within that group was RS. I think it is plain that the person or persons with legal control of RS would have been accustomed to act in accordance with the directions of instructions of DR, the person in control of the whole E Group and sentenced for criminal activities arising out of RS' activities. So I disagree with NewDay as I do not think the issue is determined solely by DR's legal status within RS.

If follows that I think DR was a controller of RS and was related to a controller of EEL (as well as a likely controller of EEL in his own right). That means I think there was the right sort of relationship in place for there to be a s.75 CCA claim and, for the reasons set out in my PD, I think NewDay should have accepted that claim.

Putting things right

I direct NewDay to pay Mrs M £3,950 in compensation. It should also add interest on this amount at the rate of 8% per year simple.[4] This interest is compensatory, so it is designed to compensate a consumer for the time they are out of pocket. Given that, I think the interest should run from the date each of the three payments were made for E membership to the date of settlement, so interest is paid on £500 from 16 September 2015, on £2,000 from 26 November 2015 and on £1,450 from 10 December 2015.

My final decision

I uphold Mrs M's complaint against NewDay Ltd trading as House Of Fraser and direct it pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 20 July 2022.

Mark Hutchings
Ombudsman

[3] Here RS
[4] NewDay must by law take tax from this, but it should provide Mrs M a certificate showing how much tax has been paid if she asks for one