DRN-3747113

The complaint

Mrs L, who is represented by a friend, Ms S, complains that National Westminster Bank Plc ("NatWest") rejected her claim under section 75 Consumer Credit Act 1974 in respect of the cost of a timeshare. Mrs L made the purchase along with her husband, but the credit card payment was made from her sole account and for the simplicity I will refer to Mrs L as the purchaser throughout this decision.

What happened

Mrs L made a number of timeshare membership points from a company I will call E. These were:

- April 2010: Sapphire membership valued at £5,495 of which £500 was paid by credit card.
- November 2012: Emerald VIP membership valued at £18,355 of which £1850 was paid by credit card and the balance was paid by bank transfer. (the subject of this complaint). The payment was made to a company I will call RS.
- October 2013: Diamond VIP membership valued at £11,645. The source of payments for this acquisition are not clear.
- September 2015: Optimum membership valued at £16,000.00 of which £16,000.00 was paid by debit card and the balance was paid by bank transfer.

She has explained that when she made the initial purchase she did so at a meeting where she was put under pressure to buy the membership. Subsequent purchases were made at three later meetings.

Under the terms of Mrs L'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 L says she did not use any of her credits.

In May 2018, E stopped offering services to its customers. E applied to be struck off the Companies House register in June 2018 and that happened in October 2018 – this was the formal process to bring the company to an end. Further, in March 2019, the Chief Executive of E (Mr O) and the Managing Director of E (Ms O) were sentenced in Birmingham Crown Court for various consumer protection offences related to E. Finally, in December 2019, RS was declared to be insolvent.

In 2018 she contacted NatWest around the time E ceased trading and made a claim that E had misrepresented the products. This was rejected by the bank. She said that she was making a s 75 claim for the sums paid on her credit card and listed the payments she had made in 2010, 2012 and 2015. The bank asked Mrs L for further information in support of her claim. It says it didn't receive the required information. On 6 September 2018 it wrote to her to say that the 2015 contract superseded the earlier ones and as it was not paid in full or in part using her credit card section 75 did not apply. It notified her of her right to bring the matter to this service.

In March 2020 Mrs L made a further claim under section 75 in respect of the 2012 purchase which was partly funded by her credit card. This was initially rejected by NatWest as it noted the credit card payment was made to a third party and it asked Mrs L if she had any evidence it was connected with E. She provided details that showed the two companies were connected. NatWest then asked for evidence that E had not been providing the service it had offered between 2012 and 2017. Mrs L explained that she had made contact with E by phone and it was impossible to obtain the detail the bank was seeking.

Mrs L brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. He noted Mrs L had made her claim only in respect of the 2012 purchase and he took the view that the claim for misrepresentation had been made out of time. On the issue of a breach of contract this had been dealt with by the bank in 2018 and it was not within the time limits which apply to this service.

Mrs L didn't agree. She said that E was closed down in 2018 with the directors being prosecuted and at that point she realised that she would not get the service for which she had paid.

I issued a provisional decision as follows:

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.

Where 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.

The 2018 and 2020 Claims

Mrs L 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 L said NatWest were equally liable for what she said had happened.

I noted that the claim made by Mrs L in March 2022 states that she believes E '*has breached the contract with me*'. She also set out why E had misrepresented the memberships it was selling.

I asked for further information from the bank about the claim made in 2018. Its final response letter in 2018 said that it should be read in conjunction with a letter dated 29 June 2018. It also supplied the letter sent by Mrs L making her initial s 75 claim. In this she makes a s 75 claim for misrepresentation and not breach of contract. In that claim she states: "*I feel the product was misrepresented by this company and would like to state the following points to substantiate my claim"* Later she says: "*We feel we have been completely misled and missold by the above name company…"*

NatWest asked for further information and says that as this was not provided it was unable to complete its investigation and so the claim was declined. In its final response letter dated 6 September 2018 NatWest said that has Mrs L had upgraded each new membership would have superseded the previous one. As her claim was in respect of the November 2012 payment this had been superseded by a new contract which had not been funded by her credit card. As such it did not address her claim of misrepresentation and the matter was not pursued.

I was satisfied that the claim in 2018 was only on the matter of misrepresentation and the issue of breach of contract was not raised by Mrs L. As such I said I could not consider the issue of misrepresentation since Mrs L failed to bring it to this service within the required time of six months from the issue for the final response letter by the bank. However, I did not consider a claim of breach of contract was addressed in 2018 and I could consider the complaint which arose from NatWest's refusal to uphold that claim in 2020.

I didn't go into the detail of the rules set out in the Limitation Act since it was clear that the event which gave rise to the claim of breach of contract occurred in 2018 and the breach of contract claim was made in March 2020 well within the relevant time limits.
In this decision I will use the word E to describe the E Group of related businesses. But Mrs L actually contracted with E Europe Limited (EEL) (a registered British company) and paid R S SL (a registered Spanish company). This is important when discussing the arrangements in place at the time of sale.

Connected Companies

I began by setting out the relevant law that I must consider, before saying how I think this applies to Mrs L's claim.

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 will come onto, I did not set out the details of s.140A CCA.

What were the arrangements in place at the time Mrs L took out E membership?
It was not in dispute that Mrs L 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 L entered into an agreement with EEL and it provided subscription to "*E Europe*". 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 L's credit card statement shows it went to RS. I couldn't see that Mrs L entered into any contractual relationship with RS. So the question I had to consider was what were the arrangements between RS and EEL? Having considered the law as set out above, if RS and EEL were "associates", I thought the right arrangements were in place for Mrs L to make a claim under s.75 CCA. The sole director of EEL2 was Ms O.

RS was incorporated in Spain in 2007. Mr O was appointed as "*Apoderado*" at that stage. Several different appointments and resignations are recorded, but in November 2011, Mr O and Mr DD and Mr DV were appointed as "*Apo Sol*".

And in June 2012, Mr DD and Mr DV were appointed as "*Administrador Unico*". It has been suggested that "*Apo Sol*" means "apoderad sol", which means legal representative and not director, but I am not aware of any legal basis for this assertion.

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

Ms O is Mr O's stepdaughter, so they are relatives, and therefore associates, for the purposes of s.184 CCA. As sole director Ms O is 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 Mr O is a controller of RS under part (b) of the definition of "controller" in s.189 CCA, however I do think he is 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.

Mr O described himself as the CEO of E. In March 2019 he and his stepdaughter, Ms O were sentenced for consumer protection offences at Birmingham Crown Court. The sentencing remarks include the following:

"[Ms O] and [Mr O], you pleaded guilty to consumer protection offences in respect of your roles as Chief Executive in your case [Mr O], and as Managing Director [Ms O], 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 [Mr O], and by my findings [Ms O], I find that that was done with your consent."

"Your basis of plea [Mr O] 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."

"[E] Europe Limited 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 [Mr O] 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 [E] Europe Limited."

I said it is plain that Mr O was a controller of RS, no matter who its registered officers were. The sentencing judge found as a fact that he was the chief executive officer of the group that included that business, so I find 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 [Mr O] 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 think the two body corporates, EEL and RS, are associated under s.184(3)(a) CCA and there are the requisite arrangements in place for a s.75 CCA claim to be made.

Was there a breach of contract?

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

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

Superseding Agreement

E offered 'credit' that you bought and could then use against lifestyle services, including holidays. So I believed every purchase was just for more credits, rather that extinguishing and then rebuying rights. If that was the case customers would be throwing away their existing 'currency'. Given the history of the company little detail is available, but I understood that each purchase pushed them into the next band of points ownership, which entitled them to more things.

This reinforced by the fact Mrs L retained the same membership number throughout. I also noted that each agreement didn't say that it superseded the previous one and it simply increased the number of credits available to the purchaser.

It was clear from reading the judgement against the directors E was not too concerned about the niceties of the law. In his opening remarks the judge said; "*And over a period of about two and a half years through the use of oppressive, aggressive and highly manipulative sales practices employees of the company and officers bullied and they frightened customers, often they were elderly, some indeed were infirm, into signing up for expensive services costing between on my estimate in some cases £5,000 and as high as almost £47,000 worth of services"*.

I didn't believe E took due regard of contract law or worried unduly about the contents of its contracts. I could only conclude that there is no basis for saying the contract which forms the basis of this complaint was superseded.

What does NatWest need to do?

Under s.75 CCA, I concluded NatWest was jointly liable for any damages that follow the breach of contract. Mrs L has said that she was unable to use any of the credits she bought before E went under. As she is no longer able to make use of these credits, I thought she has lost everything that she paid for membership.

So I proposed to direct NatWest pay Mrs L £18,355 in compensation. It should also add interest on this amount at the rate of 8% per year simple. This interest is compensatory, so it is designed to compensate a consumer for the time they are out of pocket.

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.

Both parties have accepted my provisional decision so I need not add anything further.

Putting things right

NatWest should pay Mrs L £18,355 plus annual simple interest at 8% from the date of the payments until the date they are refunded.

My final decision

My final decision is that I uphold this complaint and I direct National Westminster Bank Plc to refund £18,355 plus interest as set out above.

NatWest must by law take tax from the interest, but it should provide Mrs L a certificate showing how much tax has been paid if she asks for one.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 8 November 2022.

Ivor Graham
Ombudsman