DRN-3966576

The complaint

Mr M complains that he was misled into buying a holiday product with a promise that his existing arrangements would be cancelled. Because he paid in part using his credit card, issued by The Co-operative Bank Plc ("the Bank"), he says that, under section 75(1) of the Consumer Credit Act 1974, it is equally liable with the seller to meet his claims. Mr M is represented by a firm of solicitors, which I'll call "A".

What happened

Mr and Mrs M were members of a points-based holiday club, D. They held 500 membership points, which they could exchange for holiday accommodation. By around November 2014, however, they had decided that their membership no longer suited their needs, and they were looking for ways to relinquish or sell their membership. D did not have a process that allowed them to do so.

Mr and Mrs M became aware of a scheme which, Mr M says, initially indicated that it could sell timeshares and similar products. When they made further enquiries, however, A says that Mr M was told that there was in fact no real market for D's holiday club points and membership. Instead, Mr and Mrs M were encouraged to buy credits which they could use to obtain discounts on holiday products, including accommodation and flights. Any unused credits could then be sold back after 14 months for the same or more than Mr and Mrs M had paid for them. The seller in the meantime would arrange for Mr and Mrs M's membership of D to be brought to an end.

Mr and Mrs M agreed to the offer and to pay some £6,000 (I will discuss the exact price below). Mr M paid £1,000 of the price using his credit card.

A few days later, Mr and Mrs M became concerned when they made some further enquiries about the companies involved in the scheme. They sought to cancel the contract and asked the Bank to refund the £1,000 card payment – which it did.

Despite their request to cancel, Mr and Mrs M later made a further payment of £5,000 from their account with a different bank. They say however that the contractual arrangements have not been as they were told they would be. Because those arrangements were partly funded by the credit card payment, Mr M says that the Bank is equally liable with the seller to meet his resulting claims.

When A approached the Bank, it disputed that it had any liability to Mr M. In summary, it said that section 75(1) of the Consumer Credit Act does not apply, because:

- Mr M's contract was with one company but the card payment was made to a different company; and/or
- Mr and Mrs M cancelled the contract and received a refund.

When A referred the matter to this service, our investigator thought however that the complaint should be upheld. The links between the companies involved were such that

section 75(1) could apply; and the contract had not been cancelled, even though Mr M had received a partial refund.

Because no agreement could be reached, the case was passed to me for further consideration. I issued a provisional decision, in which I said:

A has referred a number of similar complaints to this service, representing complainants who say they have been misled in much the same way as Mr M says he was misled. In part, A's submissions are that the very similar recollections of a large number of customers are evidence of the seller's general practice and, therefore, of what happened to Mr and Mrs M. A has also referred to (and relies on) wider investigations into the seller and linked businesses.

I must however consider the individual circumstances of Mr M's complaint. General findings about the seller's activities and the recollections of other customers are not necessarily evidence of Mr M's treatment. They do however add a degree of credibility to his own claims.

The contract

The contract which Mr and Mrs M entered into was called a "Monster Credits Purchase Agreement (with Timeshare Trade-In)". "Monster Credits" was the name given to the credits which could be used to obtain holiday discounts. It was dated 27 November 2014.

The contract recorded that the seller was Complete Internet Solutions Ltd, a company registered in the Seychelles. Mr and Mrs M were to pay £6,050 for 285,333 credits. It also noted that they owned 5,000 points with D. Mr and Mrs M signed to say that they had read and agreed to be bound by the contract terms. They had the right to withdraw from the agreement within 14 days. The contract also indicated that the seller would not seek or accept any payment within that period.

I have seen a copy of the General Legal Terms provided in connection with a different customer's claim. I assume they are the same terms referred to in Mr and Mrs M's agreement. They explain the terms on which Monster Credits can be redeemed, but are silent on the issue of cancellation of timeshares or holiday club memberships and say nothing about the subsequent sale or redemption of Monster Credits. They include cancellation rights and key information, purportedly in accordance with The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.

The documents supplied also include an invoice and receipt dated 27 November 2014 from Hollywood Marketing SLU, a Spanish company. It records a payment of €1,145.79 plus tax of €80.21, giving (erroneously) a total of €1,200. It says that it is payment for vouchers to the value of £4,850 and notes:

"… This purchase does not form a part of any other contract or purchase that you may, or may not, be entering into now (or at any other time) from this, or any other, company. Nor does the payment constitute a "deposit" or an "Advance Payment" against any other product(s), contract(s) or purchase(s)…"

The card payment

Mr M made a payment of £1,000 on his credit card on the same day. His card statement and the Bank's records indicate that it was made to Hollywood Marketing SL and the till receipt shows that the equivalent was €1,226.00. As I have indicated, the payment was later refunded, when Hollywood Marketing SL did not challenge a chargeback request.

Section 75 of the Consumer Credit Act

One effect of section 75 of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- *that the lending financed the contract giving rise to the claim; and*
- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

In the case of credit card payments, the arrangements among card issuers, card schemes and recipients of card payments generally amount to "pre-existing arrangements".

The contract giving rise to Mr and Mrs M's claim in this case was with Complete Internet Solutions Ltd. The card payment was however made to a different company, Hollywood Marketing SL (which has since changed its name). The Bank's "pre-existing arrangements" were therefore with that company, not with Complete Internet Solutions Ltd.

However, under section 187 of the Act, a consumer credit agreement is to be treated as entered into under such pre-existing arrangements if it is entered into by the creditor and an associate of the supplier. A says that either (i) Complete Internet Solutions Ltd and Hollywood Marketing SL are associates or (ii) that Hollywood Marketing SL is the "supplier".

In the Act, "supplier" is defined by reference to the person with which the creditor has arrangements and by reference to the person which is a party to a transaction with the debtor. In any given transaction, however, it seems to me that there can only be one "supplier" and that, for the purposes of section 75, it must be a party to the underlying transaction and the party with which the creditor has arrangements.

Under section 184, however, a company is an "associate" of another company "… 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…"

The ownership of Complete Internet Solutions Ltd is hidden. I understand that is not unusual in the Seychelles, where corporate and nominee shareholders and directors are common. However, in October 2014 a power of attorney was executed by the company in favour of a Mr R. That document gave him wide powers to control the company and its finances. I think he can properly and fairly be said to have been its "controller" within the meaning of section 184 at the relevant time. A person does not need to be an officer or shareholder of a company in order to be a controller of it.

At the same time, a Mrs R – said by A to be the wife of Mr R – was the sole shareholder and administrator of Hollywood Marketing SL. I am satisfied therefore that it is likely that she was the controller of that company.

Spouses are "associates" of each other. I am satisfied therefore that the two companies were controlled by individuals who were associates of each other and that accordingly the companies were associates of each other. I do not believe it makes any difference that the second part of section 184(3)(a) uses "persons" and "controllers" (in the plural); by section 6 of the Interpretation Act 1978 the plural includes the singular.

I must therefore consider whether Mr M has a claim for misrepresentation against Complete Internet Solutions Ltd.

Misrepresentation

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

As I have indicated, the written contract terms were, at best, opaque, and dealt primarily with the Monster Credits scheme itself. A says that Mr and Mrs M were told that they would be able to sell those credits after 14 months and recover their expenditure. In addition, they would be released from their obligations to D.

On balance, I think it more likely than not that they were told that, or something very similar. The only reason they met with Complete Internet Solutions Ltd in the first place was because they wanted to be released from their holiday club arrangements. It seems unlikely that they wanted to spend more money on further arrangements of questionable use and value to them. And if the only benefit they were buying was the Monster Credits, there was no reason to include reference to the points they held with D. Nor was there any reason to describe the agreement as including a timeshare trade-in.

I believe too that what Mr M was told was not true. He and Mrs M have not been released from their holiday club membership. I do not believe either that there is any realistic market for the Monster Credits they bought. They are only likely to be sold in connection with a promise to release other clients from timeshare or similar obligations.

In my view, there's a high likelihood that a claim in misrepresentation – were it practical to bring one – would succeed.

The effect of the refund

Shortly after they entered into the contract with Complete Internet Solutions Ltd, Mr and Mrs M asked to cancel it – as they were entitled to do, according to the contract terms. The contract was not cancelled, however, and they later made a payment of £5,000. I note that this was slightly less than what was due according to the contractual documents. The Bank has suggested that this was because the cancellation was accepted and that new terms were agreed – so that the "new" contract was not financed by a credit card payment.

I note however that no new documentation was produced or signed. I think it more likely therefore that Mr and Mrs M were persuaded to continue with the existing arrangements but with a small adjustment in the price they paid.

As part of the overall arrangement, Mr and Mrs M received a book of vouchers which they could use to buy a range of goods and services. A says that these were routinely produced towards the end of the sales process. The sale of the vouchers was set out as a separate contract and was paid for separately, as I have described above.

Having reviewed the invoice and receipt associated with the vouchers, however, I do not believe it reflects the reality of what happened here. The payment recorded on the invoice was not the same as the card payment that was made, and was arithmetically incorrect too. And the card payment that was actually made was deducted from the overall sum due under the contract with Complete Internet Solutions Ltd.

It is not for me to speculate on the reasons for producing a separate invoice for vouchers, rather than including them in the overall package. In the circumstances, however, I am not persuaded that the purchase of vouchers recorded in the invoice constituted a separate contract which was financed by the card payment. Either it was (despite what is claimed on the invoice) part of the overall deal, or it was only partially funded by the card payment. It follows that the main contract was partly funded by the card payment and that Mr M has a

claim against the Bank in the same way he has a claim against Complete Internet Solutions Ltd.

Remedies

A argues that Mr M potentially has claims for misrepresentation and for breach of contract. I have discussed misrepresentation, but A says that the representations made could be incorporated as terms of the contract. I believe that is arguable.

The main significance of the distinction is in the remedies available. The usual remedy for breach of contract is to put the claimant in the position they would have been in but for the breach. In this case, that would most likely mean requiring the Bank to ensure that Mr and Mrs M's holiday club membership was cancelled or for it to take over that membership. Either remedy would require the cooperation of D, and there is no particular reason to think it would be forthcoming. It would not be fair in my view to make an award which cannot be enforced or which, for practical purposes, requires the agreement of a third party.

The remedies available for misrepresentation are generally more flexible.

Be that as it may, I think it is appropriate in this case to consider what would have happened if Mr and Mrs M had not been misled about what Complete Internet Solutions Ltd and its associates were providing. I have little doubt that they would not have agreed to anything and would not have spent the money they did on trying to end their holiday club membership.

That being the case, I believe that a fair and reasonable way to resolve this complaint is for the Bank to refund the payment made to complete the contract. That was a payment of £5,000 made on 22 December 2014.

Mr and Mrs M have not had the use of those funds in the meantime. So, I think it would be fair to add interest to the award. This service's usual practice is to award interest at 8% a year simple, reflecting the judgment rate and the likely cost of not having funds – by reference to the typical cost of borrowing. I see no particular reason to make a different award here.

I concluded – provisionally – that the Bank should pay Mr M £5,000, plus interest at 8% from 22 December 2014 until payment.

Mr M accepted my provisional decision. The Bank thought however that the interest rate was too high. Mr M had made the payment of the balance of £5,000 from a savings account which paid just 0.65% a year, so that was an appropriate rate. Mr M did not accept that offer, so I have reviewed the case for a final time.

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 only remaining issue between the parties is the rate of interest that should apply on the £5,000 which Mr and Mrs M paid from their savings account. As I indicated in my provisional decision, 8% a year reflects the judgment rate and the likely cost of not having funds.

The section of the Financial Ombudsman Service's website which provides technical guidance for financial businesses explains that we can make an award to compensate a customer who has been deprived of funds – as Mr and Mrs M were here. It says:

In most cases, we think a rate of 8% simple per year is appropriate to reflect the cost of being deprived of money in the past. We wouldn't normally use the current rates paid on deposit accounts as a benchmark. This is because the rates of interest customers have to pay in order to borrow are usually much higher.

8% is also the same interest rate that the courts would normally award. This rate takes into account that:

- *the rate is gross before tax is deducted*
- *it often applies to losses at times when different base rates applied*
- *current interest rates charged on overdrafts and loans may not have reduced in line with the base rate*

In some cases, we can use a different rate if we think it's fair. For example, if we think the money your customer was deprived of might have been used to pay a credit card bill, we might use the higher interest rate they were charged instead.

Having considered the issue carefully, I think that statement of our usual approach produces a fair outcome in this case. I see no reason to award a higher or lower rate of interest. It's likely too that, if Mr and Mrs M had successfully sued Complete Internet Solutions Limited in court, any judgment would have attracted interest at an annual rate of 8%. Mr M's claim against the Bank is, under section 75, a "*like claim*" to that which he has against the supplier; he should not be left worse off than if he had taken action against that supplier.

My final decision

For these reasons, my final decision is that I uphold this complaint. In order to resolve it in full, The Co-operative Bank Plc should pay Mr M £5,000, together with interest at 8% a year simple from 22 December 2014 until payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 14 March 2023.
Mike Ingram
Ombudsman