DRN-4068992

The complaint

Mr F complains that Creation Financial Services Limited treated him unfairly when it declined claims he made under section 75 of the Consumer Credit Act 1974 (CCA).

Mr F is represented by a claims management company but I'll refer generally to everything that's been said on his behalf as if Mr F had said it himself, to keep things simple.

What happened

In April 2019 Mr F and his wife purchased a holiday product when they were on holiday abroad. The cost was nearly £9,000 and Mr F paid over £5,000 of this using his credit card from Creation. Mr F says they were promised a number of exclusive member benefits and discounts by a salesperson (for a company that I'll call A) who also said membership was an investment and A could re-sell this for them at a substantial profit at any time.

A few months later Mr F found the website relating to the product purchased was inaccessible and A had gone into liquidation. With the help of a representative (that I'll call B) he complained to Creation (in February 2020) raising a claim under section 75. Creation didn't respond and Mr F referred the matter to our service.

One of our investigators contacted Creation and it said section 75 doesn't apply because the specific type of debtor-creditor-supplier (d-c-s) relationship needed to bring such a claim isn't present. Creation stated that Mr F made the credit card payment to A but A is not the supplier under the purchase agreement meaning there's a break in the d-c-s chain and Creation isn't liable under section 75.

Our investigator looked into what happened and she didn't recommend the complaint should be upheld. She was satisfied the relevant payment was made to A but the purchase agreement doesn't mention A – it says another entity (that I'll call K) ran the membership and arranged any benefits. The investigator considered whether the payment to A could be treated as a payment to K for the purposes of a section 75 claim (under section 184 CCA). She could see there were some claims made online about links between A and K but she was unable to verify these with a reliable source. And she wasn't persuaded that having the commercial relationship claimed or the same employee(s) was enough. The investigator didn't think section 75 applied and she considered it wasn't unreasonable of Creation to decline Mr F's claim.

Mr F didn't agree and he asked for an ombudsman to review the matter. He said, in summary, the supplier and A were associates as A was a marketing company linked to the supplier via a sales manager who was also an owner of A.

Having considered the evidence available, I wasn't minded to uphold the complaint. My reasons weren't the same as the investigator's however and I'd considered some additional issues. I thought it was fair to let the parties see my provisional findings in this situation – so they could comment further, if they wanted to, before I made my final decision. I issued a provisional decision to the parties on 23 March 2023. My reasoning is set out below (in italics) and this forms part of my final decision.

My provisional decision

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Where evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision 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.

I have to take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and (where appropriate) good industry practice at the relevant time, when I make my decision. And I want to assure the parties, if I don't address every single point that's been raised, it's not because I haven't thought about it. I have considered everything that's been said and sent to us but I'm going to concentrate in this decision on what I think is relevant and material to reaching a fair and reasonable outcome.

Section 75 CCA
Section 75 provides that the borrower under a credit agreement has an equal right to claim against the credit provider if there's a breach of contract or misrepresentation by the supplier of goods or services - in certain circumstances. So, I've considered section 75 when I've looked at whether Creation has taken appropriate steps in relation to this complaint.

I'm satisfied that one of the requirements under this section is there must be a valid d-c-s agreement. Section 75 says "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."

A d-c-s agreement is defined under section 12(b) of the CCA as "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". Section 11(1)(b) provides that a restricted-use credit agreement is a regulated consumer credit agreement "to finance a transaction between the debtor and a person (the "supplier") other than the creditor".

There seems to be no dispute that Mr F made the relevant payment in April 2019 to the company that I've called A. I've seen the purchase agreement that Mr F and Mrs F signed at the point of sale and I'm satisfied this says the supplier they contracted with was a Spanish company - that I will refer to as S. It should be noted that S traded under the name of the entity that I've called K (which is not the same entity as a UK company that bears a similar name).

I think Creation argues (essentially) that the payment to A means there wasn't a d-c-s agreement because the credit agreement was not made under "pre-existing arrangements, or in contemplation of future arrangements" between Creation and the supplier, S.

Section 187 CCA provides some assistance as to what amounts to "arrangements" between creditor and supplier as follows –

> *(1) 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 persons mentioned in subsection (4)(a), (b) or (c).*

(2) A consumer credit agreement shall be treated as entered into in contemplation of future arrangements between a creditor and a supplier if it is entered into in the expectation that arrangements will subsequently be made between persons mentioned in subsection (4)(a), (b) or (c) for the supply of cash, goods and services (or any of them) to be financed by the consumer credit agreement.

(3) Arrangements shall be disregarded for the purposes of subsection (1) or (2) if—
(a) they are arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and
(b) the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers generally.

(3A) Arrangements shall also be disregarded for the purposes of subsections (1) and (2) if they are arrangements for the electronic transfer of funds from a current account at a bank within the meaning of the Bankers' Books Evidence Act 1879.]

(4)The persons referred to in subsections (1) and (2) are —
(a) the creditor and the supplier;
(b) one of them and an associate of the other's;
(c) an associate of one and an associate of the other's.

(5) Where the creditor is an associate of the supplier's, the consumer credit agreement shall be treated, unless the contrary is proved, as entered into under pre-existing arrangements between the creditor and the supplier.

Like the investigator, I've considered whether S (the supplier) and A (the business that took the payment) are "associates" of each other (as referred to above) – meaning payment to A could be treated as a payment to S for the purpose of section 75.

The term associate is defined under section 184 CCA which says –

(1) A person is an associate of an individual if that person is—
(a) the individual's husband or wife or civil partner,
(b) a relative of—
(i) the individual, or
(ii) the individual's husband or wife or civil partner, or
(c) the husband or wife or civil partner of a relative of—
(i) the individual, or
(ii) the individual's husband or wife or civil partner.

(2) A person is an associate of any person with whom he is in partnership, and of the husband or wife [or civil partner] or a relative of any individual with whom he is in partnership.

(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
(b) if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by person of whom he is an associate.

(4) A body corporate is an associate of another person if that person is a controller of it or if that person and persons who are his associates together are controllers of it.

> *(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] .*

The information I have about both S and A is somewhat limited. An online search shows they've shared the same postal address overseas in the past and I accept the individual named by B may well have been involved with both companies.

B says this individual was an employee of one and an owner of the other, but I haven't seen any documentary evidence of that. And I'm not persuaded, in any event, that the relationships (as described by B) would be sufficient to mean that S and A are associates (as defined). In short, I don't think there's sufficient evidence to reasonably conclude that one controlled the other or they were both controlled by the same people or by associates of those people.

I recognise there can be other circumstances where "arrangements" exist between a creditor and a supplier without there being a direct contract between them, but I've seen nothing to show that's the case in the particular circumstances here. I'm satisfied Creation had an agreement with A under the Mastercard network that amounts to "arrangements". However I've seen no evidence of any agreement that A might have had with S regarding the relevant payment - and I've got nothing to show that Creation was party to (or even aware of) any such agreement.

For the reasons I've set out, I'm not presently persuaded that there was a d-c-s agreement here as required under section 75. I realise these are somewhat technical arguments and Mr F is likely to be frustrated by what I've said but the requirements of section 75 are strict. And I don't think it's unreasonable for Creation to decline his section 75 claim, in these particular circumstances.

Chargeback
Chargeback is a process that allows a customer to ask for a transaction to be reversed if there's an issue with the goods or services they've paid for. Chargeback wasn't mentioned specifically when Mr F contacted Creation in February 2020 to raise a claim under section 75. But Mr F said he hadn't received the services he paid for using his Mastercard and it looks as if Creation considered a chargeback - which I think was reasonable.

Creation told us it didn't pursue a chargeback at that time because it asked Mr F for additional information which wasn't received. And I've thought about whether Creation followed the relevant scheme rules when it decided not to raise a chargeback. I want to be clear however that I'm not deciding on the merits of any claim that Mr F might have.

There's no automatic right to a chargeback but we generally think a financial business should attempt one if there's a reasonable chance of success. Whether a chargeback succeeds or not is decided under the card scheme rules and it's for the financial business to decide if a chargeback is likely to succeed - albeit we'd expect it to make that assessment on a reasonable basis.

I've seen an email from a Creation "chargeback analyst" to Mr F's representatives dated 9 March 2020 requesting "some form of confirmation that the company is no longer trading". It looks as if B responded with evidence of A's status the following day. But I've seen nothing

to show that B provided any information about "the company" - S - which I'm satisfied is the supplier of the services Mr F says he didn't receive. It looks as if a UK registered company with a similar name to S was dissolved in December 2019 but I've got nothing to show that S ceased trading at the same time - or that any clear evidence of S's failure to provide services was supplied to Creation. I don't think it was unreasonable for Creation to take the view that a chargeback was unlikely to succeed based on the evidence it had at the time. And I can't fairly find it was wrong of Creation not to raise a chargeback in 2020.

I can see Creation wrote to B requesting information again in 2022 but I'm not clear about why that happened. The relevant scheme rules usually provide that a chargeback must be raised within 120 days of certain trigger events. I don't have enough information to say for certain when the 120 days might have started to run here but the rules also provide for a longstop of 540 days from the date of the transaction (in these particular circumstances). I'm satisfied the relevant transaction took place on 26 April 2019. So, I think any opportunity to raise a chargeback likely ran out in October 2020. And I'm unable to reasonably require Creation to provide a refund or do anything further.

I realise my provisional findings are likely to come as a disappointment to Mr F but, for the reasons I've set out, I'm not presently persuaded there are sufficient fair and reasonable grounds to uphold this complaint.

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.

I invited the parties to consider what I'd said and let me have any further submissions or evidence by 7 April 2023. Both parties have now responded. Creation accepts my provisional findings but Mr F disagrees. His representatives say (in summary):-

- the complaint was upheld originally by the investigator and should be upheld now;
- the original provider of the relevant product misled customers and that company was closed down by the Spanish authorities with its assets frozen but an individual manager later set up A which also sold the product;
- this product did not work, A closed down and it was very difficult for customers to get a refund because of the way things were set up - an internet search will show how many customers lost out in a similar way to Mr F.

I have considered the additional information provided carefully. I'm sorry if Mr F feels let down but I'm afraid nothing that's been said has persuaded me to change my mind. I acknowledge the investigator was minded initially to uphold this complaint. I'm satisfied however that she sent a revised view, after further evidence was provided, recommending the complaint should not be upheld.

I agreed with that outcome but I thought it was fair to issue a provisional decision - because I'd considered the additional matter of a chargeback and I wanted to explain in more detail why I didn't think there was a d-c-s agreement in place. B hasn't disagreed with what I said about the chargeback or provided any new evidence that persuades me it's reasonable to conclude there was a d-c-s agreement here - as required under section 75.

I realise Mr F feels strongly about what happened. I have sympathy for the situation he finds himself in and I appreciate he's probably frustrated by these somewhat technical arguments. The requirements of section 75 are strict however and, for the reasons I've set out already,

I'm not persuaded the sort of agreement required under that section was in place in the particular circumstances here. It follows, I can't fairly find it was unreasonable for Creation to decline Mr F's section 75 claim. And, as I've explained, I'm also unable to say it was wrong of Creation not to raise a chargeback.

I realise this outcome will probably come as a disappointment to Mr F but he's not obliged to accept what I've said, in which case it remains open to him to pursue the matter by any other means available.

My final decision

For the reasons I've given, my decision is I am unable to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 4 May 2023.

Claire Jackson
Ombudsman