DRN-4309600

The complaint

Mr S has complained about a timeshare he partly paid for using his Creation Financial Services Limited ("Creation") credit card.

What happened

On 5 November 2013, Mr S, alongside his wife, bought timeshare membership from a supplier when overseas in Malta ("Business A"). On 5 December 2013, Mr S paid for his membership using two credit cards – his Creation card and another card issued to him by a different business.[1] Mr S didn't make a payment directly to Business A, but to a different entity I'll call "Business H". In September 2014, Mr and Mrs S traded in the 2013 membership for a new timeshare with Business A.

In 2019, Mr S complained to Creation that the timeshare had been mis-sold and, because he'd paid for it using credit, Creation was responsible to answer his concerns. Amongst other things, Mr S made a claim under the Consumer Credit Act 1974 ("CCA"). Creation considered what Mr S had said, but thought there wasn't enough evidence of what Mr S said went wrong to uphold the complaint.

Unhappy with Creation's response, Mr S referred his complaint to our service. And whilst the complaint was with our service, Mr S explained that he's used his Creation credit card to pay off a loan used to buy the timeshare membership.

One of our investigators considered everything, but didn't think Creation had done anything wrong in turning down the claim. She thought that Mr S had used his card to pay off a loan and not to buy the membership directly from the timeshare supplier. That meant the credit card wasn't used to finance the timeshare membership directly and that Mr S wasn't able to make the CCA claims against Creation.

Mr S didn't agree with our investigator's view, explaining that our investigator had misunderstood how the card was used. He said that the loan provider, Business A and Business H were all part of the same group of companies, so they were all associated. What had happened was that he's initially agreed to take out a loan, but ended up not doing so. The loan was never actually drawn down, meaning the payment to Business H was to pay for the membership directly and not to pay off what had been borrowed. As Mr S disagreed with the investigator, the complaint was passed to me for a decision.

I considered all of the available evidence and arguments and, having done so, explained that I'd come to a different conclusion to our investigator. So I issued a provisional decision, setting out my thoughts, and invited both parties to respond before I issued a final decision.

When explaining how I came to my provisional findings, I explained that I'm required by DISP 3.6.4 R of the Financial Conduct Authority Handbook to take into account:

> *"(1) relevant:*

[1] A similar complaint concerning this other credit card is being considered separately by our service.

(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and

(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."

Our investigator thought that Mr S had used his Creation credit card to repay the loan he took, rather than pay for the timeshare membership directly. Having looked at everything and thought about what Mr S said, I disagreed. I said I understood why our investigator thought that, given that Business H was linked to both the timeshare supplier and the loan provider, that I called "Lender V". But I saw that two payments were made on the same day to Business H and I'd not seen any evidence that the loan was ever drawn down, so, on balance, I thought it was more likely the payment was used to pay for the membership directly.

I noted that Mr S set out a number of concerns about how Business A sold timeshare membership. I thought it would be helpful to summarise what those concerns were. But in doing so, I didn't set out in detail every concern Mr S had raised, rather I focused on the issues central to the outcome of this complaint.

Mr S said:

- Business A had been found by the Financial Conduct Authority ("FCA") to have acted as unauthorised credit brokers when arranging loans. Mr S thought the FCA found that Business A hadn't properly explained the loans to consumers, that proper credit checks weren't carried out and people were pressured into signing deals.

- Mr S initially agreed to take a loan from Lender V, albeit that he didn't actually draw down this finance. Business A weren't authorised to broker this loan and adequate credit checks weren't carried out.

- There were breaches of legislation during the sale, including the CCA, the Sale of Goods Act 1982, the Consumer Rights Act 2015, the Consumer Credit (Linked Transactions) (Exemptions) Regulations 1983, the Consumer Credit Act 2006, the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, the European Timeshare Directive 2008/122/EC and EU Directive 2015/2302.

- There was a Spanish Supreme Court decision that ruled that no payment could be taken (or credit agreement signed) within the 14-day cooling offer period after agreeing to purchase and it was illegal for memberships to not have specific details of the apartment available under the timeshare and for memberships to run more than 50 years.

- The annual maintenance fee costs weren't adequately explained at the time of sale.

- The rental programme that was available barely covered the cost of the annual management fees. Plus the guarantee of the rent covering the maintenance charges was removed in 2017.

- Mr S had to stay in 'lower grade' accommodation to that which his membership entitled him. This was a breach of contract.

- Mr S was told the membership was sold at a discount and it was actually worth around £16,000. He was told the membership was an investment and it would be

sold later at the higher rate.

In my decision I considered Mr S's concerns in a number of different sections.

Did Business A act as an unauthorised credit broker?

I noted that some loans are regulated by a regulator in the UK, currently the FCA. And to arrange or broker these regulated consumer credit loans, a business needed to be authorised by the UK regulator to do that. The FCA looked into a number of loans granted by a UK lender to pay for Business A memberships and found, for a period of time, the entity that arranged the loans wasn't authorised to do so.

Mr S paid for his timeshare membership by using two credit cards. In those circumstances the payment was taken through the credit card network and no regulated loans were arranged by Business A. So, I couldn't say that Business A acted as an unauthorised credit broker in Mr S's case as it didn't broker a loan for him – Mr S already had a credit agreement with Creation in place at the time of sale. This also meant that Business A didn't need to confirm Mr S's ability to repay his credit card when agreeing to sell membership.

I said that I knew Mr S initially agreed to take a loan from Lender V, but he didn't actually draw down this loan. I hadn't seen a copy of the loan agreement that Mr S signed, but from what I knew about Lender V, it was a company based in the British Virgin Islands ("BVI") that didn't provide consumer credit loans regulated in the UK. So I wasn't sure that Business A (a BVI registered company selling timeshares in Malta) needed UK regulation to broker a loan with a BVI registered lender. But I made no firm finding on that point as Mr S didn't take out a regulated loan with Creation, the business concerned about in this complaint.

Was there a breach of legislation and/or regulation when the timeshare was sold?

Mr S had pointed to a number of UK and EU Regulations that he said were breached during the sale. Mr S's agreement stated that it was governed by the laws and jurisdiction of the BVI, so I wasn't satisfied that the legislation and regulations referred to applied to the sale, some of which in any event postdate the sale. But even if they did apply, I didn't think that they helped Mr S with his claim.

Mr S had pointed to a Spanish judgment that he said was important when thinking about the sale and breaches of relevant law. In particular, that judgment held that payment shouldn't be made in the 14-day cooling off period and memberships shouldn't run over 50 years. But Mr S's agreement was entered into outside of Spain and with a business with no links to Spain, so it wasn't clear to me why Spanish law would apply to this agreement. But in any event, Mr S didn't make payment until a month after he signed up for the timeshare, which was when the agreement said payment was due, and I couldn't see he tried to cancel within 14 days of the sale. Further, the agreement gave rights to a specific hotel room and was set to run for 32 years, so complied with the principles Mr S said were set out in the Spanish judgment. Finally, even if the sale did breach Spanish law, I couldn't see why that meant Creation would have to compensate Mr S for what had gone wrong.

Further, Mr S hadn't pointed to any specific breaches of the highlighted legislation or regulations, nor said why he thought Creation would be liable for those breaches, apart from claims under the CCA. So, I considered those further.

Did Mr S have any claim under the CCA?

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 ("DCS") 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".

The upshot of this is that there needs to be a DCS agreement in place for the lender (here Creation) to be liable to the borrower (here Mr S) for the misrepresentations or breaches of contract of the supplier (here Business A). But, on the face of it, I thought there was no such relationship as Business A wasn't paid directly using the credit card, rather the payment was taken by Business H.

Mr S provided information that Business A and Business H were linked as they were all part of the same group of companies (as was Lender V). Based on that, I thought it was possible there were the right sort of arrangements in place for there to be a DCS agreement in place. But I didn't need to make a finding on that point as, even if there was a DCS agreement in place, I didn't think Mr S's s.75 CCA would succeed.

I said it was important to note that Mr S's purchase agreement financed by Creation started in November 2013 and ended in September 2014, when it was traded in for a new timeshare with Business A. So, when thinking about a breach of contract, it is only a breach of that agreement, while it was in place, that I could consider. For example, I was aware that in 2020 Mr S said Business A became insolvent. But, as that insolvency happened after the relevant timeshare membership ended, if Mr S lost holiday rights on Business A's insolvency, that couldn't amount to a breach of the 2013 agreement.

Mr S said that the annual maintenance fee wasn't made clear at the time of sale. I could see that the first year's fee was included in the purchase price, but then a fee would be due by the end of the year for the following year's membership. The contract said that the cost was to be set in accordance with the scheme rules.

As Mr S traded in his membership in September 2014, I didn't think he would have been charged a maintenance fee at all under his 2013 membership – the 2014 fee was included in the price paid and the 2015 fee hadn't fallen due at the time of exchange. Further, I couldn't see there was any alleged misrepresentation made about the maintenance fee, nor that the allegation that the costs could have been clearer could amount to a misrepresentation.

Mr S explained that he was offered a rental programme, so that he could receive money back by not using his timeshare. Mr S said he was told this would cover the annual cost of the maintenance fees, but this promise was removed in 2017. But, as set out before, the agreement that was subject to this complaint ended in 2014, so any change didn't apply to that agreement. In the evidence Mr S supplied, I saw that in 2013 he agreed to receive £1,600 for the weeks of timeshare accommodation in 2014 and 2015, so it appeared that any rental programme worked as expected.

I saw that Mr S stayed at Business A's resort in April and September 2014 before trading in his membership, and on neither of those occasions did he stay in the room associated with his membership. But I didn't think that amounted to a breach of contract because Mr S said Business A bought back the holiday weeks in 2014 and 2015 for £1,600. So, I thought Mr S couldn't have expected to stay in his designated room in 2014 given that he'd sold that right. Instead, he used a voucher to pay for his April 2014 stay, so I didn't think that accommodation was supplied under the 2013 membership. It wasn't clear on the evidence I had on what basis Mr S went on holiday in September 2014, but again, I didn't think it was a week provided under his timeshare agreement as he'd sold his entitlement the year before.

Mr S said he was told that his membership was worth more than he paid for it and it was an investment. I thought, if that was untrue, that could amount to a misrepresentation. However, I didn't think there was enough for me to say any such assertion was untrue. Mr S provided some handwritten notes he said were from the time of sale that record that he was told the timeshare could be worth £39,000 in 2022. Mr S also said he understood that the timeshare resale programme opened in 2015. But he exchanged the timeshare in September 2014, so I couldn't see he ever tried to sell it to see what, if anything, he could receive for it. Further, in the ten months he had the membership, he was able to sell two years of usage for £1,600 and his handwritten notes showed that maintenance fees were around £400 a year, so that shows a generated income in those two years. Further, when the agreement was exchanged, Mr S said he traded it in for the purchase value, so it looks like he didn't lose any money on it. Given all of that, I couldn't say there was enough to conclude his membership didn't offer the chance to make a return on what he paid for it.

In conclusion, I couldn't see that Creation should have accepted any claims made under the CCA.

Creation responded to say it had nothing further to add.

Mr S responded with more arguments he wanted me to consider. He provided a letter sent to Creation in March 2019 that dealt with the relationship between Business H and Business A. He also set out why he disagreed with my provisional decision. Mr S said that a UK court had found that Business A were an unregulated credit broker and that was relevant to his complaint. He also said that the credit card payments being taken within 14 days was illegal and pointed to problems he had with the exclusivity and availability of holidays and an increase in maintenance fees.

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've considered what Mr S has said, but it doesn't change the conclusions I reached in my provisional decision.

As I explained in my provisional decision, Mr S paid for his timeshare membership partly using his Creation credit card. Mr S has pointed out that a credit card works in a similar way to a loan, so he says this is similar to the unauthorised brokering that Business A had done in arranging loans. However, at the time of the sale, the credit agreement relating to that card was already in place. So, Business A didn't have to arrange anything for Mr S to have access to credit as he used his existing credit card. It follows that Business A wasn't acting as a credit broker in Mr S's case.

In my provisional decision, I considered whether Creation should have accepted a claim under the CCA. As I set out in that provisional decision, Creation are only responsible for

things related to the contract that was funded by its credit card, i.e. the one in place between September 2013 and September 2014. I understand that Mr S says the cost of maintenance fees increased, but I can't see that he was ever charged a maintenance fee under the relevant agreement. Nor can I see that Mr S had a problem with exclusivity or availability, given that he was able to holiday at Business A's resort in that time. Any problems he had with that after September 2014 aren't something Creation is responsible for. Finally, I still can't see that Business A (or Business H) took payment using his Creation card within 14 days of him agreeing to become a member. So I still don't think Creation needs to do anything further to resolve this complaint.

My final decision

For the reasons set out above, I don't uphold Mr S's complaint against Creation Financial Services Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 26 September 2023.

Mark Hutchings
Ombudsman