DRN-4355159

The complaint

Mrs L complains that NewDay Ltd unfairly declined her claim under the Consumer Credit Act 1974 ("CCA").

What happened

In October 2015, Mrs L, along with another, bought membership of a holiday club called "E"[1]. The total cost of the membership was £13,544.90 and Mrs L paid £2,504.90 using her NewDay credit card and the rest by bank transfer. The credit card payment did not go to E directly, but rather it went to another company called "RS". The bank transfer was paid to E.

Mrs L said that E offered legal support to get her out of an existing timeshare, but to get that she had to sign up to the holiday club membership. 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 purportedly 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. EEL applied to be struck off the Companies House register in June 2018[2] and that happened in October 2018. 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 L, 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 using a credit card, Mrs L said NewDay were equally liable for what she said happened.

NewDay responded to the claim, but said that as Mrs L 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.

Mrs L was unhappy with the outcome of her complaint, so referred it to our service. In doing so, she explained that she had already unsuccessfully tried to get damages from NewDay by bringing a court action in August 2019.

One of our investigators considered the fact that court proceedings had been brought and thought that this was a complaint that our service should not consider.

A copy of the court's judgment was provided. The judge said that the Particulars of Claim presented only referred to a claim for misrepresentation, however during the hearing it was clear that Mrs L wanted to make a claim for breach of contract. The judge said that claims

[1] In this decision I will use E to describe a group of related businesses. But Mrs L 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 is the formal process to bring the company to an end.

had to be set out clearly and an extract of the judgement reads:

> *"For all of those reasons, I am not enabled to make the findings of fact that would be essential for me to allow the claim as pleaded, either in full or in part. For that reason, …, I cannot ignore the law and the Civil Procedure Rules. Therefore I am afraid I must dismiss the claim."*

A copy of the Particulars of Claim was supplied which shows that the claim was made under s.75 CCA, but was in respect of misrepresentations made to Mrs L.

A different investigator considered the matter again and came to a different view. They said that the evidence suggested that the claim was dismissed without the judge making a finding on the merits – rather it was dismissed for procedural reasons. Given that, the investigator thought our rules meant we could consider this claim. They said they would go onto consider the merits of the claim in due course and asked for more information from NewDay.

NewDay disagreed and thought our service should have dismissed the claim. In response, I told NewDay that, having considered everything, I did not think the complaint should be dismissed. I thought that the judge had not made findings on the merits of the claim or made any findings of fact on the issues relevant to the decision. In light of that, I said I saw no reason to dismiss the complaint. I explained that I passed the complaint to an investigator to look at its substance and, if necessary, their view and the decision whether to dismiss the complaint could be reconsidered in an ombudsman's decision.

NewDay responded to explain that at the hearing, the person who had bought holiday club membership alongside Mrs L was cross-examined and a note of the hearing taken by NewDay's counsel was provided. NewDay pointed to parts of the judgement and argued that there was a clear finding on the merits of the case and the evidence before the court. NewDay argued that, at trial, the nature of the claim altered and a new cause of action was introduced. It said that, as their counsel managed to persuade the judge that the claim should be dismissed, it was not right that Mrs L was then entitled to a second attempt at the claim which circumvented the judge's decision. It said that, if Mrs L was unhappy, she should have appealed the judgment rather than coming to our service. In summary, NewDay said this was an attempt to relitigate the claim.

One of our investigators looked into the substance of the complaint and thought NewDay should have accepted the claim Mrs L 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 the purchase price with interest. Mrs L agreed with our investigator's view.

NewDay disagreed with the view, again saying that it did not think RS was sufficiently linked to EEL so that s.75 CCA did not apply to the purchase. It also provided new arguments why it thought the claim should be dismissed. As NewDay did not accept the view, the complaint was passed to me for a decision.

I considered all the available evidence and arguments to decide what was fair and reasonable in the circumstances of this complaint. Having done so, I disagreed with our investigator and issued a provisional decision setting out my thoughts, inviting both parties to provide any comments before I issued a final decision.

I explained that 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.

I said that 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.

But before I considered the substance of the complaint, I dealt with NewDay's arguments that this claim was one which I should dismiss.

In response to our investigator's view, NewDay provided more arguments. It pointed to the principles in *Henderson v. Henderson* (1843) 3 Hare 100 ("Henderson") and argued that Mrs L should have brought her 'whole case' at the time her claim went to trial and to bring a subsequent claim based on the same subject matter could amount to an abuse of process. NewDay argued that it was unlikely a court would reconsider Mrs L claim if pleaded as a breach of contract as this should have been advanced at the original trial. NewDay said that, if I were allow the complaint to proceed, I would be departing from the law, so I would need to provide good reason to do so.

The rules that govern how I look at complaints are set out in the Financial Conduct Authority's Handbook, specifically the DISP Rules. DISP 3.3 deals with complaints that I could dismiss without considering the merits. I noted that, for the avoidance of doubt, this concerned complaints that fell within the jurisdiction of the Financial Ombudsman Service, but ones in which I exercised my discretion to dismiss. I said that guidance is set out in DISP 3.3.4A for when to dismiss complaints such as Mrs L's. The relevant part reads:

> *"The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that:*
>
> > *…*
> > *(3) the subject matter of the complaint has been the subject of court proceedings where there has been a decision on the merits; …"*

Given that DISP 3.3.4A says the ombudsman 'may dismiss a complaint' and not 'must dismiss a complaint', I said the power to dismiss complaints is discretionary and not mandatory. So the question I had to consider was whether I should exercise that discretion in the circumstances of this complaint.

No further guidance is given by what is meant by "the subject matter of the complaint". I thought if a wide interpretation was taken, it could be wide enough to say that Mrs L's complaint about the sale of a holiday club membership was something that a court had considered, and about which, it had dismissed a claim. But a narrower interpretation would consider that a breach of contract claim had never before been considered by a court. So I considered all of this further.

I was conscious that the Financial Ombudsman Service considers complaints and not causes of action, so our role is different to the courts, albeit that some issues can be dealt with in both forums. In Mrs L's case, I said my role is not to determine the outcome of any potential claim she might have under s.75 CCA, rather it's to consider whether NewDay has acted fairly in turning down any claim. Similarly, it is for a court to determine how the principles from Henderson might apply to any further legal claim Mrs L made and that is not my role.

I was also satisfied that Mrs L's complaint was both one that falls within the jurisdiction of the Financial Ombudsman Service and one that we are competent to deal with it, so I did not think it should be dismissed as being something better dealt with by a court (see DISP 3.3.4A(5)).

I considered the judgment of the District Judge. The judge found that the Particulars of Claim set out a claim for misrepresentation and not for breach of contract. He stated that a claimant cannot plead misrepresentation and then, in the course of a trial, switch to a breach of contract claim due to CPR Part 16. The judge held that he was not enabled to make the findings of fact what would be essential to allow the claim *as pleaded*, in full or in part, and so he dismissed the claim (my emphasis).

The judge, in so far as he made any finding of fact, held that the claim for misrepresentation was in relation to £2,504 (and some pennies). Beyond that, he made no comment as to the facts of the claim. I thought it was plain that the judge did not make any finding on the merits of a claim for breach of contract – in fact, he specifically declined to do so.

Here, Mrs L referred a complaint to our service that NewDay had not properly considered her claim for a breach of contract made under s.75 CCA. That claim had never been the subject of court proceedings and I found there had never been a decision on its merits. So, whether or not this could fall within the ambit of DISP 3.3.4A(3), for the above reasons, I chose not to exercise my discretion to dismiss this complaint.

Having decided not to dismiss the complaint, I went on to consider its merits. In doing so, I considered whether NewDay fairly considered Mrs L's s.75 CCA 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*".

Here, NewDay answered Mrs L's claim and said it was declining it as there was no D-C-S agreement in place. Specifically because the credit card payment went to RS and not to E.

In summary, s.184 and 189 CCA states that a D-C-S agreement can still be in place if the entity that takes the payment is associated with the entity that provides the services. In this instance, I thought it was likely a court would find RS and E were associates for the purposes of the CCA. That was because a named person was sentenced for breaches of consumer protection law in relation to the operation of E and RS. He was found to have been chief executive of a group that encompassed both RS and E, and so I thought he was a controller of both companies, meaning they were linked in the way required by the CCA. It follows, I did not think NewDay were right to say there was no D-C-S agreement, and I thought about what it should have done when assessing the s.75 CCA claim, assuming that the D-C- S agreement was in place.

On the face of it, there was a breach of contract for which NewDay could be jointly liable under s.75 CCA. However, I thought it would have been fair for NewDay to still turn down the claim and I explained why.

Mrs L's claim was made under s.75 CCA. That is a legal claim, so both legal and procedural arguments are available to NewDay to respond to and resist any claim. Once Mrs L brought a complaint to our service that her claim had been unfairly declined, NewDay argued that the complaint should be dismissed for the reasons set out above. I explained why I was not dismissing the complaint, but I thought the same arguments gave NewDay a reason to turn down the claim.

Mrs L brought a case to trial against NewDay on the basis of a misrepresentation made by E about the nature of the holiday club membership. That trial was heard and a judge dismissed the claim. Mrs L raised a breach of contract claim arising out of the same holiday club membership – the same claim the judge said he could not determine at trial.

I thought that NewDay were entitled to turn down the claim on the basis that it would likely succeed in an application to have the claim stuck out as an abuse of the court's process under Part 3 of the Civil procedure Rules. The principle from the Henderson case is that a party to litigation is not able to raise in subsequent proceeding matters that were not, but could and should have been raised in earlier proceedings. I considered the law around this and I agreed NewDay would likely succeed in any application.

I thought the position was set out clearly by Mr Justice Coulson (as he then was) in the judgment in *Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC), at 107:

> *"… the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. The CPR are designed to avoid the litigation equivalent of death by a thousand cuts..."*

Here I had seen nothing to suggest that Mrs L was not able to bring a breach of contract claim at the same time as she brought her misrepresentation claim – there was no new evidence that she did not have available at the time. I understood Mrs L had professional representation at the time of her claim, so it was not clear to me why no breach of contract claim was made. However, as I thought the claim could have been made earlier, I thought NewDay would have acted fairly in turning down a claim for that reason.

Mrs L responded to my provisional decision, explaining why she disagreed with what I had said. She thought my provisional decision was a procedural exercise and that I failed to deal with the substance of her claim. She thought I had failed to properly consider the consumer protection issues that arose in her claim.

NewDay did not respond to my provisional decision.

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.

I have thought about what Mrs L has said and whether it should change the outcome I reached in my provisional decision. As detailed above, there have been criminal prosecutions arising out the activities of the companies Mrs L contracted with and paid, so I

think it is likely Mrs L has suffered a loss as claimed. But the issue for me is whether NewDay could be held responsible for that loss. I understand why Mrs L feels my provisional decision is procedural in nature, but for the reasons set out above, I do think NewDay has a reason not to pay compensation to Mrs L. It follows, I don't think it needs to do anything further to resolve this complaint.

My final decision

I do not uphold Mrs L's complaint against NewDay Ltd for the reasons set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 20 October 2023.

Mark Hutchings
Ombudsman