

The complaint

Mr D has complained that Creation Financial Services Limited ("Creation") has unfairly turned down a claim he made under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mr D was contacted by someone from a business I'll call "Business I". He says he was told that it would be able to make a claim on his behalf in relation to a timeshare he held, which would lead to him getting compensation. But for tax reasons, he'd have to fly to Tenerife to make the claim.

In November 2018, Mr D went to Tenerife and entered into an agreement with a different business, that I'll call "Business S". Mr D says this was for a number of things, including for Business S to make a claim on his behalf in relation to his timeshare and for Business S to supply travel services. As part of the deal, Mr D says he was told to make a payment by bank transfer to a different business, that I'll call "Business A", in relation to paying for the holiday services. Mr D paid Business S just over £1,000 using his Creation credit card and transferred £13,960 to Business A.

In November 2019, Mr D made a claim to Creation under s.75 CCA. Creation claimed back the amounts paid on the credit card to Business S under a 'chargeback' scheme, which is a way of lenders getting back money paid in certain circumstances. But it also considered Mr D's claim under s.75 CCA for the amount he paid to Business A. Creation said, as he paid the £14,000 to Business A and not Business S, it wasn't liable as the right sort of arrangements weren't in place for this claim under the CCA. Unhappy with Creation's response, Mr D referred a complaint to our service.

One of our investigators considered the complaint and thought Creation needed to do more to deal with Mr D's claim. She thought that Mr D's evidence was that everything had been sold to him by Business S and he only paid anything to Business A because of what he'd been told. So she thought the purchase should be treated as a package and all the agreements fell within a s.75 CCA claim. It followed, she thought Creation also needed to refund the payment made to Business A too.

Mr D agreed with our investigator's view, but Creation disagreed. It said Business A and Business S weren't linked in the way that meant it was responsible under s.75 CCA to refund anything paid to Business A. So Creation asked for the matter to be passed to an ombudsman for review.

I considered all of the available evidence and arguments and, having done so, agreed that Creation needed to do more, but for different reasons to our investigator. So I issued a provisional decision, setting out my thoughts, and invited both parties to comment before I issued a final decision. An extract of that decision reads:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint."

When evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is most likely to have happened given the available evidence and the wider circumstances.

There is no evidence from Business S or Business A, and the only evidence there is from the time of sale is from Mr D. He has provided all of the documentation he has, along with his memories. So when considering this claim, that is the only evidence there is available. I'm mindful that his memories may not be an accurate representation of the precise sales process as memories are imperfect. So I've had to weigh all of that up when deciding what I think most likely happened. I don't think it's unfair to Creation for me to do this – ultimately I must decide the complaint in front of me based on the evidence available.

When considering this complaint, I think it is important to set out what I find Mr D agreed to and with which business. I'll then consider any legal claims that Creation needed to consider, given the legal relationships between the parties. Finally, I'll consider whether Creation needs to do anything further to resolve this complaint.

Mr D's memories of the sale

Mr D explained that he attended a sales presentation in Tenerife with Business S on 5 November 2018. He had been invited to attend by Business I to see if he could reclaim money previously paid for timeshare membership. Mr D explained that he was told any claim made would be on a 'no win, no fee' basis.

When attending the meeting, it actually turned out to be a long sales presentation, where it was explained to him how a claim would be made and money recovered on his behalf. But he was also told by Business S that it had a travel company that took advantage of a tax position in Tenerife to offer discounted holidays that worked out 25% cheaper than UK 'high street' prices. And to get any money recovered from the timeshare providers without a tax liability, Business S got its customers to purchase holidays through their companies in Tenerife. Mr D explained that he understood all the companies involved in Tenerife were run by the same people, but they were set up separately as they were offering different services.

Mr D paid £1,000 when in Tenerife using his credit card and was told that everything else he paid would be held in a high interest account in Hong Kong and this money would be held to be spent on future holidays. But to comply with Tenerife tax rules, Mr D was told that he'd need to pay £6,500 on the day, which was done by borrowing money from Business S, and then transfer that money, plus an additional amount, later.

When Mr D returned to the UK, he says he was contacted by someone from Business S saying they were a credit broker and they could arrange a loan for Mr D through a British lender. However, Mr D saw this loan was being arranged for 'home improvements' and he says he didn't feel comfortable taking a loan for the wrong reason, so he paid the balance using his savings.

Mr D has explained that he was told, if he'd taken the loan, he wouldn't have needed to make any repayments as there was a 60 day period before repayments started and the timeshare reclaim funds would have been banked in that time. But he never received any money from a timeshare claim.

The available documents

Much of the documentation comes from the sale that took place on 5 November 2018 ("the Date of Sale"). I've seen a number of different documents, each signed separately by Mr D. It's not entirely clear what they relate to, so I've set them out in some length before I can say what I think happened.

There is a document on Business S headed paper called an 'Accommodation Contract'. An extract reads:

"Included in the initial subscription fee is 1 week of accommodation in any of the Canary Islands, provided and used, a second week reserved and paid for today...and the choice of 2 weeks of accommodation in any of the Canary Islands of your choice, reserved and paid for today... which can be modified if required."

The reservation details show that the 'Tourist Agent' was Business S and the price and other offers were agreed by Business S. The total price as £1,000 and it said payment was received on the Date of Sale.

I have seen a document on Business S headed paper that said Mr D was entitled to five worldwide holidays of seven nights each, plus £250 toward the cost of flights. These were described as a 'gift' and said they would be booked by Business S's reservations team. It is also said that the week of accommodation in the Canary Islands had to be used before these holidays were made available. This was also signed on the Date of Sale.

Another document on Business S headed paper, that was signed by Mr D on the Date of Sale, says that he accepted that the accommodation booked for him by Business S between 4 and 7 November 2018 was satisfactory and cost €587.45. On the same day he signed a separate document to say he had enjoyed the services provided by Business S.

On the Date of Sale, Mr D signed to say Business S had registered the amount of £6,500 on his behalf and he was expected to pay £2,750 on 9 November 2018. On the same day Mr D signed to give authorisation for £2,750 to be taken as payment on his credit card on 9 November 2018.¹

There is also a document titled "Subscription for the Exclusive Service" on Business A headed paper and it states that a payment of £14,000 was due to be paid by bank transfer by 5 December 2018. Details of Business A's bank are given, although this was given with a different transfer value of £13,960.

I've seen a document titled "Terms & Conditions" on Business A headed paper from the Date of Sale and signed by Mr D. It says that once the balance due was paid, Mr D was entitled to full usage of Business A's facilities. The agreement does say:

"The week of accommodation in the Canary Islands is to be used before the Exclusive use of the Travel Agency."

Other than that, the scope of services offered by Business A are not clear, although it appears to be a form of travel agency.

Finally, Mr D received a piece of paper saying he was entitled to 1,500 "Sovereigns", although it's not clear what these were or who was supplying them to Mr D.

¹ I noted that I couldn't see that this payment was ever taken

I have seen an email sent by Mr D to Business I on 13 November 2018. In it, he asked a number of questions about the agreement and also checked to make sure the payment had gone through, but he did say:

"I reread the agreement and I am concerned by the lack of details in it. During the sales presentation it was made clear that your research estimated that the average family would spend about three thousand pounds every year. And over a five year period this would equate to 15 thousand pounds. You also said that you could earn a high rate of return in Hong Kong OF 12.9 %. I was told that 15 thousand would be paid into my account and this was to be used to make the payments laid out in the agreement.

...

The sales agreement is lacking any detail as to what I am signing up for. Therefore I request that you provide me with a full explanation so that I will know just what I am paying the fifteen thousand for. You told me the other day on the phone that this money was ours to spend on holidays. I can not find any mention of this in the papers I have signed. On Friday you said [J] would phone me on Monday. He did, but he said that I would have to repay the loan which he could set up for us. I explained that the only way I would be able to repay the loan would be a successful claim."

I've seen a payment mandate that set out a bank transfer of £13,960 to be paid on 5 December 2018 from Mr D's bank account to Business A.

On 22 January 2020, Mr D received an email from a third party saying that Business S had ceased trading. The email says that any claim made against a timeshare provider was also on hold.

What were the agreements?

I find that Mr D purchased accommodation from Business S, for one week in Tenerife and for three further weeks in accommodation within the Canary Islands. This was paid for by using the Creation credit card.

Mr D also purchased a service of some kind from Business A. I find this was arranged by Business S, most likely acting as agents for Business A, as Mr D only recalls one meeting on the Date of Sale when he agreed to go ahead with the agreements.

Further, Mr D could only use the travel agency services of Business A after he used accommodation in the Canary Islands. But the only reference to such accommodation was in the agreement with Business S. It follows, I find that these agreements were entered into at the same time and at the same meeting and were 'linked'. By that I mean the performance of one agreement depended on the performance of the other.

I also think Business S agreed to make a claim on Mr D's behalf in relation to an existing timeshare membership he held. Mr D hasn't provided anything on Business S headed paper relating to any timeshare claim, but I do think the potential claim was talked about. I say that for several reasons. First, Mr D has set out in some detail his recollections of the sale and he said that Business S explained how it would make the claim on his behalf. Secondly, Mr D has provided documents from the Date of Sale that include papers stating that UK banks and review sites had given negative coverage about the reclaim scheme, but that was because it was in their interests to do so. Thirdly, Mr D says in his email to Business I of 13 November 2018 that he

needed the claim to be able to repay any loan taken to pay for the agreements. Finally, there is a handwritten note from the Date of Sale that says:

“This will put money in a account to be spent over the next five years. This can be of set against the money they will recover ...the next 60 DAYS”.²

On balance, I think the evidence suggests that Mr D contracted with Business S to make a claim on his behalf in relation to his existing timeshare. It is not clear what that claim was actually for, but it appears that Business S said Mr D would get a pay out within 60 days of the Date of Sale, which would be enough to cover the cost of the things he agreed to buy.

Was Creation jointly responsible for any breach of contract or misrepresentation?

S.75 CCA states that in certain circumstances, when a debtor has a claim against a supplier in respect of a misrepresentation or breach of contract, they will have a like claim against the creditor. So here, Mr D (the debtor) was asking Creation (the creditor) to answer his claims about what he said had gone wrong.

But this doesn't apply to every claim Mr D may have. Creation is only responsible for claims when there is a debtor-creditor-supplier (“DCS”) agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit card. In Mr D's case, he paid Business S directly with his credit card and it is not in dispute that Creation could be held jointly responsible for any claim of a breach of the contract with Business S that arose from that transaction or of a misrepresentation that led Mr D into entering into agreements with Business S.

However, I don't think Creation had to answer any claim for breach of contract by Business A. That was because anything supplied by Business A was outside of the arrangements between Mr D, Business S and Creation. Under the CCA, it is possible Creation would have to answer a claim if it could be shown Business A and S were 'associates' (s.184 and s.187 CCA). Having considered everything, I can't see they were. But, for the reasons I'll come to, that doesn't make a difference in this case.

Did Creation properly consider the claims?

I don't think it's in dispute that Mr D didn't receive any of the services he expected to, either from Business A or S, save for accommodation in November 2018. Creation made a chargeback claim against Business S, so I think it accepted this by doing so. But Creation has said that it wouldn't pay anything in respect of the payment to Business A. For the reasons set out above, I agree that Creation isn't responsible for any breaches of Business A's agreement. And the damages normally paid for a breach of contract would mean that Business S's breaches wouldn't mean anything paid to Business A would need to be returned.

However, I do think Creation needed to properly assess any claim for misrepresentation, here that the misrepresentation was fraudulent or negligent. The normal way to remedy any such claim would be rescission of the contract entered into and damages to put Mr D in the position he would have been in had the misrepresentation not been made. So I first need to consider whether Business S, and thereafter Creation, could be liable for a misrepresentation.

² I said that this note wasn't complete, so this was my best reading and interpretation of the note

I think Business S made a number of representations about how it could make a claim in respect of Mr D's timeshare. In particular it said a claim could be made and that it would be paid within 60 days.

I also think Business S told Mr D that money he paid would be held in a high interest account in Hong Kong, which could then be used for future holidays and the money he paid to Business A was for this purpose. This fits with the handwritten note from the Time of Sale, as well as the email later sent by Mr D to Business I. But it also fits with the document from Business S that says it registered an amount of £6,500 on his behalf and he had to make a payment towards that a few days later.

For there to be a misrepresentation there needed to be an untrue statement of fact or law made by one party to another, which induces the party receiving the statement to enter a contract, thereby causing them loss. A statement of opinion can be a misrepresentation if the opinion amounts to a statement of fact and it can be proved that the person who made it did not hold that opinion or could not reasonably have held it.

Here Mr D has set out a number of things that could amount to misrepresentations. The specific things Business S said would happen with any claim were clearly representations made to Mr D of things that it could cause to happen. But those were statements of fact that I don't think were true. I think Business S must have known it couldn't guarantee any payment of compensation, within a specific timeframe or at all, or that it had no reasonable grounds for believing it could do so. Any claim made to Mr D's timeshare provider was simply that, a claim, with no guarantee it would be paid or how much. Further, claims like that take time, so it was fanciful that anything would be paid within 60 days. I can't see how Business S had any reasonable grounds to believe it could procure the outcome it said it would. It follows, I think that amounted to a misrepresentation.

I also think it was a misrepresentation that funds Mr D sent Business A would be held in a high interest account in Hong Kong for use for future holiday purchases. From what I've seen, I can't see those funds were ever put into such an account. I also think Business S must have known that was untrue as it said it was registering the amount of £6,500 for Mr D, but there is no evidence to suggest it ever did that, nor that it ever had any intention of doing so.

If I think about what would have happened had Business S not misrepresented that it could get Mr D a sum of money within 60 days, I don't think he would have entered an agreement with Business S to make a claim. But I also found that Mr D was told by Business S that funds he sent to Business A as part of the deal were to be held on his behalf in a high interest account. I think the central reason he entered into any of these agreements was the guarantee of a large sum on money in the near future from a claim and the possibility of savings on future holidays. And had he known the reality that there was no guarantee of a successful claim or that the funds weren't held in the way proposed, I don't think he would have entered into any of the agreements. It follows, I think Creation needs to pay the amount paid to Business A as part of Mr S's s.75 CCA claim, to put him the position he'd be in had the misrepresentations not been made."

I explained that Mr D needed to provide evidence of what had been paid to Business A before I could direct Creation to make any further payment.

Mr D responded to say he agreed with my provisional decision. He provided an email showing that a bank transfer was arranged to Business A for £13,960 on 5 December 2018.

Creation responded to say it accepted the email as evidence that the payment was made. But it was unable to find a link between Business S and Business A and that the evidence appeared to show that Mr D had two separate contracts with two separate companies. Without evidence that the companies were linked, it wouldn't accept my provisional findings.

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.

Having done so, I see no reason to depart from my provisional findings.

I note that Creation have not questioned any of the findings I reached in my provisional decision. So, for the reasons set out above, I find that Business S misrepresented to Mr D that it would be able to make a successful claim on Mr D's behalf within 60 days and that funds Mr D sent to Business A would be held in a high interest account in Hong Kong. I note that it is not in dispute that Mr D paid £13,960 to Business A.

Creation has said that there is no evidence that Business S and Business A are linked. I dealt with this in my provisional decision and said:

"anything supplied by Business A was outside of the arrangements between Mr D, Business S and Creation. Under the CCA, it is possible Creation would have to answer a claim if it could be shown Business A and S were 'associates' (s.184 and s.187 CCA). Having considered everything, I can't see they were."

But I don't think Creation needs to answer for the monies paid to Business A because Business A were linked to Business S, the company paid using the credit card. Rather, the amount paid was a direct result of the misrepresentations of Business A, which is something Creation is responsible for under s.75 CCA.

Creation has not disputed my finding that Business S misrepresented things to Mr D and that that was done knowingly, in other words that Business S must have known what was said was untrue. That means in a claim for misrepresentation against Business S (and through s.75 CCA, Creation as well), Mr D is entitled to both rescission of the agreement and damages that cover losses as a direct consequence of the misrepresentation. And, as I said in my provisional decision, I don't think he would have made any payment to Business S or Business A had he known there was no guarantee of a successful claim. So the reason I thought Creation needed to make a payment to Mr D in respect of his payment to Business A was due to Business S's misrepresentations and not due to the links between the two companies.

Putting things right

Creation needs to pay Mr D £13,960, plus 8% per annum simple interest from 5 December 2018 to the date it pays compensation. By law Creation may need to deduct tax on this interest. If it does, it should give Mr D a certificate showing what tax has been paid.

My final decision

I uphold Mr D's complaint against Creation Financial Service Limited and direct it pays compensation as detailed above.

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

Mark Hutchings
Ombudsman