DRN-4709583

The complaint

Mrs C complains that Capital One (Europe) plc ("Capital One") unfairly dealt with her claim under section 75 of the Consumer Credit Act 1974 ("the CCA") in relation to transactions she made using her credit card to purchase a timeshare product.

What happened

In or around July 2018, whilst on a free promotional holiday, Mrs C (together with another party) attended a sales meeting with a timeshare supplier, who I'll refer to as K. During that meeting, Mrs C (jointly with the other party) agreed to purchase a timeshare product from K consisting of membership of a holiday cub which included a points allocation to be used to secure accommodation and holiday experiences under the club scheme.

The purchase price agreed was £3,500 requiring an initial deposit of £350, with ten subsequent monthly payments of £315 between September 2018 and June 2019. These payments were made using a Capital One credit card in Mrs C's sole name.

In or around July 2022, using a professional representative ("the PR"), Mrs C submitted a claim to Capital One pursuant to section 75 of the CCA ("S75"). The PR allege that Mrs C was pressured into entering into the purchase agreement following a lengthy sales meeting. They further allege that K had misrepresented the timeshare product to Mrs C. And it was those misrepresentations that had persuaded her to agree to the purchase.

In particular, the PR allege K told Mrs C that the purchase would allow her to upgrade to a two bedroomed accommodation unit providing a more spacious and comfortable stay. But since making the purchase, Mrs C has found there is a substantial lack of availability at the times she wished to travel. The PR says this is contrary to the flexibility she was initially promised by K.

Further, the PR point out that Mrs K's partner has since retired for personal reasons, which has limited their income and ability to travel and use the product.

In response to Mrs C's claim, Capital One asked for various information and evidence in order that they could assess her claim more fully. But they say that information wasn't received. And in the absence of any evidence to support the various allegations, they weren't able to progress Mrs C's claim. In addition, Capital One noted that payments under the agreement were made to a trustee company (who I'll refer to as "F") rather than to K. As a result, they didn't think the necessary Debtor-Creditor-Supplier ("DCS") arrangement existed, as required under S75. And so didn't uphold Mrs C's claim.

The PR didn't agree with Capital One's findings and referred Mrs C's claim to this service to consider. Capital One told this service they hadn't received a complaint about the outcome of Mrs C's claim. However, they didn't think they'd done anything wrong by not upholding it.

One of this service's investigators considered everything that had been said and provided. Having done so, they also didn't think the necessary DCS relationship existed. And because of that, they didn't think Capital One's failure to uphold Mrs C's claim was unfair or unreasonable.

The PR didn't agree with our investigator's findings and referenced the outcome of a Judicial Review ("JR") relating to this service's treatment of complaints and our interpretation and adherence to legal principles that may apply. The PR feel this service is free to depart from

applying the law in order to reach, what they believe, is a fair and reasonable outcome for Mrs C. In doing so, they also reference findings relating to the sale of *"fractional"* timeshare products and referred to a previous decision made for another (different) consumer.

As an informal resolution couldn't be reached, Mrs C's complaint has been passed to me to consider further. Having done that, I reached a similar outcome to that of our investigator but for different reasons. And there were various aspects I considered which I feel weren't fully addressed previously. Because of that, I issued a provisional decision on 29 February 2024 giving the parties to this complaint the opportunity to respond to my findings before I reached a final decision.

In my provisional decision I said:

> Relevant considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides consumers with protection for goods or services bought using credit. Specifically, where there's evidence of misrepresentation or breach of contract. Mrs C made payments for the timeshare product in question using her Capital One credit card. So it isn't in dispute that S75 applies here. This means Mrs C is afforded the protection offered to borrowers like her under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this complaint.
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> It's important to distinguish between the complaint being considered here and any legal claim. The complaint this service is able to consider specifically relates to whether I believe Capital One's failure to uphold Mrs C's complaint was fair and reasonable given all the evidence and information available to me, rather than actually deciding any legal claim.
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> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service and this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.
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> Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.
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> The complaint submitted
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> From the information available, it appears the PR (on Mrs C's behalf) has submitted various separate claims to Capital One pursuant to S75 relating to various timeshare purchases she made from K. For clarity, the complaint I'm considering here specifically relates to the purchase she made in or around July 2018, and the related claim.

[1] Dispute Resolution: The Complaints sourcebook (DISP)

[2] The Financial Conduct Authority

Further, and as I've already said, this service can only consider any complaint relating to the outcome of that claim – not the claim itself. Ordinarily a claim for misrepresentation under S75 is a 'like' claim. For example, where a claim under the Misrepresentation Act 1967 is being made (against K in this case), S75 makes provision for a 'like' claim against the lender (here that's Capital One) – effectively mirroring the misrepresentation claim. As I've already said, this service is only able to consider the complaint about Capital One's handling of that claim and the outcome they reached. I unable to decide the legal claim itself.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by K in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that K made false statements of fact when selling the timeshare product. In other words, that they told Mrs C something that wasn't true in relation to the allegations raised. I would also need to be satisfied that the misrepresentation was material in inducing Mrs C to enter into the purchase contract. This means I would need to be persuaded that she reasonably relied upon false statements when deciding to buy the timeshare club membership and associated points..

From the information available, I can't be certain about what Mrs C was specifically told (or not told) about the benefits of the product she purchased. It was, however, indicated she was told these things. So, I've thought about that alongside the evidence that is available from the time. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mrs C's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says she were told.

I've considered a document entitled *"Application for membership of* [the club] *Sale and Purchase Agreement"*, as provided by the PR.

Note 5 of the agreement that Mrs C appears to have signed says, *"You acknowledge that you have read and agree to be bound by the attached terms and conditions".*

Part 1, note 3 of the agreement states *"Members of The Club are entitled to utilize the Points held by them to reserve Use Rights at accommodation within The Club and to utilize other benefits, subject to availability…".* It goes on to say, *"Members are entitled to use the Points they have acquired to holiday (subject to availability) at any of the accommodation available to The Club".* Further, *"Members' requests for the use of accommodation within The Club are granted and confirmed by* [the reservations company] *on a first come first served basis".*

Note 4 says, *"Members bookings for accommodation within The Club may be made not more than twenty four (24) months in advance, prior to the start date of the accommodation requested".*

This is further confirmed in note 9 where it states, *"membership of The Club entitles the Member to use their Points to reserve Usage Rights in accommodation within The Club or to reserve certain products or services offered by third parties, subject to availability and to the restrictions referred to below".*

Note 10 states, *The services and facilities that are made available* […] *will vary between individual resorts".*

Part 3, note 1 states, *the ability to book accommodation forming part of The Club* […] *is allocated subject to availability, and on a first come first serve basis.* And goes on to say, *"The Developer and or* [the reservations company] *cannot guarantee that reservation requests will be satisfied, and Members should ideally make their reservations as far in advance as possible in order to have the best chance of securing their desired accommodation* […] *for the desired period.*

I think it was made quite clear within the agreement that there was no guarantee Mrs C could secure accommodation of her preferred type and size at her preferred location at all times and bookings were subject to availability and on a first come first serve basis. So, based upon what I've seen and the evidence available, I can't reasonably conclude that K did represent the product in the ways alleged

Furthermore, the PR also haven't provided anything to support Mrs C's assertion that she was unable to complete her preferred booking choices. And they haven't provided any details or evidence to show how far in advance the bookings were attempted, or the holiday periods sought. It appears Capital One did ask for more information, including details of those attempted and failed bookings. But they also didn't receive that information, so weren't able to consider her claim further.

Was there a valid DCS relationship?

The purchase application and agreements clearly defines the various parties involved in the transaction and membership together with their roles. In particular:

- The Developer – a company I'll refer to as "I".
- The Master Distributor – a company I'll refer to as "I2"
- The Marketing Agent – K
- The Reservations Company – a company I'll refer to as "K2"; and
- The Trustee – a company I'll refer to as "H".

Mrs C's Capital One credit card statements show that the payments she made (under the agreement) were made to a different company (who Ill refer to as "F").

Under Section 75 of the CCA, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision. Payments under the purchase agreement were made to another entity rather than to the supplier directly – or indeed any of the entities detailed within the agreement. Because of that, It's now possible that there was no such relationship in place following the High Court's judgment in the case of Steiner v National Westminster Bank PLC [2022].

However, given the facts and circumstances of this complaint and my overall outcome with those in mind, I don't think it's necessary to make a formal finding on the DCS arrangement for the purpose of this decision, because I don't think the complaint should succeed on its merits anyway.

Oher considerations

It's alleged that Mrs C was pressured in to entering into the agreement as a result of a lengthy sales meeting. A claim under S75 is limited to evidentially supported allegations of misrepresentation and/or breach of contract. So, I'm unable to consider any allegations of pressure under that provision.

Further, the PR have explained circumstances which have led to Mrs C's income and ability to travel and use the product purchased being limited. Again, this isn't something that can be considered under S75, and in any event, I've not seen anything to suggest this could've been reasonably foreseeable by K and consequently Capital One..

I think it's also important to recognise that the complaint is Mrs C's to make as she is the claimant here, and consequently the only eligible complainant. So, whilst I sympathise with the situation she finds herself in, as her partner wasn't party to the claim and subsequent complaint, I don't believe this aspect can be considered further.

The PR have referred to various rulings and other decisions relating to this service's powers and jurisdiction and the experiences of other consumers. Whilst I acknowledge what they've said, my own findings suggest that the rejection of Mrs C's claim doesn't appear unfair or unreasonable. And I don't believe the circumstances and findings relating to other consumers help me in establishing the facts of what actually happened in Mrs C's particular case and experience.

Summary

I want to reassure Mrs C that I've considered her complaint very carefully, together with everything that's been said and provided by all the parties involved. Based upon the information and evidence available and my findings above, I can't reasonably conclude that Capital One's failure to uphold Mrs C's claim was ultimately unfair or unreasonable. I realise Mrs C will be disappointed but, for the reasons above, I don't currently intend to ask Capital One to do anything more here.

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.

On behalf of Mrs C, the PR acknowledged receipt of my provisional decision and confirmed they had nothing further to add. Capital One haven't responded. However, given my provisional findings, I don't think I need to delay issuing my final decision any longer.

With nothing new to consider or anything that persuades to vary from my provisional findings, my final decision remains unchanged. So, I won't be asking Capital One to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mrs C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 23 April 2024.

Dave Morgan
Ombudsman