DRN-4905318

The complaint

Mrs C, who is represented by a professional representative ("PR"), complains Capital One (Europe) plc unfairly declined a claim she has brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

In March 2020, Mrs C purchased an upgrade to her existing holiday club membership from a timeshare supplier ("the Supplier"). The deal involved trading in her existing holiday club membership for a new fractional ownership membership with the club. The total purchase price was £24,259 and after the value she received for her existing holiday club membership, Mrs C needed to pay an extra £2,604, which she paid using her Capital One credit card. However, she paid a different business I'll refer to as "PHR", rather than paying the Supplier directly.

PR made a claim to Capital One under s.75 CCA. In short, it said the Supplier misrepresented things at the time of the sale and that, under s.75 CCA, Capital One was jointly liable. Capital One noted the payment had been made to a third party and asked for further information. It subsequently concluded that as PHR was paid using the card and the Supplier was not paid directly, it wasn't responsible to answer the claim made under s.75 CCA because there was no debtor-creditor-supplier agreement.

After PR referred Mrs C's complaint to our service, one of our investigators considered it, but did not think Capital One needed to do anything further. She found that because Mrs C's card payment had been made in favour of PHR, and not the Supplier, there was no debtor-creditor-supplier agreement. And so she found the provisions of the CCA to which PR referred did not operate in the way PR had argued. The Investigator also concluded that the strength of the evidence didn't suggest that there had been any misrepresentations by the Supplier and she was unable to conclude that Capital One was wrong to decline the Section 75 claim.

PR responded to our investigator to say it disagreed with the outcome. It did not disagree with our investigator's finding regarding the creditor-supplier agreement, but said that as the correct legal answer did not lead to a fair outcome, the law should be disregarded in this complaint.

As the parties couldn't come to an informal agreement on the outcome of this complaint, it was passed to me for a decision.

In my provisional decision I explained that:

"*When deciding complaints, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:*
"(1) relevant:
(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."

When the evidence is incomplete, inconclusive 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.

Having considered everything, I don't think there's enough evidence for me to say that this complaint should be upheld – I'll explain my reasons below.

This case is one of four transactions involving the purchase of timeshare membership and/or upgrade agreements, which Mrs C has at least partly paid using her Capital One credit card. A fifth case was also considered by the Financial Ombudsman Service, but Capital One wasn't the respondent in that case. This is the fourth and final transaction in the chain and this decision only deals with the purchase Mrs C made in March 2020.

Capital One has said the necessary debtor-creditor-supplier agreement isn't in place for Mrs C to be able to hold it liable for what's happened under s.75 CCA. It says this is because the credit card payment didn't go directly to the Supplier, and instead went via a third-party, PHR.

The CCA makes provision for connected lender liability in specific circumstances, set out in section 75. As Capital One explained in its correspondence with PR, section 75 doesn't provide an automatic right to receive a refund. There are several criteria that must be met for a successful claim against the creditor (or lender), which include that:

- *the agreement with the lender is a debtor-creditor-supplier agreement falling within section 12(b) or (c) of the CCA*
- *the agreement with the lender is not a non-commercial agreement*
- *the debtor has, in relation to a transaction financed by the agreement, a claim against the supplier in respect of a misrepresentation or breach of contract*
- *that claim relates to any single item to which the supplier has attached a cash price of more than £100 but not more that £30,000*

The key questions in Mrs C's case are:
a) whether the agreement with Capital One meets the definition of a debtor-creditor-supplier agreement falling within section 12(b) or (c) of the CCA; and
b) whether Mrs C has, in relation to her contract with the Supplier, a claim against the Supplier in respect of a misrepresentation or breach of contract.

<u>Does the agreement with Capital One meet the definition of a debtor-creditor-supplier agreement?</u>

Section 12(b) of the CCA says that a debtor-creditor-supplier 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". And section 11(1)(b) says 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".

Mrs C's agreement with Capital One is a regulated consumer credit agreement. It was used to finance the transaction she was undertaking with the Supplier. But the payment was made

to PHR. Capital One has used this as the basis of its decision to decline Mrs C's claim, saying it was unable to find a link between the Supplier and PHR.

I've have made some online enquiries. These showed the Supplier is a company incorporated in Singapore and PHR is a company registered in Goa, India. The company registrations suggest that the Supplier and PHR ultimately shared the same controlling director. I also note Mrs C has submitted a document from the supplier titled: "Certification of Management Chargers Waiver", which states that the agreement is authorised by "Partners – the Supplier in association with PHR". I think this is likely enough to meet the definition of "associates" as defined in section 184 of the CCA, which also created an association between the two corporate bodies (the Supplier and PHR).

Section 187 of the CCA covers arrangements between creditor and supplier. It says:
"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)."

Subsection (4) says the persons referred to in subsection (1) 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."

Given the likely associate connection established between the Supplier and PHR, I think the debtor-creditor-supplier requirement may well be met. But I don't think it's necessary to make a formal finding on the debtor-creditor-supplier arrangement for the purpose of this decision, because I don't think the claim in respect of a misrepresentation or breach of contract should succeed on its merits anyway.

<u>Does Mrs C have, in relation to the transaction financed by the agreement, a claim against the Supplier in respect of a misrepresentation or breach of contract?</u>

Because Capital One reached a different conclusion in respect of the debtor-creditor-supplier arrangements, this aspect didn't form part of its reasons for declining Mrs C's claim. The Investigator did express a view on this point, but concluded that the claim would not be successful.

It's not necessary, for the operation of section 75, that a claim must be successful. It simply has to exist, either in misrepresentation or in breach of contract. Mrs C undoubtedly has a claim. PR argues on Mrs C's behalf that the Supplier misrepresented the timeshare product, its benefits and pressured her and her husband into purchasing a product which failed to provide the advantages promised. PR says that the Supplier failed to reach the standard of commercial conduct that is expected of them.

PR has submitted a copy of the Purchase Agreement Mrs C (and her husband) entered into whilst holidaying in Goa, India in March 2020. As I said above, the Supplier named is a company incorporated in Singapore. The Capital One account statement shows the payment was transacted via PHR, the Supplier's associate and a company registered in Goa, India. The agreement Mrs C entered into with these same companies is explicit as to the law of India governing the contract. In the circumstances, I must conclude that UK or even European Law has no bearing on the Purchase Agreement.

I note PR says that the timeshare membership was sold as an investment when it shouldn't have been sold as one. But I haven't seen why it thinks it shouldn't have been sold as one. PR would be mistaken to believe that the consumer protections that exist in the UK and Europe – for example, The Timeshare, Holiday Products, Resale and Exchange Contracts

Regulations 2010 – apply to Mr and Mrs C's agreement. That is because the contract was formed under the law of India, in Goa, India.

Neither PR nor Mrs C have told us why they believe the Supplier and/or the contract she entered into are in contravention of the prevailing laws under which the Purchase Agreement was enacted. They explained that Mr and Mrs C purchased additional membership points to entitle them to a higher standard of accommodation. But, PR says Mr and Mrs C were pressured to sign up to the agreement.

A claim under s.75 CCA 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. PR has also referred to changes in Mrs C's circumstances which have led to a reduction in her ability to travel and use the holiday club membership. Again, this isn't something that can be considered under s.75 CCA, and in any event, I've not sufficient reasons to suggest this could've been reasonably foreseen by the Supplier and consequently Capital One.

I have thought about what Mrs C has said about her memories of the sale, but I cannot see how they mean it would be fair or reasonable to hold Capital One responsible for the Supplier's alleged failings. It follows that whilst I think Capital One probably needed to answer the claim made, I don't think it now needs to do more as I don't think a claim under s.75 CCA would have been successful."

Responses

I asked the parties to the complaint to let me have any further representations that they wished me to consider by 12 July 2024.

Both Capital One and Mrs C have responded to say they had no further comments to add.

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 reviewed everything again. Neither Mrs C nor Capital One have provided further evidence or new information for me to consider. So, I've not seen enough for me to alter my provisional conclusions.

In summary, although I think Capital One probably needed to have answered the claim made, I don't think it now needs to do more as I don't think a claim under s.75 CCA would have been successful.

My final decision

For the reasons given above, I do not uphold Mrs C's complaint or make an award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 15 August 2024.

Stefan Riedel
Ombudsman