

The complaint

Mr M's complaint is, in essence, that Lloyds Bank PLC (the "Lender") acted unfairly and unreasonably by deciding against paying a claim under section 75 of the Consumer Credit Act 1974 (the "CCA").

What happened

In or around July 2016 (the 'Time of Sale'), Mr M (together with his wife) went on a promotional holiday provided by a travel concierge business (the 'Supplier') registered in the United Kingdom ('UK'). During that holiday, Mr M attended a half day sales presentation with the Supplier during which agreed to purchase membership of the Supplier's concierge service (the 'Concierge Service').

To pay for the Concierge Service, Mr M says he made a number of payments between July 2016 and November 2017 to a different company registered in Spain (the 'Spanish Company'). Those payments were made using Mr M's Lloyds credit card. Mr M then made a further payment to the Spanish Company of £8,973 on 20 February 2017 by bank transfer from an account with another financial business.

On 11 October 2019, Mr M contacted the Lender to initiate a claim under section 75 of the CCA. Having arrived at a hotel booked through the Supplier, he had been turned away. He subsequently discovered that the Supplier's website was no longer available, and he wasn't able to contact the Supplier. As Mr M was no longer able to use the Concierge Service, he says he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr M.

The lender investigated Mr M's claim but said he hadn't provided sufficient information or documentation to uphold it. However, following further exchanges and discussions, the Lender agreed to pay Mr M £185 (plus interest) in respect of the annual membership renewal fee he'd paid in 2019 for renewal of the Concierge Service.

In March 2020 – using a professional representative (the 'PR') – Mr M wrote to the Lender to further complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr M says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier told or implied to Mr M:

- it had specific expertise and professional ability to be in a position to secure significant savings that could not be realised in the wider market;
- he would receive significant benefits and discounts on holidays and flights;
- the cumulative savings over a period of time would represent a long-term investment to ensure he would recover the subscription cost;

- it was a bona fide, reputable and solvent company;
- he would be able to book and arrange products and services through the Supplier's preferred providers at a discount; and
- it was a "no loss" situation and a "sure thing".

Mr M says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to him.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr M says that as the Supplier ceased trading in September 2019, he is no longer able to use the membership service he subscribed to and paid for.

As a result of the above, Mr M says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to him.

The Lender issued its final response letter on 27 April 2021 rejecting his complaint, reiterating that it wasn't able to reconsider Mr M's claim any further in the absence of evidence to support the allegations.

Mr M then referred his complaint to the Financial Ombudsman Service. It was assessed by an investigator who, having considered all the evidence and information available, didn't think Mr M's complaint should be upheld.

Mr M didn't agree with our investigator's findings and asked that his complaint be considered further by an ombudsman, which is why it was passed to me. In support, the PR:

- say that the "*facts*" within the Letter of Complaint and submission to the Financial Ombudsman Service resulted from a detailed interview with Mr M, which he verified, confirmed and attested as accurate;
- allege that the Supplier is part of a wider fraudulent timeshare/holiday operation insisting that Mr M's recollections were more reliable than any documentation provided by the Supplier.

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 that, I do not think this complaint should be upheld. But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable to all parties in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

When deciding complaints, I am required by the DISP¹ 3.6.4 R of the FCA² Handbook to take into account:

"(1) relevant:

(a) Law and regulations;

¹ Dispute Resolution: Complaints Sourcebook

² Financial Conduct Authority

(b) *Regulators' rule, 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."*

What did Mr M purchase?

The only document I've seen relating specifically to the purchase Mr M made is headed "*Membership Application Form*" (the 'Membership Application') and is dated at the top, 20 February 2017. Under the heading "*First – Definition*" it begins "*By way of this contract [...]*". So, I'm satisfied that this document forms the basis of the Membership Agreement and contract Mr M entered into with the Supplier. It then goes on to explain (in very broad terms) the Concierge Service to be provided by the Supplier to Mr M (and his wife).

Importantly, clause 2.1 states, "*This membership Application validity starts from the day the payment of the contracted service level is received [...]*". I shall address this in more detail below.

Essentially, the Concierge Service appears to offer services for its members, procured from a network of "*companies and professionals*" used by the Supplier.

The document details various costs associated with the membership application. These include:

- An annual membership charge of either £185 or £195 according to the membership tier level chosen, albeit I can't see that it specifies the tier level chosen by Mr M.
- Payment of a "**Joining Fee**" of £10,850 under the following payment terms (emphasis added):
 - £1,877 by "*Visa/Bank Transfer*" due 17 July 2016
 - £8,973 by "*Bank Transfer*" due 31/08/2017

It goes on to say, "*Unless otherwise specified by [the Supplier], all monetary amounts referred to herein will be paid in British Pounds*".

Clause 5.2 under the heading "*Obligations of Members*" says, "*Members, 30 days in advance of their membership expiry date, are obliged to notify [the Supplier] and to pay the Annual Membership fee if they wish to extend their membership for another year or wish to continue should they have let their membership lapse*".

In summary, payments are split between the one-off joining fee of £10,850, and an annual membership fee of either £185 or £195 (dependent upon the tier level chosen).

What payments were made?

The Letter of Complaint suggests payments totalling £10,606.22 were made over six transactions as follows:

- 17 July 2016 - £1,348.94 to the Spanish company using Mr M credit card;
- 17 August 2016 - £115.24 to the Spanish company using Mr M credit card;
- 18 September 2016 - £113.58 to the Spanish company using Mr M credit card;
- 18 October 2016 - £120.73 to the Spanish company using Mr M credit card;
- 20 November 2016 - £114.73 to the Spanish company using Mr M credit card; and
- 11 November 2017 - £8,973.00 paid by bank transfer to the Spanish Company.

However, the payments listed appear to total £10,786.22, whilst the Membership Application details a Joining Fee of £10,850. Furthermore, each payment appears to have been made in

Euros rather than “*British Pounds*”, as required under section 3 of the Membership Application. And none of the credit card payments appear to quote a contract or membership number or any reference to the transaction they actually relate to.

The bank transfer does include a reference number, albeit that reference doesn't seem to appear anywhere on the Membership Application. Finally, it also appears that most of the payments were made beyond the 30 days specified within clause 5.2 of the Membership Application.

I've also considered copies of Mr M's other credit card statements from the lender. It appears there were a total of 19 payments made to the Spanish Company starting some months before July 2016 through into the first half of 2019. So whilst on balance, I think it's likely that some of those payments did relate to his Concierge Service Membership Application, I don't think it's possible to conclude with any certainty which of the payments included within the Letter of Complaint did, in fact, relate to Mr M's Membership Application.

The claim for misrepresentation under section 75 of the CCA

For me to conclude there was a misrepresentation by the Supplier in the ways that have been alleged, generally speaking, I would need to be satisfied, based upon the available evidence, that the Supplier made false statements of fact when selling the Concierge Service membership. In other words, that they told Mr M something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr M to enter the purchase contract. This means I would need to be persuaded that he reasonably relied upon the alleged false statements when deciding to buy the Concierge Service membership.

This part of the complaint was made for several reasons that I set out at the start of this decision. The difficulty I have is identifying what was actually said at the Time of Sale. The PR has provided limited evidence to support the misrepresentations Mr M says the Supplier made, although I acknowledge that he does say he was told these things. So, I have thought about this alongside the limited evidence that is available from the Time of Sale.

Although not determinative of the matter, I've not seen any specific wider evidence from the Time of Sale, such as marketing material or any of the wider purchase documentation – only the Membership Application. Having considered that, I can't see that it includes anything that defines in any detail the specific services and benefits Mr M was entitled to receive under his Concierge Service membership. And certainly not to the extent suggested within the Letter of Complaint.

Under the heading “*First – Definition*”, it says that the Concierge Service “*is defined as [...] providing its members with various services through [the Supplier] and/or its listed associates. All current services and benefits are shown in Appendix A [the Suppliers] Concierge Product Information' although these will be reviewed from time to time [...]*”. But I've not seen a copy of the Appendix A referred to, nor any other materials from the Time of Sale. So, I can't say, with any certainty, that the Concierge Service was represented to Mr M in the ways alleged.

The claim for breach of contract under section 75 of the CCA

I'm satisfied that the Supplier entered into an insolvency process in September 2019, The PR has provided evidence which is confirmed by my own enquiries with Companies House.

However, upon my reading of the Membership Application, the payment of £10,850 was, in fact, a joining fee. It seems Mr M's application was accepted, and he became a member of the Supplier's Concierge Service – Mr M has confirmed that. So, I can't reasonably conclude that Mr M didn't receive his membership as a consequence of paying the joining fee. And I haven't seen any evidence to suggest that the Supplier failed to provide Mr M with his membership under the agreement.

Under clause 5.2 of the Membership Application in conjunction with the section headed "*Third – Costs*", I think it's clear that Mr M's membership was initially for 12 months only. And each year, he was required to elect whether to renew and continue that membership, subject to an annual membership charge. So, each new year of membership constituted a fresh contract period subject to Mr M electing to renew and pay the renewal fee. And the cost of that renewal was either £185 or £195, dependent upon the membership tier chosen.

The Lender agreed and paid Mr M the sum of £185 – an amount equivalent to the most recent year's membership renewal he'd paid. And in all the circumstances, I think that appears to be fair and reasonable as it was at that point the Supplier failed to provide the Concierge Service to Mr M, so breaching the contract. But that breach occurred after Mr M paid his renewal fee in 2019. And there's no evidence to suggest that the Supplier breached the contract during any of the preceding years when it was still trading.

Was there the necessary Debtor-Creditor-Supplier ('DCS') Agreement

The PR brought claims on Mr M's behalf under section 75 of the CCA. I think it is helpful to set out the relevant legal provisions.

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 for a claim under section 75 of the CCA, there needs to be a DCS agreement in place for the Lender to be liable to the borrower (here that's Mr M) for the misrepresentations of the Supplier. But, on the face of it, it's possible there was no such arrangement in place at the relevant time as the Supplier wasn't paid directly using Mr M's credit card. Instead payments were made to the Spanish Company.

The PR says that "*As a result of the S189 association*", the Supplier and the Spanish Company (who received the payments) "*are collectively referred to as "the Supplier"*". And "*any payment made to either [the Supplier or the Spanish Company] should be considered as a payment to the same entity*".

As it appears that the payments were received by the Spanish Company rather than the Supplier directly, it's possible that there was no such agreement in place. Particularly 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 debtor-creditor-supplier arrangement for the purpose of this decision because I don't think the complaint should succeed on its merits anyway.

Conclusion

Having considered all the evidence and information available, I won't be upholding Mr M's complaint because:

- it is not possible to identify and link the exact payments Mr M made for the Concierge Service membership he purchased with any certainty;
- there's no evidence to support the alleged misrepresentations; and
- the Lender's settlement of the breach of contract claim appears to be fair and reasonable.

I acknowledge the PR's comments in response to the investigator's initial findings. And I'd like to reassure Mr M, and the PR, that I have carefully considered everything that Mr M has said. However, in circumstances like these, I need to consider those allegations against the documentary evidence that is also available. That's what I've done here.

The PR also suggests that the Supplier was acting fraudulently. The Supplier, as far as I can see, was not a regulated financial business. And the Financial Ombudsman Service has no jurisdiction to make and act upon findings of fraud or otherwise. I can only consider the facts and evidence as they relate to Mr M's individual complaint. That being that Lloyds Bank PLC unfairly and unreasonably declined his claims under section 75 of the CCA. And for the reasons explained, I don't think that was the case here.

My final decision

For the reasons set out above, I don't uphold Mr M's complaint against Lloyds Bank PLC. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 12 February 2025.

Dave Morgan
Ombudsman