DRN-5499929

The complaint

Mr O complains that MBNA Limited ('MBNA') rejected his claim under section 75 of the Consumer Credit Act 1974 ('CCA'). Mr O made the associated purchase along with his wife. But as the payment was made by him using his credit card , only Mr O is an eligible complainant. Therefore for simplicity, I will refer to him only throughout my decision.

What happened

In October 2016 (the 'Time of Sale'), Mr O entered into a contract with a business (the "Purchase Agreement") who I'll refer to as 'GGH'. Mr O believed the Purchase Agreement involved an investment in three real estate properties which would generate a rental income for him. The purchase price under the Purchase Agreement was €90,047 after a deduction granted of €19,200. Mr O hasn't provided specific details of how and if this amount was paid in full.

There was also a separate Management Mandate Agreement ('MMA') with another business, who I'll refer to as 'GEC'. The agreed purchase price under the MMA was €5,995 which Mr O says he paid to GEC using his MBNA credit card.

In March 2024, Mr O submitted a claim to MBNA under section 75 CCA ('s.75') in relation to both the Purchase Agreement and the MMA with GEC. Mr O alleges that both contracts were misrepresented to him, and that GEC had breached the terms of the MMA. He told MBNA that GEC had disappeared, and he'd been trying to contact them over the last few years. He thought that MBNA were liable for both the misrepresentations and breach of contract under s.75.

To support his claim, Mr O provided information prepared by an online investigation business (the 'OIB') which had been investigating the activities of both GEC and GGH. The OIB's investigations suggested that *"the GGH product was not a real estate investment product, which could be described as an asset, but rather an elaborately disguised timeshare product".* The OIB allege that the GHG contract and the associated sales process did not comply with the regulations that apply and were unlawful. It also alleges that the services offered under the MMA had been misrepresented and, as such, the contract had also been breached.

While investigating Mr O's claim, MBNA pointed out that it could only review a claim when the contract amount is *"up to £30k",* whereupon Mr O said, *"he was only claiming £6k or what* [he] *paid on* [his MBNA credit] *card".*

Having considered Mr O's claim, MBNA rejected it on the basis that the payment Mr O made using his credit card was made to GEC. And MBNA believed the MMA had been fulfilled by GEC pointing to the fact that Mr O had received a rental income (under the Purchase Agreement) in 2022. It also confirmed that the agreed price under the Purchase Agreement was in excess of the s.75 claim value, so it was unable to progress this aspect any further.

Mr O didn't accept MBNA's decision, so raised a complaint. In doing so, he provided more information and evidence to support his arguments. MBNA provided its final response to Mr O in a letter dated 20 May 2024. And in doing so, rejected Mr O's complaint as it believed the s.75 claim outcome to be correct. MBNA also said that Mr O had used his credit card to pay GEC rather than GGH which meant there wasn't the necessary debtor-creditor supplier

('DCS') relationship, as required under s.75, to consider any claim relating to the Purchase Agreement.

Unhappy with MBNA's response, Mr O referred his complaint to the Financial Ombudsman Service. One of this service's investigators considered all the evidence and information provided. Having done that, the investigator didn't think MBNA had acted unfairly in rejecting Mr O's s.75 claim. In particular:

- the necessary DCS link couldn't be established to permit a successful s.75 claim in relation to the Purchase Agreement; and
- Mr O's claim(s) had been submitted to MBNA too late under the provisions of the Limitation Act 1980 (the 'LA').

In response to the investigator's findings, Mr O said:

> *"…we have ended up with 3 Timeshare, which we never wanted, we were sold 3 real estate properties with a rental income that would finance the purchase over time. GEC were supposed to look after our interests…".*
>
> *"I don't accept your conclusion that we were not duped and mis-sold/defrauded…"*

Mr O asked that an ombudsman consider his complaint further, which is why it was passed to me.

Having considered the relevant information about this complaint, I reached the same conclusion as our investigator. However, in doing so and for greater clarity, I put forward some additional reasoning. Because of that, I issued a provisional decision ('PD') on 3 April 2025 giving Mr O and MBNA Limited the opportunity to respond to my findings below, before reaching a final decision.

In my PD I said:

> Whilst I understand and have every sympathy with Mr O's experience, I do not currently 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 DISP[1] 3.6.4 R of the FCA[2] Handbook to take into account:
>
> > *"(1) relevant:*
> >
> > *(a) Law and regulations;*
> >
> > *(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."*
>
> <u>The claim under s.75 CCA</u>

[1] Dispute Resolution: Complaints Sourcebook
[2] Financial Conduct Authority

Liability under s.75 isn't based on anything the lender does wrong, but on any proven misrepresentation and / or breach of contract by the supplier. It imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid s.75 claim, it should pay its liability. And if it fails or refuses to do so, that failure or refusal can give rise to a complaint to the Financial Ombudsman Service.

So, when a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful s.75 claim, the act or omission that engages this service's jurisdiction is the creditor's (here that's MBNA's) refusal to accept and pay the debtor's (Mr O's) claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

In Mr O's case, as MBNA refused to accept and pay his claim in March 2024, it is MBNA's handling of that claim that this service is investigating – not the alleged actions or failings of the supplier or its associates. So, in considering Mr O's complaint, it is my role to decide whether MBNA acted fairly and reasonably when considering and responding to his claim.

As a general rule, creditors (like MBNA) can reasonably reject s.75 claims that they are first informed about after the claim has become time-barred under the LA as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mr O's s.75 claim was time-barred under the LA before he put it to MBNA.

A claim under s.75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against a supplier. A claim for misrepresentation again a supplier would ordinarily be made under s.2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrues (see s.2 LA).

But a claim under s.75, like the one in question here, is also *"an action to recover any sum by virtue of an enactment"* under s.9 LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Mr O entered into the MMA with GEC and the Purchase Agreement with GGH at that time based upon the alleged misrepresentations – which he says he relied upon. And as regards the credit card account with MBNA used to help finance the purchase, Mr O was already an account holder at the Time of Sale.

Mr O first notified MBNA of his s.75 claim in March 2024. And as more than six years had passed between the Time of Sale and when he first put his claim to MBNA, I don't ultimately think it was unfair or unreasonable of MBNA to reject Mr O's concerns about the supplier's alleged misrepresentations.

In submitting his claim to MBNA, Mr O suggests that GEC failed to fulfil its responsibilities under the MMA, which could amount to a breach of contract. I understand that GGH ceased trading in 2023. And based upon advice and guidance provided to Mr O by the OIB, in particular about the lawfulness or otherwise of the contract he entered into with GGH, I think it was this that made Mr O aware of the alleged breach by GEC. In essence, Mr O argues that GEC should have identified that the contract with GGH was illegal and acted in his interest accordingly.

Much of the information that Mr O relies upon suggests that the whole scheme was fraudulent. So, I have considered whether the provisions of s.32 LA apply here insofar as the limitation period may be postponed in instances of fraudulent

misrepresentation and/or deliberate concealment. Having done that, I don't think this is something this service is ultimately able to decide. But I have to consider if it is something upon which Mr O could rely on in pursuing his claim with MBNA. So, for the purposes of this decision, I think it's worth considering the merits of Mr O's claim on the presumption it was made in time.

The MMA with GEC

I've gone on to consider whether it would have been reasonable for MBNA to have upheld Mr O's claim for breach of contract based upon the documentary evidence I've seen.

The MMA appears to be a document between Mr O and GEC which sets out across six clauses the parties' contractual obligations under it. The document appears to have been signed by the parties to it and lists a number of services GEC will provide in very general terms. These include:

- the co-ordination and intermediation of the internal and external procedures;
- settlement of administration and registration costs;
- to ensure correct identification of the customer; and
- that the products allocated to the customer are available for registration.

In reference to the findings and advice provided by the OIB, Mr O suggests that no real estate investment existed, and the Purchase Agreement was unlawful. In particular, as it breaches the regulations that apply. Therefore, the suggestion is that GEC *"were supposed to look after our interests* [under the MMA]*"*.

Having considered the MMA in some detail, I'm not persuaded that Mr O has demonstrated that GEC failed to deliver under it in such a way as to amount to a breach of contract. The services to be provided by GEC are vaguely worded, and it would be extremely difficult to establish that the contract had been breached. Nor does any of the documentation indicate that GEC was acting as an agent for GGH. It was providing services to Mr O and not to GGH.

To take one example; of all the services GEC agreed to supply, I think the one which offers the greatest support to Mr O's claim is:

> *"Check with the development company that the products allocated to the customer are available for acquisition under the legislation in force".*

This wording is typical of the document generally in that it is imprecise. It does not specify which company is the development company, but it is reasonable to presume that could be GGH. While I can see that Mr O may have taken that to read that GEC should check that the product is legally available for him, it does not say that. It simply says it will check with the development company. So, in order to satisfy any obligation under that clause, it simply had to ask the development company whether the products were legally available. I can't see that it offered to do any more than that. And it certainly didn't offer to ensure any answer from GGH was accurate.

I appreciate Mr O takes it as implicit in the MMA that GEC would ensure everything was in order with the GGH contract. Whilst I can understand why he may think that I can't reasonably conclude that it offered such a service. So, even if the Purchase Agreement was found to be illegal and/or fraudulent – and I make no such finding – I can't reasonably say that GEC failed to deliver what was promised under the MMA.

The Purchase Agreement with GHG

I acknowledge that Mr O later told MBNA that *"he was only claiming £6k or what* [he] *paid on* [his MBNA credit] *card".* However, Mr O has also suggested that this

payment, albeit made to GEC, formed part of the consideration due under the Purchase Agreement. So, I think it's appropriate to consider this aspect further.

The Purchase Agreement clearly sets out the parties to it which include Mr O and his wife ('The Purchaser') and GGH ('The Distributor'). The contract then goes on to reference another business as the 'Promoter' and the 'Service Company'.

Clause 2, under the heading 'Clauses of the contract' says,

"The Real Estate Period(s) and the rights associated with them shall become the property of the PURCHASER upon full settlement of the amounts specified in clause No3.

Clause 3 includes:

"Total purchase price:	***109,247.00 euros (*)***
	(One Hundred and Nine Thousand Two Hundred and Forty Seven Euros)
[*…]	
Deduction granted:	*19,200.00 euros*
As:	*Financial Compensation on the grounds of non-use of the Real Estate period(s) by the **PUCHASER** during the years 2017, 2018*

*Under the agreements made, payment of the amount mentioned above shall be made by the **PURCHASER** according to the following terms:*

1/	***Deducted Amount:***	*5,995,00 euros*
	Payment date:	*12th October 2016*
	Method of payment:	*Credit Card,*
2/	***Amount:***	*5,995.00 euros*
	Payment date:	*26th October 2016*
	Method of payment:	*Bank Transfer,*
3/	***Amount:***	*78,057.00 euros*
	Payment date:	*12th December 2016*
	Method of payment:	*Bank Transfer,"*

I think the Purchase Agreement is clear that the total price payable under it was €90,047 (€109,247 less a deduction granted of €19,200).

Having established this, I then considered what s.75 says. In particular, under s.75(1), it says:

> *"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".*

However, s.75(3) then goes on to say:

> *"Subsection (1) does not apply to a claim—*
>
> *(b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000 […]"*

So, based upon the Purchase Agreement Mr O provided to MBNA with his claim, it appears the purchase price was for more than £30,000. Mr O says that the payment he made to GEC was ultimately used as the *"**Deducted Amount**"* under *"**1/**" above.* He also says that the payment under *"**2/**"* above was sourced by drawing from his MBNA credit card to his bank account, albeit he's been unable to provide any documentary evidence to support that.

Given the provisions of s.75 I've referred to above, I can't reasonably say that MBNA's rejection of Mr O's claim on that basis was unfair or unreasonable.

For completeness, I would add that s.75a does allow claims for breach of contract relating to purchases up to £60,260. But that particular provision only applies to 'Linked Credit Agreements'. s.75a (5) says,

> *"In this section "linked credit agreement" means a regulated consumer credit agreement which serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service* […]*"* (emphasis added).

In Mr O's case, he says that he used his MBNA credit card. And as the Credit Agreement under which that operates wasn't entered into exclusively to provide funding for the Purchase Agreement with GGH, it doesn't meet the requirements of s.75a.

Was there the necessary DCS Agreement?

Having decided that Mr O's claim (under the GGH contract) appears to breach the limit under s.75(3), I think there's another reason why his claim should not succeed. And it is this particular aspect I will explore next.

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 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 s.75 to be successful, there needs to be a DCS agreement in place for the Lender (MBNA) to be liable to the borrower (Mr O) for the misrepresentations or contract breaches of the supplier (GGH). But, on the face of it, it appears there was no such arrangement in place at the relevant time as GGH (as the supplier under the Purchase Agreement) wasn't paid directly using Mr

O's credit card. Instead, Mr O's credit card statement clearly shows that the payment was made to another business (GEC).

I've carefully considered the entirety of the Purchase Agreement. Having done so, I can find no reference to GEC being a party to that agreement. Or that GEC had any contractual obligations under it.

With that being the case, I can't reasonably conclude that there was the required DCS in place such that it might lead to a valid claim being made under s.75. And with that being the case, I can't say that MBNA's ultimate decision to reject Mr O's claim was unfair or unreasonable.

Summary

I do appreciate that Mr O will be disappointed, but hope my provisional decision clearly explains why I can't say that MBNA ultimately acted unfairly or unreasonably in rejecting his claim as it did. He may well be able to pursue his claim through other avenues however, I don't intend asking MBNA to do anything more here.

MBNA have acknowledged receipt of my PD confirming it has nothing further to add.

Mr O also confirmed receipt advising he would review what I'd said and advise if there's any further information he can provide. However, Mr O did not provide anything new for me to consider.

As the time given for responses has now passed, Mr O's complaint has been passed back to me.

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.

In responding to my PD, Mr O expressed his disappointment. Whilst I appreciate and understand his frustration, having not been given anything new to consider, I've no reason to vary from my provisional findings. And for the reasons explained above, I will not be asking MBNA to do anything more here.

My final decision

For the reasons set out above, I do not uphold Mr O's complaint about MBNA Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 20 May 2025.

Dave Morgan
Ombudsman