

The complaint

Mr E complains that American Express Services Europe Limited ("AESEL") unfairly did not accept his claim under the Consumer Credit Act 1974 ("CCA") in respect of a purchase of a holiday product made in April 2018. Mr E is represented by a professional representative ("PR").

What happened

In January 2017 Mr E purchased a holiday product from a company I will call A. It cost £19,000 and Mr E made several payments over four days using his AESEL credit card.

In May 2020 PR submitted a letter of claim to AESEL. In summary it said that:

- As A was in liquidation there had been a breach of contract.
- Mr E had been told the product was an investment and would increase in value.
- He was told he could sell it at a profit in a few years.

PR brought a complaint to this service on Mr E's behalf reiterating the points it had made in the letter of claim. It added that A had breached the EU Timeshare Directive without specifying how.

The complaint was considered by one of our investigators who recommended it be upheld. She asked for testimony from Mr E. He said that while on holiday he had been persuaded to attend a sales meeting. In the course of two hours he had been told he would not lose money and he could sell the product after two years. He thought the destination was up and coming and the hotel was one of the best in the area. After two years he tried to sell it but without success. He said he was told he might get £3,000 or £4,000.

Our investigator said that A's products could only be sold through its own marketplace and this had since been closed. She felt it was unlikely that the product could be sold and she considered Mr E's testimony supported his complaint. She accepted he had only purchased the product as a means of selling it and he had done so due to misrepresentation by A.

AESEL has failed to engage with either PR or this service in any meaningful way and despite agreeing to reply to our investigator's view it has not done so.

I issued a provisional decision as follows:

"Sections 56 and 75 of the Consumer Credit Act

Under s. 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of s. 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that

claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and*
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. New management companies were appointed, and I understand Mr E was able to use the timeshare as usual after that date.

Although I have not seen all the documentation for this complaint I am aware that on 8 July 2020 the trustee wrote to all the club members. Its letter said:

“We have good news for all members. Following discussions with the liquidators of both [AR and AXP] and with the directors of [GSR] (the owner of the resort) it has been decided that in the best interest of all clubs’ members, [FNTC] be requested to establish a new company to act as manager of the clubs on behalf of all clubs’ members.

“This new management company will be a non-profit making entity and its only role will be to manage the clubs for, and on behalf of, its members.

“We’d like to reassure you that the future of the clubs is secure. From your perspective as a member, there is a lot to look forward to as soon as governmental travel restrictions are lifted. We are also pleased to report to you that [R Resort & Spa], [GS] in Malta has reopened and is available for member use after the resort has successfully established COVID-19 health and safety precautions.”

On the face of it, therefore, the services linked to Mr E’s purchase remain available to him and are unaffected by the liquidation of the A companies.

Misrepresentation

Misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue, and which materially influenced the other party to enter into the contract.

I have noted Mr E’s testimony and the agreement he signed or at least the parts which have been submitted to this service.

Much of what Mr E says he was told concerns the possibility of selling the product. I am afraid however that I think it most unlikely that he was told that. If he had been told that – or had otherwise believed that to be the case – I would have expected him to ask for more information, not least because the documentation states the opposite.

The Statement of Compliance initialled by Mr E notes that:

“The primary purpose of our Membership is to access holiday accommodation and is not a financial investment for a return. We also understand that the membership price paid does not necessarily reflect the market value of our membership.”

It goes on to say:

"We have been informed of the various options we have to exit our Membership. We understand that the [A's] Resale's facility will be available with effect from the year 2020. We have also been advised should we wish to initiate the process to exit our membership through the [A] resale's facility we would first need to enter into a listing agreement. We have not been given any resale's timeframe guarantees since finding a new buyer depends on market conditions and could potentially take one or more years. We are not reliant on any resale's proceeds to pay off any financial commitments relating to any Memberships we own. Furthermore we understand that the future value of the Club Membership cannot be guaranteed and past trends are not an indication of future value"

Both of these statements were separately initialled by Mr E. They make it clear that he was not purchasing a financial investment and any resale opportunities would be limited and were not guaranteed. I cannot say what was said by the sales representatives and I am aware that they would put the best gloss on the product but I cannot say that this would amount to misrepresentation.

I also believe Mr E had a 14-day cooling off period in which to check any matters which were of particular importance to him. Overall I do not believe it was unreasonable for AESEL to choose not to accept his claim under s. 75.

Conclusion

It is not for me to decide whether Mr E has a claim against A, or whether he might therefore have a "like claim" under s. 75 CCA. Rather, I must decide what I consider to be a fair and reasonable resolution to Mr E's complaint. In the circumstances, I think that AESEL was right not to accept the claim. I would add that AESEL's failure to engage properly with PR and this service is disappointing."

AESEL accepted my provisional decision, but PR said that it was well known that A sold timeshares as investments. It also referenced the Chickombe ruling which was a 2018 court decision which had considered the ramifications of A engaging in credit-broking without FCA authorisation. It suggested this showed that A was in breach of the Timeshare Regulations by marketing the product as an investment. It also submitted press cuttings regarding another lender's decision to repay interest on loans where these had been brokered by A as an unauthorised broker between April 2014 and April 2016.

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 have taken due note of PR's arguments, but I am not persuaded that I should change my provisional decision.

The basis of the argument is that the product was sold as an investment and that, in effect, the documentary evidence should be ignored and I should rely on Mr E's testimony and the claim that it is generally known that A sold the product as an investment.

Mr E has told this service that: *"After 2 hours there being told I would bot [stet] lose money and could sell after 2 years or whenever I wanted.*

It would be easy to sell as Malta was getting more tourist than ever before and it was very up and coming and this was one of the best hotels on the island."

However as I have noted in my provisional decision he signed and individually initialled a

statement that reads: *“The primary purpose of our Membership is to access holiday accommodation and is not a financial investment for a return. We also understand that the membership price paid does not necessarily reflect the market value of our membership.”*

I find it difficult to conclude that the product was misrepresented which is the only claim made by PR to AESEL. I have to be able to say that an untrue statement of law or fact was made by A. I appreciate that sales representatives will put the best gloss on the product they are selling, but that of itself does not mean that this amounts to misrepresentation. They may have talked about potential resale opportunities but that does not mean the product was sold as a financial investment.

In any event if Mr E was making a financial investment I would have expected him to seek more evidence about the likely performance. He had 14 days in which he could withdraw from the agreement and I consider this allowed him the opportunity to be satisfied that the product was suitable for his needs.

Nor can I say that the decision of another lender covering a period outside the date when Mr E made his purchase allows me to reach a different conclusion.

Quite simply I do not consider that Mr E or PR have established that there was misrepresentation as set out in s.75 CAA.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr E to accept or reject my decision before 28 December 2023.

Ivor Graham
Ombudsman