

The complaint

Mr L has complained that Marks & Spencer Financial Services Plc (“M&S”) turned down his claim made under the Consumer Credit Act 1974 (“CCA”).

What happened

Mr L was an existing customer of a timeshare supplier (“the Supplier”). When on holiday in November 2014, Mr L was persuaded to take out a new membership from the Supplier. Under this membership he was entitled to use two apartments every year for two weeklong holidays.¹

In November 2020 Mr L complained to M&S using the help of a professional representative (“PR”). PR argued that there was a breach of contract as the Supplier had become insolvent and were not offering services to Mr L that had been paid for. PR said that Mr L paid £4,000 toward the cost of membership using his M&S credit card, so M&S were jointly liable for what had gone wrong under s.75 CCA.

In January 2021 M&S responded to PR, but it didn’t deal with the claim made. And in February 2022 PR referred a complaint about this to our service. After that, M&S considered the claim made, but thought it wasn’t responsible under the CCA as Mr L’s payment didn’t go directly to the Supplier, rather it went to a different entity I’ll call “Business H”, and there was no evidence these two entities were linked.

One of our investigators considered the complaint, but didn’t think M&S needed to do anything further. He thought the evidence suggested that the payment on the M&S card was made a day before Mr L took out the membership that is the subject matter of this complaint. He thought it was more likely than not that this was a payment in respect of an earlier timeshare. This also fit with the payment schedule set out in the November 2014 timeshare membership as payments weren’t due until later. Given this, our investigator didn’t need to consider whether the Supplier and Business H were linked.

Mr L didn’t agree with our investigator and asked for the complaint to be reconsidered by an ombudsman. PR, on his behalf, said it was possible that the date of the agreement had been amended or it had been provided the day after making payment.

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.

The documents available

Mr L’s agreement is signed and dated 20 November 2014. It says the cost of the membership is £6,000 and details that payment is made up of an exchange of another membership, plus £6,000 due by 20 May 2015. It says that is made up of “6 payments of

¹ The membership was taken in the names of Mr and Mrs L. But as Mr L says the credit card used to pay for it was in his name, only he is able to make this complaint. So I’ll refer to Mr L throughout.

£1,000 per month commencing on 20 DEC 2015" and the payment method was BTRAN – I take this to mean bank transfer.

I've seen Mr L's M&S credit card statement. It details a payment of £4,000 made to Business H. It states that the transaction date was 19 November 2014 and that it was applied to the account the following day. PR has provided evidence that the Supplier and Business H were part of the same group of companies and so it argues they were linked.²

I've also seen a number of credit card statements from a different lender, showing there were separate payments made totalling £5,000 between 21 January and 7 May 2015 to Business H. These were made up of three payments of £1,000 and one payment of £2,000. This card was in Mr L's wife's name.

Our investigator asked Mr L, via PR, what the payments made using the different card were for. PR said that Mr L paid £4,000 toward the purchase using his M&S credit card on 20 November 2014 and £2,000 using his other credit card in May 2015. Mr L thought the other £3,000 was in relation to an outstanding balance owed on a purchase made in 2013.

Mr L also provided membership applications from the Supplier dated 16 May 2012 and 4 November 2013. The May 2012 membership cost £15,500. It appears that this was to be paid by a mixture of £2,682 due in June 2012 by bank transfer and the remainder paid the following month with finance. There is also a letter from September 2012 from the Supplier acknowledging 'recent payment'. The November 2013 membership cost £20,900 and was paid by way of a loan for £10,900 and the remaining £10,000 to be paid by "BTRAN" by 18 November 2013. There is also evidence of a loan taken in 2016 to pay for a further membership.

What I think happened

When I make a finding of fact, as I must do so here, I make it on the balance of probabilities – that is to say what I think is more probable than not.

Here there are a number of things that aren't in dispute. They are:

- Mr L was a long standing customer of the Supplier.
- Mr L owed the Supplier something in relation to a purchase shortly before the time of the November 2014 sale.
- Mr L's M&S credit card statements shows £4,000 was paid on 19 November 2014.
- The timeshare membership agreement that is the subject matter of this complaint is dated 20 November 2014.

I've also considered what Mr L said happened. In his letter of claim, PR said Mr L was on holiday when he was invited to a catch-up meeting, however it turned out that meeting was a sales event. PR said the membership offer was a special offer only available on the day and Mr L was pressured into making an immediate decision. So it appears that Mr L decided to take out the membership in one meeting.

Mr L said he paid £4,000 toward the membership at the time it was taken out. Our investigator asked for more of Mr L's recollections before he issued his view and PR said £4,000 was paid on 20 September 2014 using the M&S card, with the balance of £2,000 being paid in May 2015. He thought the other three payments of £1,000 in related to an

² I don't need to make a finding about the relationship between Business H and the Supplier, but for the purposes of this decision I've assumed they are linked such that the payments made to Business H were intended to pay the Supplier

outstanding balance owed due to a purchase from the Supplier in 2013.

After our investigator issued his view, Mr L said something different. He now said that the payment of £4,000 was a deposit for the November 2014 membership, plus a payment of £3,000 toward the outstanding balance from a 2013 purchase.

I have thought about what I think most likely happened. In doing so, I've considered what Mr L said, but I also recognise that memories are imperfect and can fade with time. I also note that at the time these payments were made, it does appear that Mr L had an ongoing relationship with the Supplier with payments being made in respect of different memberships, so understandably it may be difficult to know now precisely which payment related to which purchase. Further, Mr L hasn't been consistent with his memories of what payment related to which agreement.

I think it's more likely than not that the payment made on 19 November 2014 related to an earlier timeshare arrangement. Mr L was on holiday at the time and I think it was using the Supplier's accommodation. At the time he owed money in respect of an earlier purchase to the Supplier. I note the 2013 purchase agreement shows that £10,000 was due to be paid by "BTRAN" by 18 November 2013, which I take to mean bank transfer. But by November 2014, that balance was outstanding and late. I think it likely that any payment made would be to clear that balance, rather than to fund a new purchase.

The November 2014 agreement states that the cost of £6,000 was to be paid instalments and starting the following month, so under that agreement Mr L had nothing to pay the Supplier in November 2014. Further, the payments made on Mrs L's credit card fit with payments due under the agreement. I do understand that the payments made in January to May 2015 total £5,000, so there is a £1,000 shortfall. However, I can't say £1,000 of the payment made on 19 November 2014 was for that. I say that as I don't find it likely Mr L made a payment on 19 November for an agreement he didn't enter into until the following day – an agreement Mr L says he was persuaded to take out in one pressured meeting. Although it's possible the date on the agreement is wrong, Mr L hasn't provided clear enough evidence to persuade me that was the case.

In conclusion, I don't think the money paid using the M&S credit card was used to fund the November 2014 membership, rather I think it was used to pay for the November 2013 membership. It follows, M&S can't be held responsible under the CCA for things that Mr L says went wrong with the November 2014 membership.

My final decision

I don't uphold Mr L's complaint against Marks & Spencer Financial Services Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 3 November 2023.

Mark Hutchings
Ombudsman