

## **The complaint**

Mr G, who is represented by a professional representative ("PR") complains that American Express Services Europe Limited ("AESEL") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

## **What happened**

In 2017 Mr G and his wife entered into a contract with a Panamanian company I will call B for membership of a holiday club at a cost of \$13,375. Of this £714.64 was paid using Mr G's AESEL credit card. This makes Mr G the eligible claimant and in this decision for simplicity I will refer to him as the purchaser.

In December 2019 PR submitted a letter of claim on behalf of Mr G to AESEL. It said that Mr G had been told he would have to pay a maintenance fee, but not that it would increase by 10% a year. It said he had been led to believe that he could take 30 weeks holiday, but not that he could only have one week each year. It claimed B's representative had made other false claims and subsequently Mr G had been unable to utilise the product and so there had been a breach of contract.

AESEL rejected the claim and said that PR was relying on unsupported testimony from Mr G. It explained that no supporting evidence had been supplied and it had not been made clear how the contract had been breached.

PR brought a complaint to this service on Mr G's behalf stating that B had breached the contract by misrepresenting it and breaching the EU Timeshare Directive. The complaint was considered by one of our investigators who didn't recommend it be upheld. She said there was insufficient evidence to show that there had been either a breach of contract or misrepresentation. PR didn't agree but submitted no further evidence.

## **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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent 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 more likely than not to have happened given the available evidence and the wider circumstances.

## S. 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.

## S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr G) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (AESEL) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

It's important to note that, as AESEL was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

## Misrepresentation

On Mr G's behalf PR alleges that the holiday product was misrepresented to him, in particular that he was unaware the maintenance fees would increase and he was limited to one week's use per year.

Not having been present at the sale it's not possible for me to say exactly what was said, and in what circumstances. But the terms of the contract set out fairly clearly what was being purchased. It states that Mr G has use of a "*junior suite which may be utilized 1 week(s) per year, during 30 consecutive years for the lodging services...*"

With regard to the annual fees the agreement sets out clearly that these may increase. It states:

*"In addition to the amount mentioned in the preceding clause, the MEMBER shall pay the CLUB'S ANNUAL FEE. For the 2013 the CLUB'S ANNUAL FEE will be 163.00 USD and will be due in the course (15) days of January of each year, and during the entire duration of the membership. However, without prejudice to what has been mentioned previously, the CLUB'S ANNUAL FEE could incur in an increase year fees, based on any increases in various line items for which they are intended. THE CLUB compromises (STET) to do its best effort that in the event an increase occurs, to not exceed more than a ten percent (10%) of the contribution of the previous year. The fee must be paid annually, even if the member does not use the services."*

This was signed by Mr G and it does not support his claim. As our investigator has said the sales representatives would have put the best gloss on the product and emphasised the benefits membership would offer, but that does not mean that this amounted to misrepresentation. It is reasonable of AESEL to have expected Mr G to have read the documentation and to have been satisfied with what he was signing.

Overall it is difficult for me to conclude that any misrepresentations were made.

#### **Breach of Contract**

As our investigator has explained under s.75 of the CCA, we can only consider whether the B failed to perform one or more of the contract's terms – thereby breaching the contract. I have not seen evidence that this occurred which makes it difficult for me to conclude there has been one or more breaches. PR has said Mr G has not been able to use the product, but has not explained what has prevented him. It has not given any evidence of a breach.

It has also referred to the EU Directive, but this contract is with a Panamanian company and the contract says that all parties accept the jurisdiction of the laws and tribunals of Panama. As such I do not consider the EU Timeshare Directive has any bearing on this claim.

#### **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 G to accept or reject my decision before 15 November 2023.

Ivor Graham  
**Ombudsman**