

The complaint

Mr M complains that Bank of Scotland plc – trading as Halifax (“Halifax”) acted unfairly in not upholding his claim under section 75 of the Consumer Credit Act 1974 (“CCA”) in relation to a timeshare product he purchased using his credit card.

What happened

In or around November 2015, Mr M (jointly with his wife) agreed to purchase a timeshare product from a supplier who I’ll refer to as “D”. The product purchased provided membership to a points-based scheme operated by D with 5,000 points to be used each year against holiday accommodation bookings at properties and resorts included within the scheme.

The total cost of the product purchased was £4,051. A deposit of £299 was paid at the time using a credit card in Mr M’s sole name issued by another business. Mr M made a further payment of £3,851 in or around April 2016 using a credit card issued by Halifax, also in his sole name.

In or around March 2017, using a claims management company (the “CMC”), Mr M submitted a claim to Halifax under section 75 of the CCA (“S75”). The CMC said that under S75, Halifax were jointly and severally liable for any breach of contract or misrepresentation by D. And they alleged that D had misrepresented the product purchased by telling Mr M:

- the only way to exit the points membership was to purchase a different asset-backed type membership;
- he was guaranteed to be able to exit the asset-backed type membership after 15 years; and
- purchasing more points would provide access to additional benefits although he already had access to these.

Further, the CMC alleged there’d been a breach of contract. They said Mr M wasn’t provided with documents confirming ownership of any part of any property, which was a contractual requirement under the asset-backed timeshare product agreement.

To assist their investigation into Mr M’s claim, Halifax asked the CMC to provide documentary evidence to support the allegations made.

It doesn’t appear the CMC provided any new evidence. Instead, they expanded Mr M’s claim, suggesting clauses contained within the terms and conditions weren’t fair under the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”). In particular, they thought the purchase contract was unenforceable due to clauses that weren’t explained to Mr M at the time of the sale, including:

- membership of the product purchased continues until 2054 and potentially in perpetuity; and
- Mr M would have no control of sums incurred/charged during that time.

The CMC also suggested D hadn’t provided Mr M with notice of a general meeting in 2016, which he was entitled to receive and attend. As such, they considered this to be a breach of contract.

Halifax thought there was insufficient evidence to substantiate the claims of misrepresentation and didn't accept there was any evidence of a breach of contract. Halifax also thought the further allegations didn't stand given Mr M had signed the terms and conditions confirming sight of the documents relevant to the agreement.

In response, the CMC suggested D had further misrepresented the product by suggesting that Mr M was purchasing membership of an exclusive club. They interpreted exclusivity as providing access to exclusive resorts unavailable to non-members at a price cheaper than could be found elsewhere.

Halifax said the contract doesn't guarantee the accommodation would be available to members only. They also didn't agree with the CMC's arguments relating to the comparative price for members and non-members.

Unhappy with Halifax's responses, the CMC referred Mr M's complaint to this service. Having considered all the information available, our investigator found that the purchase agreement from November 2015 didn't relate to the asset-backed timeshare product referred to by the CMC. Or that there was any evidence Halifax had funded such a product. Furthermore, our investigator couldn't find any evidence to support any claim of misrepresentation, or that D had failed to perform one or more of the contract's terms, thus creating a breach. As a consequence, they didn't think Halifax needed to do anything more.

The CMC didn't accept our investigator's findings. They asked this service to consider the contents of a 51-page document prepared by Counsel with "*Generic submissions on behalf of complainants*" relating to points-based products sold by D.

As an informal resolution couldn't be reached, Mr M's complaint has been passed to me to consider further. Having done so, while I reached the same outcome as our investigator, I'd considered some issues which I didn't feel were previously fully addressed. Because of that, I issued a provisional decision ("PD") on 6 July 2023 – giving the CMC, Mr M and Halifax the opportunity to respond to my findings before I reached a final decision.

In my provisional decision, I said:

When considering what's fair and reasonable, DISP¹ 3.6.4R of the Financial Conduct Authority ("FCA") Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

S75 provides protection to consumers for goods or services bought using credit. Mr M paid £4,051 for the timeshare product in November 2015 and paid a deposit of £299 using a credit card issued by another business. The CMC have provided evidence that Mr M made a further payment of £3,851 in April 2016 using a credit card issued by Halifax. The total of these two payments is £4,150. This is slightly more than the purchase price shown in the purchase agreement provided by the CMC.

Assuming the Halifax card payment does relate to the purchase made in November 2015, S75 would apply to that purchase. This would mean that Mr M is afforded the protection offered to borrowers like him under those provisions. Halifax appear to have accepted that the payment does relate to a timeshare membership Mr M purchased from D. Although I think it's unclear whether the Halifax card payment does actually relate to the November 2015 purchase. However, I've taken this section into account when deciding what's fair in the circumstances of this case.

It's important to stress that this service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. The complaint being

¹ The Dispute Resolution Sourcebook

considered here specifically relates to whether I believe Halifax's treatment of Mr M's claim was fair and reasonable given all the evidence and information available. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made 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 evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Misrepresentation

For me to conclude there was a misrepresentation by D in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that D made false statements of fact when selling the timeshare product. 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 contract. This means I would need to be persuaded that Mr M reasonably relied on those false statements when deciding to buy the timeshare product.

The CMC have provided a copy of a purchase agreement which Mr M signed in November 2015. It refers to the purchase of points rights and membership (where not already a member). There appears to be no suggestion within that agreement that the product purchased was an asset-backed product of the nature described by the CMC. Further, the CMC haven't provided any other evidence suggesting that the product Mr M purchased, using his Halifax credit card, was an asset-backed product.

The misrepresentations alleged within the CMC's letter of claim specifically relate to an asset-backed product. But given my finding above, I don't think these apply to the points-based product Mr M purchased in November 2015. And because there's no evidence available that Mr M did purchase an asset-backed timeshare product using his Halifax credit card, I don't think I can consider the alleged misrepresentations further as they don't appear relevant here.

I've considered the CMC comments as regards the alleged exclusivity of Mr M's membership and benefits. In particular, the CMC have stated "[...] *it must be accepted that [Mr M] purchased membership of an exclusive club [...] It must be accepted that either [Mr M] would gain access to exclusive resorts, namely accommodation unavailable to non-members, and/or accommodation which is cheaper than can be found elsewhere*".

It's unclear whether this allegation is intended to relate to the points-based purchase in November 2015 or to the asset-backed product originally referred to by the CMC. Either way, I've not seen any evidence specific to any product Mr M purchased which defines exclusivity. So, this appears to be either the CMC's or Mr M's own interpretation rather than what was actually communicated, whether verbally or in writing. And in the absence of any evidence to support that interpretation, or that D did in fact represent the membership in that way, I can't fairly say they did misrepresent the product as suggested.

Breach of contract

In the original letter of claim, the alleged breach of contract also appears to reference an asset-backed timeshare product. But as I've already explained above, I haven't seen any evidence that Mr M purchased such a product using his Halifax credit card.

So, I don't think I can consider this aspect further within the context of Mr M's complaint.

However, the CMC did subsequently allege that D had breached the underlying contract by not inviting Mr M to attend a general meeting when they were required to do so. Again, it's unclear whether this allegation relates to the points-based purchase in November 2015, or the asset-backed product originally referred to. Either way, I haven't seen any evidence to support this allegation.

Section 308 of the Companies Act 2006 explains:

"Notice of a general meeting of a company must be given-

- (a) In hard copy form,*
- (b) In electronic form, or*
- (c) By means of a website [...],*

or partly by one such means and partly by another".

Accepting my comments above, I haven't seen any evidence that D didn't comply with this requirement other than Mr M's suggestion he didn't receive an invitation. Of course, non-receipt isn't the same as failure to provide notice. And in any event, the CMC haven't explained how any alleged breach ultimately resulted in a loss for Mr M. And on that basis, I can't reasonably say that Halifax's response was unreasonable here.

Unfair terms under the UTCCR

The potential existence of unfair terms within the contract and conditions associated with the product Mr M purchased wouldn't ordinarily fall under the provisions of S75, as this section provides protection specifically against misrepresentation or breach of contract. And as Mr M appears to have signed the contract documentation acknowledging and accepting those terms, I can't reasonably say they were misrepresented to him.

I acknowledge that some of the contractual terms that apply to the purchase in November 2015 could've potentially been unfair under the UTCCR. However, as far as I can tell, any potential unfairness of those terms doesn't appear to have eventuated in practice resulting in a loss for Mr M. Such terms could, of course, lead a court to decide that an unfair relationship exists under the provisions of section 140A of the CCA (S140A). This is contingent upon there being clear evidence that the payment made in April 2016 does specifically relate to the November 2015 purchase. But I can't see that such a claim has been made to Halifax in any event. And because of that Halifax haven't been given reasonable opportunity to consider such a claim and respond. So, I don't believe this is something I can consider further within the context of the complaint made by the CMC on Mr M's behalf.

I have considered the generic submissions prepared by Counsel. However, as these were generic points and not specific to Mr M's own purchase or recollections, I don't think they offered much help in making factual findings in Mr M's case.

Summary

Having carefully considered all the information available, it appears much of the original claim doesn't relate to the product Mr M purchased in November 2015. And I've seen no evidence that Mr M used his Halifax card to purchase the asset-backed timeshare product referred to by the CMC. However, I have considered the subsequent points raised by the CMC together with the responses from Halifax. And as I've explained above, I can't say that Halifax's responses were ultimately unfair or unreasonable here.

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.

Halifax have acknowledged receipt of my provisional decision confirming they agree with my findings and have nothing further to add.

Despite this service's attempts to follow up with them, the CMC have neither acknowledged receipt of my provisional decision nor provided any further comment or evidence. In these circumstances and in the absence of any further information, I've no reason to vary from my original findings.

My final decision

For the reasons set out above, I don't uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 5 September 2023.

Dave Morgan
Ombudsman