DRN-4255773

The complaint

Mr P complains that TSB Bank plc ("TSB") acted unfairly in not upholding his claim under section 75 of the Consumer Credit Act 1974 in relation to a timeshare product he purchased using his credit card.

What happened

In or around January 2015, Mr P was staying at a holiday resort outside of the UK. The holiday had been booked as part of an exchange arrangement provided under an existing timeshare membership held by Mr P. During his stay, he received a call from a representative of another timeshare supplier (who I'll refer to as "A") inviting him to attend a meeting. Mr P agreed to meet.

During that meeting, Mr P says A discussed his existing timeshare and exchange arrangements to establish whether he was happy with the service and product he held. Mr P says he told A that whilst he was happy with his existing timeshare provider, he wasn't happy with the ease of booking exchanges under that timeshare membership.

Mr P says A explained they were currently changing their own exchange provider and asked if he'd consider buying one of their timeshare products. But he told A he couldn't afford two timeshares. Mr P says A offered to arrange for his existing timeshare product to be terminated in exchange for a timeshare membership with them at a cost of £14,875. But Mr P thought this was too expensive. He says A offered to reduce the price by £2,000 if he agreed to rent out any associated apartments under a new membership with them in 2016 and 2017. In exchange, Mr P had the option to purchase a voucher for £950 giving him access for one year to use towards a holiday. In the event they couldn't terminate his existing timeshare, A confirmed they would terminate the new timeshare contract purchased from them.

Mr P agreed to purchase the timeshare product from A on the basis agreed at a cost of £12,875. He paid £3,875 using his credit card with TSB with the balance to be funded under a separate loan agreement with another business. Having completed the purchase, Mr P received confirmation his previous timeshare had been cancelled and he subsequently received rent for 2016 and 2017, as agreed. This was offset against his maintenance fees liabilities under the new timeshare membership with A.

In 2018, Mr P says he asked A to rent out his timeshare week for 2020. But A weren't able to do that as they already had all the apartments they required available for rent.

In or around March 2019, Mr P met with A again and asked them to put his timeshare up for sale once the five-year anniversary was reached in January 2020. A sale listing agreement was completed in March 2019. But Mr P received no updates after that. However, in May 2020, it was announced that A had entered liquidation.

In or around July 2020, using a professional representative ("the PR"), Mr P submitted a claim to TSB under section 75 ("S75") of the Consumer Credit Act 1974 ("CCA"). The PR said that A were now in liquidation and aren't able to provide the service sold. As a result, the PR believes this constitutes a breach of contract. Further, the PR said A had made a number of promises to Mr P about the product purchased which turned out not to be true. In particular, the PR said:

- the timeshare contract would only last for five years and would then be sold at market value;
- the product was represented as an investment, which is in breach of the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 ("the TR"); and
- there would be no issues renting out Mr P's timeshare.

In addition, the PR allege that A told Mr P that the product would be available at the price agreed only on that day, in breach of the Consumer Protection from Unfair Trading Regulations ("CPUT"). And in his own statement, Mr P states he was pressured into completing the purchase and felt very uncomfortable in doing so.

TSB didn't provide a substantive response to Mr P's claim here, despite various written exchanges between them and the PR. So, the PR referred Mr P's complaint to this service.

One of investigators looked into the circumstances and evidence available for Mr P's complaint. During the course of that investigation, TSB provided a summary of what had happened while they considered Mr P's claim. They said that as they hadn't been provided with any supporting evidence, they'd asked the PR to provide further information and evidence so they could consider Mr P's claim further. But not all the information was received, despite various chasers and exchanges.

TSB identified that payments made by Mr P, using his credit card, were to a third-party company – not to A. And because of that, they said they weren't able to establish whether the necessary debtor-creditor-supplier[1] ("DCS") arrangement existed in order that Mr P could make a valid claim. Despite requests, TSB said they haven't received the necessary evidence from the PR to clearly establish the DCS arrangement. So, weren't able to progress his claim further.

Our investigator thought there was sufficient evidence to suggest the necessary DCS arrangement was in place to support Mr P's S75 claim. And having considered all the circumstances, our investigator thought the main reason for Mr P's purchase was because he was led to believe he would have a good value product which he could sell in the future. Because our investigator thought Mr P's recollections were plausible, they thought A had misrepresented the timeshare product to him. And as a consequence, thought TSB hadn't properly assessed his claim under S75.

Our investigator thought TSB should reimburse Mr P for the amount(s) paid using his credit card with them, together with any interest charged, adding to that 8% simple interest per year. They also thought TSB should refund all loan payments made by Mr P together with 8% simple interest each year, subject to evidence being provided that any claim against the loan provider had been unsuccessful.

Finally, our investigator thought TSB should reimburse Mr P for any maintenance fees paid under the timeshare agreement for the years the timeshare product wasn't used (subject to evidence being provided) together with 8% simple interest each year.

The PR confirmed that Mr P accepted out investigator's findings. TSB asked for additional time to consider the claim further with reference to their legal team. But to date, have not provided their response or any additional information.

As an informal resolution couldn't be reached, the complaint has been passed to me to consider further.

Having considered the relevant information about this complaint, I reached a different outcome to that of our investigator. Because of that, I issued a provisional decision ("PD") on 21 June 2023 – giving the PR, Mr P and TSB the opportunity to respond to my findings before I reached a final decision.

[1] Under section 12 of the Consumer Credit Act 1974

In my provisional decision, I said:

Relevant Considerations

When considering what's fair and reasonable, DISP 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 for consumers for goods or services bought using credit, subject to the necessary DCS arrangement being in place. Mr P paid £3,875 for the timeshare product with a credit card issued by TSB, so it appears that S75 could apply here, provided the necessary DCS arrangement can be established. This means that Mr P would be afforded the protection offered to borrowers like him under those provisions. And as a result, 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 considered here specifically relates to whether I believe TSB's treatment of Mr P'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 A in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that A made false statements of fact when selling the timeshare product in 2015. In other words, that they told Mr P 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 P to enter the contract. This means I would need to be persuaded that Mr P reasonably relied on those false statements when deciding to buy the timeshare membership.

The Membership Application Agreement, signed by Mr P, refers to the *"[…] Application for Membership which shall be valid from the date of payment of Membership Application Fee until the year 2045 […]".* Note 3 of the Statement of Compliance says, *"Membership expires on 31st December 2045".* This document was also signed by Mr P, and it appears he initialled next to this note. So, in the absence of any other corroborating evidence from the time of the sale, I can't reasonably conclude that Mr P was told that the contract would only last for five years.

Note 8 of the Statement of compliance says, *"We understand that the [A] Resale facility will be available with effect from the year 2020. We also have been advised that should we wish to initiate the process to exit our Membership through the [A] Resale facility, we would first need to enter into a Listing Agreement. We have not been given any resale timeframe guarantees since finding a new buyer depends on market conditions and could potentially take one or more years. Furthermore, the future value of the Club Membership cannot be guaranteed […]".*

So, it appears that while Mr P could choose to sell his membership after 5 years, no assurances were given by A as to how long that would take and what level of proceeds could reasonably be achieved relative to his initial outlay or the market price of his membership at that time.

The PR believe that the ability to sell the membership at market value, in their view, amounted to the marketing or selling of the timeshare contract as an investment, contrary to Regulation 14 of the TR. However, the contract can't have been marketed and sold as an investment contrary to the TR simply because there might have been some inherent value to Mr P's membership. A would had to have presented the membership in such a way that used its investment element to persuade Mr P to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3).

So, I'm not persuaded by the PR's submissions on this particular point. But as one of the benefits was Mr P's ability to potentially rent his membership, I've considered the PR's suggestion more broadly given this complaint's circumstances. And having done that, I still don't think the product was likely to have been marketed and sold as an investment.

I say this because there is evidence that A made efforts to avoid giving consumers the impression that this type of timeshare membership was a financial investment. There was, for example, a clear disclaimer within the Statement of Compliance. At point 6, it says, *"The primary purpose of our Membership is to access holiday accommodation and is not a financial investment for a return".* And as I've already stated, this document not only appears to have been signed by Mr P, but he also appears to have initialled next to that point.

With this in mind, I've found no evidence that any rental element of the membership contract was actively marketed by A as a benefit to Mr P. Instead, beyond the initial two years, it relied upon Mr P proactively requesting that his membership week be rented. This is supported by the fact that Mr P made such a request in 2018. It doesn't appear this was proactively offered by A. More importantly, nowhere in Mr P's testimony does he say that the membership was marketed and sold to him as an investment. And I find that difficult to explain if, in fact, it was.

Mr P says that he told A that the previous timeshare product he'd held with another supplier had no end date. And given that the product he purchased from A included the ability to put his membership up for sale after five years, I can understand why this might have been attractive to him. But as I've explained, I've found no evidence that this was marketed to him in such a way to constitute an investment under section 14(3) of the TR.

On a final note, I've found no evidence to support the allegation that A told Mr P there wouldn't be any issue with renting his timeshare membership week if he required. While the ability to do so may have been a feature, there doesn't appear to have been any guarantee that this could be achieved.

The allegations of pressure

The PR's letter of claim alleges that A used aggressive commercial practices and Mr A was pressured into entering the agreement. I acknowledge what Mr P says in his testimony about the length of the sales presentation he attended. So, I can understand why it's argued that the prolonged nature of the presentation might have felt like a pressured sale – especially if, as they approached the closing stages, he was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

However, against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr P agreed to the purchase at the time of the sale when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to A, after the purchase, to suggest he'd agreed to it when he didn't want to. And as he hasn't provided a credible explanation for why he didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted, if he only agreed to the purchase because he was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr P was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr P made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

Breach of Contract

The only contractual documentation I've seen so far is Mr P's Membership Application Agreement, together with its terms and conditions, a Withdrawal Form and the Statement of Compliance – all from January 2015. The Membership Application details a week in two specified apartments at a named resort. The agreement is between Mr P and A, a company that the agreement described as the *"operator of the agreement"* of the holiday rights that were sold.

The Letter of Claim said that A was in liquidation and couldn't provide the service it sold to Mr P. So, as far as he and the PR were and are concerned, there'd been a breach of contract. I've seen a letter from the liquidator appointed which was sent to all club members – including Mr P. It confirms a new club manager had been appointed and, as a result, *"the Clubs would continue to operate for the benefit of members".* The letter also included contact details for the new club manager. So, assuming Mr P is still able to access the benefits afforded to him under his timeshare contract, and I've seen nothing to suggest he can't, I can't reasonably say he's suffered any loss here.

I've seen the original confirmation from A that Mr P's timeshare agreement had been listed for resale following his request in 2019. It confirms, *"[…] there is no timeframe or amount being guaranteed".* However, very little else appears to have been said and/or provided in relation to this allegation. So, as things currently stand, I don't know what Mr P's current position is under the Purchase Agreement or the Resale Listing Agreement. And without knowing (1) what rights and obligations have been assigned to another business since A's liquidation (if any) and (2) what specific rights Mr P thinks he has lost; I can't say that Mr A has suffered a loss that TSB is likely to be jointly liable for.

Was the right arrangement in place?

Under Section 75 of the CCA, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision.

As it appears that payments under the purchase agreement were made to a third party rather than to A directly, it's possible that there was no such agreement in place. Particularly following a very recent High Court judgment in the case of Steiner v National Westminster Bank PLC [2022].

However, as I understand it, the claimant there sought permission to appeal that decision. And, in any event, given the overall outcome I've reached, I don't think it's necessary to make a formal finding on the debtor-creditor-supplier arrangement for the purpose of this decision because I don't currently think the complaint should succeed under S75.

Summary

I acknowledge that TSB don't appear to have provided Mr P with an outcome for his claim under S75. However, it seems they were awaiting additional information from the PR which has yet to be received. So, with that in mind, and having considered all the information available, I've thought carefully about whether TSB 's handling of Mr P's claim was unfair or unreasonable.

In doing so, I also carefully considered the allegations presented together with any corroborating evidence provided. And while I appreciate that Mr P will be disappointed, I haven't found anything that persuades me that TSB need to do anything more at the moment. But I will reconsider that should any further relevant information and evidence be forthcoming.

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.

TSB acknowledged receipt of my PD and confirmed they had no further comments.

The PR didn't accept my provisional findings and raised various points to support their arguments. In particular they said:

- Mr P is fully aware the timeshare was for a longer period but *"was assured that there would be a guaranteed exit after 5 years"* which supported his stated needs to exit the product after that period;
- *"The closure of* [A's] *re-sale scheme cannot be disregarded"* and *"can be no clearer example of breach of contract";*
- my PD disregarded findings and comments made by the investigator in their original view; in particular relating to the ease at which timeshares provided by A can be resold;
- a timeshare product subsequently offered as an upgrade to Mr P was marketed on the basis there was no resale market, so was the only way to protect his investment;
- my PD failed to consider the evidence and testimonies of numerous other complainants relating to products sold by A;
- the liquidators for A confirmed that the resale programme has been discontinued with no obligation by the subsequent management company to reinstate it.

I think it's important I reiterate that I've found no evidence that A provided any guarantee, written or otherwise, that Mr P would be able to successfully exit his timeshare after five years. Only, that he could seek to exit it after five years – an option being to list it for sale under A's resale facility.

One of the key questions here is whether A were contractually obliged to provide a resale programme enabling Mr P to sell his timeshare product after five years. I've carefully considered the copy of the Membership Application Agreement Terms and Conditions provided in Mr P's case. Having done so, I've not found anything which contractually obliged A to provide a resale service.

However, as I said in my PD, the Statement of Compliance does reference the resale facility under note 8. But this doesn't appear to form part of the main contract itself or place an obligation upon A to provide it. I acknowledge that it does say that the facility will be available with effect from the year 2020. And as I said in my PD, it seems A accepted Mr P's completed resale listing agreement in March 2019 ahead of the 5th anniversary of his

timeshare agreement. So, it would appear A did agree to provide Mr P access to their resale service under his completed listing agreement.

The next question is whether the subsequent closure of the resale programme constitutes a breach of contract. I haven't been provided with a specific copy of the listing agreement completed in Mr P's case. However, he has provided a copy of a listing agreement template given to him by A in 2015, when he first agreed to purchase the timeshare from A. Section 6.2 says *"This Agreement shall be valid until: (i) the Option* [for A to purchase the timeshare] *is exercised by* [A]*; (ii) the Option lapse of the Option Period; or (iii) until this Agreement is otherwise terminated".*

It seems the resale listing agreement was terminated upon appointment of the liquidators of A. The agreement appears to contain no contractual minimum term or guaranteed listing period. So, it would seem its eventual termination fell under part (iii) of the aforementioned section.

If I were to find that A's failure to continue providing the resale programme constituted a breach of contract – and I make no such finding – I would need to be satisfied that a successful sale would've been achieved in order to uphold Mr P's complaint here. But I've not seen any evidence to suggest a successful sale was missed out on or would've been achieved had Mr P's listing continued. And because of that, I can't reasonably conclude there would be an entitlement for damages as a consequence.

The PR believe I've failed to consider the circumstances and evidence of other similar complaints involving A as a timeshare provider. In reaching my decision, I can only consider the evidence available which relates specifically to Mr P's own situation and circumstances. That's what I've done here. And while I acknowledge there may have been other similar complaints, I can't consider the individual circumstances of those within the context of Mr P's complaint here. Ultimately, I don't think they provide much help in terms of making factual findings in Mr P's case.

Having thought very carefully about everything that's been said and provided, I'm not persuaded to vary from the findings in my PD. And because of that, I won't be asking TSB to do anything more here.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 30 August 2023.

Dave Morgan
Ombudsman