DRN-4518267

The complaint

Mr M complains that National Westminster Bank Plc trading as Ulster Bank ("UB") unfairly declined his claim under section 75 of the Consumer Credit Act 1974 ("CCA") in relation to a payment he made using his credit card to purchase a timeshare product.

What happened

In or around October 2015, Mr M was on holiday, using his timeshare, when he was invited to an update meeting with his timeshare provider – who I'll refer to as "L". Mr M says that as a consequence of this meeting, he agreed to purchase an additional 40,000 points in a timeshare product supplied by L. It appears this purchase was subsequently completed in February 2016. Mr M says it was funded using a credit card in his sole name provided by UB.

In or around August 2021, using a professional representative ("the PR"), Mr M submitted a claim to UB under section 75 of the CCA ("S75"). Within the claim, the PR suggest Mr M, *"had previously bought a timeshare product from* [L] *on the basis this was an investment and could be sold at a later date".* The PR further allege Mr M purchased the timeshare points in February 2016 having relied upon representations made by L which turned out not to be true. And under section 75 of the CCA ("S75"), UB are jointly liable for those misrepresentations. In particular, the PR allege that L told Mr M:

- the purchase of more points would enable stays at larger accommodation and increase availability; and
- points would allow access to exclusive luxury resorts.

The PR say these statements were untrue as Mr M continued to experience difficulties booking the holidays he wanted. It's also alleged resorts weren't exclusive as they were generally also available to non-members.

The PR also allege there were breaches are various regulations and legislation that apply to the sale of timeshare products. In particular, they said:

- the timeshare contract was *"in perpetuity, an unusual and extremely onerous term sufficient to render the contract null and void"*;
- the product was sold as an investment contrary to regulation 14 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs"); and
- L used aggressive sales practices contrary to The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")

The PR added that Mr M reserves the right to claim breach of contract.

In response, UB didn't agree Mr M's claim. They said the credit card payment had been made to a different company rather than to L. And for a successful claim under S75, there needed to be evidence that a 'debtor-creditor-supplier' ("DCS") agreement existed. In other words, evidence that Mr M had made payment, using his credit card, to the company against whom he is claiming – here that's L. But UB were unable to establish that link so didn't think a valid claim could be demonstrated under S75.

The PR didn't agree with UB's findings. In particular because they believe they'd presented sufficient evidence to establish a DCS link under section 184 of the CCA. So, they referred Mr M's complaint to this service.

One of this service's investigators considered all the evidence and information available. Having done so, they didn't think UB's failure to uphold Mr M's claim was ultimately unfair or unreasonable. In particular, whilst our investigator did think there was sufficient evidence to establish the DCS link, they didn't think there was any evidence to support the alleged misrepresentations.

The PR didn't agree with our investigator's findings. In response, they explained at length why they thought there was a valid DCS relationship. They also provided generic comments about alleged consumer experiences when purchasing from L together with further allegations not included within the original claim.

As an informal resolution couldn't be achieved, Mr M's complaint has been passed to me to consider further and reach a decision. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 16 November 2023 giving both sides the chance to respond before I reached my final decision.

In my provisional decision I said:

> Relevant considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] 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 consumers with protection for goods or services bought using credit. Mr M paid for the timeshare product using a credit card under an existing regulated agreement. So, it isn't in dispute that S75 applies here. This means Mr M is afforded the protection offered to borrowers like him under those provisions, subject to any restrictions and limits. As a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe UB's failure to uphold the claim submitted by Mr M was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service and we aren't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.
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> 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.

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[1] Dispute Resolution: The Complaints sourcebook (DISP)

[2] Financial Conduct Authority

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by L in the ways that have been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that L 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 the allegations raised. I would also need to be satisfied that those misrepresentations were material in inducing Mr M to enter into the purchase contract. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the timeshare points.

From the information available, I can't be certain about what Mr M was specifically told (or not told) about the benefits of the points-based product he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the evidence that is available from the time. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr M's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says he was told.

In particular, I've not seen any documentation that sets out anything in relation to booking availability or quality. And my own experience of such contracts tends to suggest that bookings are subject to availability in any case. Further, the PR suggest that *"promises of exclusivity have not come to fruition as non-members are able to holiday at these resorts".* But I haven't seen anything that gives any assurance of exclusivity in relation to the product purchased or, more importantly, defines exclusivity. So, this appears to be either the PR's or Mr M's own interpretation of exclusivity rather than anything actually communicated by L, whether verbally or in writing.

As regards any allegation that the product was sold as an investment, the claim appears to suggest this comment relates to previous timeshare purchases made by Mr M rather than this particular purchase. So, I don't think UB can reasonably be held responsible for anything said or done in relation to prior purchases which they didn't fund. And in any event, I think it unlikely the product can have been marketed and sold as an investment contrary to the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") simply because there might have been some inherent value to it.

I've found nothing within the evidence provided to suggest L gave any assurances or guarantees about the future value of the product Mr M purchased. L would had to have presented the product in such a way that used any investment element to persuade him to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Breach of contract claim under S75

While the PR mention the reservation of rights to submit such a claim, I can't see that there's been any claim made. So, I don't think this is something I can consider here.

The alleged regulation breaches

The PR have explained why they believe there to have been various breaches of the regulations that applied here. Such breaches**,** if substantiated, could point to unfairness within the purchase contract. Claims for unfairness don't ordinarily fall under S75. However, they could be included within a claim under section 140A of the CCA ("CCA").

S140A looks at the fairness of the relationship between Mr M and UB arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A.

But I can't see that such a claim has been submitted to UB here. Only alegations that there were regulatory breaches. So, I don't think I can consider how UB responded to these allegations within the context S140A. However, for completeness I have considered the allegations separately even though I don't think they can form part the S75 claim.

- The term of the timeshare product

The PR suggest the product purchase operated in perpetuity, such that in the event of Mr M's death, any liability under it would be inherited by his survivors/beneficiaries of his estate. However, I haven't seen any documentation from the time of the sale that provides any details of the term of the product purchased. Further, the PR have since said that the PR told Mr M that purchase of the product points would provide a guaranteed exit under a release clause of five or ten years. However, I also haven't seen any evidence of this either. So, I don't think this is an area I'm able to comment on.

- The pressured sale and process

The claim suggests Mr M was pressured into purchasing the product through the use of aggressive sales practices contrary to CPUT. I can understand why it might be argued that where there may have been a prolonged presentation, it might have felt like a pressured sale – especially if, as Mr M 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.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr M agreed to the purchase when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to L, after the purchase, suggesting he'd agreed to it when he didn't want to. And neither the PR nor Mr M have provided a credible explanation for why he didn't subsequently seek to cancel the transaction within the 14-day cooling off normally period permitted here.

If he only agreed to the purchase because he felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest he was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that he made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations ("CPUT").

Furthermore, the claim appears to suggest the original presentation took place in October 2015. But it doesn't appear that Mr M completed the purchase until February 2016. So, on the face of it, it appears Mr M had considerable time to consider his decision before proceeding.

Was the right arrangement in place?

Under Section 75 of the CCA, a DCS relationship is a precondition to a claim under that provision.

As it appears that the payment under the purchase agreement was made to a third party rather than to L 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, given the facts and circumstances of this complaint and my overall outcome with those in mind, I don't think it's necessary to make a formal finding on the DCS arrangement for the purpose of this decision, because I don't currently think the complaint should succeed on its merits anyway.

Other considerations

In responding to the investigator's findings, the PR has referenced what they believe to be systemic difficulties and problems encountered by other consumers and customers of L. However, in considering Mr M's complaint, I'm only able to consider the facts and evidence as they specifically relate to Mr M's own experience. So, while I acknowledge what has been said, these were generic points and not specific to Mr M's own purchase or recollections. So, I don't think they offered much help in making factual findings in Mr M's case.

I've also noted the PR appear to have raised additional claim points in their response to our investigator. My role here is to consider whether UB's response to Mr M's claim was fair and reasonable. As these didn't form part of the claim submitted to UB, I don't think it would be fair or reasonable to consider any new claim points as part of the complaint referred to this service.

Summary

I would like to reassure Mr M that I've carefully considered everything that's been said and provided in reviewing his complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that UB's response to his claim was ultimately unfair or unreasonably. Because of that, I don't currently intend to ask UB to do anything more 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.

In response to my provisional findings, UB confirm they have nothing further to add. However, despite follow up by this service, neither the PR nor Mr M have provided any further comment or evidence for me to consider.

In the circumstances, I've no reason to vary from my provisional findings. So, I won't be asking UB to do anything more here.

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 30 January 2024.

Dave Morgan
Ombudsman