

The complaint

Mr R complains that Clydesdale Bank Plc (“Clydesdale”) unfairly declined his claim under section 75 of the Consumer Credit Act 1974 in relation to the purchase of timeshare products using his credit card.

What happened

In or around May 2011, Mr R and his wife agreed to upgrade their existing timeshare membership with a company I’ll refer to as “D”. The upgrade involved the purchase of points rights in a timeshare scheme operated by D at a cost of £3,000. The purchase was funded by making payments of £600 and £2,400 using a credit card with Clydesdale in Mr R’s sole name. The points could be used to book holidays and accommodation from a portfolio operated by D.

In or around January 2012, Mr and Mrs R agreed to upgrade their timeshare membership with D by purchasing an additional 12,000 points rights at a cost of £6,500. After an initial payment of £1,300 using Mr R’s credit card, documentation suggests the balance was to be paid by way of 12 monthly payments of £434, also from Mr R’s credit card.

In or around January 2017, using a professional representative (the “PR”), Mr and Mrs R submitted a claim to Clydesdale under section 75 (“S75”) of the Consumer Credit Act 1974 (“CCA”). The PR said that D had made a number of promises to Mr and Mrs R about the products which turned out not to be true. In particular, the PR said:

- by entering into the contract, Mr and Mrs R would gain access to a particular service/benefit. But as they already had access to that benefit, this was misrepresented; and
- Mr and Mrs R could rent out their new points to cover their management fees. But they received no rental income.

In response to the claim, Clydesdale asked the PR to provide evidence to support any alleged breach of contract or misrepresentation. PR replied by alleging that Mr and Mrs R had purchased membership of an exclusive club. They said, *“It must be accepted that [Mr and Mrs R] would gain access to exclusive resorts, namely accommodation unavailable to non-members, and/or accommodation which is cheaper than can be found elsewhere”*.

Clydesdale didn’t uphold the claim. They said, *“Mr R has been using the service of [D] extensively since 2011 and has booked for 2017[...].”* They said there was no evidence that Mr R had purchased the points merely to gain access to the particular benefit(s) suggested. They also said there was no evidence to suggest that access to any rental programme was a factor in Mr R’s decision to purchase. Or that he’d ever expressed an interest in advertising the points for rental.

Unhappy with Clydesdale’s response to Mr R’s claim, a complaint was raised with them. But Clydesdale didn’t agree they’d done anything wrong and believed they weren’t able to justify Mr R’s claim.

The PR referred Mr R’s complaint to this service. Having considered all the information and evidence available, our investigator didn’t think there was any evidence to support any misrepresentation by D. And as a consequence, didn’t think Clydesdale had treated Mr R unfairly.

The PR didn't agree with our investigator's findings. So, as an informal resolution couldn't be reached, the complaint has been passed to me to consider further. In support of Mr R's claim, the PR wish to rely on a 51-page document produced by counsel containing "*Generic submissions on behalf of complainants*", which relates specifically to complaints about the sale of points products by D. This is supplemented by a six-page document, from the PR, providing observations and allegations relating to D's sales procedures and documentation.

Having considered the relevant information about this complaint, whilst I ultimately came to the same outcome as our investigator, I'd considered certain aspects not previously addressed. Because of that, I issued a provisional decision ("PD") on 15 June 2023 – giving the PR, Mr R and Clydesdale the opportunity to respond to my findings before I reached a final decision.

In my provisional decision, I said:

Relevant Considerations

The purchase here was completed using a credit card in Mr R's sole name. So, while the claim submitted was in joint names with his wife, Mr R is the only eligible claimant under the CCA and, as such, the only eligible complainant.

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. Mr R paid for the timeshare points with a credit card issued by Clydesdale, so it isn't in dispute that S75 applies here. This means that Mr R is 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 Clydesdale's treatment of Mr R'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 holiday products in 2011 and 2012. In other words, that they told Mr R something that wasn't true in relation to one or more of any points raised. I would also need to be satisfied that these misrepresentations were material in inducing Mr R to enter the contracts. This means I would need to be persuaded that Mr R reasonably relied on these false statements when deciding to buy the membership points/upgrades.

Allegations have been made specifically relating to the product sales referenced above. The difficulty I have is identifying what was actually said at the time of the sale. The PR have provided limited details and evidence to support the misrepresentations Mr R says the seller made, although I acknowledge that he does say he was told these things. So, I've thought about this alongside the limited evidence that's available from the time of Mr R's purchases.

Although not determinative of the matter, I've not seen any specific evidence from the time of the sale, such as marketing material or any of the wider purchase documentation. And whilst I have seen the front pages of the purchase agreements together with the associated points certificates, I can't see that these support what Mr R says he was told or that what was said amounted to misrepresentation. And while I don't doubt the honesty of his recollections, honesty isn't the same as credibility – which is an important distinction to make for the purpose of this complaint (see what Mr Justice Leggatt had to say in *Gestmin SGPC S.A. v Credit Suisse (UK) Limited* [2013]).¹

But even if I was to put to one side what the courts might say about the reliability of human memory, experience tells me that the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others. And having not been present at the time of the Sale, it isn't possible for me to determine with certainty what Mr R was or wasn't told by D. So, in the end, the part his recollections play in determining the outcome of this complaint comes down to the extent they can be corroborated given the other evidence available.

For example, the PR have reached a conclusion that exclusivity equates to *"accommodation unavailable to non-members and/or accommodation which is cheaper than can be found elsewhere"*. But the PR haven't provided any evidence specific to Mr R's purchase which references or defines exclusivity. So, this appears to be either the PR's or Mr R's own interpretation rather than what was actually communicated, whether verbally or in writing.

I've also considered the various points included in the Counsel's submissions provided by the PR. However, these were generic points and not specific to Mr R's recollections of the sale. So, I don't think they offered much help in making factual findings in Mr R's case. And regarding the additional points raised in another document provided by the PR, the conclusion of that document suggests, *"the moment [D] commenced sale of the Fractionalised Points product in 2012 there was a fundamental breach of the [...] Points Contract"*. As far as I can see, the products purchased by Mr R weren't part of D's Fractional timeshare product scheme. So, I think they serve little (if any) help in supporting the claims of misrepresentation here.

Conclusion

Having considered everything that's been said together with the limited evidence available here, I've not been able to find anything that supports the allegations of misrepresentation under S75. And on that basis, I can't say that Clydesdale's response to Mr R's claim was ultimately unreasonable or unfair. While I do appreciate Mr R will be disappointed, I don't intend asking Clydesdale 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

¹ This was followed in *Lachaux v Lachaux* [2017], discussed with approval and explained by the Court of Appeal in *Kogan v Martin* [2019] (see, in particular, paragraph 88) and quoted with approval by the Supreme Court in *Bancoult, R (on the application of) (No 3) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2018].

reasonable in the circumstances of this complaint.

Clydesdale have acknowledged receipt of my PD and confirmed they have nothing further to add.

Despite follow up attempts by this service, the PR have neither acknowledged receipt of my PD nor provided anything further for me to consider.

With the time for further comment and evidence having now passed and in the absence of anything further to consider here, I've found no reason to vary from my original findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 17 August 2023.

Dave Morgan
Ombudsman