

The complaint

Mr and Mrs K's complaint is that Shawbrook Bank Limited ('SB') wrongly rejected, and failed to pay, a claim under Section 75 of the Consumer Credit Act 1974 ('CCA') relating to the purchase of a timeshare.

What happened

Background to the Complaint

In August 2013, ('Time of Sale') Mr and Mrs K took out a timeshare membership from a timeshare provider (the 'Supplier'), trading in an existing timeshare and paying more to acquire a new membership with 'Fractional Points'. This purchase gave them the right each year during their term of membership to redeem annual Fractional Points allocated in exchange for the use of certain accommodation in the Supplier's nominated resorts and other benefits. And at the end of their projected membership term, they also had a share in the net sale proceeds of a property tied to their membership.

At the Time of Sale, Mr and Mrs K financed the cash element of the purchase by entering into a Fixed Sum Loan Agreement with SB (the 'Loan Agreement'). Under the Loan Agreement they borrowed £6,500.00 which was to be repaid over 120 months from the date such sum was advanced by SB to the Supplier; the total amount repayable under the Loan Agreement after credit charges was £12,506.60. However, the Loan was repaid in full in September 2014.

Mr and Mrs K's Section 75 Complaint

Mr and Mrs K engaged a professional representative ('PR') and wrote to SB on 26 January 2017 and made a claim under Section 75 of the CCA for return of monies paid and cancellation of the Loan Agreement.

The PR said that:

- Mr and Mrs K were existing members of a holiday club but were told they could upgrade their membership via a new contract for better benefits.
- Mr and Mrs K were told the new contract had a shorter term, and initially it seemed to offer better holidays with easier bookings.
- Mr and Mrs K were told they would never have a problem booking and entered into the new contract in good faith. However, now that the Supplier had been taken over by a different company, they had been told that holiday bookings must be made a year in advance. This was not feasible, so they felt they were misled, that the membership had been mis-sold and they wanted a return of their monies and cancellation of the Loan Agreement.

SB investigated and dealt with Mr and Mrs K's complaint and issued its final response letter on 23 March 2017. They said that they could not see any grounds to support the allegations raised based on the information provided and rejected the complaint.

They also said that:

- The membership bought in 2013 lasted for a shorter period (ending in 2027-2029) than Mr and Mrs K's earlier type of membership (which was due to end in 2054).
- The change of membership made no difference to the availability of accommodation to Mr and Mrs K and the same booking windows applied.
- The Supplier constantly increased the number of destinations available to book by members using points.
- Having reviewed comments placed on the Supplier's computer records since Mr and Mrs K acquired Fractional Points, there was nothing which would suggest that they had experienced any difficulties securing their desired availability.
- The Supplier had been acquired by a private equity fund, but this had no effect on the day-to-day operations of the company, or on the availability bookable by their members.
- Mr and Mrs K had successfully secured peak-season reservations each year since acquiring Fractional Points.

As a result, Mr and Mrs K referred the complaint to the Financial Ombudsman Service on 27 March 2017.

The complaint was assessed by an adjudicator who concluded in a letter dated 5 November 2020, that SB had fairly investigated the claim and so rejected the complaint on its merits. On 14 November 2020 PR asked for the complaint to be re-examined. Thereafter the matter was eventually referred to another investigator who, on 18 December 2023, concluded that based on what he'd seen, he did not think that SB had acted unfairly and determined not to uphold the complaint.

In his decision the investigator confirmed that if Mr and Mrs K didn't accept the decision – and would like an ombudsman to make a final decision on the complaint – they should provide any further evidence or representations by 12 January 2024. Mr and Mrs K replied on 18 December 2023, via their PR, asking that the matter should be referred to an ombudsman for decision. Hence this claim has been passed to me. However, so far as I can see, other than making a request for referral as noted above, no further evidence or representations have been provided by either party.

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.

My Investigation

I have reviewed the documents from the point of sale as well as looking at information provided in relation to memberships Mr and Mrs K held before and after the purchase.

Attached to and forming part of the membership agreement, are Terms and Conditions.

Paragraph 3 thereof said:

“3. We hope that You will have many great holidays using Your [Supplier] Fractional Points. However, please note that accommodation at peak times is highly demanded and all accommodation is subject to availability.”

The KEY INFORMATION document, Part 1 paragraph 3 sets out the nature and content of right(s) of redemption of points and said that:

“Reservations can be made by you into the Owners Club and into the accommodation held in trust for the European Collection as early as 13 months prior to your planned arrival date.”

It went on to say that for certain resorts the booking period was shorter: for resorts referred to as the Five Collections the booking window for Owners was up to 10 months prior to the date of arrival; and for Portfolio Resorts the booking window was 10 months prior to the date of arrival.

The Key Information document said that:

“All accommodation is subject to availability”.

The Key Information document Part 3, 1. ADDITIONAL INFORMATION ABOUT THE RIGHTS ACQUIRED, paragraph 12, said:

“All accommodation is available on a first come first served basis and is subject to availability and there is more availability at some resorts than others.”

Paragraph 13, said that:

“Demand for accommodation is high during peak periods (such as school holidays), and Late Availability may not be available at these times. Where specific dates are required, Owners are advised to book well in advance of their desired travel dates to avoid disappointment.”

There was also a “Customer Compliance Statement” (‘CCS’) signed by Mr and Mrs K at the Time of Sale.

Paragraph 1 of the CCS said that:

“We understand that all accommodation reservations must be made by using our annual allocation of [Supplier] Fractional Points and that we will have no automatic booking or usage rights to stay at accommodations in the Owners Club.”

Paragraph 10 of the CCS said that:

“We understand that the [Supplier] Fractional Points system offers us the flexibility of choosing the location, season, size of accommodation and length of stay to meet our particular needs, subject to availability.” (Emphasis added)

Paragraph 11 of the CCS said that:

“We understand that reservation requests into the Owners Club and into the European Collection Resorts can be made up to 13 months before the date of check-in. We also understand that bookings into all the other resorts in the Club® can be made up to 10 months prior to the date of arrival.”

On page 3 of the CCS, directly underneath the signatures of Mr and Mrs K, it is said that:

“If there is anything that you are unsure of, that you feel is ambiguous or contradictory or which you have specifically relied on but which is not addressed in the paperwork, this is YOUR opportunity to have it clarified or confirmed in writing. Please make a note of your

question on this Customer Compliance Statement before handing it back to your sales advisor. Alternatively, amend your copy of the Customer Compliance Statement and send it to us during your cancellation period. Either way, we will ensure that any issues raised by you are fully addressed.

*Additionally, if you think we can improve on our sales presentation in any way we would welcome your comments in the section below!
Additional questions /comments”*

The document ends at that point without any additional questions or comments having been inserted in it.

The Legal and Regulatory Context

When coming to what I consider to be a fair and reasonable outcome to this complaint, I am required to take into account the law. In this complaint, amongst other things, I have specifically considered the CCA and the law on misrepresentation.

My Findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

When doing that, I am required by DISP 3.6.4 R 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.”

When evidence is incomplete, inconclusive, incongruent, or contradictory, I have made my decision on the balance of probabilities – which, in other words, means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

And having read and considered all the available evidence and arguments, I do not think this complaint should be upheld. I realise that will be disappointing to Mr and Mrs K. But I hope they understand why.

Mr and Mrs K’s Section 75 Complaint

It is clear that Mr and Mrs K entered into a contract with the Supplier for services financed by a debtor-creditor-supplier agreement in both their names. And as I am satisfied that Section 75 applies, if I find that the Supplier is liable for having mis-sold or misrepresented something to Mr and Mrs K, or for breach of the membership agreement, SB, as the creditor, is also jointly liable.

Misrepresentation

The essence of Mr and Mrs K's claim is that the Supplier misled and mis-sold the timeshare product.

A misrepresentation is, in very broad terms a statement of fact or law made by one party to a contract which is untrue and which induces the other party into entering into that contract.

Mr and Mrs K say that they were told that they could exchange their timeshare membership to one with a lesser contract length. Based on the evidence provided, that is exactly what happened and so I can see no misrepresentation there.

They also claim that the Fractional Points:

"...initially seemed to offer better holidays with easier booking etc. In fact they were told they would never have a problem booking with [the Supplier]."

It seems to me that the allegation is that they were told that *"they would never have a problem booking with [the Supplier]"* and that turned out to be untrue. But they also said, after taking out the new membership, they *"initially seemed to offer better holidays with easier booking etc."* So, it appears Mr and Mrs K actually experienced an easier booking process than before with their new membership. It was only after the Supplier was bought by a different business that they say there were problems.

It is possible that a representative of the Supplier may have said Mr and Mrs K would not have a problem booking holidays, but I have not seen any evidence to support that they did have problems booking a holiday. Rather, I have seen that Mr and Mrs K were able to book a holiday every year, until the year they complained, and they have not provided any evidence of times they tried unsuccessfully to book.

Furthermore, as regards booking accommodation, I can see no evidence that there was any statement or term or condition in the membership agreement, express or implied, that there would *"never be a problem"*. Indeed, quite the contrary: as set out above, there are numerous references to bookings being subject to availability. And that accords with common sense – it is unrealistic to expect a holiday supplier to be able to provide accommodation at any location, at any time of the year, at all times. So even if Mr and Mrs K were told that they would not have a problem booking holidays, I cannot say that meant they were told they would be provided with unlimited availability.

I recognise that Mr and Mrs K have concerns about the way in which their fractional points membership was sold and/ or operated but S.75 of the CCA doesn't provide protection for all scenarios that might lead to a customer to be dissatisfied with a product or service. On balance, given the evidence in this complaint I am not persuaded that SB acted unfairly or unreasonably when it dealt with Mr and Mrs K's Section 75 claim.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that SB acted unfairly or unreasonably when it dealt with Mr and Mrs K's Section 75 claim.

My final decision

For the reasons set out above, I do not think this complaint should be upheld.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to accept or reject my decision before 23 April 2024.

Michael Hoggan
Ombudsman