

## The complaint

Mrs B complains that Marks & Spencer Financial Services Plc ("M&S") failed to uphold her complaint pursuant to section 75 of the Consumer Credit Act 1974 ("the CCA") in relation to payments she made using her credit card to purchase timeshare products.

## What happened

Mrs B (together with her late husband) made a total of 17 timeshare product purchases over an extended period between October 2005 and April 2020. Each product was sold and supplied by a company, who I'll refer to as "A". The product purchases were funded in different ways. But from a total of 17 purchases, six were funded (either in full or in part) using a credit card provided by M&S in Mrs B's sole name.

In or around April 2022, using a professional representative ("the PR"), Mrs B submitted a complaint to M&S pursuant to section 75 of the CCA ("S75") in relation to the six purchase they'd financed. The PR allege that A had misrepresented to Mrs B the various timeshare products she purchased. And it was those misrepresentations that had persuaded Mrs B to agree to the purchases. In particular, the PR allege A told Mrs B:

- the timeshares were easy to sell and wouldn't have to be a long-term financial responsibility;
- she could exit the timeshares at any time using A's experienced sales team;
- she would benefit from any profit made from any resale;
- the timeshare products purchased were an excellent investment;
- this was a "no lose" situation and she would "get her money back"; and
- the purchase prices were a special deal that was only available on the day and the products were only available for a very limited time.

The PR suggest the representations weren't true as Mrs B has been unable to sell her timeshares, let alone derive a profit from such sales. They also allege that the selling of timeshares as an investment breaches the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 ("the TRs").

The PR further allege that A breached the contracts having entered into a liquidation process leading to the withdrawal of their resale service. They include allegations of fraudulent misrepresentation suggesting that A's downscaling of their operations and ultimately entering into a liquidation process was a deliberate and foreseeable strategy. And because of that, A knew they wouldn't be in a position to provide a resale service enabling Mrs B to recover the money she'd spent on her purchases. The PR allege that A's intention to exit their timeshare resale business was deliberately concealed from Mrs B.

The PR accept that a number of the purchases were completed more than six years before the complaint was submitted. And whilst it may be argued that the provisions of the Limitation Act 1980 ("the LA") mean Mrs B's complaints were made too late, they argue that section 32 of the LA ("S32") makes provision for any limitation to be postponed due to the alleged fraudulent misrepresentations and deliberate concealment.

In response, M&S treated the PR's letter as a complaint under the DISP<sup>1</sup> rules. But M&S said their response wouldn't materially differ in the event the PR's submission was subsequently deemed to constitute a formal claim under S75.

M&S didn't think Mrs B had provided sufficient evidence of the misrepresentations alleged. Further, they said Mrs B had submitted her complaint too late in respect of five of the transactions complained about. And as there was no material evidence to support any allegations of fraudulent misrepresentation or concealment, they didn't think the provisions within S32 applied here.

M&S also didn't think the Debtor-Creditor-Supplier ("DCS") relationship - as required under S75 - existed in relation to a purchase made in October 2012. Further, they thought the purchase price of that transaction exceeded the £30,000 threshold under S75.

M&S referenced various clauses included within the contracts (which Mrs B had signed) which they believe contradicts the various allegations of misrepresentation. They also said that some of the documents referenced in the complaint hadn't been included. They said that if provided, they would consider whether their response needed to be amended. Ultimately, it appears no further documentation was provided, and Mrs B's complaint wasn't upheld by M&S.

The PR didn't agree with M&S's findings, so referred Mrs B's complaint to this service. In doing so, they provided detailed responses to M&S's findings explaining why they disagreed with them. I don't propose to include these in detail. However, I may refer to these where appropriate below.

One of this service's investigators considered everything that had been said and provided. Having done so, they didn't think M&S's decision not to uphold Mrs B's complaint was unfair or unreasonable. In particular, our investigator thought M&S were entitled to rely upon the provisions of the LA as a defence in respect of five of the purchases included within Mrs B's complaint. And they didn't think the evidence supported the application of S32 to postpone any limitation period.

As regards a later purchase in 2017, whilst our investigator thought the complaint had been made in time, they didn't think it plausible that A had sold this to Mrs B as an investment. Or that there was any evidence to support any of the allegations. Our investigator also didn't agree that A had breached the contract(s) when they entered a liquidation process.

The PR didn't agree with our investigator's findings and thought this service should consider "similar fact evidence" in relation to other claims and complaints submitted by consumers who'd purchased timeshare products from A. They also refer to claims paid out by another financial business in relation to loans they provided to fund purchases from A and refer to a newspaper report and an FCA<sup>2</sup> notice, also relating to timeshares sold by A. The PR thought our investigator's approach to S32 wasn't right and referenced an unrelated court ruling to support their argument.

As an informal resolution couldn't be achieved, Mrs B's complaint was passed to me to consider further. Having done that, I was inclined to reach the same outcome as our investigator. But I'd considered a number of issues which may not have been fully addressed or explained previously. So, I issued a provisional decision on 27 February 2024, giving both sides the chance to respond before reaching my final decision.

In my provisional decision, I said:

Relevant considerations

When considering what's fair and reasonable, DISP 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant

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<sup>1</sup> Dispute Resolution: The Financial Conduct Authority Complaints sourcebook (DISP)

<sup>2</sup> The Financial Conduct Authority

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. Specifically, where there's evidence of misrepresentation or breach of contract. Mrs B paid for six of the timeshare product purchases (in part or in full) using her M&S credit card. So it isn't in dispute that S75 applies here. This means Mrs B is afforded the protection offered to borrowers like her under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this complaint.

Given the facts of Mrs B's complaint, relevant law also includes the LA. This is because the transactions complained about - the purchases funded using a credit card provided by M&S - took place between 2006 and 2017. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered any effect I think this might also have.

It's important to distinguish between the complaint being considered here and any legal claim. The complaint this service is able to consider specifically relates to whether I believe M&S's failure to uphold Mrs B's complaint was fair and reasonable given all the evidence and information available to me, rather than actually deciding any legal claim.

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 this service isn'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.

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.

#### The complaint submitted

At the outset, it appears the PR's submission to M&S was in the form of a complaint pursuant to the DISP rules. It doesn't appear to be a legal claim or a letter before action for a claim under S75. So, I've considered this complaint under the DISP rules. It's also relevant to say that the sale of timeshare products doesn't fall within the definition of a financial product or service under the Financial Services and Marketing Act 2000 ("FSMA"). So, this service isn't able to consider any complaint against A about the sale of the timeshare product. I can only consider M&S's response to the complaint pursuant to S75.

Ordinarily a claim for misrepresentation or breach of contract under S75 is a 'like' claim. For example, where a claim under the Misrepresentation Act 1967 is being made (against A in this case), S75 makes provision for a 'like' claim against the lender (here that's M&S) – effectively mirroring the misrepresentation claim. As I've already said, this service is only able to consider a complaint about the outcome of such a claim. It can't decide the legal claim itself.

However, it appears no such claim has been submitted – only a complaint.

#### The purchases included within the complaint

The PR have included details of 17 purchases Mrs B completed between 2005 and 2020. However, it's only alleged that six of these were funded through the use of Mrs B's M&S credit card. So, for the purposes of this complaint, I can only consider the circumstances of those purchases. I say that because it wouldn't be appropriate for me to hold M&S responsible for any of the circumstances and allegations relating to purchases they didn't fund. S75 doesn't extend to those purchases.

To summarise, it appears the following purchases were funded, either in part or in full, using an M&S credit card in Mrs B's sole name. I would add that whilst purchases may have been completed in joint names with Mrs B's late husband, the credit card was in her sole name meaning she is the only eligible complainant here.

- 1) October 2006 – Timeshare purchase costing £14,844;
- 2) October 2010 – Timeshare purchase costing £27,000;
- 3) October 2011 – Timeshare purchase costing £25,500;
- 4) October 2012 – Timeshare purchase (two products) costing £36,670;
- 5) October 2013 – Timeshare purchase costing £18,950; and
- 6) September 2017 – Timeshare purchase costing £19,967.

Having considered the evidence available together with Mrs B's own witness statement and accepting the number of purchases Mrs B completed, it doesn't appear the timeshares were retained long term to form a portfolio. Rather in most cases, it appears they were exchanged or upgraded to a new timeshare product or unit each time.

#### Was a claim for misrepresentation under S75 made in time?

As I've already said, it appears no formal claim has been submitted – only a complaint. The PR says A misrepresented the nature of the purchase agreements and benefits to Mrs B when she agreed to purchase the products. And they believe this could bring cause for a claim under S75.

But a section 75 claim is *"an action [that is, court action] to recover any sum by virtue of any enactment"* under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. So here, Mrs B had to make a claim within six years of when she entered into the purchase contracts and funded them under the credit card agreement. The PR confirm the purchases funded by M&S took place between October 2006 and September 2017. So, it appears that is when it's alleged Mrs B lost out having relied upon the alleged false statements of fact at those times.

Details of the alleged misrepresentations were submitted by the PR to M&S in April 2022. But this was more than six years after purchases 1 to 5 were completed and Mrs B first says she lost out. Whilst it appears a formal claim hasn't yet been submitted; I believe a court is likely to find that any claim falls outside of the time limit permitted in the LA.

#### Could the limitation period be postponed?

The PR argue that the limitation period should be extended under Section 32 of the LA because they believe the products were fraudulently misrepresented to Mrs B. Further they believe the evidence suggests A knew (or ought to have known) of their intention to cease providing a timeshare resale service. So, they believe this intention was deliberately concealed from Mrs B.

Section 32(1)(a) applies when *"the action is based upon the fraud of the defendant"*. But the PR haven't provided me with any compelling evidence from the time of the sales to support the various allegations they've made. In particular that A

represented the products as investments that could be sold for a profit. None of the supporting documentation from the time of the sales supports that assertion.

Section 32(1)(b) applies when *“any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant”*. But again, I don’t think the PR’s conclusions are supported by any compelling evidence from the time of the sales or anything persuasive to suggest A knew or deliberately concealed anything about their future plans for maintaining and offering a timeshare resale service.

As I’ve already said, only a court can decide the extent to which the various sections of the LA apply here. But as far as I can see, there’s been no court finding to support any allegations of fraudulent misrepresentation or deliberate concealment in Mrs B’s case. So, based upon the evidence and information available to me, I can’t reasonably say that M&S’s defence under the LA appears unfair or unreasonable. And I’m not persuaded, based upon what’s been said and provided, that there’s any reason why a court might decide time could be extended in keeping with the provisions of the S32 of the LA.

#### Was there a valid DCS relationship?

Under Section 75 of the CCA, a “debtor-creditor-supplier agreement” is a precondition to a claim under that provision. It appears that payments under the purchase agreements were made to another entity rather than to the supplier directly. Because of that, It’s now possible that there was no such relationship in place following the High Court’s 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 debtor-creditor-supplier relationship for the purpose of this decision because I think M&S had and has a defence to any related CCA claim(s) in question under the LA

#### Was the timeshare product purchase in October 2017 misrepresented?

At the outset, I should reiterate I’ve seen no evidence a formal claim has yet been submitted – only a complaint under DISP. So, it could be argued that any claim in respect of the 2017 purchase – if subsequently made - may now also be too late under the provisions of the LA. However, as this wasn’t the case when the complaint was first raised in 2022, I’ve considered this further for the purpose of my decision here.

For me to conclude there was misrepresentation by A in the way that has been alleged, generally speaking, I would need to be satisfied, based upon the available evidence, that A made false statements of fact when selling the timeshare product in 2017. In other words, that they told Mrs B something that wasn’t true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mrs B to enter into the contract. This means I would need to be persuaded that she reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can’t be certain about what Mrs B was specifically told (or not told) about the benefits of the product she purchased. It was, however, indicated that she 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 Mrs B’s claim, such as marketing material or documentation from the time of the sale that echoes what the PR says she was told. In particular that the product would be an excellent investment that she could sell for a profit using A’s resale service.

It's generally understood that the selling of timeshare products as an investment falls contrary to Regulation 14(3) of the TRs. But I think it unlikely the product can have been marketed and sold in such a way simply because there might have been some inherent value to it. And in any event, despite the PR's assertions, I've found nothing within the evidence provided to suggest A gave any assurances or guarantees about the future value of the product Mrs B purchased. A would have had to have presented the product in such a way that used any investment element to persuade her 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. And whilst Mrs B's testimony suggests A often gave indications of resale values, none of this is supported by any evidence from the time of the sale.

I'm mindful that Mrs B's witness statement suggests she was told she would be able *"to request a guaranteed cash repayment of our substantial investment"* under a *"New Scheme to be launched from 1 January 2020"*. But again, I've found nothing within the evidence provided to support that assertion. There's no documentation or exchanges from the time of the sale to corroborate the allegation. So, I can't say, with any certainty, that A did tell her that.

Further, while A may have previously offered a timeshare resale service, I haven't seen any evidence to suggest they were contractually bound to continue to do so. And even if they were, I've seen nothing that suggests they gave any guarantee of a successful sale or that a profit could be achieved. In the absence of that, I don't think it's possible to establish with any certainty what, if any, attributable financial loss Mrs B may have incurred.

While it's possible Mrs B may have intended to purchase the timeshare product as a financial investment, I can't conclude, with any certainty, that intention was due to anything A said to her.

#### Other considerations

Whilst I acknowledge the PR's comment about the consideration of similar fact evidence relating to claims from other consumers, I don't think this helps me to establish the facts of what happened in Mrs B's specific circumstances. And in considering Mrs B's complaint, I'm only able to consider the facts as they specifically relate to her own experience.

The PR also reference the actions of, and redress provided by, another financial business relating to loans they provided when funding purchases from A. However, again I don't believe the circumstances of those cases assist me in establishing the facts of what actually happened in the circumstances of Mrs B's own complaint.

#### Summary

To reiterate, whilst I may not have referred to everything that's been said and provided here, I would like to reassure Mrs B that I've taken everything into consideration in reaching a decision. Having done so, and for the reasons mentioned above, I haven't found anything that persuades me that M&S's response to her complaint was unfair or unreasonable. I realise that Mrs B will be very disappointed, but I don't currently intend to ask M&S to do anything more.

### **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.

M & S haven't responded to my provisional findings. The PR have acknowledged receipt confirming that they accept my provisional decision. And because of that, my final decision remains unchanged.

**My final decision**

For the reasons set out above, I don't uphold Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 24 April 2024.

Dave Morgan  
**Ombudsman**