

The complaint

Mrs P complains that NewDay Ltd has rejected her claim under section 75 Consumer Credit Act 1974 ("S75").

What happened

In January 2019 Mrs P purchased an annual swim membership at a leisure centre using a credit card she had with NewDay Ltd.

Mrs P says that she had also purchased and attended a set of swimming lessons which had assisted her with both her technique and confidence in the water. She says her teacher told her she was a confident swimmer and they encouraged her to swim in the deep end of the pool on completing her lessons.

In April 2019, while attending a particular swim session, Mrs P says she was approached by a lifeguard and asked to undertake a "swim test" by swimming a full length of the pool and treading water for 30 seconds. She says the lifeguard told her that, not only must she perform this test at that time, but that she must be able to repeat it any time of asking. They also said that if she struggled to swim a length then she would be restricted to using the shallow end.

Mrs P says that, as a new swimmer, she was concerned she wouldn't be able to repeat the test as and when required, but also didn't think her swimming had raised any health and safety concerns. She was practising her strokes and had been well aware of other swimmers. Mrs P says she'd never seen anyone else asked to undertake this test. She felt the test was unfair and would prevent her from further improving her swimming ability. Mrs P says she challenged the lifeguard to show her the rule that a swim test was necessary to use the deep end. She says he was unable to do so. She decided to leave the pool and not undertake the test.

Mrs P complained to the leisure centre that the requirement for her to pass a swim test to use the deep end hadn't been provided to her in any terms or conditions, nor was it displayed at the pool. She said she wouldn't have taken out the swim membership if she'd known there was a rule about undertaking a swim test, as and when required, to use the deep end.

Mrs P didn't get a reply from the leisure centre and so decided to make a claim for a pro rata reimbursement of the fee she'd paid to join the pool under S75. She made her claim to NewDay.

NewDay rejected Mrs P's claim. It said that the leisure centre hadn't breached the contract she had with it for use of the pool, and that Mrs P's complaint related to an isolated incident that had occurred while she had been at the pool. NewDay said that at this particular session the normal operating procedure which applied was that swimmers must be over 16 years old and able to swim 100m (a length was 25m).

NewDay said that in the interests of health and safety the pool area was the responsibility of the lifeguard, and they needed to be confident that a swimmer met certain swimming criteria for their own safety. Once this had been clarified then a note could be added to the swimmer's account that they met the necessary requirement. If the lifeguard considered a swimmer was not confident in the water, then it was for the lifeguard to decide whether the swimmer could complete the session. This was why swimmers may be asked to demonstrate they can swim 25m if this ability wasn't evident to the lifeguard. There were also alternative sessions available where there were more lifeguards present which Mrs P could access.

Mrs P disagreed with the view taken by NewDay and complained to this service. She said that when she had taken out the contract to use the pool, she had been told by a lifeguard she could use the deep end after swimming a length. No qualifications or specifications were made known to her. The leisure centre had misrepresented its swimming policy inducing her to enter into the contract.

Mrs P also says that the leisure centre misrepresented the particular session she had attended as this had been advertised as being for swimmers "of all levels". She had later been informed there was a need for the swim test and, had she known of that at the start, she wouldn't have taken out the pool membership.

Mrs P says she believes the leisure centre had breached her contract by adding restrictions to her use and enjoyment of the pool that were not in the original contract. She did not receive the service described and advertised. Mrs P says she was not informed of any restrictions, or the need to take any swim test, before being able to make full use of the pool. On the day in question she had been asked to leave the deep end and walk back to the shallow end by the lifeguard, and they had also said they wouldn't let her use the deep end in future and would require her to undertake the swim test if they saw her there. Mrs P said the actions of the lifeguard had stopped her using pool membership. This had only been an isolated incident because she hadn't returned to the pool.

Our investigator didn't recommend Mrs P's complaint should be upheld. He said he was sorry that Mrs P had felt intimidated and upset by the actions of the lifeguard, but his role was to look at the decision of NewDay and its obligations under S75. He couldn't look at complaints about staff at the leisure centre.

Our investigator said there weren't any specific health and safety laws for swimming pools, but swimming pool operators must comply with their general duties under Health and Safety at Work and associated regulations. Operators are obliged to make suitable and sufficient assessment of the health and safety risk to workers and users to help decide what they must do to make their pool safe.

The investigator said he could understand why the lifeguard had asked Mrs P to demonstrate she could swim a full length. Mrs P had said she would practice her swimming by stopping mid length before carrying on and he thought it would be reasonable for a lifeguard to want to ensure users of the deep end were sufficiently confident in their swimming.

Our investigator said that Mrs P hadn't been able to provide the terms and conditions of her membership but, looking at these and the lists of benefits of membership that were displayed on the leisure centre's website, there was no mention of using the deep end as part of the swim membership. It stated that membership included access to the pool and therefore he didn't think there had been a breach of the contract.

Our investigator said he didn't know what had been said to Mrs P at the time she took out the agreement, but he didn't think that she joined the pool because she'd been told she could use the deep end after swimming a length.

Mrs P disagreed with our investigator's view. She said she had swum a length a number of times as part of her swimming lessons and had told the lifeguard this. His response had been that he didn't have any health and safety concerns but "had time on his hands". She said there were no health and safety concerns at the time and the swim test doesn't exist.

Mrs P said that she hadn't been given any paperwork when she joined, and she hadn't been told that parts of the pool couldn't be used. She'd been told during her lessons that the full pool was for use of swimmers completing a swimming course. And so, it was quite reasonable for her to assume she could use the full pool when she had completed the lessons. At no point had she been told membership could be restricted to the shallow end only.

As the parties were unable to agree the complaint has been passed to me.

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 certain circumstances section 75 of the Consumer Credit Act 1974 gives a consumer an equal right to claim a refund against the supplier of goods or services and the provider of credit, if there has been a misrepresentation or breach of contract by the supplier. My role is to decide whether NewDay handled Mrs P's section 75 claim fairly and reasonably.

Mrs P decided to take out an annual membership for the pool, and pay for a set of swimming lessons, to improve her ability in the water. It's agreed there was no paperwork provided to Mrs P at the time she took out this membership. The terms and conditions, together with a list of the benefits of membership, are however shown on the leisure centre's website. Looking at these I think it's reasonable to say that the contract was for access to and use of the pool.

Mrs P says that her membership agreement has been breached by the requirement to take a swim test before being able to use the deep end, and also that the membership agreement was misrepresented to her.

Looking firstly as to whether there was a breach of contract, I've seen the agreement is for "use" of the pool. Mrs P says that the requirement she undertakes a swim test, as and when required, prevents her from being able to use "all" of the pool, and so is a breach of this term and condition. However, I think it's reasonable to expect that any use of the pool must be subject to health and safety requirements and I've seen Mrs P agrees with that. There will be times when full use of the pool may have to be restricted for certain swimmers. For instance, the number of lifeguards on duty will impact on any health and safety risk assessment carried out as to who can use the pool and, in the particular, the deep end. I also think it's reasonable for a decision as to the health and safety of the swimmers, at a particular pool session, to be a matter for the lifeguard on duty at the time. So, it wouldn't be unreasonable for a lifeguard to be able to ask a swimmer to demonstrate they could swim a length, and tread water for a short time, in order for that swimmer to then use the deep end safely.

As set out by our investigator, there are no national health and safety standards for swimming pools, and it is for the pool operators to ensure the pool is safe for use by workers and swimmers on the day. I appreciate Mrs P says there is no such thing as a swim test, but

I wouldn't expect there to be a universally used swim test to establish whether a swimmer was or wasn't sufficiently competent to use the deep end of any pool. I think it's reasonable that what would be required, to show competence in the water, will vary from pool to pool, the session being run and the number of staff on duty.

I'm sorry Mrs P was upset by the actions and comments of the lifeguard on the day, but I've seen they weren't refusing to allow Mrs P to swim, they wanted to check her competence in the water. I appreciate Mrs P disagreed with the view taken by this particular lifeguard and felt singled out and intimidated but, even if the lifeguard had acted unfairly in making this request, I don't think that means there was a breach of contract to access and use the pool. I think any complaint about the behaviour of a lifeguard would be a matter for the leisure centre to investigate.

Mrs P has not returned to the pool after this incident, and although I can understand why that was her choice. I don't think there is enough evidence to say Mrs P's use of the pool was so restricted by the leisure centre that it amounted to a breach of the contract she had with it to use the pool. Despite the request from lifeguard, Mrs P was still able to access the pool and attend sessions. Looking at the evidence, I think it was fair for NewDay to consider that this was not a breach of the contract.

Mrs P also says that the agreement was misrepresented to her as she had been advised by a lifeguard that if she could swim a length, she could use the deep end. She says she was never told that there were other rules that could be applied and, if she had been told about the swim test, she wouldn't have joined. Looking at this part of Mrs P's complaint, for NewDay to have found there'd been a misrepresentation, it would have needed to be satisfied that at the time Mrs P took out the membership she had probably been told something by the leisure centre that wasn't true, *and* that untrue statement on its own induced her to take out this agreement.

Here, Mrs P took out the pool membership at the same time as she arranged swimming lessons. I think it's reasonable to say she wanted the swim membership so she could access the pool and improve her swimming. She says she was advised if she could swim a length, she could use the deep end. The lifeguard on the day in question asked her to demonstrate that, so I don't think what's been said about when you could use the deep end was untrue. I also don't think that Mrs P would have been induced solely by the statement regarding swimming one length and using the deep end to take out the membership.

I think NewDay has acted fairly in considering Mrs P's claim. It investigated the matter and reached a reasonable conclusion that there had not been a breach of contract and, despite being asked to do the swim test, she was still able to access the pool. So, I think it was reasonable for NewDay to conclude that Mrs P's contract to use the pool had not been breached, and nor had it been misrepresented at the time she took it out.

So, for the reasons given above, I'm not upholding Mrs P complaint.

My final decision

As set out above I'm not upholding Mrs P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 17 February 2021.

Jocelyn Griffith
Ombudsman

