

## **The complaint**

Mrs S complains that HSBC UK Bank plc, trading as First Direct, won't refund to her the money that she paid for services in connection with the relinquishment of a timeshare.

## **What happened**

I issued a provisional decision on this complaint on 7 December 2021 in which I described what had happened as follows:

"Mrs S and her husband had an agreement for a timeshare with a timeshare company. They wanted to end the agreement so they entered into a contract with the supplier, which is a company that specialises in timeshare relinquishment, and Mrs S paid it £903.56 in February 2015 using her First Direct credit card.

Mrs S claimed a refund of the £903.56 from First Direct under section 75 of the Consumer Credit Act 1974. It said that, in order for her claim to be assessed, it required her contract with the supplier, including the terms and conditions. She couldn't provide those documents so complained to this service.

Our investigator recommended that her complaint should be upheld. He was persuaded that there had been a misrepresentation and a breach of contract so he recommended that First Direct should refund Mrs S the money that she'd paid to the supplier, with interest.

First Direct has asked for this complaint to be considered by an ombudsman. It says that there were discussions between the supplier and Mrs S prior to the contract being made, which clearly made reference to how the agreement would be exited which was on the grounds of ill health due to Mrs S's husband's surgery – but he made a recovery and they didn't want to use that reason to exit the agreement because they were able to travel and didn't want to impact their travel insurance. It says that it seems that Mrs S changed her mind about how the agreement would be exited after making the payment, so any discussions that took place after the payment was made are irrelevant for a misrepresentation.

It also says that Mrs S was deemed to be aware of the terms which applied to the timeshare and was also aware of the details of the health issues which could be used as a basis of the exit – so the reliance element of the test for misrepresentation hadn't been properly satisfied. It says that Mrs S has provided no information to it to consider a section 75 claim so it's especially unfair and unreasonable for it to be held liable for refunding the price paid to the supplier in circumstances where Mrs S and her husband should be expected to have communicated directly with the timeshare company about their circumstances in relation to the existing timeshare, rather than engaging with the supplier.

Mrs S says the timeshare was relinquished in July 2016 which was confirmed in a letter from the timeshare company. She says that, even though they're out of the

timeshare, they haven't received their deposit of £2,275 back and she'd like First Direct to refund it to her".

I set out my provisional findings in that provisional decision which were as follows:

"Mrs S used credit provided by First Direct to pay for services from the supplier. In certain circumstances, section 75 of the Consumer Credit Act 1974 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier. To be able to uphold Mrs S's complaint about First Direct, I must be satisfied that there's been a breach of contract by the supplier or that she was induced into entering into the contact by a misrepresentation made by the supplier, and that First Direct's response to her claim under section 75 wasn't fair or reasonable. But I'm not determining the outcome of Mrs S's claim under section 75 as only a court would be able to do that.

It's clear that Mrs S and her husband wanted to relinquish their timeshare and they entered into a contract with the supplier as it specialises in timeshare relinquishment and Mrs S paid £903.56 to the supplier in February 2015. She hasn't been able to provide a copy of her agreement with the supplier but she's provided some e-mail correspondence with it from that time, including an e-mail from the supplier in February 2015 which says:

*"... it is my professional opinion that the best solution for you would be to pursue the route of a Guaranteed Exit Solution with us. Simply put, this is where we negotiate with your timeshare company and legally get you out of the contract ...".*

In complaints such as this one, where the evidence is incomplete, inconclusive or contradictory, I have to make my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

I consider it to be clear that the supplier represented to Mrs S and her husband that it guaranteed that it would legally get them out of their contract with the timeshare company. I also consider it to be more likely than not that Mrs S and her husband relied on that representation when entering into the contract with the supplier - so they were induced into entering into the contract by that representation.

The supplier drafted a relinquishment letter to the timeshare company which Mrs S and her husband sent in June 2015 and it replied with a letter setting out their options for disposing of their timeshare membership. Mrs S exchanged e-mails with the supplier about relinquishment options and it appears that the timeshare company was being asked to accept a surrender of the timeshare because of exceptional circumstances on the basis of Mrs S's husband's medical issues.

The supplier said in an e-mail in October 2015: *"I asked you in the beginning to get the dr to authorise a letter saying you had an operation and didn't want to travel etc but you decided against it because of future holiday insurance which I told you would be fine"*. Mrs S replied that there were no after-effects from the operation, her husband was fitter than before the operation and it wasn't true to say that they didn't want to travel. Mrs S sent another e-mail to the supplier in January 2016 because the timeshare company hadn't accepted their request to relinquish the timeshare and they would have to pay maintenance fees for another year.

I've not seen all of the communications after that between Mrs S, the supplier and the timeshare company but Mrs S has confirmed that the timeshare was relinquished in July 2016. She says that that was achieved because of her efforts and not because of the services provided by the supplier. Mrs S isn't satisfied with the services provided by the supplier but I consider that the supplier has provided services to her and her timeshare has been relinquished. The supplier guaranteed an exit from the timeshare contract and that's what has been achieved.

I've seen no evidence to show that the supplier had said that Mrs S would receive a refund of the deposit that she'd paid to the timeshare company and her complaint to this service only referred to the payment that she'd made to the supplier (and not to the deposit). Because of that, I'm unable to consider the deposit as part of this complaint and I make no finding about the deposit (but I consider it to be unlikely in these circumstances that First Direct would be liable to refund the deposit to Mrs S).

I'm not persuaded that there's enough evidence to show that the supplier misrepresented its services to Mrs S – it guaranteed an exit from the timeshare contract and that has been achieved. Nor am I persuaded that there's enough evidence to show that there's been a breach of contract by the supplier. It provided services to Mrs S to help her get out of the timeshare contract. Mrs S wasn't happy with the services that it provided but that isn't enough to show that there's been a breach of contract by the supplier.

I don't consider that First Direct's response to Mrs S's section 75 claim was fair or reasonable in these circumstances. It said that it required her contract with the supplier, including the terms and conditions, in order for it to assess her claim. I consider that it was provided with enough information for it to be able to investigate her complaint. But, if it had properly investigated her complaint, I consider that it would have said that there hadn't been a breach of contract or misrepresentation by the supplier.

I sympathise with Mrs S for the issues that she's had with the timeshare company and the supplier, but I find that it wouldn't be fair or reasonable in these circumstances for me to require First Direct to refund to her the £903.56 that she paid to the supplier, to pay her any compensation or to take any other action in response to her complaint".

Subject to any further comments from Mrs S or from First Direct, my provisional decision was that I didn't intend to uphold this complaint. First Direct has accepted my provisional decision but Mrs S has provided the following information in response to it. She says that:

- the breach of contract was when the supplier stopped replying to her emails and phone calls – and that the last contact it had with her was in October 2015;
- she sent a further letter to the supplier in July 2016 requesting a refund after she'd visited the timeshare company's office;
- the contract states: *"We negotiate with your timeshare company and legally get you out"* but the supplier never contacted the timeshare and only drafted some letters for her to send;
- there were no discussions prior to the contract payment about how the agreement would be exited and the only discussion was about the currency for the payment; and
- the stumbling block was that her doctor wouldn't falsify documents so that she could have an easy exit.

## **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.

That includes careful consideration of the information that Mrs S has provided in response to my provisional decision – but that information hasn't changed my findings on her complaint. It's clear that there have been issues with the service that Mrs S received from the supplier and that she went to the timeshare company's office to end her timeshare contract. Although I sympathise with Mrs S for that experience, I don't consider that the issues that she's described are enough to amount to a breach of contract by the supplier.

The supplier guaranteed an exit from the timeshare contract which has been achieved and it provided services to Mrs S to help her get out of that contract. I'm not persuaded that there's enough evidence to show that there's been a breach of contract or misrepresentation by the supplier in these circumstances. I find that it wouldn't be fair or reasonable for me to require First Direct to refund to Mrs S the £903.56 that she paid to the supplier, to pay her any compensation or to take any other action in response to her complaint.

## **My final decision**

My decision is that I don't uphold Mrs S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 2 March 2022.

Jarrold Hastings

**Ombudsman**