

The complaint

Mr M complains that MBNA Limited won't refund to him the money that he paid for some holiday club membership points. He's being represented in his complaint by a claims management company.

What happened

Mr M and his wife entered into a purchase agreement in October 2012 to buy 4,000 holiday club membership points. The total price payable under the agreement was £4,800 and Mr M paid £960 of that amount using his MBNA credit card in October 2012 and the balance of £3,840, also using his MBNA credit card, in November 2012.

Mr M's representative made a claim to MBNA in August 2017 under section 75 of the Consumer Credit Act 1974. It said that the membership had been misrepresented to Mr M and his wife and that the holiday company had breached the contract. MBNA said that there was no debtor-creditor-supplier agreement in relation to Mr M's contract with the holiday company so he didn't have a valid section 75 claim. Mr M wasn't satisfied with its response so a complaint was made to this service that the holiday company was in breach of the contract by misrepresenting the contract to Mr M and his wife and breaching the EU Timeshare Directive.

Our investigator didn't recommend that Mr M's complaint should be upheld as she didn't think that MBNA's decision to turn down his claim was unfair or unreasonable. She wasn't persuaded that there was a misrepresentation at the time of sale and she didn't think that the holiday company had breached the contract agreed between it and Mr M and his wife. She said that, because there wasn't enough evidence to uphold Mr M's complaint, she hadn't made a finding on the debtor-creditor-supplier relationship.

Mr M's representative, on his behalf, has asked for this complaint to be considered by an ombudsman. It says that our investigator's recommendation is manifestly wrong and none of the relevant clauses have been reviewed. It says that there have been breaches of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Protection from Unfair Trading Regulations 2008 and it has provided an "*indicative and non-exhaustive*" list of terms which it says may be regarded as unfair. It has also provided a generic submission from counsel about the holiday company and the unfair terms that it uses and a further document in which it describes what it says has been a fundamental breach of contract by the holiday company.

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.

Having done so, I agree with our investigator that Mr M's complaint shouldn't be upheld for these reasons:

- Mr M's claim was made under section 75 which 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 (provided that certain criteria set out in that section are met);

- Mr M's claim under section 75 is that there's been a breach of contract by the holiday company and that the membership points were misrepresented to him and his wife and that they wouldn't have bought them if they hadn't been misrepresented to them;
- I'm not determining the outcome of that claim in this decision as only a court would be able to do that but I'm considering whether or not MBNA's response to Mr M's claim was fair and reasonable in the circumstances;
- Mr M's complaint form says that the holiday company was in breach of the contract by misrepresenting the contract to Mr M and his wife, and his representative's letter to MBNA in August 2017 describes the misrepresentations that it says were made to Mr M and his wife, including that:
 - they would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit;
 - they were advised that they would receive priority when booking; and
 - they were informed that the selection of destinations would continue to broaden;
- and it says that those promises were untrue;
- I've been provided with a copy of the purchase agreement that Mr M and his wife signed in October 2012 and I consider it to be likely that they would have also signed other documents as that time but neither Mr M nor his representative has provided copies of those documents;
- Mr M's representative's August 2017 letter to MBNA says that Mr M and his wife were advised that they would receive a guaranteed yearly rental income from their membership points which would cover the maintenance fees and provide a profit but they've never made any profit on the product;
- the letter says that Mr M and his wife were forced to endure an extremely high-pressured presentation about the benefits of purchasing the membership points but no further evidence about the rental income that they were advised that they would receive has been provided and Mr M hasn't provided any evidence to show that he has unsuccessfully tried to generate a rental income from the points;
- I don't consider that Mr M has provided enough evidence to show that the holiday company said that he and his wife would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit;
- Mr M's representative says that Mr M and his wife have attempted to reserve holidays on several occasions only to find that there's no availability but the same weeks are available to the general public through third party booking agencies – but I've seen no evidence to show that they were advised that they would receive priority when booking or that the resorts were exclusive to club members;
- Mr M's representative also says that Mr M and his wife were informed that the selection of destinations would continue to broaden but the selection has been reduced in favour of increasing the availability elsewhere – but I'm not persuaded that there's enough evidence to show that they were informed that the selection of destinations would continue to broaden or that the selection has been reduced;
- if the holiday company had made such promises to Mr M and his wife but the promises weren't contained in the documents that they were then signing, I consider

that it would be reasonable to expect them to have asked for the promises to be set out in writing;

- I'm not persuaded that there's enough evidence to show that the membership points were misrepresented to Mr M and his wife by the holiday company or that they were induced into entering into the purchase agreement to buy the membership points by any such misrepresentations or that the membership points were mis-sold to them;
- Mr M's representative says that holiday company is in breach of contract by including manifestly unfair terms and that Mr M and his wife are entitled to receive notice of, and attend and speak at, all general meetings of the holiday company but they haven't been provided with notices of the general meetings;
- I've seen no evidence to show that Mr M and his wife contacted the holiday company to tell it that they hadn't received notices of the general meetings and I don't consider that any failure by the holiday company to send Mr M and his wife any notices of meetings in these circumstances would be a breach of contract for which MBNA would be liable under section 75;
- I've carefully considered what Mr M's representative has said about the unfairness of the terms of the documents that Mr M and his wife entered into with the holiday company and the breaches of regulations and the EU Timeshare Directive that it has described (including the various submissions that it has provided since our investigator's recommendations);
- I've not been provided with all of the documents that Mr M and his wife are likely to have signed with the holiday company in October 2012 but it would be for a court to determine whether or not any of the terms in those documents was unfair;
- Mr M and his wife signed the purchase agreement and I'm not persuaded that there's enough evidence in these circumstances to show that there's been a breach of contract by the holiday company for which MBNA would be liable under section 75;
- one of the criteria for a claim under section 75 is that there must be a debtor-creditor-supplier agreement but, as Mr M's credit card statements show that the payments of £960 and £3,840 were made to a trustee, and not to the holiday company (even though the holiday company is also referred to on the statements), it's now possible that there was no such agreement in place following the High Court's judgment last year in the case of *Steiner v National Westminster Bank plc*;
- but as I'm not persuaded that there's been a misrepresentation or breach of contract for which MBNA would be liable under section 75, I consider that there's no need for me to make any finding as to whether or not there was a debtor-creditor-supplier agreement in these arrangements;
- I sympathise with Mr M and his wife for the issues that they've had with their holiday club membership points but I consider that MBNA's response to Mr M's section 75 claim was fair and reasonable; and
- I find that it wouldn't be fair or reasonable in these circumstances for me to require MBNA to refund to Mr M any of the money that he paid for the membership points, to pay him any compensation or to take any other action in response to his complaint.

My final decision

My decision is that I don't uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 4 July 2023.

Jarrold Hastings
Ombudsman