DRN-3658100

The complaint

Mr L complains Nationwide Building Society ("NBS") has not fairly dealt with a claim he made under section 75 of the Consumer Credit Act 1974 ("CCA"). Mr L is represented in his complaint by a Mr M.

What happened

I issued a provisional decision on Mr L's complaint on 4 August 2022, in which I described the events leading up the provisional decision as follows:

"Mr L engaged a firm of solicitors I will call "S" in December 2018 in connection with a timeshare he had purchased in Spain in 2006 which he believed had been mis-sold to him, and in relation to which he was being pursued for alleged management fee arrears. It appears Mr M was also involved in the initial conversations with S. S agreed to act on a fixed fee basis unless litigation was necessary.

S was paid a fee in advance of £4,025 for its services, which included an administration fee. Mr L's position is that S agreed it would serve a "notice of termination" on the timeshare company in order to release Mr L from the timeshare. S would then pursue a compensation claim against the timeshare company on a no-win, no-fee basis.

I understand Mr L became concerned about a lack of progress and communication from S as the months went by. Mr M then intervened. He made an official complaint to S on Mr L's behalf in June 2019. He raised a number of concerns which I think it's reasonable to summarise as follows:

- *S was not following Mr L's instructions. Specifically, it hadn't served a notice of termination on the timeshare company. Instead, it had been negotiating with the company and passing on offers of settlement. Mr M said Mr L's timeshare contract*

  was illegal and so a notice of termination should have been served. Mr L had also been told he wouldn't need to pay anything further, which was inconsistent with him having to pay maintenance fee debts which were included in the offers.

- *S's paperwork was unsatisfactory.*

- *Mr L hadn't heard anything from S in five months, apart from a short email from a paralegal.*

Mr M suggested that S either serve a notice of termination on the timeshare company and then proceed with a no-win no-fee claim, as had been initially agreed, or end the contract and give Mr L all his money back. Mr M noted that Mr L was very unwell and this needed to be taken into account in any dealings with him.

Ms W, on behalf of S, responded to the complaint on 5 July 2019. She disagreed

with the complaint. I could summarise her points as follows:

- *General updates had been provided regarding Mr L's timeshare company monthly. Updates specific to Mr L's case had been provided more frequently than Mr M had claimed.*

- *S had undertaken preparatory work, taken a substantial witness statement from Mr L and had follow-up phone calls and correspondence with him. It wasn't fair to say that the only contact had been a single email.*

- *She was aware of court rulings mentioned by Mr M but cautioned against believing everything that was published or said about these rulings. Getting out of the timeshare was not as simple as serving a notice of termination. The timeshare company may not agree with or accept that.*

- *It thought negotiating with the timeshare company was appropriate at this stage as litigation was a last resort. It was in contact with the company's lawyers and would continue to try to negotiate.*

Ms W expressed a hope that matters could continue to proceed and the relationship between S and Mr L repaired.

Mr M responded, disagreeing over key details and raising additional concerns. Ms W responded again later in July 2019 in a similar vein to her previous communication, noting that while she took the complaints seriously her view was that they were getting in the way of releasing Mr L from the timeshare.

In August 2019, through Mr M, Mr L made a claim with NBS under section 75 of the CCA in respect of poor service and misrepresentation by S. NBS rejected the claim in October 2019, prompting a follow-up complaint from Mr M or Mr L's behalf in which he provided what he considered to be further evidence of S's misrepresentation. NBS confirmed its original decision later in November 2019, stating that Mr L could bring his complaint to the Financial Ombudsman Service if he disagreed.

It also turned out that NBS had destroyed some documents Mr M had sent to support Mr L's claim. Mr M said these were originals and the fact they'd been destroyed could prejudice any future claim Mr L had against his timeshare company. NBS initially paid £200 compensation to Mr L for destroying the documents, but removed this from his account after he asked for it to be returned as he did not accept it.

Mr M then contacted the Financial Ombudsman Service on Mr L's behalf. There were delays in us looking into the matter, and in the meantime Mr L made a complaint to the Legal Ombudsman ("LeO") directly about S. He also, through Mr M, continued to complain to S, asking that they follow his instructions or return the fee he'd paid.

In January 2022 one of our investigators issued findings on the case. She came to the following conclusions:

- *S had breached its contract with Mr L. It had begun acting for him in December 2018 but it didn't seem to have contacted him since July 2019, and it was now early 2022. Our investigator had been unable to get hold of anyone at S to find out what was going on. And although the contract between Mr L and S said it could take 12 months or more for the timeshare release to be achieved, due to the Consumer Rights Act 2015 a term was treated as included in the contract that the service would be performed within a reasonable time. Our investigator*

did not believe more than three years was a reasonable time and so the contract had been breached.

- *The effect of section 75 of the CCA was that Mr L could hold NBS liable for S's breach of contract. She considered it would be fair for a full refund of S's fees to be provided by NBS as compensation for the breach of contract, along with associated fees, interest and charges.*

- *NBS's offer of £200 compensation for losing Mr L's documents was reasonable.*

Mr M indicated that he was relieved to read the investigator's findings. NBS said it wasn't in a position to respond as it was aware of the parallel, ongoing investigation by the LeO into the complaint about S. It said it was trying to speak to S about the case before responding to our investigator. Due to the lack of a response from NBS, preparations were made for Mr L's case to be referred to one of our ombudsmen to make a final decision. It has now been passed to me to decide.

Further developments

Between Mr L's case being prepared for a decision and it reaching my desk, the LeO released its initial findings into the complaint about S, which Mr M sent us a copy of. It was apparent the LeO may have had access to more evidence than this service, and further enquiries were made which resulted in us being sent a 124 page document which contained extensive communications records between S, Mr L, Mr M and the timeshare company and its agents.

We identified within this document that it seemed S had emailed Mr L in May 2020 saying it had decided it could no longer act for him in light of the continued concerns expressed by him and Mr M, and offering him a full refund of fees paid. We were able to reach someone at S to query this email. S said that the offer had been made two years ago and no longer stood.

NBS also subsequently contacted us to say they'd heard from S, which had informed them they had obtained another offer from the timeshare company for Mr L, but that they (S) were not happy to deal with Mr M.

Since I began my review of the case there has been a provisional and subsequently a final decision from the LeO upholding part of Mr L's complaint against S about poor service. The LeO looked at three issues: the failure to issue a notice of termination or advise on this; a failure to keep Mr L updated or communicate with him; and a failure to provide documents and evidence of work Mr L had requested.

The LeO upheld Mr L's complaint on the latter two points and concluded S should pay Mr L £250 compensation in respect of the unreasonable level of service it had provided. Mr M, on Mr L's behalf, has expressed disagreement with the LeO's decision."

I then went on to explain my findings and the provisional decision I had reached, in the following words:

"I've considered all the available evidence and arguments to decide provisionally what's fair and reasonable in the circumstances of this complaint.

Section 75 of the CCA gives consumers a degree of protection when they pay for goods or services using a credit card, so long as certain criteria are met. If the criteria

are met then the consumer can hold their credit card provider liable for any breach of contract or misrepresentation on the part of the supplier of the goods or services.

It's not disputed that the technical criteria for Mr L to be able to make a claim against NBS under section 75 are in place, so on this point I'll say only that it appears to me that the technical criteria have indeed been met. I will focus my provisional decision on the question of whether there was a misrepresentation or breach of contract by S.

The overlap with the LeO case

Before I go on to consider the matter of the section 75 claim, I need to comment on the implications of the LeO having already made a final decision about the service provided by
S. Our rules allow us to choose not to consider a complaint (known as "dismissing" the complaint) in a number of different scenarios. These scenarios include where:

"(2) the subject matter of the complaint has been dealt with, or is being dealt with, by a comparable ADR entity;"

The underlying subject matter of Mr L's complaint relates to his dissatisfaction with the services he paid S for. The LeO, which is a comparable ADR entity, has dealt with a complaint about S. But it's important to point out that the LeO has not looked at quite the same complaint or from the same angle.

The LeO's ombudsman was clear that he was considering a complaint against S, about whether it had provided Mr L with "unreasonable service". The complaint I am being asked to decide is against NBS, about whether NBS treated Mr L fairly in turning down his section 75 claim. In order to do that, I will necessarily need to consider what transpired between him and S, and whether S breached its contract with him, or misrepresented something to him.
I'm not, however, considering the level of customer service S provided to Mr L.

So I think the complaints, although involving the same supplier, are different. I therefore don't intend to dismiss Mr L's complaint about NBS in light of the LeO's decision on his complaint against S.

The alleged deficiencies in Mr L's timeshare contract

Before continuing I think it would also be helpful to make some observations about the arguments raised in relation to the timeshare contract itself, as it's clear that Mr M believes these to be vitally important to the case and he has referred to them in much of his correspondence.

Mr M has focused throughout his communications with S, this service and the LeO, on certain aspects of Mr L's contract with his timeshare company which he says are illegal due to Spanish law and historic decisions in the Spanish courts. Mr M's position is that Mr L

could, in essence, get out of his timeshare easily by serving the notice of termination referred to earlier in this decision. Not wanting to engage in expensive litigation which he believes they would no doubt lose, Mr M says he is sure the timeshare company would concede on receiving such a notice.

My view is that it may not be as simple as that. The House of Commons Library

published a briefing paper on timeshare ownership earlier in 2022 which analyses various problems UK timeshare owners have had, and which refers to issues of the kind Mr M has highlighted. Given the official nature of its publication, I would consider this briefing paper to be a reputable source of information. It refers to perpetuity clauses, floating weeks and other things Mr M has mentioned, but doesn't suggest that the presence of these features in a timeshare contract means that one could simply send a notice of termination to a timeshare company and be immediately released from one's obligations.

I think, on the contrary, the paper suggests things are more complicated, with additional considerations such as which laws apply to a given contract, and the possibility that previous court judgments have turned on the individual facts and may not be applicable in all cases.

In any case, my decision doesn't turn on the merits of Mr M's arguments relating to the timeshare contract, so I don't need to make further findings on this point.

Misrepresentation

A misrepresentation is a false statement of fact which a person relies on, causing them to act in a way which is to their disadvantage (in this case, entering a contract).

Mr M has suggested S misrepresented what it would do for Mr L in a verbal conversation with him prior to entering the contract. Specifically, Mr M says he recalls S's employee indicating that a notice of termination would be served on the timeshare company, and that the timeshare company would probably concede on being notified of allegedly illegal clauses in its contract with Mr L.

Mr M says he was then in hospital and, while he was there, S sent documents to Mr L to sign which didn't accurately reflect the conversation which had been had. Mr M said Mr L had signed it after multiple emails from S asking that he do so, and has suggested the lengthy and obscure nature of the documents means Mr L would not have appreciated that it didn't reflect his instructions.

It is rarely straightforward to comment on what may have been said in a verbal conversation of which it appears there is no independent record. But I think it's important that I highlight that Mr M has not, in my view, been very specific about what exactly a notice of termination is, the form it would take, and what it would contain, other than a list of allegedly illegal clauses in the timeshare contract. I think this lack of clarity over the form and substance of a notice of termination is important, as it could easily lead to misunderstandings.

We have no direct evidence from Mr L regarding the content of the conversation with S. In the few emails I've seen from Mr L, he hasn't referred to a notice of termination. The client care documents from S, which Mr L signed, do not refer to a notice of termination. The only evidence that S told Mr L it would be issuing this to the timeshare company is Mr M's recollection.

I note that in one of the first emails from S to the timeshare company's solicitors on 1 April 2019, S did in fact point out the various allegedly illegal features of the contract, and made an argument that the company should refund him the payments he'd made towards the timeshare and terminate the contract. So in this sense they did put the arguments across which it is said Mr L had expected. It appears the timeshare company did not accept these arguments.

Returning to the question of misrepresentation, I think what most likely happened is that Mr L and S's employee had a different understanding of what specifically was being requested of S. And S did send an email to the timeshare company which, in my view, covered the kind of points it appeared Mr L and Mr M expected a notice of termination to cover. S didn't press the argument further with the timeshare company, but I think it's difficult to conclude S falsely represented the actions it would take regarding termination.

Finally, regarding the comment Mr M recalls S's employee making, that the timeshare company would probably concede after receiving a notice of termination, this appears to have been a statement of opinion rather than a statement of fact. Assuming the statement was made, to be able to conclude it was a misrepresentation there would need to be evidence that the employee did not actually hold the opinion she expressed. I've not seen evidence which would support this.

Breach of contract

A breach of contract occurs when one party breaks the express terms of contract, or breaks terms treated as included in the contract by the operation of law.

Mr L's contract with S was a contract for services and would be covered by the relevant parts of the Consumer Rights Act 2015 ("CRA"). One of the effects of the CRA is to cause terms to be treated as included in a contract for services that:

a) *The services will be carried out with reasonable care and skill*

b) *Where a timescale or deadline for the service is not fixed, the service will be carried out within a reasonable time.*

What constitutes reasonable care and skill is not defined in the CRA, but it has generally been held to mean the standard of care and skill which would be expected of a competent practitioner of the service in question. What constitutes a reasonable time is a question of fact.

It is also worth me mentioning that by virtue of section 50 of the CRA, in a contract for services anything that is said or written to a consumer by a trader about either the trader themselves, or the service, is treated as being included in the contract if the consumer took the information into account when deciding to enter the contract.

When our investigator issued her findings recommending that Mr L's case was upheld, she had access to less information than is available to this service now. From her perspective, there was no evidence that S had really done anything after receiving Mr L's payment. She noted that the client care documents had said the process of releasing Mr L from the timeshare could take 12 months or longer. It had been more than three years however, so in the absence of evidence of work completed by S, she considered it had not performed the services contracted for within a reasonable time. I think this was the correct conclusion for our investigator to have reached based on the information available to her. But there have been a number of developments since then.

The 124 page document I referred to earlier shows S took a witness statement from Mr L in

March 2019 and sent him a copy. It sent the following communications to the timeshare company and its agents:

- *A letter in January 2019 notifying the company that it was acting for Mr L.*

- *Some acknowledgement emails between February and March 2019.*

- *An email in April 2019, referred to above, in which it argued for termination of the timeshare agreement and a refund of monies paid towards it.*

- *An email in December 2019 in which it asked a debt recovery firm to stop contacting Mr L.*

- *A series of emails in November and December 2021 to the timeshare company discussing a potential offer.*

As the LeO noted, from the middle of 2020 until at least December 2021, S did not contact Mr L or Mr M. It appears from the evidence that S also failed to reply to emails from the timeshare company's solicitors asking for updates on Mr L's case, as well as emails from Mr
M. I note this cessation of activity roughly coincided with the email from S to Mr L saying that it had decided it could no longer act for him.

In almost three years it appears S sent only a handful of communications to the timeshare company. Having read the emails sent by S, I would say that perhaps two of them represented attempts to move Mr L's case forward or put arguments to the timeshare company (the April 2019 email and an email in November 2021). S suggested there was other work going on in the background, but it's not provided evidence of this.

Returning to the terms of the contract (along with any implied terms), Mr L's agreement with S said the following about the time things would take:

"As far as timescales are concerned it is difficult at this stage to provide a realistic estimate. We will keep you informed of progress throughout, explaining the reasons for any delays and advise you if any additional unforeseen work becomes necessary.

However, we would make it very clear to you that it is not uncommon due to the nature of the work involved for these matters to take up to 12 months to achieve relinquishment. This may be longer if matters are complex, the attitude of the timeshare company is unhelpful or require legal proceedings to settle them."

I think a reasonable person would interpret this part of the contract as meaning that it could take up to 12 months for S to achieve the object of the contract (relinquishment/release) but that it could be longer if:

- *Matters were complex.*

- *The attitude of the timeshare company was unhelpful.*

- *Legal proceedings were required.*

This section of the contract was in a larger font, so it seems it was something S thought was important to bring to Mr L's attention. I think Mr L would have taken into account the likely timescales when deciding whether to sign the contract. So, bearing in mind the effect of section 50 of the CRA, if the object of the contract was not achieved within 12 months of December 2018 and none of the points above applied, then my view is

that S would be in breach of its contract with Mr L. If some or all of the points applied I will have to consider instead whether S's services had been performed in a reasonable time.

I've not seen evidence that legal proceedings were required or being contemplated by S, and while complexity is to some extent a subjective issue, the matter doesn't seem to have been especially complicated. The attitude of the timeshare company was not unhelpful: it made a couple of offers to reduce some of Mr L's maintenance fee debts in response to the April 2019 email, and at the end of 2021 it offered to reduce these debts significantly. It was certainly willing to talk to S, and as I noted earlier it was proactive in contacting S to try to move matters forward.

I think the reason matters took much longer than 12 months in Mr L's case (and why they have still not concluded) is because of the issues I've already referred to in this decision: S just didn't do much to progress Mr L's case for very long periods of time. I acknowledge the fact that Mr L didn't accept the initial offer from the timeshare company, which could have resulted in him being released from the timeshare in mid-2019. However, I cannot see in the contract with S that he was obliged to accept any offer which was made. Indeed, when notifying him of the offer, S observed: "I would imagine you will not find the terms particularly attractive, but I must seek your instructions."

In light of the above I conclude S had breached its contract with Mr L in either December 2019 or January 2020 by failing to secure his release from his timeshare within 12 months of December 2018."

I also considered the matter of NBS destroying Mr L's original documents, concluding:

"I think the £200 compensation offered by NBS for this is a fair amount to reflect the distress and annoyance this would have caused Mr L. Mr M has said he's worried that the lack of originals could cause problems for Mr L in the future, but I don't think it would be appropriate for me to award compensation for something which may not happen."

Finally, I went on to determine, provisionally, what appropriate redress would look like had NBS fairly honoured Mr L's section 75 claim:

"Under the CRA Mr L would be entitled to a price reduction of an "appropriate amount" as a result of S's breach. Further guidance on what this means is given by explanatory notes which accompany the CRA:

"A "reduction in price of an appropriate amount" will normally mean that the price is reduced by the difference in value between the service the consumer paid for and the value of the service as provided. In practice, this will mean that the reduction in price from the full amount takes into account the benefit which the consumer has derived from the service. Depending on the circumstances, the reduction in price could mean a full refund. This could be, for example, where the consumer has derived no benefit from the service and the consumer would have to employ another trader to repeat the service "from scratch" to complete the work."

S did carry out some work for Mr L, but what benefit did he derive from the service S provided? By the time the contract had been breached around December 2019 or January 2020, Mr L had had his witness statement taken. He had also received an offer from the timeshare company to allow him out of the timeshare if he paid 5,676 euros, which was a significant reduction on what the timeshare company said he owed

before that point. Mr L's position is that he was unwilling to pay anything to the timeshare company as he did not consider himself liable for the fees, and offers to reduce his alleged debts were not what he had been looking for S to obtain for him. But I don't think it would be reasonable to conclude he has derived no benefit at all from S's involvement.

Calculating a price reduction is an exercise which is not without difficulty, especially in scenarios like this where the cost of services has not been broken down. I note the courts have discouraged in any event making too fine-toothed an assessment of difference in value in contracts for services. Taking a broad view that the benefit Mr L has derived from the contract up to the point of it being breached has been quite limited, and the lack of evidence of much activity on S's part, I think an appropriate price reduction would be 80% of S's fixed fee, which equates to a partial refund of £3,220. Due to its joint liability under section 75 of the CCA, my view is that Mr L would be able to claim this same amount from NBS.

There is a difficulty here in that I understand S are still claiming to act for Mr L, albeit it's clear their relationship has broken down and the May 2020 email stated they had decided they could no longer act for him. Nevertheless, I'm mindful Mr L could benefit from the contract with S if they continue to act for him. To account for this possibility I intend to make it a condition of any final decision that NBS does not need to pay the amount of £3,220 until it receives evidence that S are no longer acting for Mr L."

I summarised my intended directions to NBS as follows:

- *"Pay Mr L £3,220, adding 8% simple interest per year* to this amount calculated from 1 January 2020 (12 months after the date the cooling off period expired on the contract with S) to the date the payment is made. NBS does not need to pay this amount until it receives confirmation that S are no longer acting for Mr L.*

- *Pay Mr L £200 compensation, as it has already agreed to do, assuming this amount remains unpaid.*

**If Nationwide Building Society considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr L how much tax it's taken off. It should also give Mr L a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate."*

Finally, I invited all parties to let me have any new evidence, arguments or comments they wanted me to consider, by 18 August 2022. That date has now passed and so the case has been returned to me to consider again.

The responses to the provisional decision

Mr L accepted the final decision. He also provided evidence that he'd written to S, terminating their agreement. NBS said it would also accept the provisional decision.

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.

Because both parties to the complaint accept my provisional decision, I see no reason to

depart from the findings and conclusions I reached in it, as I've reproduced above. I also see no reason, having reviewed the file again, to change my provisional findings.

It follows that I adopt the contents of my provisional decision as part of this final decision and uphold Mr L's complaint.

My final decision

For the reasons explained above, I uphold Mr L's complaint and direct Nationwide Building Society to take the following actions:

- "Pay Mr L £3,220, adding 8% simple interest per year* to this amount calculated from 1 January 2020 (12 months after the date the cooling off period expired on the contract with S) to the date the payment is made. NBS does not need to pay this amount until it receives confirmation that S are no longer acting for Mr L.

- Pay Mr L £200 compensation, as it has already agreed to do, assuming this amount remains unpaid.

I believe Mr L has sent a copy of the confirmation that he has ended his agreement with S to NBS. However, if NBS does not have a copy, our investigator will be able to provide this.

*If Nationwide Building Society considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr L how much tax it's taken off. It should also give Mr L a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate."

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 16 September 2022.

Will Culley
Ombudsman