

The complaint

Mrs D complains that John Lewis Financial Services Limited won't refund to her the money that she paid for two holiday club memberships. She's being represented in her complaint by a claims management company.

What happened

Mrs D and her husband entered into a membership purchase agreement in April 2015 to buy a holiday club membership from a holiday company. The purchase price was £4,550 and Mrs D paid £2,275 of that amount using her John Lewis Financial Services credit card with the payment being made in May 2015. Mrs D also authorised a holiday club to charge a total of £2,275 to her credit card by twelve monthly charges of £189.58 from May 2015.

Mrs D and her husband then entered into a membership upgrade agreement in August 2015 to upgrade their membership. The purchase price was £7,050 from which the £4,550 that they'd agreed to pay in April 2015 was deducted so the amount due from them was £2,500. Mrs D paid that amount using her John Lewis Financial Services credit card with the payment being made fourteen days later. Mrs D also made a payment of £1,675 to the holiday club using her John Lewis Financial Services credit card in August 2015.

Mrs D's representative, on behalf of Mrs D, made a claim to John Lewis Financial Services in December 2019 under section 75 of the Consumer Credit Act 1974. It said that the holiday company had breached the contract and had misrepresented the product to Mrs D and her husband. Mrs D and her husband had made other claims to John Lewis Financial Services about holiday products and it confused this claim as a duplicate of another claim so it didn't address it.

As no response had been received from John Lewis Financial Services to Mrs D's claim, a complaint was then made to this service that the holiday company was in breach of the contract by misrepresenting the contract to Mrs D and her husband and breaching the EU Timeshare Directive. Mrs D's husband sadly passed away in October 2021.

John Lewis Financial Services then said that it had reviewed the documents that Mrs D's representative had provided but didn't believe that the criteria for a section 75 claim had been met as it hadn't been shown that the product had been misrepresented to Mrs D and her husband to lead to any breach. It offered £100 compensation for the incorrect handling of the claim because it said that the claim shouldn't have been filed without being worked and its agent had made an error in doing that.

Our investigator didn't recommend that Mrs D's complaint should be upheld as he didn't think that John Lewis Financial Services' decision to turn down her claim was unfair or unreasonable. He wasn't persuaded that there was a misrepresentation at the time of sale and he didn't think that the contract had been breached. He said that John Lewis Financial Services had offered to pay £100 compensation because aspects of its service could have been better. He said that he thought that that was a fair outcome in the circumstances.

Mrs D's representative, on behalf of Mrs D, has asked for this complaint to be considered by an ombudsman. It says that it doesn't agree with our investigator's recommendation and that Mrs D has found the whole situation extremely distressing and other executors of her late husband's estate have taken over the conduct of this complaint. It says, in summary and amongst other things, that:

- Mrs D and her husband were sold the product as an investment that could be sold prior to the expiration of 2024 at a profit and they completed the application to sell it two months after their purchase which makes absolutely no sense if they weren't advised that they would make a swift profit;
- Mrs D and her husband purchased an initial timeshare contract in April 2015 which offered what was described as medium and the resale value was limited as it was not for peak periods so they decided in order to maximise their returns that they would accept the advice of the holiday company in relation to their investment and upgrade about four months later to a premium – high time;
- it was never their intention to use the timeshare, and they paid a further £250 to list the property for sale about seven weeks after purchase;
- the EU Timeshare Directive was breached because no advance payment, guarantee or acknowledgement of debt to the trader or to a third party is allowed before the end of the withdrawal period but the contract entered into in August 2015 was paid on the day as can be seen from Mrs D's account statement;
- the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 say that a trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract; and
- Mrs D and her husband were unable to contact the seller a short time after their purchase.

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 Mrs D's complaint shouldn't be upheld for these reasons:

- Mrs D'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);
- Mrs D's claim under section 75 is that there's been a breach of contract by the holiday company and that the memberships were misrepresented to her and her husband 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 John Lewis Financial Services' response to Mrs D's claim was fair and reasonable in the circumstances;
- Mrs D's complaint form says that the holiday company was in breach of the contract by misrepresenting the contract to Mrs D and her husband and breaching the EU Timeshare Directive, and her representative's letter to John Lewis Financial Services

in December 2019 describes the misrepresentations that it says were made to Mrs D and her husband, including that:

- they were advised that the product was of some substance but it's now clear that it's worthless and has no merit;
 - it was represented to them that the purchase would be an investment as the product would increase in value and, after a period of a few years, they would be able to sell it at a considerable profit, which was untrue; and
 - they were advised that they would be able to book exclusive accommodation and at a cheaper cost than holidays available online but they've been unable to book any holidays whatsoever and have not used the product;
- I've been provided with a copy of the membership purchase agreement that Mrs D and her husband signed in April 2015 and the membership upgrade agreement that they signed in August 2015 but not the terms and conditions that were on the reverse side of those agreements or any other documents relating to the purchases;
- the membership purchase agreement said that Mrs D and her husband were buying occupancy rights for an unspecified apartment that sleeps two people for one week in the medium holiday period commencing in 2015 and expiring in December 2024;
- the membership upgrade agreement said that it cancelled and replaced the membership purchase agreement and that Mrs D and her husband were buying occupancy rights for an unspecified apartment that sleeps two people for one week in the premium-high holiday period commencing in 2016 and expiring in December 2023;
- the agreements gave Mrs D and her husband occupancy rights at a holiday club and I'm not persuaded that those rights are worthless;
- neither Mrs D nor her representative has provided a detailed account of the circumstances in which it was represented to them that the purchases would be an investment, the conversations that took place or the information that was provided to them – but I've seen no evidence to show that it was likely that the products would increase in value, that they were advised that they would increase in value or that it was likely that they would be able to sell their occupancy rights at a considerable profit;
- Mrs D's representative says that Mrs D and her husband completed an application to sell the product two months after their purchase and that they paid a further £250 to list the property for sale about seven weeks after purchase but it's provided no further evidence to show that they did so – and I'm not persuaded that there's enough evidence to show that the holiday company represented to Mrs D and her husband that the memberships were an investment;
- the agreements refer to "*exclusive rights of occupancy*" and I've seen no evidence to show that Mrs D and her husband wouldn't have received exclusive occupancy of the apartment but I'm not persuaded that there's enough evidence to show that they were advised that the accommodation would be cheaper than holidays available online;
- Mrs D's representative said in its December 2019 letter that Mrs D and her husband had been unable to book any holidays and they'd been unable to contact the holiday company to use the product, but it said in response to our investigator's recommendation that it was never their intention to use the accommodation;
- if the holiday company had made such promises to Mrs D and her husband 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 memberships were misrepresented to Mrs D and her husband by the holiday company or that they were induced into entering into the agreements by any such misrepresentations;
- Mrs D's representative's December 2019 letter says that Mrs D and her husband were to have exclusive rights of occupancy but they've been unable to contact the holiday company at any time to use the product so the holiday company has committed a repudiatory breach of contract which can't now be remedied;
- neither Mrs D nor her representative has provided evidence to show the steps that have been taken to contact the holiday company and, if they were unable to contact the holiday company, I consider that it would be reasonable to expect them to have tried to contact the holiday club where the accommodation is based – but I've seen no evidence to show that they've done so;
- 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 John Lewis Financial Services 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 Mrs D's payments were made to the holiday club, and not to the holiday company, 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 John Lewis Financial Services 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;
- Mrs D's representative says that the EU Timeshare Directive was breached because Mrs D's payment under the membership upgrade agreement was made on the day that she and her husband entered into that agreement;
- Mrs D and her husband entered into the membership purchase agreement in April 2015 – it said that they had the right to cancel the agreement until 28 April 2015 – Mrs D paid £2,275 using her John Lewis Financial Services credit card with the payment being made in May 2015 (more than fourteen days after they'd entered into the agreement) and she authorised the holiday company to charge a total of £2,275 to her credit card by twelve monthly charges of £189.58 from May 2015 (a month after they'd entered into the agreement) so I don't consider that any payments under that agreement were made before the end of the withdrawal period;
- Mrs D and her husband entered into the membership upgrade agreement in August 2015 – it said that they had the right to cancel the agreement within fourteen days - Mrs D paid £2,500 using her John Lewis Financial Services credit card with the payment being made fourteen days after they'd entered into the agreement – so I don't consider that the payment under that agreement was made before the end of the withdrawal period;
- Mrs D also made a payment of £1,675 to the holiday club using her John Lewis Financial Services credit card in August 2015 on the same day that she and her husband had entered into the membership upgrade agreement – but that wasn't a payment of the purchase price payable under the membership upgrade agreement and I've not been provided with any evidence to show why that payment was made

at that time – but I’m not persuaded that there’s enough evidence to show that there’s been a breach of the EU Timeshare Directive;

- Mrs D’s representative says that the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 were breached because the holiday company marketed the memberships as an investment – but I’ve already said that I’m not persuaded that there’s enough evidence to show that the holiday company represented to Mrs D and her husband that the memberships were an investment so I’m not persuaded that there’s enough evidence to show that there’s been a breach of those regulations;
- John Lewis Financial Services didn’t respond to the claims that had been made to it so I can’t say that its response to them was fair and reasonable – but it accepted that it had handled the claim incorrectly as it shouldn’t have been filed without being worked and its agent had made an error in doing that – and it offered to pay £100 compensation;
- I consider that its offer of £100 compensation is fair and reasonable compensation for those issues – and it said at that time that it didn’t believe that the criteria for a section 75 claim had been met as it hadn’t been shown that the product had been misrepresented to Mrs D and her husband to lead to any breach – and I consider that it was fair and reasonable for it then not to have upheld the claim; and
- I sympathise with Mrs D for the loss of her husband and for the issues that she’s had with the memberships, but I find that it wouldn’t be fair or reasonable in these circumstances for me to require John Lewis Financial Services to refund to Mrs D any of the money that she paid for them, to pay her any compensation other than the £100 that it has offered, or to take any other action in response to her complaint.

If the £100 compensation hasn’t been paid to Mrs D and she now wishes to accept it, I suggest that she contacts John Lewis Financial Services to tell it that she accepts its offer.

My final decision

My decision is that I don’t uphold Mrs D’s complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs D to accept or reject my decision before 20 December 2023.

Jarrold Hastings
Ombudsman