DRN-4158575

The complaint

Mr W complains that Nationwide Building Society didn't fairly or reasonably deal with his claim under Section 75 of the Consumer Credit Act 1974 (CCA) in relation to a holiday product exchange he undertook in 2013.

The claim, which is the subject of this complaint, is Mr W's, because it relates to a credit card in his sole name. But as the holiday product was in Mr and Mrs W's name, I'll refer to Mr and Mrs W throughout much of this decision.

What happened

Mr and Mrs W had an existing timeshare membership with a third party (the 'Supplier'). They say they were concerned about the increasing maintenance costs and their ability to continue to make use of their membership given their age. When they raised this, they were told the membership was taken out in perpetuity and would pass to their children on the death of Mr and Mrs W. Mr W says they didn't want the obligations of the membership passed to their children. They were then told they could exit the agreement if they paid an exit fee of £4,799. They were told this would remove their entitlement to the 60,001 points they had acquired in 2007 and the removed points would be replaced with 80,000 annual 'exit points' which would be allocated for the years of 2015 and 2016 (2014 wasn't in the new agreement as the maintenance fee for that year had already been paid and so they could make use of their previous agreement points for 2014). The new agreement would end in December 2016.

Mr W says the new agreement was misrepresented because:

- They were told the only way to exit their previous timeshare membership was to pay the fee, but they have since realised that being sold a membership in perpetuity is illegal. Therefore, the Supplier wasn't allowed to charge the exit fee with the conditions they set out.

- They were told they were paying an exit fee and weren't ever told they were buying a new membership. They didn't need the additional 20,000 points that were provided as a replacement as they had been happy with their previous 60,001 membership points.

- They were told they needed to purchase 80,000 points for £4,799 to exit the agreement but subsequently found the cost to exit the agreement was the purchase of 60,000 points costing £2,799.

Mr W also complained that:

- They were unable to use their full allocation of points by end December 2016 and were told these could be used in 2017 but when they tried to book a holiday in Spring 2017, they weren't allowed. So, they lost the use of around 30,000 points.

- The representatives used aggressive sales techniques to convince them into the agreement and to make a payment on the day and they weren't told about their cancellation rights for the new agreement.

Nationwide considered Mr W's claim under Section 75 of the CCA. It noted that for a valid claim under Section 75, there needed to be a valid debtor-creditor-supplier (DCS) agreement in place. It said that the party Mr W paid using his Nationwide credit card was different to the holiday club membership provider and so there was no valid DCS agreement.

Mr W didn't agree with Nationwide and said evidence had been provided to show a valid DCS agreement was in place. Mr and Mrs W raised a complaint, and this was referred to the Financial Ombudsman Service.

Our investigator found evidence to support there being a valid DCS agreement. They put this to Nationwide and this was accepted. Our investigator considered the merits of Mr W's complaint and issued a view in June 2022. They found that Mr and Mrs W had been given a deal to exit their original timeshare agreement and part of this involved the transfer of their existing points for the allocation of 80,000 new points for use in 2015 and 2016. They didn't find that a misrepresentation had occurred and so they didn't think Nationwide's decision to decline the Section 75 claim was unfair.

Mr W didn't agree with our investigator's view. He provided further submissions supporting his claim that they had been mis-sold the new agreement in order to exit a previous agreement and that they had also been overcharged in the process.

My provisional conclusions

I issued a provisional decision on this complaint. The following sets out my findings.

Was the right arrangement in place?

Under Section 75 of the CCA, a relevant "debtor-creditor-supplier agreement" (DCS) is a precondition to claims under that provision.

Nationwide initially declined Mr W's section 75 claim due to the required DCS agreement not being in place. I have looked at the information provided and can see that Mr W's credit card payment was made to a name different to the Supplier as noted on the purchase agreement. That said, the purchase agreement states that all payments should be made to the Supplier and based on further evidence provided by our investigator, Nationwide accepted that the DCS agreement was in place. Given this I have considered the merits of this complaint.

Section 75: Misrepresentation

For a claim to be upheld under Section 75 and the CCA, there needs to have been a breach of contract or misrepresentation. Mr W has explained that in 2007 he was encouraged to increase his holiday club points from 40,000 to 60,001. Mr W has said that after purchasing the additional points he realised this wasn't beneficial due to the increasing maintenance costs which is what led to the meeting in 2013 about exiting the agreement.

I do not have a copy of the agreement from 2007 (or the original purchase agreement) nor do I have the details of how the payment for the extra points were made. So I cannot say whether the costs were made clear or that the ongoing nature of the agreement was disclosed. However, noting the timing of the purchase I think any claim for misrepresentation under the 2007 agreement (or previous purchase agreements) would likely fall outside of the time limits under the Limitation Act 1980 (LA). I say this because a Section 75 claim is "an

action to recover any sum by virtue of any enactment" under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. The date on which the 'cause of action' accrued is the point at which Mr and Mrs W entered into the purchase agreement because they entered into the agreement based on the alleged misrepresentation by the Supplier – which they relied on. As the claim wasn't made until 2019, I think it's likely to have fallen outside of the time limit set out in the LA.

Mr W's claim is in regard to the agreement entered into in 2013. He has been consistent in his testimonies that his and Mrs W's intention was to exit their obligations and not to take on any further commitments. I therefore find it reasonable to accept that Mr and Mrs W only entered the 2013 agreement as a way to exit the 2007 agreement.

The 2013 agreement sets out that all points from the previous agreement are transferred which meant all management charges and maintenance costs were transferred. As part of the 2013 agreement new points were allocated for holidays in 2015 and 2016. While this is clearly set out, I accept that Mr and Mrs W only accepted this agreement (including the additional points) because it was presented as the only way available for them to exit the previous agreement obligations.

As I haven't seen a copy of the 2007 agreement, I cannot say whether there were options to exit at no additional costs. But having looked at the information provided along with the 2013 agreement there is a statement that the minimum purchase price to become a member of the club – Exit is 60,000 points for £2,799. This is a lower amount than Mr W paid.

Accepting that Mr and Mrs W's intention was to exit their obligations, I find it reasonable to accept they would have done this at the minimum cost available to them. While I do not have evidence to show they should have been able to exit at no cost, the evidence does appear to support an option to exit at a cost of £2,799 and I find it reasonable that had Mr and Mrs W known about this option (rather than being led to believe that the only option was to pay £4,799) then they would have taken it. On balance, I think the price of exiting this agreement was misrepresented to Mr and Mrs W and because of this I think Mr W should be refunded the difference between the amount he paid and the lower exit cost, being a refund of £2,000.

Mr W has also noted that the Supplier stated it was a member of the Resort Development Organisation (RDO) which he has said was untrue as the RDO confirmed the Supplier wasn't a member in 2013. This appears, on balance, to be a further misrepresentation. However, it isn't clear that a misrepresentation regarding the RDO resulted in any material disadvantage for Mr W and without this I do not find I need to consider this issue further.

Section 75: Breach of contract

Mr W says they were unable to use all of the points by end of December 2016 due to issues with the resorts they wished to stay at. On my reading of this complaint, this strikes me as an allegation of breach of contract.

However, there is nothing to suggest that Mr and Mrs W were told these resorts would be available to them at the time they wanted, and I understand they were able to book other holidays in this period. Due to the issues they asked to be able to book a holiday in spring 2017 and while I can see this was agreed this was on the basis the holiday was booked before the end of December 2016. I cannot see that this happened and as the points were valid until the end of December 2016, I cannot say that when Mr W made contact in 2017 about booking a holiday and was told his points had expired that this was a breach of contract.

So, in regard to this issue, I can't say that there's been a breach of contract that Nationwide is likely to be jointly liable for.

Conclusion

I can understand why Mr and Mrs W may be unhappy with the product they purchased, and I accept that they want a full refund. However, in this case based on the evidence I have seen I do not find I have enough to say that should happen. But I do think it reasonable to accept that they would have taken the reduced cost exit option had this been made available to them and without evidence to explain why this wasn't given as an option, I find it reasonable to accept the exit cost was misrepresented and that Mr W should be refunded £2,000.

Nationwide accepted my provisional decision. Mr W provided further evidence in support of his claim for the full £4,799 paid in 2013 to be refunded. Mr W requested that specific consideration be given to the calculations he had provided as part of this investigation as well as other specific emails he had sent.

Mr W explained that he didn't have copies of the 2003 and 2007 purchase agreements and didn't expect to be able to get copies of these, but he remembered that they simply contained information about the points purchased, price and date of commencement and no exit details were included. He said they wouldn't have entered the agreement had they known they would be charged to exit. Mr W confirmed that the 2007 agreement was not financed by Nationwide.

Mr W said that 'perpetuity' wasn't mentioned until his meeting in 2013 when he and Mrs W raised it. It was then that they were told they couldn't exit the agreement. After challenge they were then told they could exit if they paid the £4,799 exit fee. Mr W said it wasn't fair to impose a fee that wasn't included in the details of the purchase. The 2013 agreement was then presented, and this didn't mention the exit fee but instead the purchase of new points. Mr W said they questioned certain clauses and were told they couldn't exit their points without entering the new contract. Mr W said that the only "requirement" to exit the previous agreements for 60,001 points was to sign to transfer them back to the Supplier. The annual maintenance obligations had already been paid for 2013 and 2014 prior to the meeting in 2013.

Mr W reiterated that the 2013 agreement was misrepresented and that there shouldn't have been a requirement on them to buy a new investment to exit an existing one. Mr W referenced the calculations he had provided previously which he said supported his claim of a mis-sale. Mr W said that due to the evidence he had provided of misrepresentation and mis-sale the full purchase price of £4,799 should be refunded.

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.

When doing that, I'm required to take into account the relevant law and regulations; regulator's rules, guidance and standards; and codes of practice and what I consider to have been good industry practice at the time.

When evidence is incomplete, inconclusive or contradictory, I've made my decision on the balance of probabilities – that is, what I think is more likely than not to have happened given the available evidence and wider circumstances.

As parts of my provisional decision haven't been challenged by either party, I do not intend to revisit them, and my conclusions as set out in my provisional decision remain unaltered. Instead, I will focus on the issue that remains in dispute which is Mr W's claim that due to the 2013 agreement being misrepresented and mis-sold he should receive a full refund of £4,799 rather than the partial refund of £2,000 I set out in my provisional decision.

Firstly, I appreciate the detailed response Mr W has provided to my provisional decision and for confirming his knowledge of his previous 2003 and 2007 agreements in regard to their content and also that the 2007 agreement wasn't financed by Nationwide. This decision is about the 2013 agreement, but Mr W's recollection of the previous agreements provides useful context.

As I said in my provisional decision, I accept, based on the testimonies provided that Mr and Mrs W only entered the 2013 agreement as a way to exit the 2007 agreement. I note Mr W's recollection that the 2007 agreement didn't contain any information regarding a cost to exit but I also note that there is no evidence to say that it would be possible to exit the agreement at no cost. Mr W has said that charges can't be applied to exit perpetuity contracts under Spanish and Portuguese law but in this case, the contract is between an Irish based company and Mr and Mrs W in the UK. I have therefore looked again at the purchase agreement to see if there is information contained within it that changes my provisional conclusion.

I note Mr W's comment about the clauses in the 2013 purchase agreement being separate in regard to the purchase of 80,000 points for £4,799 and the transfer of his existing points. However the agreement is clearly titled as an 'Exit' agreement and so I find it reasonable to accept that the deal which is presented includes the terms of the exit which in this case is the removal of the obligations under Mr and Mrs W's previous agreements and the purchase of the new points. So, while I appreciate what Mr W is saying I do not find that I have evidence that there was an option available to exit at no cost.

Mr W asked that I look at his calculations and I have done so (and had previously considered these before issuing my provisional decision but as I didn't refer to them, I understand why Mr W has noted these). I agree that these show that the charge applied in the purchase agreement of £4,799 for 80,000 points does not link to the minimum price for exit set out in the accompanying information of £2,799 for 60,000 points. I can see why Mr W feels this shows the purchase agreement was misrepresented. But in this case, as I find that the lower exit price should have been offered, I find this is the relevant amount to consider.

As I previously said, I do not find evidence that there was an option for Mr and Mrs W to exit their obligations without any ongoing costs but there is evidence that the exit could have happened at a minimum cost of £2,799. Therefore, I find that this is the amount they should have been offered and accept that had this been offered as an alternative they would have paid this rather than the £4,799.

I understand why Mr W believes he should be refunded the full purchase cost but in this case I think, on balance, the fair resolution is for a refund of £2,000 to reflect the additional amount Mr W paid beyond what appears to be the minimum exit price. I also note that Mr W has said that he booked holidays in 2015 and 2016 using the points he purchased in 2013 and so I cannot say that he has had no benefit from these.

So, while I understand Mr W may be disappointed by this decision, I do not find I can say that Nationwide is required to refund the full purchase but instead, £2,000 (along with interest) as it has agreed.

Putting things right

Nationwide Building Society should, as it has agreed, refund Mr W £2,000 (being the difference between the amount he paid and the recorded minimum cost of exit) with simple interest at 8% per year from the date the claim was declined until the date of settlement.

My final decision

My final decision is that Nationwide Building Society should take the actions set out above in resolution of this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 21 August 2023.

Jane Archer
Ombudsman