

The complaint

Mr S complains about the sale of a timeshare. He says that National Westminster Bank Plc (who I'll call NatWest) financed the purchase and that he therefore has claims against it.

Mr S has brought his complaint through a representative, so references to his submissions and arguments include those made on his behalf.

What happened

I issued a provisional decision on this complaint earlier this year. An extract from that provisional decision is set out below.

In April 2017 Mr S entered into an agreement with Silverpoint Vacations SL to purchase what appears to have been occupation rights in one of a group of ten properties. The cost of the agreement was 23,375 Euros. Mr S paid a 2,000 Euro deposit using a credit card supplied by NatWest. He paid the balance by bank transfer.

In July 2021 Mr S complained to NatWest. His claim was detailed but in essence he said he had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented, there had been a breach of contract, and the failure to disclose commission and the pressure exerted during the sales process had resulted in an unfair relationship. He also claimed that NatWest hadn't performed adequate affordability checks.

NatWest didn't think Mr S had provided sufficient evidence for them to consider his various claims and he, therefore, escalated the complaint to this Service.

Our investigator considered what had happened but wasn't persuaded there was sufficient evidence to support Mr S's complaint.

Mr S's representatives didn't agree. They said the product purchased fell within what could be defined as a Collective Investment Scheme (CIS) as defined by Section 235 of the Financial Services and Markets Act 2000 (FSMA) and that Silverpoint was neither authorised to establish and operate CIS's, nor exempt from authorisation. It was, therefore, they suggested, in contravention of the 'general prohibition' in Section 19 of FSMA. They said that if the supplier had complied with FSMA, it would not have entered into the Agreement – nor would Mr S have assumed the financial burden. As a result they said the Statutory breaches by Silverpoint had led to the creation of an unfair debtor creditor relationship. They therefore asked for a decision by an ombudsman.

What I've provisionally 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.

I'm issuing a provisional decision here as I can see we didn't respond to all of the issues. I'm not currently expecting to uphold the complaint.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under FSMA. Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.

As a general observation I would explain that there has been very limited evidence provided in support of Mr S's various claims here. I've seen a copy of a purchase agreement but haven't been supplied with any detailed terms, correspondence, or documentary evidence to support Mr S's allegations. I don't think Mr S's testimony alone is reason to support his claims.

The claim under the CCA

When something goes wrong and the payment was made, in full or in part, with a credit card, as appears to be the case here, it might be possible to make a section 75 claim. This section of the CCA says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.

There's been no suggestion that all the necessary criteria for a claim to be made under section 75 haven't been met and I'm persuaded they have been.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that I think some of Mr S's claims fit better under, as the pre-contractual acts or omissions of the credit broker or supplier will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Mr S and the lender.

It's not for me to decide the outcome of a legal claim Mr S may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether NatWest were reasonable to reject his claims.

The claim under section 75 of the CCA

Mr S says the agreement was misrepresented to him for several reasons. He says he was promised it was an investment but other than Mr S's testimony, I've not seen evidence to corroborate that. Mr S also says the timeshare (as he initially put it) was misrepresented to him as there wasn't a secondary market through which it could be sold. But Mr S hasn't provided any information in support of that claim, and I'm not persuaded that his testimony alone is sufficient to suggest a promise was made that a resale market would be provided or that the purchase would be resold.

Mr S says that Silverpoint went into liquidation and if that was the case and Mr S wasn't able to benefit from the purchase he'd made, I may think there had been a breach of contract. I've not seen evidence that Mr S wasn't able to make use of his purchase and I can see that by the time he raised his claim with NatWest his timeshare had been relinquished and he was no longer bound by it.

I don't, therefore, think it's likely a court would find there was sufficient evidence to uphold a claim under section 75, and I don't think NatWest were unreasonable to do so either.

The claim under section 140A of the CCA

Section 140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship.

Mr S says the purchase agreement was sold to him under "extreme pressure" and, under certain circumstances, that could be something that would have created an unfair relationship between him and the supplier. But I've not seen any evidence to support that assertion and I don't think a court would be likely to think that was the case either.

Mr S also says there was an unfair relationship as he wasn't told about commission arrangements. I've not seen evidence that a commission was paid to NatWest and I think that was unlikely as NatWest had only provided the credit card by which Mr S paid his deposit and they wouldn't, therefore, be likely to have a formal commission arrangement with the supplier.

Ultimately, I don't think NatWest were unreasonable to reject the claims Mr S made to them under section 140A and I'm not expecting to ask them to take any action.

Breach of section 19 of FSMA

In response to our Investigator's findings, Mr S's representatives said they now thought the purchase wasn't for a timeshare product and that it therefore constituted a CIS under Section 235 of the FSMA. And as a consequence, a breach of Section 19 of the FSMA. I've seen no evidence to support that allegation. Further, the alleged breach of Section 19 of the FSMA and any resultant unfairness appears to constitute a new allegation that wasn't included within the original claim. And a breach of the FSMA in the way presented doesn't, as I understand, constitute misrepresentation or breach of contract under section 75. In the event that Mr S wishes to pursue that allegation, I believe it should be presented as a separate claim and/or complaint. I can't see that has happened here. So, NatWest haven't been given fair opportunity to investigate and respond. Because of that, I don't believe it would be fair or reasonable for me to consider that particular allegation further as part of the complaint I'm considering here.

Affordability

Mr S says that NatWest failed in their duty to assess whether the credit was affordable for him. But any complaint of that type here would be a complaint that NatWest did not properly assess affordability when setting or changing Mr S's credit limit on his credit card, as that was the credit provided. Mr S has provided no information about that. I am not persuaded that the credit limit was not properly assessed or that Mr S suffered any loss if it was.

My provisional decision

For the reasons I've given above, I am not expecting to uphold this complaint.

Further comments and/or information

NatWest didn't provide any further comments for me to consider but Mr S's representatives did. They said they were disappointed that I had not considered their detailed submissions in relation to the purchase being a CIS and they wanted me to do so. They said that to refrain from doing so would in their opinion be unfair as the Ombudsman is required to consider all relevant law at the time.

In addition, they explained that Mr S had been advised that the property was under construction at the time of purchase and would take around 3 years to complete. He was also under the impression that he would receive rental income up to the point of sale when he would receive 10% of the net sale proceeds which would be more than he paid for it.

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.

Our rights to consider a complaint are set out in the Financial Conduct Authority's Handbook under DISP 2.8.1. In broad terms they explain that we can consider a complaint if the business has sent its final response on the matter, or if eight weeks have elapsed since the consumer sent the complaint and the business hasn't responded. Mr S's complaint about the purchase being a CIS, and about rental income, weren't raised with the business, and they haven't had a chance to respond to them yet. It wouldn't be fair for me to consider those issues at this point but that doesn't interfere with Mr S's right to raise them with NatWest, and to escalate them to this Service if he is unhappy with their response.

I've not been provided with any new evidence or comments that has led me to change my position on the complaint we are able to consider at this time. My provisional decision, therefore, becomes my final decision.

My final decision

For the reasons I've given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 April 2024.

Phillip McMahon
Ombudsman