DRN-4939302

The complaint

Mr V has complained that National Westminster Bank Plc ("NatWest") acted unfairly and unreasonably by declining to pay a claim under s.75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mr V, alongside his wife, had purchased a number of holiday club and timeshare memberships from a timeshare supplier ("the Supplier") over a number of years between 1999 to 2016. By the end of 2016, they held around 450,000 of the Supplier's 'points' which could be exchanged to take holidays at the Supplier's resorts.

In October 2017 ("the Time of Sale"), Mr and Mrs V attended a sales meeting when holidaying with the Supplier and were introduced to a new type of membership – Fractional Ownership. Fractional Ownership was asset backed – which meant it gave Mr and Mrs V more than just holiday rights. It also included a share in the net sale proceeds of a named property after their membership term ended.

Mr and Mrs V entered into a 'Purchase Agreement' with the Supplier to take out Fractional Ownership. In doing so, they traded 102,000 of their original points for 102,000 fractional points, acquiring two 'fractions' in an apartment in the Supplier's resort in Tenerife ("the Allocated Property") which was to be sold after ten years. This cost £8,950 and they paid for this by using Mr V's NatWest credit card for the full amount.[1]

In July 2022, Mr V appointed a professional representative ("PR") to write to NatWest and make a claim under s.75 CCA on his behalf ("the Letter of Claim").[2] The claim was about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against NatWest under s.75 CCA, which NatWest failed to accept and pay; and
2. A breach of contract by the Supplier giving him a claim against NatWest under s.75 CCA, which NatWest failed to accept and pay.

(1) S.75 CCA: the Supplier's misrepresentations at the Time of Sale

Mr V says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Ownership would provide significant benefits and discounts on holidays, however the benefits received were continuously reduced to the point where they could have taken the same holidays at a cheaper rate without using their membership.
2. told them that the apartment would be re-valued and sold at a significantly higher price. It

[1] The payment did not go straight to the Supplier, rather it went to a different, related business. NatWest has accepted that these businesses were associated as set out in s.184 CCA.
[2] As the credit card was in Mr V's name, only he was able to make such a claim against NatWest and bring a related complaint to this service.

was stated that the proceeds would be shared between the owners after marketing costs had been deducted. It was implied that Mr and Mrs V would get back what they paid for Fractional Ownership or make a profit, so this was an “investment”. This was a false representation as the Supplier had failed to disclose the current value of their share in the Allocated Property. Therefore, the Supplier had not provided a valuation to compare whether a profit could in fact be achieved, so it was unclear what if any profit could be made.

3. made Mr and Mrs V believe that purchasing the Fractional Ownership was favourable to them by implying that it was risk free. The representative stated that it was only an "upgrade" whereby some of their points would be turned into a Fractional Ownership and that there was "no other reason for them not to do it". It was implied that there was no risk as Mr and Mrs V would only be trading their points in for something better; a share of the proceeds of sale after "marketing costs had been deducted". But the Supplier failed to provide any specific information about the risks or details of the relevant market for the Allocated Property.
4. told them that the special deal to upgrade was only available on the day. Falsely stating that a product was only available for a very limited time and was an exclusive opportunity only offered to a selected number of people, was done so in order to make Mr and Mrs V make an immediate decision Further, Mr and Mrs V were outnumbered and pressurised by salesmen.[3]

(2) Section 75 of the CCA: the Supplier’s breach of contract

Mr V says that the Supplier breached the Purchase Agreement because it marketed the entire resort in which the Allocated Property was located (“the Resort”) for sale in September 2021. Mr V alleged this meant a new management company was appointed and it would eventually close as a destination for members. But it was also alleged in the Letter of Claim that the resort was closed to members in 2021.

As a result of the above, Mr V says that he has a misrepresentation claim and a breach of contract claim against the Supplier, and therefore, under s.75 CCA, he has a like claim against NatWest, who, with the Supplier, is jointly and severally liable.

PR also said the Supplier breached regulations that applied to the sale of timeshares, like Mr and Mrs V’s Fractional Ownership.

NatWest dealt with Mr V’s concerns as a complaint and issued its final response letter in August 2022, rejecting it on every ground.

Mr V then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr V disagreed with the Investigator’s assessment and asked for an Ombudsman’s decision – which is why it was passed to me.

What I have 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.

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii)

[3] This is my summary of the fourteen alleged misrepresentations set out by PR.

regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

And having done that, I do not think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

The CCA introduced a regime of connected lender liability under s.75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against NatWest under s.75 CCA essentially mirrors the claim Mr V could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. Here, NatWest is only responsible for claims when there is a debtor-creditor-supplier ("DCS") agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit card. In Mr V's case, he paid a differently named business to the Supplier directly with his credit card. Under the CCA, NatWest would have to answer a claim if it could be shown that the Supplier and the business that took payment were 'associates' (s.184 and s.187 CCA). NatWest accepts that was the case and so it is satisfied that s.75 CCA applies – I see no reason to find otherwise. It follows, if I find that the Supplier is liable for having misrepresented something to Mr V at the Time of Sale, NatWest is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. While I recognise that Mr V has concerns about the way in which his Fractional Ownership was sold, he has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons he alleges. I have in mind that a material and actionable misrepresentation is an untrue statement of fact or law made by one party (or his agent, acting within the scope of his authority) (the "representor") to another party (the "representee") that induced that party to enter into a contract. Further, a mere statement of opinion, rather than fact or law, which proves to be unfounded, is not a misrepresentation unless the opinion amounts to a statement of fact, i.e. it can be proved that the person who gave it, did not hold it, or could not reasonably have held it.

In summary, Mr V has alleged that Fractional Ownership was sold as an investment and has highlighted a number of concerns that flow from this. Those include that he would receive significant benefits from membership, that he was told the Allocated Property would be sold in 2027 and he would get his money back, that he would receive a profit and that this was all 'risk free'. However, in so far as there was any representation made that Fractional Ownership was an investment, this could not, in my view, amount to a misrepresentation. That is because Mr and Mrs V's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. So if they were told Fractional Ownership was an investment, that would not be untrue.

I understand Mr V has concerns that flow from this, such as that he was not given sufficient information to understand the value of this investment, but not being given further information does not, in itself, amount to a false statement of fact or opinion. Rather, I can only consider whether he was actually misled about Fractional Ownership under a s.75 CCA claim.

In the Letter of Claim, PR alleged that Mr and Mrs V were told that the investment would generate a profit and would be risk free. However, it appears to me that PR has said in the Letter of Claim that it was implied to Mr and Mrs V that Fractional Ownership was a risk-free investment, rather than there being an explicit representation that such an investment was 'risk free'. That would fit with the witness statement Mr V produced when making this claim to NatWest. In that statement, he said:

> *"10. We were told the aim was that after 10 years (in 2027), the apartment would be re-valued and sold with the proceeds shared between the owners after all marketing costs had been deducted. I agreed to purchase 2 fractions, where each fraction equates to one week, thus, each property would consist of 52 fractions.*
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> *11. We were told that the Fractional Ownership product was likely to resell at a significantly increased price as these apartments were sought after particularly by the Northern Portuguese. This would result in us getting our money back."*

Having considered Mr V's witness statement, I cannot see that he has said he was told any investment was 'risk free'. Given that his witness statement is his actual evidence of what happened, I do not think any actual statement was made that Fractional Ownership was a risk-free investment. Further, as Mr V has not set out the substance of this allegation in his witness statement, not only can I not say that such a representation was made to him, I also think that if it was, that it was not something he relied upon when taking our Fractional Ownership.

Mr V has said he was told the Allocated Property was likely to resell at an increased price and the reasons he was given for this assertion – I have taken from this he meant it would make a profit for him. But I cannot see that if Mr V was told something like this, it would be anything other than an honestly held opinion by the salesperson – I have not seen any evidence to suggest that either the salesperson did not believe that to be the case or that they could not reasonably have believed it to be true.

In the Letter of Claim, it was alleged that the benefits received under the Fractional Ownership were continuously reduced to the point at which they could have got cheaper holidays without using their membership on the open market. It is not clear to me specifically what false statement it is alleged was made to Mr V, however even if I were to find that he was explicitly told that holidays secured through Fractional Ownership were cheaper than the equivalent holiday available on the open market, I have not been provided with any evidence to show that was untrue.

Further, there is nothing else on file that persuades there were any false statements of existing fact made to Mr V by the Supplier at the Time of Sale, including that any offer made by the Supplier was only available on that day. It follows, I do not think there was an actionable misrepresentation by the Supplier for the reasons alleged.

For these reasons, therefore, I do not think NatWest is liable to pay Mr V any compensation for the alleged misrepresentations of the Supplier.

Section 75 of the CCA: the Supplier's breach of contract

I have already summarised how s.75 CCA works and why it gives Mr V a right of recourse against NatWest. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, NatWest is also liable.

Mr V says that the Supplier breached the Purchase Agreement because it put the Resort, in which his Allocated Property was contained, up for sale in 2021 and, following that, either that when it was sold members would not be able to book holidays there or that it was closed to members in 2021. However, neither Mr V nor PR have said, suggested or provided evidence to demonstrate that he is no longer:

1. a member of the Fractional Ownership club;
2. able to use his Fractional Ownership membership to holiday in the same way he could initially; and
3. entitled to a share in the net sales proceeds of the Allocated Property when his Fractional Ownership membership ends.

On one reading of Mr V's allegations, he says that the Supplier breached the Purchase Agreement because there is no guarantee that he will receive his share of the net sale proceeds of the Allocated Property. I understand that he is saying that he fears that, when the time comes for the Allocated Property to be sold, he will not receive his share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain. Further, the ownership of the Allocated Property was transferred to a trustee as a safeguard for members such as Mr V, so I do not think the Supplier was able to sell the Allocated Property.

Turning to the other allegation that Mr and Mrs V lost access to the Resort, in his witness statement, Mr V has said:

> *"16. […] On 02/09/2021 I received a general email from [the Supplier] regarding the re-opening of one of the hotels following lockdown. It also stated that "following the long closure [the Resort] has passed to a new management company and will eventually close as a destination for club members". We had received no warning of this.*
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> *17. I can also see that a number of Estate Agents based in Tenerife (and mainland Spain) are now advertising these apartments at [the Resort] for sale, and that an apartment similar to the one that I have invested in is being advertised for 110,000 euros which equates to £93,879. If the property subsequently sells for the advertised price then my 2 fractions would equate to a maximum of £3,400 after costs, this would result in the financial benefits that had been projected to me being overstated."*

Additionally, a section of the Purchase Agreement reads:

"Miscellaneous provisions

Due to the nature of the product, certain changes are expected during the lifetime of the Membership.

The Developer has the right at any time, and the Purchaser consents that the Developer has the right, in respect of the present Purchase Agreement General Conditions or Pre-Contractual Information, an in respect of all existing and future Purchase Agreements General Conditions:
…
• To modify the Information disclosed in the "Standard Information Form for Timeshare contracts" as established by European Directive 2008/122, when necessary, including but not limited to […] add new resorts and delete resorts […]"

So, in his evidence, Mr V has not said that he lost his access the Resort using his membership, rather that at some future point that might be the case. Further, the Purchase Agreement appears to anticipate that the accommodation available to members may well change during the course of memberships. Again, it would seem that any potential breach of contract lies in the future, but even if Mr and Mrs V were unable to stay at the Resort, I cannot say that meant Mr V has lost out on something he was otherwise entitled to under the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think NatWest is liable to pay Mr V any compensation for a breach of contract by the Supplier. And with that being the case, I do not think NatWest acted unfairly or unreasonably when it dealt with the claims for misrepresentation or breach of contract under s.75 CCA.

Other matters

PR has pointed to Regulations that it argues the Supplier breached when selling Mr and Mrs V Fractional Ownership at the Time of Sale. But I cannot see that those alleged breaches are things that could fall to be considered as claims under s.75 CCA – for example, it is not alleged, nor do I think it is arguable, that the Supplier breached the Purchase Agreement or misrepresented something by breaching the relevant Regulations. Given that, I do not make a finding on these matters as they have no bearing on the outcome of this complaint.

My final decision

I do not uphold Mr V's complaint against National Westminster Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 28 October 2024.

Mark Hutchings
Ombudsman