DRN-4665679

The complaint

Mr N complains that NewDay Ltd ("NewDay") failed to uphold his claim under section 75 of the Consumer Credit Act 1974 ("CCA") in relation to payments he made using his credit card to purchase a timeshare product.

What happened

In or around May 2015, while on holiday (with another party) using their existing timeshare product, Mr N agreed to meet with the supplier of that timeshare product – who I'll refer to as "L". During that meeting, Mr N agreed to purchase 15,000 additional points in the timeshare product he held to be used against holiday experiences and accommodation from a portfolio offered by L. The purchase price agreed was £7,200 and was funded with payments from a credit card in Mr N's sole name provided by NewDay.

In or around May 2021, using a professional representative ("the PR"), Mr N submitted a claim to NewDay under section 75 of the CCA ("S75"). The PR alleged that L had misrepresented the product points purchased to Mr N. And it was those misrepresentations that had persuaded Mr N to agree to the purchase. In particular, the PR alleged L told Mr N the purchase:

- would enhance his current product holding;
- would drastically reduce the annual management charges;
- would provide greater access to the holidays of his choice; and
- included a five year release clause.

The PR claim none of this representations were true and annual fees increased dramatically, destinations were always fully booked, and L refused to allow Mr N to exit from the product when he asked to. They also allege that Mr N was pressured into entering into the product purchase contract.

In response, NewDay said they didn't have enough information to confirm that a breach of contract or misrepresentation had taken place. They asked the PR to provide evidence to support the claims together with a copy of the terms and conditions of the contract. There followed further exchanges between the PR and NewDay in which the PR expanded the allegations of misrepresentation. They suggested that the timeshare points had been represented to Mr N as an investment that could be sold at a profit. But it appears NewDay still didn't receive the evidence and information they needed to progress Mr N's claim.

Unhappy that Mr N's claim hadn't yet been upheld, the PR referred matters to this service as a complaint. So, this service contacted NewDay who confirmed that although a claim had been received, no complaint had been raised. They agreed to investigate this further.

It appears NewDay weren't able to provide a resolution to Mr N's complaint within the timescales required under DISP[1]. Because of that, NewDay offered to pay compensation to Mr N of £50 to reflect any distress and inconvenience caused. However, they didn't think they'd done anything wrong in not upholding his claim. They confirmed that Mr N's claim

[1] Dispute Resolution: The Financial Conduct Authority Complaints sourcebook (DISP)

could still be considered subject to the necessary evidence and documentation being provided to support the allegations.

The PR (and Mr N) remained unhappy with NewDay's response. So, asked this service to look into matters further. One of our investigator's considered all the evidence and information available. Having done so, they couldn't find any evidence to support the alleged misrepresentations. So, didn't think NewDay's response had been unfair or unreasonable.

The PR didn't agree with our investigator's findings suggesting they'd failed to consider Mr N's S75 claim properly. They provided details of the (alleged) experiences of other consumers when purchasing products from L together with their own interpretation of L's actions and practices, and how they believe these breached the regulations that apply. The PR also provided details of products Mr N had previously purchased from L.

As an informal resolution couldn't be achieved, Mr N's complaint was passed to me to consider further. Having done that, I was inclined to reach the same outcome as our investigator. But I considered a number of issues which may not have been fully addressed or explained previously. So, I issued a provisional decision on 7 February 2024 giving both sides the chance to respond before I reach my final decision.

In my provisional decision, I said:

> Relevant considerations
>
> When considering what's fair and reasonable, DISP 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
>
> S75 provides consumers with protection for goods or services bought using credit. Specifically, where there's evidence of misrepresentation or breach of contract. Mr N paid for the timeshare product using his NewDay credit card. So it isn't in dispute that S75 applies here. This means Mr N is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this complaint.
>
> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe NewDay's failure to uphold Mr N's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
>
> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service and this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.
>
> Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.
>
> The Complaint
>
> To provide further clarity, the PR submitted a claim under S75 in May 2021 – not a complaint. This was a legal claim for misrepresentation which NewDay has joint

liability for under S75. A legal claim doesn't fall under the DISP rules. So, until the point the PR referred Mr N's claim to this service, I can't see that any complaint about the outcome of his claim had, in fact, been made to NewDay. It was at this point that NewDay agreed to investigate the complaint referred to them by this service.

In doing so, they've since confirmed that they failed to meet the timescales set under DISP to provide a response to Mr N's complaint – not the claim. And because of that, they've offered compensation to Mr N of £50. This doesn't appear an unreasonable gesture, given the circumstances. However, as complaint handling isn't a regulated product or service under the Financial Services and Markets Act 2000 ("FSMA"), this isn't something this service has the jurisdiction to comment further on.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by L in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that L made false statements of fact when selling the timeshare product. In other words, that they told Mr N something that wasn't true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mr N to enter into the contract. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the timeshare points.

From the information available, I can't be certain about what Mr N was specifically told (or not told) about the benefits of the product he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the evidence that is available from the time. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr N's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says he was told. In particular that the product would provide enhanced benefits, reduce the associated annual management charges, improve booking availability, included a release clause or was represented as an investment that could be sold at a profit. There's simply no reference to any of this within any of the documentation provided.

It's generally understood that the selling of timeshare products as an investment falls contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs"). But I think it unlikely the product can have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, despite the PR's assertions, I've found nothing within the evidence provided to suggest L gave any assurances or guarantees about the future value of the product Mr N purchased. L would had to have presented the product in such a way that used any investment element to persuade him to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

The pressured sale and process

The claim suggests Mr N was pressured into entering into the purchase contract. But this isn't something that would constitute misrepresentation or a breach of contract under S75. However, I acknowledge what the PR have said about this and have considered the allegation further in reaching my decision.

I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Mr N approached the closing stages, he was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr N agreed to the purchase in 2015 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to L, after the purchase, suggesting he'd agreed to it when he didn't want to. And neither the PR nor Mr N have provided a credible explanation for why he didn't subsequently seek to cancel the transaction within the 14-day cooling off period usually permitted here.

If Mr N only agreed to the purchase because he felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest he was obviously harassed or coerced into the agreement. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr N made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

The increased annual charges

The PR say that the annual charges associated with Mr N's points holding have continued to increase. But as I've already said above, I haven't found any evidence to suggest he was told they would reduce as alleged.

One of the main aims of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") was to enable consumers to understand the financial implications of their purchase so that they are able to make an informed decision. If a supplier's disclosure didn't recognise that aim, and the consumer ultimately lost out – or almost certainly stands to lose out - from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, it's possible the product could be found to have been misrepresented and ultimately led to unfairness. This aspect could be considered as part of a claim under Section 140A of the CCA ("S140A"). However, I can't see that the PR have specifically submitted such a claim. And in any event, only a court has the power to make a determination under that provision. That being said, as it's relevant law, I've considered it further in reaching my decision.

It's possible L didn't give Mr N sufficient information, in good time, on the various charges he could have been subject to - under the timeshare points purchased - in order to satisfy its regulatory responsibility under Regulation 12 of the TRs. But even if that was the case, Mr N was an existing member and had been for several years by the time the sale in question happened. The PR have confirmed that he first bought a product from L in 2009 – followed by further purchases in 2010, 2011 and 2012. So, I think his experience as a member is likely to have given him enough insight into what the ongoing costs of membership were like and might be like going forward. And as he made the decision to enter into the purchase agreement with that experience in mind, in the absence of a credible explanation from him as to why, at the time of sale, L's cost disclosure (or lack of) could be said to have played a significant part in that decision, I'm not persuaded it did.

Was the right relationship in place?

Under S75, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision. As the payments made under the purchase agreement were made to another party rather than the supplier directly, it's now possible that there was no such agreement in place following the High Court's judgment in the case of Steiner v National Westminster Bank PLC [2022].

However, given the facts and circumstances of this complaint and my overall outcome with those in mind, I don't think it's necessary to make a formal finding on the debtor-creditor-supplier arrangement for the purpose of this decision because I don't think Mr N's complaint should succeed on its merits anyway.

Other considerations

In response to our investigator's findings, the PR argue that they had failed to assess Mr N's S75 claim properly. But as I've already said, this service can't decide legal claims. Only whether NewDay's treatment and response to the claim appears fair and reasonable. NewDay have been clear that they're still prepared to consider Mr N's claim further subject to the provision of evidence and supporting documentation. But as I can't see that either the PR or Mr N have provided that to them, I don't think NewDay's current stance is unreasonable.

Further, the PR reference, what is said to be, the experience of other consumers when agreeing to the purchase of products from L. But I can't see that this is evidentially supported or how those comments and allegations help in establishing the facts of what happened in Mr Ns specific circumstances.

Summary

I would like to reassure Mr N that I've carefully considered everything that's been said and provided. I realise he will be extremely disappointed, but I haven't seen anything that persuades me that NewDay's response to his claim so far has been unfair or unreasonable. I think they've been very clear about what they need to consider his claim further. Because of that, and for the reasons above, I don't currently intend to ask NewDay to do anything more here.

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.

NewDay haven't responded to my provisional findings. And while the PR acknowledged receipt, they haven't provided any new evidence or comments for me to consider. In the circumstances, I've no reason to vary from my provisional findings. So, I won't be asking NewDay to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr N's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 4 April 2024.

Dave Morgan
Ombudsman