DRN-4374461

The complaint

The estate of Mr T ("the estate") complains about how Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") handled their claim under the Consumer Credit Act 1974 ("CCA") in relation to a timeshare product funded by a loan BPF provided.

What happened

The complaint in this case relates to the purchase of a timeshare product in the joint names of Mr and Mrs T. However, the underlying claim relates to a loan in Mr T's sole name. Because of that Mr T is the only eligible claimant here. And as a result, he is the only eligible complainant.

During the course of this service's investigations, Mr T unfortunately passed away. As a consequence, the complainant is now the estate. However, for simplicity, I may refer to Mr T and Mrs T at times throughout my decision.

In or around late 2011, Mr and Mrs T agreed to purchase a timeshare product from a supplier who I'll refer to as "D". The product purchase provided an allocation of 5,000 points together with membership in a scheme operated by D. The points allocation could be used to access holiday accommodation and benefits from a portfolio operated by D. The purchase price agreed for the product was £6,500. A deposit of £1,300 was paid by Mr T using a credit card in his sole name. The balance of £5,200 was funded under a fixed sum loan agreement with BPF – also in Mr T's sole name.

In September 2017, using a claims management company ("the CMC"), Mr T submitted a claim to BPF under the CCA. The CMC said the product had been misrepresented to Mr T. And under section 75 ("S75") of the CCA, BPF were jointly liable with D for those misrepresentations. In particular, the CMC said D had told Mr T:

- he would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit; and
- the purchase of more points would qualify him for the "Fractional[1]" points scheme, but this scheme was found to be available to both members and non-members alike.

The CMC also thought there'd been a breach of contract by D that BPF were also jointly liable for. They said Mr T was entitled to receive notice, attend and speak at all general meetings. But no such notice was received.

Finally, the CMC thought an unfair relationship existed under section 140A ("S140A") of the CCA as:

- Mr T had been pressured to enter into the loan agreement;
- D had failed to conduct a proper assessment of Mr T's ability to afford the loan agreed;
- D had a fiduciary relationship with Mr T, failed to review other financial products available to Mr T and commissions paid by BPF to D hadn't been declared;

[1] A Fractional Timeshare product can provide owners with a beneficial share in a clearly identified and real property.

- contract terms allowing forfeiture of the membership for non-payment of maintenance charges had been found to be unfair by a court;

In response to Mr T's claim, BPF didn't agree the timeshare product had been misrepresented or that there's been a breach of contract. BPF also didn't think there was anything that might lead to the existence of an unfair relationship under S140A. Mr T didn't accept BPF's findings and response to his claim. So, the CMC referred his complaint to this service.

One of this service's investigators considered all the information available. Having done so, they also couldn't find any reason that might lead to the complaint being upheld. The estate and the CMC didn't agree with our investigator's findings. So, asked that the complaint be referred to an ombudsman for a final decision.

Having considered everything, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I didn't feel were previously fully addressed and wanted to give both sides the chance to respond. So, I issued a provisional decision on 30 August 2023.

In my provisional decision, I said:

> Relevant Considerations
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> When considering what's fair and reasonable, DISP 3.6.4R of the Financial Conduct Authority ("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.
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> S75 provides protection for consumers for goods or services bought using credit. Mr T paid for the timeshare points with a restricted use fixed sum loan agreement, so it isn't in dispute that S75 applies here. This means that Mr T's is afforded the protection offered to borrowers under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
>
> S140A looks at the fairness of the relationship between Mr T and BPF arising out of the credit agreement (taken together with any related agreement). And because the product points purchased were funded under the credit agreement, this is deemed to be a related agreement. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.
>
> It's 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. The complaint being considered here specifically relates to whether I believe BPF's treatment of Mr T's claim was fair and reasonable given all the evidence and information available to me. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service. And as I've already said, 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 any 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 every single point that's been made in my decision. 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.

Mr T's timeshare experience

In their response to Mr T's claim, BPF pointed out that he first purchased a timeshare with D in 1999. Although I've seen no evidence to support that, there's been no suggestion that wasn't the case. And accepting that Mr T's previous membership and product holdings may have differed from the one in this case, I think it's reasonable to conclude that he had a reasonably strong awareness about the products he'd previously purchased, how they operated and any associated costs. I also think it's reasonable to conclude that Mr T was familiar with D (as a timeshare supplier) and the sales presentations given by them.

The claim for misrepresentation under S75

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

From the information available, I can't be certain about what Mr T 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 other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports Mr T's assertions, like marketing material or documentation from the time of the sale that echoes what he says he was told. In particular that he would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit

Furthermore, BPF suggest D have no record that Mr T made any enquiries about using D's timeshare rental programme. And as a consequence, his timeshare points were never included in that scheme. While I've not seen any evidence to support that assertion, equally there's no suggestion by the estate or the CMC that wasn't the case.

I've considered the allegation relating to the purchase qualifying Mr T to participate in D's fractional timeshare scheme. BPF point out that such a scheme wasn't planned or in existence in 2011. And from my own knowledge, I'm aware that D's fractional scheme didn't come about until sometime after Mr T's purchase here.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that D did in fact make the alleged misrepresentations.

The breach of contract claim under S75

The CMC allege that D had breached the underlying contract by not inviting Mr T to attend a general meeting when they were required to do so. However, I haven't seen any evidence to support this allegation.

Section 308 of the Companies Act 2006 explains:

"Notice of a general meeting of a company must be given-

(a) In hard copy form,

(b) In electronic form, or

(c) By means of a website […],

or partly by one such means and partly by another".

I haven't seen any evidence that D didn't comply with this requirement other than the CMC's suggestion that Mr T didn't receive an invitation. Of course, non-receipt isn't the same as failure to provide notice. Furthermore, BPF pointed out that Mr T hadn't opted to receive notifications of general meetings by post when given the option. So, notices would've been sent to him by email.

BPF also confirm that minutes from such meetings are posted on D's website – which Mr T was registered to access. And given it appears Mr T had held timeshare products with D since 1999, it's reasonable to conclude he would've been familiar with D's process here. And where invitations hadn't been received, I would've expected him to raise this with them. But there's no evidence to suggest he did that here.

In any event, the CMC haven't explained how any alleged breach ultimately resulted in a loss for Mr T. And on that basis, I can't reasonably say that BPF's response was unreasonable here.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (BPF) and the debtor (Mr T) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

As I've already said, only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when looking at the various allegations.

The allegation of pressure

The CMC allege that Mr T was pressured to enter into the loan agreement.

I acknowledge how D's sales presentation might have felt like a pressured sale. However, against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr T agreed to the purchase and the loan when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to D or BPF, after the purchase, to suggest he'd agreed to it when he didn't want to. And I haven't been provided with a credible explanation for why Mr T didn't subsequently seek to cancel the purchase, or the loan agreement within the 14-day cooling off period permitted in each case.

So, if Mr T only agreed to the purchase and associated loan because he was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr T was obviously harassed or coerced. And because of that, I'm not persuaded there's sufficient evidence to demonstrate that Mr T made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired.

What were D's fiduciary responsibilities to Mr T?

Part of Mr T's S140A claim is based upon the status of D as the introducer of the loan, and their resultant responsibilities towards him. It's argued that the payment of

any commission by BPF to D wasn't declared to Mr T. It's also suggested that D didn't consider or present other financial options to Mr T.

I don't think the fact that BPF might have paid D commission was incompatible with their role in the transaction. D wasn't acting as an agent of Mr T, but as the supplier of contractual rights obtained under the points-based product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was D's role to make an impartial or disinterested recommendation or to give Mr T advice or information on that basis. As far as I'm aware, Mr T was always at liberty to choose how he wanted to fund the transaction.

What's more, I haven't found anything to suggest BPF were under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr T had previously requested those details from BPF or D. As I understand it, the typical amounts of commission paid by BPF to suppliers (like D in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely a court would find there existed an unfair debtor-creditor relationship under S140A.

Affordability Checks

It's alleged that D failed to carry out a proper credit assessment and that there were resultant breaches of the Finance and Leasing Association ("FLA") code of conduct (the "FLA code") It's important to highlight that an irresponsible lending complaint could be considered under a S140A claim. If the lending were unaffordable, I think it's possible a court might conclude that gives rise to an unfair relationship.

BPF have pointed out there was no requirement upon D to undertake a credit assessment. As the lender, that was something that BPF were responsible for based upon information available to them. The guidance that applied to how BPF's assessment should be conducted were included in in the Office of Fair Trading's ("OFT") guidance for creditors for irresponsible lending issued in March 2010.

BPF haven't provided specific evidence or details of the credit assessment they completed. And given the passage of time, it's possible that information is no longer available. If I were to find that BPF hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would have revealed that the loan repayments weren't sustainably affordable for Mr T in order to uphold the estate's complaint here.

However, neither the estate nor the CMC have provided any evidence to support any allegation that the loan was unaffordable. And with no information about Mr T's actual position at the time and no evidence or suggestion that he struggled to maintain repayments; I can't reasonably conclude the loan was unaffordable for him. Furthermore, a statement of Mr T's loan shows he regularly made repayments over and above those required under the agreement. And as a consequence, the loan was repaid more than six years before the end of the originally agreed term.

A failure to comply with the OFT's guidance doesn't necessarily lead to the debtor-creditor relationship being unfair. There would need to be a resultant loss as a consequence. Given the loan has now been fully repaid and there doesn't appear to be any evidence that Mr T suffered any loss either, I think it unlikely a court would determine unfairness here.

Maintenance fees

The CMC suggest that terms within the contract which allow membership to be forfeited due to the non-payment of maintenance charges had previously been found to be unfair by a court.

Unfortunately, I haven't been provided with the full documentation that applied in Mr T's case. However, I have previously seen similar contracts relating to the points-based product sold by D here. So, I've thought about how those annual management charges were composed and fixed, whether they were clearly explained at the time of sale and whether, in light of the long-term nature of the scheme, the terms governing those charges were unfair.

One of the main aims of the various regulations that applied here was to enable consumers to understand the financial implications of their purchase so that they were put in a position to make an informed decision. If D's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr T ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications he didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, as the Supreme Court decision in Plevin[2] makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. S140A (2) says that courts shall have a regard to *"all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor)"*. So, it's wide enough to include Mr T's ongoing exposure to unfairness in the future under the terms in question and how D have enforced any terms that are or might be unfair.

Here, it's possible D didn't give Mr T sufficient information, in good time, on the various charges he could've been subject to in order to satisfy their regulatory responsibility under Regulation 12 of the Timeshare Regulations. But even if that was the case, it appears Mr T was an existing customer of D at the time the product points were purchased. So, I think his experience as an existing member is likely to have given him a reasonable amount of insight into what the ongoing costs were likely to be going forward. I also believe any decision to purchase the additional points was made with the benefit of that experience. So, in the absence of a credible explanation as to why, at the time of the sale, D's cost disclosure (or lack of) could be said to have played a significant part in that decision, I'm not persuaded it did.

I also think it's important to acknowledge that at the time of the Mr T's claim, it appears he no longer owned the points-based membership. Taking all of this into account, it seems unlikely to me that a court might decide that the disclosure (or lack of) led to any unfairness in the relationship between Mr T and BPF for the purposes of S140A.

Other considerations

Following our investigator's view, the CMC asked that I consider the contents of two documents they subsequently submitted in support of the estate's complaint.

The first of these was a 51-page document prepared by Counsel headed *"Generic submissions on behalf of complainants".* However, given the generic nature of its contents, I don't think it's helpful in establishing the facts of what happened in Mr T's specific case.

The second is a six-page document prepared by the CMC which provides their overview and observations of the points-based product sold by D together with supporting documentation. However, having considered all the circumstances, I also don't think this helps in establishing the specific facts relating to the estate's claim. Particularly as some of the comments within it relate to aspects that weren't raised as part of the original claim or complaint.

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[2] *Plevin vs Paragon Personal Finance Ltd [2014] ('Plevin')*

Summary

Based upon my findings above, I haven't found anything that persuades me that D misrepresented the product purchased, breached any of the terms of the associated agreement or did anything that is likely to lead a court to find the relationship unfair. And because of that, I can't currently say that BPF's response to the claim was unfair or unreasonable.

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.

BPF responded to my provisional decision and confirmed they didn't wish to submit further information. Despite follow up attempts by this service, neither the CMC nor the estate have responded to my provisional decision.

In the absence of any new information or evidence, I've no reason to vary from my provisional findings. For that reason, I won't be asking BPF to do anything more here.

My final decision

For the reasons set out above, I don't uphold the complaint of the estate of Mr T.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr T to accept or reject my decision before 31 October 2023.

Dave Morgan
Ombudsman