

The complaint

Mr L complains that Oplo PL Limited won't refund to him the money that he paid for some holiday club membership points. His wife is also involved in his complaint and he's being represented by a claims management company.

What happened

Mr L and his wife entered into a purchase agreement to buy some holiday club membership points in February 2019. The purchase price of the points was £16,875 and they traded in some existing holiday club membership points. Mr L entered into a fixed sum loan agreement with a finance provider for a loan of £16,875 and he agreed to make 179 monthly repayments of £172.26 and a final payment of £172.84 to the finance provider.

Mr L's representative made claims, on Mr L's behalf, to the finance provider under sections 75 and 140A of the Consumer Credit Act 1974 in January 2020. It said that: the points were mis-sold and misrepresented to Mr L and his wife; the contract between them and the holiday company was breached; commission was paid between the finance provider and the holiday company which wasn't disclosed to Mr L which created a breach of fiduciary duty and an unfair relationship; and the loan agreement was unaffordable.

Mr L's account with the finance provider was in arrears and I understand that he also complained to the finance provider about the high volume of calls that he was receiving. The finance provider didn't uphold that complaint because it said that it was trying to contact him to address the reason for the arrears on his account. But it didn't provide a substantive response to the claims made in Mr L's representative's January 2020 letter. Mr L's wife also made claims to the finance provider but those claims relate to a different loan account.

Mr L then complained to this service. His complaint form says that: the holiday company and the finance provider failed to conduct a proper assessment of his ability to afford the loan; the finance provider paid a commission to the holiday company which wasn't declared to him and the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A. I understand that Mr L entered into an individual voluntary arrangement in March 2022. The finance provider transferred Mr L's loan account to Oplo in August 2022.

Our investigator didn't recommend that Mr L's complaint should be upheld. She wasn't persuaded that there was a misrepresentation at the time of sale and she didn't think that the holiday company had breached the contract. She said that she hadn't seen enough to suggest that the relationship between Mr L and the finance provider was unfair and she wasn't persuaded that a court would reach the conclusion that the relationship was unfair. She also said that she hadn't seen anything persuasive to suggest that the lending was unaffordable for Mr L. She didn't think that the finance provider had acted unreasonably in the number of calls that it had made to Mr L but she said that she would expect Oplo to work with Mr L with regards to his financial difficulties.

Mr L's representative, on behalf of Mr L, has asked for this complaint to be considered by an ombudsman. It has provided a generic submission from counsel about the holiday company and the unfair terms that it uses and it has raised its serious concerns about the way that the finance was sold to Mr L. It has referred to a decision issued by this service on a complaint relating to a fractional holiday ownership product in which it says the voluminous documentation for the product was reviewed and the debtor-creditor relationship was considered to be unfair. It says that the same voluminous documents and the same unfair charges exist in the product that was sold to Mr L and his wife so Mr L's relationship with the finance provider is unfair.

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.

Having done so, I agree with our investigator that Mr L's complaint shouldn't be upheld for these reasons:

- Mr L and his wife signed the purchase agreement in February 2019 and bought 100,000 holiday club membership points from the holiday company and traded-in 60,000 points in another holiday club;
- they also signed other documents including a right of withdrawal form and the holiday company's declaration of treating customers fairly in a compliant sales practice and Mr L electronically signed the loan agreement;
- Mr L's representative made claims to the finance provider in January 2020 and Mr L then made a complaint to this service – the claim letter referred to claims under sections 75 and 140A, including that the points were misrepresented to Mr L and his wife, but his complaint form only referred to claims under section 140A and didn't refer to a misrepresentation made by the holiday company;
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met) and section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;
- I'm not determining the outcome of Mr L's claims under sections 75 and 140A as only a court would be able to do that but I'm considering whether or not the finance provider's response to his claims was fair and reasonable in the circumstances;
- the January 2020 letter said that the holiday company represented to Mr L and his wife that the purchase would be an investment, but in the declaration that they signed they declared: *"We understand that we may sell our... Points at any time for any price, providing our annual fees and finance (if applicable) is paid up to date and correct transfer of membership is completed as required. However, we also understand that we have not entered into this purchase purely for a wider investment opportunity or financial gain"*;
- neither Mr L nor his representative has provided a detailed account of the circumstances in which the alleged misrepresentation was made, the conversations that took place or the information that was provided to them and I'm not persuaded that there's enough evidence to show that the holiday company represented to Mr L and his wife that the points were an investment;

- I'm not persuaded that there's enough evidence to show that the points were misrepresented to Mr L and his wife by the holiday company or that they were induced into entering into the purchase agreement by any such misrepresentations;
- the January 2020 letter also says that the holiday company has committed a repudiatory breach of contract because of the misrepresentation but I'm not persuaded that there's been a breach of contract by the holiday company for which Oplo would be liable under section 75;
- Mr L's representative says that commission was paid between the finance provider and the holiday company which wasn't disclosed to Mr L which created a breach of fiduciary duty and an unfair relationship but the finance provider says that there was no commission arrangement between it and the holiday company;
- the loan agreement that was electronically signed by Mr L says: *"On or after the date when both you and we have signed this agreement, a commission payment may be made by us to one or more of the Credit Intermediaries named above"*;
- I've not been provided with any evidence to show that the finance provider paid a commission to the holiday company or to show what commission, if any, was paid by the finance provider to any of the credit intermediaries and the finance provider had disclosed to Mr L that it may pay a commission to any one or more of them;
- from what this service has seen across the industry, if commission was ever paid it tended to be low and of less than 15% and I'm satisfied that the finance provider wouldn't have breached any duty in making any such payment – nor was it under any regulatory duty to disclose the amount of any commission paid in these circumstances - and I don't consider that the level of any commission that was normally paid in this type of situation would have been sufficiently high to mean that the finance provider should have appreciated that not disclosing the amount of the commission to Mr L risked the relationship being unfair under section 140A;
- I'm not persuaded that there's been a breach of any fiduciary duty in these circumstances;
- Mr L's representative says that the loan agreement was unaffordable for Mr L and Mr L's complaint form says that the holiday company and the finance provider failed to conduct a proper assessment of his ability to afford the loan - but neither Mr L nor his representative had provided detailed evidence about Mr L's financial position in February 2019 or to show that the loan wasn't affordable for him at that time;
- our investigator said that Mr L and his representative had been asked to provide further information regarding Mr L's financial circumstances at the time of sale but that no evidence had been received and she said that any further information would be reviewed – but I've seen no further evidence about it other than the concerns that his representative has raised about the way that the loan was sold to Mr L;
- the finance provider says that upon receipt of Mr L's loan application a full credit and affordability check was completed and, as he met its lending criteria, his application was conditionally accepted - but it's not provided any further evidence about its credit and affordability check;
- the finance provider has provided a statement for Mr L's loan account dated in September 2020 which shows that the account went into arrears soon after the loan was made to Mr L and that no payments were made to the account from September 2019 – its account notes also show that Mr L said that his account was being dealt with by his solicitor's timeshare termination team and then that his solicitors had told him not to discuss his account with the finance provider;

- I understand that Mr L entered into an individual voluntary arrangement in March 2022 but I'm not persuaded that enough evidence has been provided to show that the loan wasn't affordable for Mr L when it was made to him in February 2019 or that the loan was mis-sold to him;
- I suggest that Mr L contacts Oplo, if he hasn't already done so, to explain to it his financial situation, including his individual voluntary arrangement – it's required to respond to his financial difficulties positively and sympathetically;
- Mr L's complaint form says that the holiday company unduly pressured Mr L and his wife into entering into the purchase agreement and Mr L into entering into the loan agreement – but Mr L and his wife signed the holiday company's declaration in February 2019 which said: *"We confirm that we have been given every opportunity to consider the purchase that we are making and we have not been put under pressure or coerced to purchase the products and services; and we also confirm that we have carefully considered other financial commitments and know that we are able to meet the financial obligations entered in to hereby"*;
- Mr L also responded to a question from the holiday company which asked whether he enjoyed the presentation and how he would describe the way that he was looked after and treated by saying: *"Yes. Lovely bloke. Not pushy"*;
- Mr L and his wife had signed the holiday company's right of withdrawal form which said that they had the right to withdraw from the purchase agreement within 14 calendar days without giving any reason, so if they were concerned about the way that the points had been sold to them and didn't want to buy them, I consider that it would be reasonable to expect them to have contacted either the holiday company or the finance provider within the withdrawal period to withdraw from the purchase agreement and the loan agreement – but I've seen no evidence to show that they did so;
- I'm not persuaded that there's enough evidence to show that Mr L and his wife were unduly pressured into entering into the purchase agreement, that Mr L was unduly pressured into entering into the loan agreement or that the holiday company used unacceptable sales practices against them;
- Mr L's representative has provided a generic submission from counsel about the holiday company and the unfair terms that it uses but it would be for a court to determine whether or not any of the terms in those agreements were unfair;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated in practice and whether the operation of that term caused the relationship to be unfair;
- I'm not persuaded that there's enough evidence to show that the terms of the documents have been applied or operated unfairly against Mr L and his wife and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mr L and his wife and the finance provider;
- Mr L's representative has referred to a decision issued by this service on a complaint relating to a fractional holiday ownership product in which it says the voluminous documentation for the product was reviewed and the debtor-creditor relationship was considered to be unfair – it says that the same voluminous documents and the same unfair charges exist in the product that was sold to Mr L and his wife so Mr L's relationship with the finance provider is unfair;

- that decision related to a fractional holiday ownership product which was sold as an investment and related to a specified property – Mr L and his wife bought a points based membership from the holiday company which didn't relate to a specified property and which I don't consider was sold to them as an investment;
- both products were often sold in similar ways and may have had similar contractual documentation but the operation and effect of the contractual documentation would be significantly different for a fractional product than for a points based membership;
- I'm not persuaded that there's enough evidence to show that Mr L's relationship with the finance provider was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mr L and the finance provider in these circumstances;
- the finance provider didn't issue a substantive response to Mr L's claims so I can't say that its response to his claims was fair and reasonable – but if it had properly responded to his claims I consider that it would have been fair and reasonable for it not to have upheld them;
- Mr L had complained to the finance provider about the high volume of calls that he was receiving about the arrears on his loan account but it didn't uphold that complaint because it said that it was trying to contact him to address the reason for the arrears on his account – our investigator didn't think that the finance provider had acted unreasonably in the number of calls that it had made to Mr L;
- neither Mr L's representative's January 2020 letter nor Mr L's complaint form included a complaint about the high volume of calls that Mr L was receiving so I don't consider that Mr L has made a complaint about that to this service so I make no finding on that issue; and
- I sympathise with Mr L for the issues that he and his wife have had with their membership points, the financial difficulties that he's experiencing and the health problems that he's suffering, but I find that it wouldn't be fair or reasonable in these circumstances for me to require Oplo to refund to him any of the money that he's paid for the points, to cancel his loan agreement, to pay him any compensation or to take any other action in response to his complaint.

My final decision

My decision is that I don't uphold Mr L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 8 August 2023.

Jarrold Hastings
Ombudsman