DRN-4394064

The complaint

Mr B says that Oplo PL Ltd (who I'll call "Oplo") unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare product he was sold in March 2019. He also says the loan wasn't affordable for him and that Oplo were therefore irresponsible to extend the credit.

Mr B has been represented by a professional representative who I'll call "PR" and he entered into the timeshare agreement with his partner, but as the finance agreement was in his sole name, I will refer only to Mr B or his representatives in this decision. I mean no disrespect to Mr B's partner when doing so.

What happened

I issued my provisional decision on this complaint in August of this year. An extract from that provisional decision is set out below.

In March 2019 Mr B relinquished a pre-existing timeshare agreement with a supplier I'll call "Az" and exchanged it for points to be used towards a timeshare product with the same supplier. He financed the balance of £13,000 through a fixed sum loan with a finance provider I'll call 'H'. That finance agreement was regulated by the CCA.

In August 2022 Oplo acquired Mr B's account from H and assumed the obligations that H had in respect of the account and also the investigation of any complaints relating to the servicing of the account. Oplo are now, therefore, the correct respondent for this complaint. As some of the actions and submissions have been taken/made by H, and some have been taken by Oplo, to save confusion, I will simply refer to Oplo in this decision.

In April 2021 Mr B complained to Oplo about problems he had encountered with the timeshare product. There were a number of allegations and it's not practical to reproduce them all here, but I have taken note of them. He said the nature of the timeshare had been misrepresented to him, so he was able to make a claim against the lender under section 75 of the CCA. He also said that there was an unfair debtor-creditor-supplier-relationship under section 140A of the CCA, that Az were unable to provide the service he'd been sold as they had now been liquidated, and that Oplo had been irresponsible to provide him with credit he couldn't afford.

Our investigator disagreed. He didn't think there'd been a misrepresentation or that there was evidence of an unfair relationship, and he wasn't persuaded there was sufficient evidence that the loan was unaffordable for Mr B. He explained that although Az had been liquidated the management of the service had been transferred to another business and that there hadn't been a breach of contract.

PR didn't think the investigator had provided sufficiently detailed reasoning about why the claim should fail. They enlarged on their opinion that the timeshare product had been misrepresented to Mr B as an investment, and they asked for a decision by an ombudsman. So, the complaint has been referred to me.

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 it's been some time since the investigator provided his view and I can't see we've responded to all of the issues in the case.

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 the Financial Services and Markets Act 2000 (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.

The Consumer Credit Act 1974

When something goes wrong and the payment was made with a fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the Consumer Credit Act (1974) 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.

From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Mr B also relies on, 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 B and Oplo.

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

The claim under section 75 of the CCA

Misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue, and which materially influenced the other party to enter into the contract.

This wasn't Mr B's first transaction with the supplier. I think, by 2019, Mr B would be well aware of how the general timeshare product scheme worked. I don't think many of the issues Mr B claims were misrepresented to him initially can fairly be considered to have been significant reasons why he was persuaded to enter into a further agreement a couple of years after his first, with the same supplier. I think by that time he'd have significant experience of the "system" and how it worked. Some of the misrepresentations Mr B complains of therefore, in my opinion, fade away, but I'll consider what I think are the more pertinent ones here.

Mr B says the timeshare was sold as an investment and that he anticipated at least breaking even when he sold it. I don't think there's sufficient supporting evidence to suggest the timeshare product was sold as an investment. Indeed, the standard information form explained that:

"Resale values or timeframes cannot be guaranteed and are subject to offer and demand".

So, I'm not persuaded that a court would consider Mr B had been mis-sold the product as an investment.

Mr B also says that Az have breached their contract with him as they have been liquidated and are therefore no longer able to provide the service he purchased. It seems that the management of Az's products have been taken over by another company "V" and that company continues to offer the same services provided under the timeshare agreement. I've not been presented with any evidence to suggest Mr B has been unable to access his points or receive the service he paid for. So, I don't agree the contract has been breached and, as such, I don't think Oplo were unreasonable to reject Mr B's section 75 claim.

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 B relies upon a number of clauses in the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) that his representatives suggest created an unfair relationship between him and Az. We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that Mr B's ability to exercise choice was significantly impaired by the pressure and aggressive sales tactics he says he experienced.

Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and taking account of all of its features and circumstances, it:

a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.

Regulation 7(2) went on to say that consideration must be given to the timing, location, nature, and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision."

Mr B had already attended a presentation with the same supplier in 2017, so I think he would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Mr B didn't understand he

didn't have to say yes to the agreement or that he didn't understand he could walk away without entering into it. He was also provided with a 14 day cooling off period and I think that allowed him to reflect and withdraw from the agreement and the loan if he wished. Overall, I'm not persuaded that Mr B's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

PR also claims that an unfair relationship existed because Mr B wasn't told about the commission Az received from Oplo. Oplo have confirmed that no commission was paid in this case so I think it's unlikely a court would find there was an unfair relationship for that reason.

PR also say that Mr B wasn't offered a choice of lenders. Az wasn't acting as an agent of Mr B and his partner but as the supplier of contractual rights they obtained under the Purchase Agreement. And, in relation to the loan, it still doesn't look like it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr B and his partner advice or information on that basis. However, even if it's right to suggest that Mr B and his partner should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that they have suffered a financial loss because they entered into a credit agreement with Oplo rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship between Mr B and Oplo on this occasion given the facts and circumstances of this complaint.

PR say that the annual maintenance fees have increased well above the rate of inflation each year and that was not properly explained to Mr B prior to entering the contract. The Club Rules, at page 8, explain that the annual membership renewal fee will include maintenance costs and that there will be no increase until 2025. The rate of increase thereafter is explained in those rules. So, I don't agree that there have, as yet, been any increases, and I think the increases thereafter have been adequately explained to Mr B and his partner in the Club Rules. I don't think Oplo have therefore been unreasonable to reject a claim that there was an unfair relationship in that regard.

Was the loan irresponsible?

Mr B says that the lender was in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan. He says that they had strict obligations to complete a creditworthiness check under the Financial Conduct Authority's Consumer Credit Sourcebook (CONC) and failed to undertake those obligations.

However, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that the lender did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that the credit granted by them was likely to be unaffordable and that Mr B suffered a loss as a result. I've not been provided with sufficient evidence from Mr B to suggest he didn't have enough disposable income to sustainably afford repayments against this loan, and I don't therefore, think it would be reasonable to suggest the lender was irresponsible when providing the credit.

My provisional decision

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

Further comments and/or evidence

Oplo, now trading as Tandem Personal Loans Ltd, didn't have anything to add. PR explained

that they had spoken to Mr B and there was little more that could be added. They provided a transcript of that call in which Mr B explained that the timeshare *"was sold as a brand new product which would greatly increase the timeshare experience they already had. It would allow them access to holidays at better locations and a wide range of promotion products including supercars, yachts, lodges and motor homes"* he added that *"Their previous purchase was sold as an investment, and they were relying on the fact that this would be equally marketable. They were not told that the resale department was closing or had closed".*

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.

While I appreciate Mr B's additional comments, I'm not persuaded that Mr B has provided any additional information that would lead me to change my provisional decision. My provisional decision therefore becomes my final decision on this complaint.

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 B to accept or reject my decision before 13 November 2023.

Phillip McMahon
Ombudsman