DRN-4486717

The complaint

Mr G complains that Clydesdale Financial Services Limited – trading as Barclays Partner Finance ("BPF") – unfairly turned down his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in respect of a timeshare product they financed.

What happened

Mr G (jointly with another party) has held various timeshare product memberships and points rights with a timeshare supplier (who I'll refer to as "D") since around 1995. In particular, they purchased the timeshare scheme membership together with increasing points rights in 1995, 1998, 2001, 2010, 2011 and 2012 up to the point of the transaction that is subject to the claim here.

Late in December 2012, Mr G agreed to purchase 2,000 additional points rights from D. The purchase price agreed was £3,000 which was funded under a fixed-sum loan agreement with BPF over 120 months in Mr G's[1] sole name.

In or around March 2017, using a claims management company ("the CMC"), Mr G submitted a claim to BPF under the CCA. The CMC said that during the sales meeting in December 2012, D made a number of representations about the membership benefits which turned out not to be true. And it was these misrepresentations that had induced Mr G to enter into the purchase contracts with D. They believe that under section 75 ("S75") of the CCA, BPF are jointly liable for any misrepresentation. In particular, the CMC allege that D told Mr G:

- the points purchase would provide Gold membership status guaranteeing greater availability of accommodation and priority booking over other members; and
- Gold membership status would provide access to a greater number of dog friendly places to stay.

The CMC also allege that an unfair relationship exists between Mr G and BPF under section 140A of the CCA ("S140A") resulting out of the timeshare purchase agreement entered into. In particular, the CMC allege:

- the purchase agreement contains unfair terms relating to the forfeiture of membership for non-payment of annual maintenance fees;
- Mr G was pressured to enter into the credit agreement with BPF;
- D was acting as an agent of Mr G in arranging the finance which created a fiduciary arrangement. But D (and BPF) failed to disclose commission paid by BPF to D for arranging the loan; and
- D failed to carry out a proper credit assessment to ensure the loan was sustainably affordable for Mr G.

In responding to Mr G's claim, BPF didn't agree the product had been misrepresented to Mr G in the manner alleged. They said Mr G's existing points holding already conferred gold membership at the time of the purchase. And given Mr G's long association with D, they

[1] While the purchase in question was made in the joint names of Mr G and another party, the finance was held in Mr G's sole name. So, under the CCA, Mrs G is the only eligible Claimant and as a consequence, the only eligible complainant.

believe he would have been well aware of his membership status and the benefits that provided.

BPF didn't agree there was a regulatory requirement to disclose any commission paid to D. They also didn't think any alleged unfairness within the contract was relevant given that the concerns referenced hadn't had any proven impact or created a loss for Mr G. They also didn't agree there was any evidence Mr G had been pressured into entering the loan agreement. Or that there was anything else that would lead to unfairness pursuant to S140A.

Finally, BPF didn't agree it was D's responsibility to carry out a credit assessment. They confirmed they'd undertaken their own assessment before agreeing the loan which had satisfied them that Mr G was creditworthy, and the loan was affordable for him.

The CMC didn't agree with BPF's findings and referred Mr G's claim to this service as a complaint. In doing so, they further explained why they believe a fiduciary relationship exists between D and Mr G which confers various responsibilities upon them. In particular relating to a requirement to disclose any *"secret profit"* they may have made by virtue of commission payments from BPF.

One of this service's investigators considered all the evidence and information available. Having done so, our investigator didn't think there was any evidence of misrepresentation. Or that a court was likely to find the relationship unfair under S140A. They also didn't think there was any evidence to suggest the loan was unaffordable for Mr G.

The CMC didn't agree with our investigator's findings and asked that Mr G's complaint be referred to an ombudsman for a final decision. So, it has been passed to me to consider further. As part of my review, the CMC have asked me to consider the contents of a 51-page document prepared by counsel headed *"Generic Submission of behalf of complainants".*

In subsequent submissions to this service, the CMC raised concerns about the finance sales process employed by D with further allegations about the lack of borrowing assessments including alleged breaches of FCA[2] and OFT[3] rules and guidelines. The CMC also requested that this service obtain and provide them with detailed information and documents in relation to D's and BPF's finance sales process.

Having considered Mr G's complaint, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed. So, I issued a provisional decision on 2 November 2023 giving both sides the chance to respond before I reach a final decision.

In my provisional decision I said:

> Relevant Considerations
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> When considering what's fair and reasonable, DISP[4] 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.
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> S75 provides consumers with protection for goods or services bought using credit. Mr G paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means that Mr G 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 case.
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> S140A looks at the fairness of the relationship between Mr G and BPF arising out of the credit agreement (taken together with any related agreements). And because the

[2] Financial Conduct Authority

[3] The Office of Fair Trading

[4] Dispute Resolution: The Complaints sourcebook (DISP)

product purchased was funded under that credit agreement, they're deemed to be related agreements. 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 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 BPF's response to Mr G's claim was fair and reasonable given all the evidence and information available to me, rather than 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 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 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.

Was the timeshare product misrepresented?

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 Mr G the timeshare product in December 2012. In other words, that they told Mr G 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 G to enter the contract. This means I would need to be persuaded that Mr G reasonably relied on the alleged false statements when deciding to buy the timeshare membership points.

Various allegations have been made specifically relating to the sale and purchase in December 2012. So, I've considered those allegations against the information available from the time of the sale. It appears that as Mr G's points holding increased, his status with D changed in accordance with the total number of points held at the time. Each status category affords various benefits, some of which (but not necessarily all) may increase or change within each higher category.

From the information available and based upon what has been said by both D and BPF, Mr G already held Gold membership status prior to his purchase in December 2012. So, it doesn't appear the purchase of the additional 2,000 points had any impact upon that status. Rather it appears it gave Mr G more points to spend against accommodation and experiences from within D's portfolio.

The difficulty I have is identifying what was actually said at the time of the sale. The CMC's description of what was said at the time of the sale appears to run contrary to the documentation. Looking at the available documentary evidence from the time of sale, I can't see anything to show that the products were misrepresented to Mr G in the way described, whether in terms of increased availability or enhanced booking priority. Furthermore, there is nothing within any of the documents that makes specific reference to dog-friendly accommodation in terms of availability or otherwise.

Given my findings above, I can't say with any certainty that D did in fact misrepresent the product purchased in the way described. And because of that, I can't conclude that BPF's response to Mr G's claim under S75 was unfair or unreasonable.

Was there an unfair relationship under S140A?

The CMC suggest that certain terms of the Purchase Agreement and associated legal documentation are unfair. They've also made allegations that they also believe resulted in unfairness for Mr G. And as a debtor-supplier-creditor agreement exists by virtue of the loan agreements entered into, they believe this means that an unfair relationship exists within the context of 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 G) 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).

The breadth of the unfair relationship test under S140A is stark. But a simple breach of a legal or equitable duty doesn't necessarily make the relationship unfair. It also isn't just about 'hard-edged requirements' – though the standard of commercial conduct reasonably expected can be important. And while there may be features of the transactions that operate harshly against the debtor, it doesn't necessarily follow that the relationship is unfair. After all, such features may be required in order to protect what a court regards as legitimate interests.

Relationships between businesses and private individuals are also often characterised by large differences of knowledge and expertise – which means they're inherently unequal as a result. But as far as the Supreme Court was concerned in *Plevin*[5], it can't have been parliament's intention that such relationships should be liable to be reopened for that reason alone.

Unfair terms - consequences of non-payment of annual maintenance fees

I accept that it's possible that some of the terms governing the associated annual management charges and D's remedies, if they weren't paid, may go against the requirements of the UTCCR[6]. But I don't think I need to formally decide that point here because, even if the terms were unfair, I can't see they've actually operated unfairly against Mr G.

This doesn't necessarily mean to say that Mr G couldn't have been put at a disadvantage when entering into the upgrade agreement if the contractual terms criticised by the CMC were unfair under the UTCCR.

D has (as I understand it) given BPF an undertaking that consumers with complaints at the Financial Ombudsman Service who remain members can choose to relinquish their membership without having to pay any outstanding management charges (if there are any) and without prejudice to their ongoing complaint. With that being the case, even if the terms criticised are unfair under the UTCCR, in the absence of evidence that the terms in question had been operated unfairly against Mr G in practice, D's undertaking would seem to me to go a long way to mitigating if not resolving any unfairness that the terms might otherwise have led to.

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[5] The Supreme Court's judgement in *Plevin v Paragon Personal Finance Ltd [2014]*

[6] The Unfair Terms in Consumer Contracts Regulations 1999

The allegation of pressure

The CMC's letter suggests that Mr G was pressured into entering into the finance agreement. But they haven't provided any explanation or evidence to support that claim.

Against the straightforward measure of pressure as it's commonly understood, and in the absence of any explanation or evidence, I think it's very difficult to say that Mr G agreed to the finance agreement 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, that suggests he'd agreed to the finance when he didn't want to. And he hasn't provided a credible explanation for why he didn't subsequently seek to cancel the finance agreement within the 14-day cooling off period permitted here. His ability to cancel was clearly included within the loan documentation and Mr G also signed a Client Compliance Confirmation form in which he confirms his right to withdraw was explained to him.

If it's suggested he only agreed to the finance agreement because he felt he was pressured, I find this aspect difficult to reconcile. I haven't seen anything substantive to suggest Mr G was obviously harassed or coerced into taking the finance. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr G made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired.

D's responsibilities and disclosure of commission paid

Part of Mr G's S140A claim is based upon the status of D (as the introducer of the loan) and their (and BPF's) resultant responsibilities towards him. In particular, it's argued that the payment of commission by BPF to D was kept from him. But I don't think the fact that BPF might have paid D commission was incompatible with their role in the transaction.

D weren't acting as an agent of Mr G, but as the supplier of contractual rights he obtained under the timeshare points purchase 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 G advice or information on that basis. As far as I'm aware, he was always at liberty to choose how he wanted to fund the transactions.

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 G requested those details from BPF (or D) at any point prior to his claim. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission would've created an unfair debtor-creditor relationship under S140A.

Was a proper credit assessment completed?

The CMC have made various allegations suggesting that the loan was provided irresponsibly. In particular that no affordability checks were undertaken by D.

BPF have explained that the responsibility to assess Mr G's finance application lay with them. They've given an overview of the credit assessment they completed and said that his application met their lending policy and guidelines. BPF said their assessment showed the loan was considered affordable based upon the information they were aware of at the time, and the credit reference checks they undertook. I've also seen a copy of the loan application Mr G completed in December 2012 which includes details of his income and employment situation – amongst other things.

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've revealed that the loan repayments weren't sustainably affordable for Mr G in order to uphold his complaint here. However, with no information about Mr G'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. And given it appears the loan was fully repaid in April 2013, there doesn't appear to be any evidence of unaffordability or resultant loss.

Other considerations

I have considered the various additional submissions provided by the CMC. In particular, the generic submissions prepared by Counsel. However, as these were generic points and not specific to Mr G's own purchase or recollections, I don't think they offered much help in making factual findings in Mr G's case.

The CMC have requested that this service obtain extensive details of BPF's processes and procedures together with evidence that D (and in turn BPF) complied with the relevant rules, regulations and codes of practice that applied in the circumstances of the loan that was provided to Mr G.

This service's role as an Alternative Dispute Resolution service does not extend to regulating financial businesses or questioning their policies and procedures – that's the role of the regulator - in this case the FCA. Our powers are confined to deciding whether, on balance, their processes and procedures were applied in a fair and reasonable way in Mr G's individual circumstances. And in doing so, whether BPF's handling of Mr G's claim appears fair and reasonable. That's what I've done here.

Furthermore, it is for this service to decide what information and evidence is required in order to investigate and decide Mr G's complaint. That's also what I've done here, and I believe the evidence and information provided enables me to reach a fair and reasonable outcome in Mr G's case.

Summary

To reiterate – My role in deciding Mr G's complaint is to establish whether, based upon all the evidence available, BPF's response to his claim was unfair or unreasonable. Given my findings above, I can't say that it was. And on that basis, I don't currently intend to ask BPF 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.

BPF acknowledged my provisional decision and confirmed they had nothing to add. Despite follow up by this service, neither the CMC nor Mr G have responded to my provisional findings.

In these circumstances, and with nothing new to consider, I've no reason to vary from my provisional findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 2 January 2024.

Dave Morgan
Ombudsman