DRN-4306865

The complaint

Mr B says that Oplo PL Ltd, who I'll refer to as Oplo, should uphold claims he made to them mainly under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare he was sold.

Mr B has been represented by a professional representative who I'll refer to as "PR". Where I refer to Mr B's submissions I include those made on his behalf.

Mr B entered into the timeshare agreement with his wife, but as the finance agreement was in his sole name, I will refer only to Mr B or his representatives in this decision.

What happened

I issued a provisional decision on this complaint last month. An extract from that provisional decision is set out below.

What happened

Mr B bought a timeshare membership in May 2019 and funded the deal through a fixed sum loan with a company I'll call "H". Mr B says that H unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') and that they were irresponsible to extend the credit as the loan wasn't sustainably affordable for him.

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 "the lender" in this decision.

In June 2020 PR complained to the lender on Mr B's behalf. Their claim was quite lengthy and it's not practical to list all of the matters they mentioned here. In summary they said that Mr B had a claim against the lender as there had been an unfair relationship pursuant to section 140A (s.140A) of the CCA. They explained there hadn't been a proper assessment of whether Mr B could afford the agreement; the lender should have declared the commission it had paid to the timeshare provider, and that the timeshare company had unduly pressured Mr B to take out the timeshare and the finance agreement that funded it. They also said that there'd been a breach of contract that could be considered under section 75 of the CCA (s.75) as the timeshare company had been liquidated and were no longer able to service the contract.

Our investigator didn't think there was sufficient evidence to support Mr B's claim.

PR disagreed. They couldn't understand why other complaints regarding the same supplier, but a different creditor had been successful but this one hadn't, and they said the credit intermediary hadn't conformed to the standards required of them. They also provided a copy of generic submissions on behalf of complainants against the same timeshare provider, that had been produced for them by Counsel.

The complaint has therefore been referred to me, an ombudsman, for a decision.

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.

PR provided some generic comments from Counsel that shared some general concerns about consumer contracts with the timeshare provider Mr B entered into an agreement with. PR didn't elaborate on which of Counsel's comments they thought were pertinent to Mr B's complaint. This service can't usually consider the merits of new complaints if they haven't been made to the business first. So, I've only considered the complaint points raised with the lender in PR's claim to them of June 2020, along with any generic submissions made on those issues by Counsel.

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). 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 final decision.

The claim under section 75 of the Consumer Credit Act 1974 (CCA)

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.

PR said that as the supplier had been liquidated there was a repudiatory breach of contract as Mr B had, in effect, been deprived of the contract he was supposed to have benefitted from. In this case, however, I am aware that, even though the supplier went into liquidation in or about April 2020, new management companies were appointed to run their resorts and I think it was therefore likely that Mr B and Mrs B's timeshare membership could still be benefitted from. I don't therefore think a court would be likely to uphold a claim made to them under s.75 for breach of contract.

PR say that if Mr B was aware of the commission paid to the supplier in this deal, he wouldn't have proceeded with the deal. But the lender has explained that no commission was paid here and I therefore don't think a claim for misrepresentation under s.75 would be likely to succeed in court either.

The claim under section 140A of the CCA

Section 56 of the CCA is relevant to the claim under s.140A of the CCA as the pre-contractual acts or omissions of the 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 the lender.

It's not for me to decide the outcome of a claim Mr B may have under s.140A but I'm required to take it into account when deciding whether the lender would be reasonable to reject Mr B's claims.

S.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).

Unfair pressure

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 lengthy presentation, the pressure, lack of breaks, and the lack of time alone to think, that may have created an unfair relationship between him and the supplier.

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."

I can't see that Mr B has provided much of an account of why the presentation was pressured. I don't think I've been provided with sufficient information to suggest he 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, even if he wasn't allowed much time to think during the presentation, the cooling off period 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.

Commission

One of the main aims of both the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 and the Consumer Rights Act 2015 was to enable consumers to

understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. If a supplier's disclosure and/or the terms of a bargain didn't recognise and reflect 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, that may amount to unfairness under S.140A.

H explained that they didn't pay the Supplier commission. But even if that's wrong I don't think it would have been incompatible with its role in the transaction. The Supplier wasn't acting as an agent of Mr B but as the supplier of contractual rights he obtained under the purchase agreement. And, in relation to the loan, based on what I've seen, I don't think it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr B advice or information on that basis. I think it's unlikely a court would find that the failure to disclose commission in this case created an unfair relationship under s.140A.

No choice of lender

PR say an unfair relationship was created because Mr B wasn't given a choice of finance providers. The Supplier wasn't acting as an agent of Mr and Mrs B 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 and Mrs B advice or information on that basis. However, even if it's right to suggest that Mr and Mrs B 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 H rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship between Mr B and H on this occasion given the facts and circumstances of this complaint.

Was the loan irresponsible?

Mr B says that the lender were in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan.

However, even if the lender didn't complete adequate affordability checks (and I make no finding about that) 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, for me to say the lender needed to do something to put things right, I would need to see that the credit granted by H was likely to be unaffordable and that Mr B suffered a loss as a result. As there's little evidence that he would have found, nor found, it difficult to repay what he was lent, I'm not persuaded the agreement was unaffordable for him or that there was any unfair relationship created by any potential failure to assess the credit application more thoroughly.

Ultimately, I don't think a court would find evidence to suggest there was an unfair relationship and I'm not therefore persuaded it would be reasonable to expect Oplo to uphold Mr B's s.140A claim.

My provisional decision

I'm not expecting to uphold this complaint.

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.

Neither party provided any further comments or evidence for me to consider. So, I've not been persuaded to change my provisional decision, and that 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 15 September 2023.

Phillip McMahon
Ombudsman