DRN-4461439

The complaint

Mr O, who is represented by a professional representative ("PR") complains that Honeycomb Finance Limited ("Honeycomb") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. Specifically, he says that it was sold to him as an investment, but that it has no resale value. The purchase was financed with a loan provided by Honeycomb and Mr O says that the actions of the seller mean that the loan creates an unfair relationship between them and Honeycomb. He also says that Honeycomb did not carry our proper affordability checks before agreeing to the lending.

What happened

In February 2019 Mr O attended a presentation by a company I will call A. He agreed to purchase a points based membership of A which gave him access to its holiday accommodation. This cost £15,000 and was funded by a loan from Honeycomb.

In September 2020 PR submitted a claim to Honeycomb on behalf of Mr O. It said that the product was misrepresented, the contract was breached, commission was not disclosed and the loan was unaffordable.

Honeycomb responded to each of the points raised by PR and rejected the claim. PR brought a complaint to this service on behalf of Mr O. It reiterated the arguments made in the letter of claim. It was considered by one of our investigators who didn't recommend it be upheld. She noted Mr O's testimony and said that it was not supported by any other evidence. On the issue of breach of contract she said there was no evidence of A breaching any of the contract terms. Nor was there any basis for saying the relationship was unfair and no detail had been provided to show the loan was unaffordable.

PR didn't agree and referred to a decision by this service dealing with fractional timeshares. It noted another bank had accepted the credit brokers had not met its standards. It provided a generic submission regarding A's activities and asked why non-payment of maintenance fees leading to loss of membership was acceptable despite the Link court decision. Our investigator explained that this issue had not been raised with Honeycomb and so it was not within our remit.

PR subsequently argued that it was not relevant whether the repayments were affordable, rather it was matter of fairness. It also believed that the investigator's view was at odds with the precedent this service had established.

I issued a provisional decision as follows:

"S. 56 and 75 of the Consumer Credit Act

Under s. 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of s. 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that

claim against a lender. Those conditions include:

- *that the lending financed the contract giving rise to the claim; and*
- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

Firstly I would like to address what PR has said about the findings of the High Court following the recent judicial review of the Financial Ombudsman Service and the approach PR thinks it should take to this complaint, which in simple terms is that I should take an identical approach.

The High Court did affirm that my fellow ombudsman's findings on s.56 CCA and the extent to which it creates a statutory agency relationship between a creditor and a supplier when there is a debtor-creditor-supplier agreement in place – such that any negotiations between Mr O and A before his purchase are deemed to have been conducted by A as an agent of Honeycomb. PR argued this complaint should be treated in the same way, but I do not agree.

The complaints at the centre of the judicial review were concerned with a particular type of asset backed timeshare known as a 'fractional ownership timeshare.' Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a share in the 'ownership' of a specific property. They didn't usually confer any rights to stay in that property. But under the terms of the purchase agreement the property is usually set to be sold at the end of the membership period and the net proceeds distributed on a pro rata basis among the fractional owners.

However, that is not the type of timeshare Mr O bought and I do not consider that it follows that the same decision should be reached in this complaint as in those addressed by the judicial review.

While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction to consider when determining what a fair and reasonable outcome to a complaint might look like.

I accept that some non-fractional timeshares may share a number of contractual terms that were subject of the judicial review and may fall foul of the relevant law on unfair contract terms. However, an assessment of unfairness under s.140A CCA does not necessarily stop at a regulatory breach. It's often necessary to then assess the impact of that breach on the consumer. That much is clear from case law and – including the latest judicial review.

In other words, complaints must be decided on their individual merits which is what I will do in this case.

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. New management companies were appointed, and Mr O was able to use the timeshare as usual after that date.

In July 2020 the trustee wrote to all the club members. Its letter said: "The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members."

On the face of it, therefore, the services linked to Mr O's purchase of the points remain available to him and are unaffected by the liquidation.

Misrepresentation

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.

P has said that Mr O was told that his purchase was an investment. It also supplied written testimony from Mr O as to what he recalled being told. While I was not present I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr O believed that the purchase of points would be an investment. If he had been told that – or had otherwise believed that to be the case – I would have expected him to ask for more information.

In any event the contract shows that no sale could be made for five years and that period has yet to elapse so even if I were to accept Mr O's claim, it cannot yet be determined whether it is saleable or not.

I have noted the signed Standard Information for Timeshare Contracts and within this it states that the resale facility for the points for new members will be available after a period of five years. This does not indicate that the product was sold as an investment. Furthermore, Mr O had a 14-day cooling off period in which to satisfy himself with his purchase and could have established if it was an investment.

S. 140A claims

Under s. 140A and s. 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments. In deciding whether to make an order, a court can have regard to any connected agreement; in this case, that could include the agreement for the sale of the timeshare product in 2019. PR seems to have based this element of the claim on the payment of commission, but Honeycomb has confirmed it did not pay commission.

As such I can see no basis for a successful claim under s.140A. Nor do I think the alleged pressure to which PR says Mr O had been subjected at the time of the sale would allow me to uphold his complaint.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Honeycomb has said that it carried out a full credit and affordability check and Mr O met its lending criteria.

Our investigator said that she could not see any evidence that Mr O found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if Honeycomb 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 Mr O lost out as a result of its failings. Mr O has provided no evidence whatsoever that they would have found, nor found, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

It is not for me to decide whether Mr O has a claim against A, or whether he might therefore have a "like claim" under s. 75 of the Consumer Credit Act. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr O's complaint. In the circumstances, I think that Honeycomb's response to Mr O's claims was fair and reasonable."

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.

PR acknowledged receipt of the provisional decision, but has not responded to its contents and I have not seen a response from Honeycomb. As I have not been given reason to alter my provisional decision it stands.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 15 December 2023.

Ivor Graham
Ombudsman