DRN-4206746

The complaint

Mr C, who is represented by a professional representative which I will call F complains that he was mis-sold a holiday product and that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claim for a refund under the Consumer Credit Act ("CCA"). The purchase was made by Mr and Mrs C, but the loan was in Mr C's name so I refer to him as being the purchaser in this decision.

What happened

In September 2014 Mr C purchased 150,000 Infiniti points from a company I will call L. This cost £11,700 and was funded by a fixed term loan from BPF. He had made a number of purchases from L previously and this purchase added to the 50,000 points he held.

F contacted BPF in June 2017 and asked that the agreement be ended and the money Mr C had paid be refunded. It said the product had been misrepresented and that Mr C was treated unfairly during the sale. It said he had been told that the upgrade would give him greater flexibility and if he wished to exit the agreement that would be possible with the new purchase. F said this was not the case and argued that Mr C had been unduly pressurised into making the purchase. He also had been told that the management costs would be reduced, but again this was not true.

BPF investigated the claim under the CCA but concluded that the product had not been misrepresented, and that there was no other reason which would suggest it needed to issue a refund. It also noted that Mr C had taken a holiday each year up to and including 2017.

Unhappy with BPF's conclusion, Mr C brought a complaint to this service. It was considered by one of our investigators who didn't recommend it be upheld.

He considered if there was an unfair relationship under s.140 A CCA following misrepresentation. He concluded there was insufficient evidence to show misrepresentation. In addition he noted Mr C had attempted to sell rather than surrender the product. At the same time he had said the product was sold to him as an investment yet he was continuing to make use of it for holidays. Our investigator thought Mr C's approach had been contradictory. It seemed more likely that he had bought additional points to widen his holiday options rather than to extricate himself from the product.

He also reviewed the management charges which had only increased by £84 in three years from 2015 to 2017 when Mr C made his complaint. He didn't think the description of the fees had been misleading.

He also considered if the alleged high pressure sales techniques had caused an unfair relationship. He noted Mr C had made several purchases from L before and so would have had a reasonable understanding of the product and the sales pitch. He noted the sales documentation which had been submitted to this service which gave the opportunity to cancel the agreement within 14 days and he concluded there was no basis to say there had been an unfair relationship. Finally he said that the issue of affordability had been considered separately and so it was outside of his remit.

I issued a provisional decision as follows:

"*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

Where evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision about the merits of this complaint on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Section 140A CCA

Under this section a court may make an order under section 140B in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but I think this is relevant law and I've taken it into account.

Sections 56 and 75 CCA

Under section 56 CCA 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 section 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.*

It is clear in this case that the loan financed the purchase of the club membership points and that it was arranged by L, the seller of the points. I must therefore consider Mr C's claims about what he was told before he made the purchase.

Misrepresentation

A 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 induces the other party into the contract.

Misrepresentation is central to Mr C's complaint and he has made two main claims of how he was misled. He says that he was misled about the ability to terminate his timeshare agreement after he purchased the additional points. However, this applied only to the additional points he purchased. He also says he was told that the management fees would reduce.

I can see from the documentation which Mr C signed states:

"I/we understand that I/we may sell our Infiniti 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, I/We also understand that I/we have not entered into this purchase purely for a wider investment opportunity or financial gain."

In another document it states:

Subsequently to the signature of the above mentioned Purchase Agreement we hereby confirm that from your 5th (fifth) year of membership, you will be able to surrender your Club Infiniti Points partially or in its totality at no additional cost. Your first year of membership is stated on the first page of your Purchase Agreement as "First Year of Use".

Although the wording could have been clearer I am satisfied that the agreement referred only to the points Mr C purchased as part of that agreement. I appreciate Mr C has said he was led to believe that he would be allowed to sell his entire timeshare points, but that is not what the document says.

I also agree with the conclusions of our investigator which I won't repeat in detail that the evidence indicates Mr C bought points for use in taking more holidays rather than extricating himself from the earlier agreements. This is reinforced by his use of the points up to 2017 when he made his claim.

As far as the cost of maintenance is concerned Mr C signed to say:

"I/We understand that I/we will pay on annual Points fee towards the running of the Club and the maintenance of the resorts in the Club for the Pure and Traded Points."

The management fees remained at broadly the same level for three years up to the time Mr C made his complaint but then increased significantly after that. I have not been given the documentation received by Mr C regarding the maintenance costs when he entered into the agreement, but I am aware that the cost per point held is reduced with an increased holding.

I am given to understand that the Infiniti points fee per 100 points for a member who owned under 60,000 points was £2.27, but this reduced to £0.74 for members who owned over 200,000 points. So it reasonable to conclude that Mr C was told the cost per point would reduce with an increased holding. However it follows that the more points he held the costs could go up depending on the number.

At the time the claim was made to BPF the management fees had not increased significantly and as I am considering its response to the claim I cannot conclude it was unreasonable for it to have been rejected on the basis of there being no misrepresentation.

For these reasons, I think it unlikely that a court would uphold a claim for misrepresentation against L. It follows that BPF's response to Mr C's claim was reasonable.

Unfair relationship

Under section 140A and section 140B CCA 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 a credit agreement creates an unfair relationship, a court can take into account connected agreements. I am satisfied that the contract with L was a connected agreement in this case.

For the reasons I have explained, I do not believe that Mr C was misled about the terms of the sale contract. And I have not been given any grounds that would allow me to conclude that there was an unfair relationship.

It has been said that he was pressurised into making the purchase. However, as our investigator has pointed out Mr C has made numerous purchases over the years and I would think it reasonable to conclude that he was aware of what he was being sold and of the benefits and the potential downsides. I cannot conclude that the sales process was such that

it demonstrates that there was an unfair relationship."

F didn't agree and submitted a lengthy response which I will summarise briefly.

- It set out some background information about L and how it operated based on information received from its clients. It claimed that L told potential customers that they could sell their points back at no loss and possibly at a profit.

- F said that it was of utmost importance to Mr C that his timeshare wasn't held in perpetuity and that the purchase of points from L would solve that problem.

- Mr C was subjected to aggressive commercial practices which broke the Consumer Protection from Unfair Trading Regulations (CPUT) 2008.

- Mr C has been consistent in his testimony that he thought he was purchasing an investment, but timeshares are usually overvalued.

- L failed to follow the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Regulations") and to provide sufficient information to allow Mr C to make an informed decision.

- F expressed some concern about the way finance was sold to Mr C and referenced a judgment regarding BPF. It also said that Mr C's age should have been taken into account.

- The points which had been sold were a complex product and the consumer would find it difficult to understand what they were purchasing.

- L had not adhered to The Resort Development Organisation's Code of Conduct 1 January 2010 (the "RDO Code").

- BPF had not adhered to the Financial & Leasing Association Code.

- Improper pressure had been applied to Mr C.

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.

It is not for me to decide whether Mr C has a claim against L, 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 C's complaint. In the circumstances, I think that BPF's response in 2017 to Mr C's claims was fair and reasonable. In those claims which F made on behalf of Mr C that the product had been misrepresented in unspecified ways. It also claimed that the terms of the agreement were egregious, he was pressurised into entering the credit agreement and the commission paid had not been disclosed.

More recently F has sought to both add detail to the claim and to make an additional claim regarding the affordability of the loan. BPF has not had the opportunity to respond to those additional points, but I do not believe this need delay matters further given I do not consider

the complaint should be upheld.

S.75 Misrepresentation

The two elements put forward by F in its recent representations are that Mr C believed he could resell the points and that he was purchasing an investment. I don't believe that F had supplied any additional information which would allow me to change my view. It has given its view of L and its operations from other claimants, but not added anything specific to Mr C's claim.

Mr C had made several timeshare purchases over the years and as such I presume he was regular user of their services. He continued to make use of them by taking holidays using the points he bought from L until he decided to make a claim. If his main aim had been to extract himself from having a timeshare I do not find it credible that he deferred taking any action for three years. It suggests to me that at the time he was seeking to use the points to take holidays and not as a means of exiting the market or indeed, as an investment.

Mr C also signed a compliance statement which included: "*I/we understand that I/we may sell our Infiniti 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, I/We also understand that I/we have not entered into this purchase purely for a wider investment opportunity or financial gain."*

As I said in my provisional decision I believe this shows that the product was not sold as an investment, but it was possible that the points he purchased might be sold. It did not offer a guarantee that they would be sold or even that L would buy them back. Given his alleged reason for making the purchase I would have thought Mr C would have ensured the agreement met his needs. I appreciate he says he was subjected to pressure, but I am also aware that he had made several timeshare purchases over the years and so I find it hard to understand why he would have succumbed to the pressure.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationships between Mr C and BPF were unfair for the purpose of s. 140A. But, as it's relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under s.140A is "an action to recover any sum recoverable by virtue of any enactment" under s. 9 of the LA, I've considered that provision here.

However, I'm not persuaded that Mr C could be said to have a cause of action in negligence against BPF anyway.

Mr C's alleged loss isn't related to damage to property or to him personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

Yet I've seen little or nothing to persuade me that BPF assumed such responsibility – whether willingly or unwillingly – over and above ensuring that Mr C could afford to repay what he was borrowing.

F seems to suggest that, because L was BPF's statutory agent under s. 56 of the CCA, BPF owed Mr C a duty of care to ensure that L complied with the Timeshare Regulations. And F says that BPF breached that duty by failing to carry out – before granting Mr C credit and

paying L – the due diligence necessary to ensure that the product purchased by Mr C wasn't sold by L in breach of the Regulations.

However, English law recognises that there can't be a duty of care owed to everyone, in every situation and against all forms of harm. And there are legal tests to ascertain whether a duty of care is owed to someone in a given situation. They are:

1. A three-stage test set down in Caparo Industries v Dickman [1990] – which asks whether:

i. The damage was foreseeable.

ii. There was a sufficiently proximate relationship between the parties.

iii. It's fair, just and reasonable in all the circumstances to impose a duty of care.

2. The "assumption of responsibility test" in Henderson v Merrett Syndicates Ltd [1995], which was concerned with whether the defendant had taken on the responsibility of exercising reasonable care and skill towards the claimant.

3. Situations in which a duty of care was owed to the claimant by the defendant because such a duty had already been established by the courts.

Yet despite F's lengthy submissions, it hasn't persuaded me with reference to any of these tests or relevant authorities that the lender owed the debtor and the purchaser of a timeshare a duty of care to ensure that the product they were purchasing wasn't sold by L in breach of a relevant regulation – particularly one that imposed a criminal sanction.

F also seems to suggest that Mr C had a cause in negligence against BPF because it breached the Regulations, but, in my view, it wasn't possible for BPF to breach the Regulations.

And on my reading of the legislation, it was only L – or its agent – who could breach it. After all, it was only a timeshare provider or its agent who could enter into a timeshare agreement in the course of business.

As things stand, therefore, I can't see why any of Mr C's claims were likely to have succeeded.

Commission

I know F says that Mr C has concerns about undisclosed commission. But had such a payment been made to L by BPF, I haven't seen anything to suggest BPF would have breached a duty by making it – nor have I seen anything to suggest it was under a regulatory duty to disclose the amount of commission paid in these circumstances. What's more, as I understand it, the typical amounts of commission paid by BPF to suppliers (like the supplier in this case) was unlikely to be much more than 10%.

So, in the absence of evidence to the contrary, I think it's unlikely that the levels of commission normally paid in situations like the one in question were high enough to put BPF on notice that not disclosing commission to Mr C risked making their debtor-creditor relationship unfair.

The Purchase Agreement

"Providing credit or otherwise being a creditor under a regulated consumer credit agreement"

was an activity covered by the Financial Ombudsman Service's Compulsory Jurisdiction in 2014. As F's argument here is to suggest that the credit agreement couldn't and shouldn't have been enforced by BPF because the associated purchase agreements were unenforceable, I've considered the argument separately to Mr C's s. 140A claims.

It's possible that the purchase agreement entered into by Mr C in 2014 failed to comply with the information requirements in the Regulations. But nowhere in the Regulations (nor the European Directive 94/47/EC) can I see that a purchase agreement could be rescinded by a consumer if the information in question wasn't provided. And that's both a relevant and important consideration here as, generally speaking, a purchase agreement isn't rescindable simply because it – or part of it – was or became unenforceable.

I recognise that it was held by the Supreme Court in Durkin v DSG Retail [2014] UKSC 21 ('Durkin') that, if a debtor rescinds a supply contract that they have the right to rescind, they can also rescind a credit agreement whose purpose had been to finance the debtor's entry into that supply contract.

The legal mechanism by which this occurs is an implied term that deems the credit agreement contingent on the survival of the supply contract.

But, in the absence of any case law, I don't think the decision in Durkin can be said to have any application in a situation in which a supply contract was/is unenforceable against the consumer. An unenforceable purchase agreement under the Regulations is very different from one that the consumer is entitled to rescind. And even when the unenforceability of a purchase agreement is invoked by a consumer to support a CCA claim (as here), I've seen nothing to persuade me that it equates to terminating the contract, let alone unwinding it from the start.

So, the fact that the purchase agreement entered into by Mr C might have been (and still might be) unenforceable against him has very different legal consequences to those which flow from the rescission of a supply contract. Any attempt to apply Durkin here would require a considerable extension of its reasoning by the courts. And for that reason and those above, I'm not persuaded that this is a reason to uphold this complaint.

The Lending Decision

While PR says that Mr C suffered detriment because the right checks weren't carried out before BPF lent to him, very little has been said about this particular allegation. Furthermore this was not put to BPF at the time of the claim. Even if I were to find that BPF failed to do everything it should have when it agreed to lend (and I make no such finding), I'd have to be satisfied that the lending was unaffordable for Mr C before also concluding that he lost out as a result. As I haven't seen anything to persuade me that was the case, and his age did not preclude BPF from lending to him, I don't think this is a reason to uphold this complaint given its circumstances.

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 C to accept or reject my decision before 1 August 2023.

Ivor Graham
Ombudsman