DRN-4218258

The complaint

Mr M complains that American Express Services Europe Limited ("AESEL"), unfairly turned down his claim under the Consumer Credit Act 1974 ("CCA"). Mr M is represented by a professional representative ("PR").

What happened

In 2012 Mr and Mrs M purchased a timeshare from a company I will call O. This cost $25,700 and was funded in part from Mr M's AESEL credit card account. This means that the complainant is Mr M and in this decision for simplicity I will refer to him as the sole owner.

The purchase provided Mr M with a one week stay in a 2-bedroom villa, once a year, in week 14, starting from 2012. This points-based membership equalled 166,000 Holiday Inn Club points.

In April 2017 PR submitted a claim under s.75 CCA. It said the product had been misrepresented, in particular it claimed that:

- Mr M was told he was acquiring a freehold title to the apartment but this was not true.
- Mr M was told he would receive an income from the purchase, when the same was rented out which was not true.
- Mr M was led to believe that he would be able to book a number of properties in the brochure they were provided with. This has not proven to be the case.
- Initially Mr M understood he would attend a short presentation in order to obtain the holiday, but this turned out to be a high pressure sales presentation.

It also argued there had been a breach of contract as Mr M had not been given a copy of the public offering statement.

AESEL rejected the claim as it didn't consider the product had been misrepresented. It noted that Mr M's witness statement had not referenced several of the points made by PR. It also considered the documentation did not support the claims either. Finally, it pointed out that Mr M had been given a copy of the public offering statement on a CD ROM.

PR brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. She recognised that the sales representative would have emphasised the positives and may have outlined the product in glowing terms. However, the documentation didn't show any misrepresentation. Nor did she think there was an unfair relationship as required under s.140A.

PR asked that the complaint be considered by an ombudsman. It also submitted further representations by Mr M. He said that "the opportunity to swap weeks for points and access other locations is an implicit benefit, well understood within the industry, which was "sold" to

us". He said they had been led to believe they would have access to other properties and they had been deliberately deceived. The brochure had not been given to them and they had waited patiently for more information before realising what they had purchased was not what they had been told and shown.

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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account

the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision 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 available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld.

PR and Mr M have sent us a considerable amount of information and submissions in an effort to explain what they think the outcome of this complaint should be. However, as this service is designed to be a quick and informal alternative to the courts, my role as an ombudsman isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint. And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my reasons for reaching them. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to this complaint, when doing that.

The S. 75 Claims for Misrepresentation

S. 75 of the CCA states that, when a debtor (Mr M) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (AESEL) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

It's important to note that, as AESEL was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

The claims made by PR that Mr M thought he was buying a freehold and that it would generate income are not supported by the evidence supplied by Mr M and by AESEL and I do not believe they can be upheld. I have also noted that these claims are not supported by the documentation and see no basis in these allegations which would allow me to uphold this complaint.

PR also says that Mr M was misled into thinking he was attending a short presentation. My understanding that these presentations can be lengthy, but people can leave if they so desire and they are not forced to sign up. Mr M has explained he and his wife gave thought to whether to proceed and I think they made a considered purchase.

This leads on to what I believe is the central complaint, that they were shown a brochure with venues they wanted to visit and they were led to believe that these would be available. They were not given a copy of this brochure and when they pursued it and sought further information they learned that some, if not all, the places they wished to visit were not available.

I accept they were shown a brochure, but what I cannot say with sufficient certainty was that they were promised that all the venues would be available with their purchase. It is not unusual for timeshare companies to provide a list of properties which will be available to customers and to have that on their website. I appreciate that Mr M had difficulties in accessing the information initially and so he considers he was unable to make an informed decision about withdrawing from the agreement within the statutory time limit.

Given it was a key reason for making the purchase I think it reasonable to have expected Mr M to have been fully satisfied that he was getting what he thought he had paid for. I recognise that he trusted O and he now feels let down, but I cannot say that this arose because of misrepresentation rather than misunderstanding. Nor can I say that AESEL was wrong to consider there was insufficient evidence to allow it to uphold the claim.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationships between Mr M and AESEL 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 Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 9 of the LA, I've considered that provision here.

It was held in Patel v Patel [2009] EWHC 3264 (QB) ('Patel v Patel') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years. I have not been told if the credit card debt has been repaid or part of it is still outstanding. However, AESEL has not suggested the claim under s.140A was made out of time so I have considered if it had merit.

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

Mr M'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 AESEL assumed such responsibility – whether willingly or unwillingly – over and above ensuring that Mr M could afford to repay

what he was borrowing.

PR seems to suggest that, because O was AESEL's statutory agent under s. 56 of the CCA, AESEL owed Mr M a duty of care to ensure that O complied with the 1992 Act. And PR says that AESEL breached that duty by failing to carry out – before granting Mr M credit and paying O – the due diligence necessary to ensure that the product purchased by Mr M wasn't sold by O in breach of the 1992 Act. In any event, the payment was made by credit card and AESEL wasn't responsible for overseeing Mr M's spending decisions.

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 PR'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 C in breach of a relevant regulation – particularly one that imposed a criminal sanction.

But, in my view, it wasn't possible for AESEL to breach the 1992 Act. And on my reading of the legislation, it was only O – 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 M's claims were likely to have succeeded.

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 M to accept or reject my decision before 31 July 2023.

Ivor Graham
Ombudsman