DRN-4447162

The complaint

Mr P says that Oplo PL Ltd (who I'll call "Oplo") unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare product he was sold in May 2019. He also says the loan wasn't affordable for him and that Oplo were therefore irresponsible to extend the credit.

Mr P has been represented by a professional representative who I'll call "PR" and he entered into the timeshare agreement with his partner, but as the finance agreement was in his sole name, I will refer only to Mr P or his representatives in this decision. I mean no disrespect to Mr P's partner when doing so.

What happened

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

In May 2019 Mr P relinquished a pre-existing timeshare agreement with a supplier I'll call "Az" and exchanged it for points to be used towards a timeshare product with the same supplier. He financed the balance of £11,950 through a fixed sum loan with a finance provider I'll call 'H'. That finance agreement was regulated by the CCA.

In August 2022 Oplo acquired Mr P'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 Oplo in this decision.

In March 2021 Mr P complained to Oplo about problems he had encountered with the timeshare product. There were a number of allegations and it's not practical to reproduce them all here, but I have taken note of them. He said the nature of the timeshare had been misrepresented to him as he'd been told it would be an investment and would generate a profit. He said he was therefore able to make a claim against the lender under section 75 of the CCA. He also said that there was an unfair debtor-creditor-supplier-relationship under section 140A of the CCA as commission paid had not been divulged to him, and he hadn't been directed to any alternative credit suppliers. He also said there'd been a breach of contract as Az had been liquidated and were therefore unable to provide the service he'd been sold. He said Oplo had been irresponsible to provide him with credit he couldn't afford.

Our investigator disagreed. He didn't think there'd been a misrepresentation or that there was evidence of an unfair relationship, and he wasn't persuaded there was sufficient evidence that the loan was unaffordable for Mr P. He explained that although Az had been liquidated the management of the service had been transferred to another business and that there hadn't been a breach of contract.

PR didn't think the investigator had provided sufficiently detailed reasoning about why the claim should fail. They enlarged on their opinion that the timeshare product had been misrepresented to Mr P as an investment, and they asked for a decision by an ombudsman.

So, the complaint has been referred to me.

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.

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 (FSMA). 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 decision.

The Consumer Credit Act 1974

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.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Mr P also relies on, as the pre-contractual acts or omissions of the credit broker or 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 P and Oplo.

It's not for me to decide the outcome of a claim Mr P may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether Oplo were reasonable to reject Mr P's claims.

The claim under section 75 of the CCA

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.

Mr P says the timeshare was sold as an investment and that he anticipated a profit when it was resold. I don't agree the product was sold as an investment as, other than Mr P's testimony, there's no supporting evidence to suggest Mr P was told he could make a profit from any sale – or how this would be achieved. So, while I recognise that Mr P has concerns about the way in which his timeshare was sold, I'm not persuaded that a court would consider Mr P had been mis-sold the product as an investment.

Mr P also says that Az have breached their contract with him as they have been liquidated and are therefore no longer able to provide the service he purchased. It seems that the management of Az's products have been taken over by another company "V" and that company continues to offer the same services provided under the timeshare agreement. I've not been presented with any evidence to suggest Mr P was unable to access his points or receive the service he paid for. So, I don't agree the contract was breached and, as such, I don't think Oplo were unreasonable to reject Mr P's section 75 claim.

The claim under section 140A of the CCA

Section 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).

I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship.

Mr P relies upon a number of clauses in the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) that his representatives suggest created an unfair relationship between him and Az. 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 P's ability to exercise choice was significantly impaired by the pressure and aggressive sales tactics he says he experienced.

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."

Mr P had already attended several presentations with the same supplier, so I think he would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Mr P 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 that allowed him to reflect and withdraw from the agreement and the loan if he wished. Overall, I'm not persuaded that Mr P's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

PR also claims that an unfair relationship existed because Mr P wasn't told about the commission Az received from Oplo. Oplo have confirmed that no commission was paid in this case so I think it's unlikely a court would find there was an unfair relationship for that reason.

PR also say that Mr P wasn't offered a choice of lenders. Az wasn't acting as an agent of Mr P and his partner 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 P and his partner advice or information on that basis. However, even if it's right to suggest that Mr P and his partner 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 Oplo rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship between Mr P and Oplo on this occasion given the facts and circumstances of this complaint.

Was the loan irresponsible?

Mr P says that the lender was in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan. He says that they had strict obligations to complete a creditworthiness check under the Financial Conduct Authority's Consumer Credit Sourcebook (CONC) and failed to undertake those obligations.

However, 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 even if I was persuaded that the lender 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 the credit granted by them was likely to be unaffordable and that Mr P suffered a loss as a result. I've not been provided with sufficient evidence from Mr P to suggest he didn't have enough disposable income to sustainably afford repayments against this loan, and I don't therefore think it would be reasonable to suggest the lender was irresponsible when providing the credit.

My provisional decision

For the reasons I've given above I'm not expecting to uphold this complaint.

Further comments and/or evidence

Oplo confirmed that they had no further comments they wished to make, but Mr P's representative's provided detailed further submissions and an additional statement from Mr P.

It's not practical to list all of the submissions here, but Mr P enlarged upon what had happened in May 2019 when he purchased the timeshare product. He said:

"It was suggested to us that we give up all of the apartments that we owned and transfer to the XP system as this would benefit us. We were told that having the XP system would improve our financial investment and allow us to make more money. sell these, to allow us to recoup the money that we had spent. With this purchase we were offered 4 years free of maintenance fees, which would improve the financial situation. However, the meeting was lengthy. We had not been able to realise our investments on our previous purchases despite having listed them for re-sale and we were initially reluctant to commit to such a long-term product as the XP points. However, the sales rep went into great detail as to how this was the perfect product to recoup all our monies and effectively holiday for free (we had been struggling somewhat with all the maintenance fees we were required to pay annually which we had mentioned to the rep) by using the flexibility of the XP points products.

Our initial position was that the level of XP points we required would only require to be Level 1. It was our intention to start holidaying in the UK. (We were shown what looked like a lovely hotel in England which would have been perfect. It was explained that by trading in our existing timeshares we would be given a level 2 membership at the price of a level 1and this would assist us in recovering our monies at a profit by selling the unused points and also give us an exit strategy from the timeshare.

Basically, we were advised that the points we were not using annually would be sold to other XP members who required additional points to access the premium products such as supercars and yachts and our left-over points would be sold to them at a premium price.

We were advised that this could also include points above our maximum annual usage as the selling price of these would more than cover the surcharge on using points earlier than provided for in the contract. This would allow us to exit our timeshare early at a profit.

We would effectively be able to holiday for free as the monies we would make on selling our points would cover our annual membership fee when we required to start paying it after the 4 year grace period.

We were given the impression that Az (my edit) *would handle all of this. We would not have purchased the XP points if we had not believed there was a very real investment element to them.*

When the Az's (my edit) *booking office re-opened on January 1st 2020 we attempted to book the hotel in England and were told it was unavailable. When we tried to find it on Google to see if we could book direct it didn't exist.*

At no point did Az (my edit) *contact us regarding the sale of our points despite that being our understanding of what would happen at the point of sale."*

PR therefore repeated their assertion that the timeshare was sold as an investment and the timeshare provider was prohibited from doing that. They insisted the timeshare had been misrepresented to Mr P as it would not have given him easy access to a specific holiday destination in England, and because Mr P had been led to believe he could sell his points and had only entered into the deal on that basis.

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.

For the reasons I've already set out I don't agree the product was sold as an investment as, other than Mr P's testimony, there's no supporting evidence to suggest he was told he could make a profit. I'm not persuaded that a court would, therefore, consider the product was mis-sold as an investment.

I can't see that Mr P, or his representatives complained to Oplo about the English accommodation and potential misrepresentation. It's only fair for Oplo to have an opportunity to respond to any complaint points before this Service considers them and if Mr P wishes to pursue that aspect of his claim he'll need to do that. I've already explained why I don't think I have sufficient evidence to support the misrepresentation claim Mr P enlarged upon in his most recent submissions. Whilst I appreciate his additional testimony, I don't think there's sufficient evidence of misrepresentation, in particular, there's no supporting evidence to suggest Mr P was told he could make a profit from any sale – or how this would be achieved.

I'm not therefore persuaded to change my provisional decision and that provisional decision 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 P to accept or reject my decision before 8 December 2023.

Phillip McMahon
Ombudsman