DRN-4583134

## The complaint

Mr P complains about the sale of a timeshare he paid through a fixed sum loan with Honeycomb Finance Limited (who I'll call Honeycomb). Mr P has brought his complaint through a representative, so references to his submissions and arguments include those made on his behalf.

## What happened

I issued a provisional decision on this complaint in December 2022. An extract from that provisional decision is set out below.

*In August 2018 Mr P surrendered an existing timeshare product and bought a new one with a company I will call "Az". The purchase gave him rights to points that he could exchange for accommodation or lifestyle products such as yachts.*

*In January 2022 Mr P complained to Honeycomb. He said that section 75 of the Consumer Credit Act 1974 ("section 75") allowed him to make the same claim for breach of contract or misrepresentation against the provider of credit as he could against the supplier. He said the agreement had been misrepresented to him and there had been an unfair relationship contrary to section 140A of the Consumer Credit Act 1974 (CCA). He also suggested that Honeycomb hadn't carried out a proper assessment to ensure the loan was affordable for him and that there had been a breach of the Unfair Terms in Consumer Contract Regulations 1999.*

*Honeycomb didn't uphold Mr P's claim and he therefore escalated it to this Service. Our investigator supported Honeycomb's stance, but Mr P still didn't agree. His representative's provided further, detailed, submissions and they asked for a decision to be made by an ombudsman. The complaint has, therefore, 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 not expecting to uphold this complaint. I'll explain why.*

*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.*

*When Mr P's representatives responded to our investigator's view on this complaint they expanded on their claim and introduced several new arguments that I can't see Honeycomb had ever been asked to consider. This service can't usually consider the merits of new complaints if they haven't been made to the business first, so in this decision I'm only considering the merits of the claims Mr P made to Honeycomb in January 2022.*

***Section 75 of the CCA***

*When something goes wrong, and the payment was made with a certain type of fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the CCA says that in certain circumstances, the borrower under a credit agreement has the same right to make a 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.*

*It's not for me to decide the outcome of a legal claim Mr P may have under section 75, but I'm required to take it into account when deciding whether Honeycomb were reasonable to reject his claims.*

*If Mr P was given a false statement of fact or law, and if that false statement was a significant reason why he entered into the agreement, I may think the agreement had been misrepresented to him. In those circumstances, I may think Honeycomb were unreasonable not to uphold a claim under section 75.*

*I've reviewed the video of the sales process. In that video Mr P and his wife explain that the reason they were interested in the product was because it allowed them to use accommodation in the UK where they could take their dog. I don't, therefore, think there is sufficient evidence to support Mr P's assertion that he only entered into the deal so that he could exit it more easily. It seems that the nature of the membership was evident to Mr P at the time of sale as he was clearly aware it enabled him to book and utilise accommodation elsewhere.*

*I've not seen evidence that Mr P was promised he would be able to sell the membership either and, in the video the sales agent clearly explains that if he wishes to rent it out, that rental, and accommodation booking in general, would be subject to availability.*

*I'm not, therefore persuaded that it's likely a court would find there had been a misrepresentation here.*

***Section 140A of the CCA***

*Section 56 of the CCA relevant to the claim under section 140A of the CCA as the pre-contractual acts or omissions of the broker 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 Honeycomb.*

*It's not for me to decide the outcome of a legal claim Mr P may have under section 140A, but I'm required to take it into account when deciding whether Honeycomb were reasonable to reject his claims.*

***Was the timeshare and therefore the loan voidable?***

*If the timeshare agreement was voidable, I think it likely that the related loan was also voidable on the recission of the agreement it was used to fund, and that's something that could be considered under a section140A CCA claim.*

*Mr P's representatives referred to an EU Directive, some Spanish legislation, and a Spanish court judgment that they said, taken together, demonstrated that a timeshare that provides for a 'floating week' or the ability to use points to book holidays with a provider, was a voidable agreement.*

*The timeshare agreement states that it is governed by English law, not Spanish law, so I don't think the Spanish judgment (which in any event relates to a different timeshare product to Mr P's timeshare) could be applied directly to the question as to whether the contract is voidable under English law. Having read all of the relevant legislation, rules, and regulations, I cannot see anything that would have the effect Mr P's representative seek. In fact, in a relatively recent House of Commons Library Briefing Paper, "Timeshares: common problems faced by UK owners", it was said that a 'floating week' or 'points'-based timeshare were basic timeshare models that were not described as being problems in and of themselves. Based on the evidence I have seen, I do not think the timeshare agreement nor the related credit agreement was voidable.*

***Was undue pressure applied?***

*Mr P says he was coerced into entering into the agreement as the sales presentation was lengthy. I've therefore considered whether there is evidence that Mr P's ability to exercise choice was significantly impaired.*

*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."*

*This wasn't Mr P's first timeshare purchase. I think by the time he entered into this agreement he would have been familiar with the process. The sales video doesn't suggest the process was rushed, or that undue pressure was applied, and the questions Mr P and his wife asked the sales agent demonstrated they had a good understanding of the agreement they were entering into.*

*Mr P was also provided with a 14 day cooling off period within which he could have reflected and changed his mind.*

*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.*

***Was there an unfair relationship created if commission wasn't disclosed?***

*Mr P's representatives say Honeycomb failed to disclose the commission paid. One of the main aims of both the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 and the Unfair Terms in Consumer Contract Regulations 1999 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 Section 140A.*

*I don't think the fact that Honeycomb may have paid Az a commission was incompatible with its role in the transaction. Az wasn't acting as an agent of Mr P 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 Az's role to make an impartial or disinterested recommendation or to give Mr P advice or information on that basis. What's more, I haven't seen any persuasive evidence that the typical amounts of commission paid by Honeycomb to suppliers (like Az) when loans were interest bearing (as was the case on this occasion) was likely to be high enough to create an unfair debtor-creditor relationship given the circumstances of this particular complaint. 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. I'm not therefore persuaded any unfair relationship was created.*

***Was there an unfair relationship created because Mr P wasn't given a choice of lenders?***

*I can see that Mr P had used at least one other lender to fund a previous purchase with Az so it seems he was aware that other lenders could be used. But, even if it's right to suggest that Mr P should have been presented with a range of lenders to choose from (and I make no finding about that), there's little to nothing to demonstrate that he has suffered a financial loss because he entered into a credit agreement with Honeycomb rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship between Honeycomb and Mr P, on this occasion, given the facts and circumstances of this complaint.*

***Affordability***

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

*However, even if Honeycomb 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 Honeycomb needed to do something to put things right, I would need to see that the credit granted by Honeycomb was likely to be unaffordable and that Mr P suffered a loss as a result. I've not seen sufficient information to suggest that was the case 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 am 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 additional evidence or comments and I've not, therefore, found any reason to change my provisional decision. My provisional decision, therefore, 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 23 February 2024.

Phillip McMahon
**Ombudsman**