DRN-4597481

The complaint

Mr J complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") didn't provide a fair and reasonable response to his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a timeshare product financed by a loan they provided.

What happened

In or around August 2015, whilst on holiday utilising his existing timeshare product, Mr J met with a representative of his timeshare supplier - who I'll refer to as "L". During that meeting, Mr J agreed to upgrade his existing points-based timeshare arrangement with L by purchasing more timeshare points. The purchase price was funded under a fixed sum loan agreement with BPF for £11,500 over 120 months.

In July 2021, using a professional representative ("the PR"), Mr J submitted a claim to BPF under sections 75 and 140A of the CCA. The PR alleged that Mr J purchased the timeshare product having relied upon representations made by L which turned out not to be true. And under section 75 of the CCA ("S75"), BPF are jointly liable for those misrepresentations.

In particular, the PR allege that L told Mr J the purchase of additional points would:

- provide *"access to a 5 year get out clause";*
- upgrade the membership and remedy issues Mr J was experiencing with booking availability; and
- provide access to more luxurious accommodation.

The PR also allege that the misrepresentations, together with other things done (or not done) by L and alleged breaches of the regulations that applied, render the relationship with BPF, under the agreements unfair, pursuant to section 140A of the CCA ("S140A). In particular, the PR allege that L:

- pressured Mr J into entering the purchase and loan agreements using aggressive commercial practices;
- said the offer was only available on the day, after which the price would significantly increase;
- allowed him no time to read or consider the information provided;
- failed to advise Mr J of any commission they may have received in relation to the loan;
- made no comparisons to other loan companies;
- didn't inform Mr J that he was free to arrange his own finance; and
- failed to undertake appropriate affordability checks for the loan.

The PR thought it unfair that annual maintenance charges continued to rise sharply and challenged their basis. They also thought L had breached:

- the Timeshare, Holiday Products, Resale and Exchange Regulations 2010 ("TRs"); and

- the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

This service hasn't seen any evidence that BPF have provided a substantive response to the claims albeit it does appear it was received.

The PR referred Mr J's complaint to this service. One of our investigators considered all the information and evidence provided. Having done so, they didn't think there was any evidence to support the allegations misrepresentation under S75 or unfairness under S140A. Our investigator also didn't think there was any evidence to demonstrate the loan was unaffordable for Mr J. So, didn't think his complaint should be upheld.

The PR disagreed with our investigator's findings. In doing so, they asked that this service consider the experiences of other consumers together with alleged *"systemic"* difficulties experienced with the availability of holidays and the alleged sales tactics and practices utilised by L.

As an informal resolution couldn't be reached, Mr J's complaint was passed to me to consider further. Having done that, whilst I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 4 January 2024, giving both sides the chance to respond before I reach my final decision.

In my provisional decision, I said:

> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides consumers with protection for goods or services bought using credit. Mr J paid for the timeshare points under a restricted use fixed sum loan agreement with BPF. So, it isn't in dispute that S75 applies. This means Mr J is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> S140A looks at the fairness of the relationship between Mr J and BPF arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.
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> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe BPF's failure to uphold Mr J's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And as I've said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.
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> Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've

[1] Dispute Resolution: The Complaints sourcebook (DISP)
[2] Financial Conduct Authority

based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

The misrepresentation claim under S75

For me to conclude there was a misrepresentation by L in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that L made false statements of fact when selling the additional timeshare points in August 2015. In other words, that they told Mr J something that wasn't true in relation to the allegations made. I would also need to be satisfied that the misrepresentations were material in inducing Mr J to enter the contract. This means I would need to be persuaded that Mr J reasonably relied on these false statements when deciding to buy the timeshare product.

The difficulty I have is establishing what Mr J was told (or not told) at the time of the sale in 2015. The PR have provided limited details or evidence to support the misrepresentation they say L made, although I acknowledge that Mr J does say he was told these things. So, I've thought about this and whether there's any evidence available from the time of the purchase in 2015.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr J's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says he was told. In particular relating to the product allowing him to leave his membership after five years. There's simply no reference to this within any of the documentation that's been provided.

The PR have only provided this service with a copy of the first page of the purchase agreement. However, I've seen similar agreements from L and am aware that all accommodation and holidays included within the portfolio offered by L are subject to availability. This is normally confirmed within the full purchase agreement and accompanying appendices. These are referred to in the document provided by the PR.

Furthermore, the document does state that *"*[L] *uses a grading system based on points in order to value the different Accommodation available".* So, given that Mr J purchased more points in August 2015, it's reasonable to conclude the purchase of additional points would provide him with more purchasing power than he previously had when making bookings from the *"Resorts guide"* provided by L. I haven't seen any evidence that Mr J wasn't able to do that.

Having considered everything available, I haven't seen anything to support the allegations here. And because of that, I can't reasonably say, with any certainty, that L did misrepresent the product Mr J purchased in the way alleged.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (BPF) and the debtor (Mr J) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor). And I think it's relevant to acknowledge Mr J's existing membership and relationship with L. He'd previously purchased products (particularly timeshare points) from them. So, I think it's reasonable to conclude that at the time of the purchase in August 2015, he had a reasonably strong awareness about the products he'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude Mr J was familiar with L (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the purchase in August 2015 certainly wasn't his first.

- The pressured sale and process

The claim suggests Mr J was pressured into purchasing the product and entering into the finance agreement with BPF. I acknowledge what the PR have said about this. So, I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Mr J approached the closing stages, he was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr J agreed to the purchase and the finance agreement in 2015 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to L, after the purchase, suggesting he'd agreed to it when he didn't want to. And neither the PR, nor Mr J have provided a credible explanation for why he didn't subsequently seek to cancel the transaction within the 14-day cooling off period permitted here – both under the purchase and loan agreements.

If he only agreed to the purchase because he felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr J was obviously harassed or coerced into the agreements. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that he made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired contrary to CPUT.

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mr J as required under the TRs. As I've said above, I've seen very little from the time of the sale here, although there's no suggestion that L didn't provide all the required documentation.

It's possible Mr J wasn't given sufficient time to read and consider the contents of the documentation at the time of the sale. But even if I were to find that was the case – and I make no such finding – it's clear he still had 14 days to consider his purchase and raise any questions or concerns he might've had. And ultimately, if he was

unhappy or uncertain, he could've cancelled the agreement without incurring any costs.

Furthermore, I understand the finance agreement also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr J did raise any questions or concerns about either agreement.

- L's responsibilities and disclosure of commission paid

Part of Mr J's S140A claim is based upon the status of L (as the introducer of the loan) and their (and BPF's) resultant responsibilities towards him. In particular, it's argued that the payment of any commission by BPF to L was kept from him.

It's unclear whether any commission was paid. That said, I don't think any payment of commission by BPF to L would've been incompatible with their role in the transaction. L weren't acting as an agent of Mr J, but as the supplier of contractual rights he obtained under the timeshare product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was L's role to make an impartial or disinterested recommendation, or to give Mr J advice or information on that basis. As far as I'm aware, he was always at liberty to choose how he wanted to fund the transaction.

What's more, I haven't found anything to suggest BPF was under any regulatory duty to disclose any amount of commission they may have paid in these circumstances. Nor is there any suggestion or evidence that Mr J requested those details from BPF (or L) at any point. As I understand it, the typical amounts of commission paid by BPF to suppliers (like L in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

- The annual management charges

Various allegations have been raised in relation to the basis of the annual management charges payable under the timeshare product agreement Mr J entered into. But I've not been provided with any of the purchase agreement documentation relating to Mr J's timeshare purchase. Further, the PR haven't demonstrated what management charges have actually been invoiced and paid and how and if they differ from what was contractually included within the purchase agreement.

It's not unusual for such agreements to include provisions for recalculation of the annual charges payable each year. So, I wouldn't consider increases to be out of the ordinary in themselves. Further, given Mr J was already an existing member of L's points-based timeshare scheme, I think it's reasonable to conclude that he already had some awareness of the charges associated with his timeshare points at the time of the purchase in August 2015. And in any event, in the absence of any supporting evidence, it's not possible to reasonably assess the fairness (or otherwise) of their calculation and application here.

Were the required lending checks undertaken?

There are certain aspects of Mr J's complaint that could be considered outside of S75 and S140A. In particular, in relation to whether BPF undertook a proper credit assessment. The PR allege that a proper affordability check wasn't completed by L or BPF.

Ordinarily, responsibility falls with the lender (BPF in this case) to conduct affordability checks as set out within the Consumer Credit Sourcebook ("CONC"), part of the FCA handbook. BPF haven't provided any details of the assessment they

undertook. And given the passage of time, it's possible that information is no longer available.

It's relevant that the PR haven't provided any evidence to show that the loan was unaffordable or unsuitable for Mr J. And I've not seen anything that supports any suggestion of financial difficulty from that time.

If I were to find that BPF hadn't complied with the regulatory guidelines and requirements that applied here – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr J in order to uphold his complaint here. Furthermore, I don't believe any regulatory failure would automatically mean that the loan agreement is null and void. It would need to be proven that any such failure resulted in a loss to Mr J as a consequence.

As I've seen no specific information about Mr J's actual position at the time and no supporting evidence that he struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for him. And I can't see that he's suffered any attributable loss either.

Summary

I want to reassure Mr J that I've carefully considered everything that's been said and provided. Having done so, I haven't found any evidence from the time of the sale to support the allegations of misrepresentation or unfairness included within his claim. So, I can't say that BPF's failure to uphold it was ultimately unfair or unreasonable. Because of that, I don't currently intend to ask them to do anything more.

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.

BPF have acknowledged receipt of my provisional findings and confirmed they have nothing further to add at this stage. Despite follow up attempts by this service, neither the PR nor Mr J have responded or provided anything new for me to consider.

In the circumstances, I've no reason to vary from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Mr J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 5 March 2024.

Dave Morgan
Ombudsman