DRN-4663035

The complaint

Mrs W complains that Oplo PL Ltd ("Oplo") didn't provide a fair and reasonable response to her 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 July 2018, whilst on a promotional holiday, Mrs W attended a presentation by a timeshare supplier – who I'll refer to as "A". During the course of that presentation, Mrs W agreed to purchase a points-based timeshare product from A. The purchase price agreed was £14,535 which was funded under a fixed sum loan agreement with Oplo.

In April 2022, using a professional representative ("the PR"), Mrs W submitted a claim to Oplo under sections 75 and 140A of the CCA. The PR alleged that the timeshare product was purchased having relied upon representation made by A which turned out not to be true. And under section 75 of the CCA ("S75"), Oplo are jointly liable for those misrepresentations.

In particular, the PR alleged that A told Mrs W that the product purchased:

- would allow access to a two week holiday for all Mrs W's family;
- provided the ability to travel to Australia or any other hotel or resort; and
- could be sold at a profit as part of A's resale scheme.

The PR said that selling the product as in investment falls contrary to Regulation 14 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

The PR went on to say that as A are in liquidation, they're unable to provide the service Mrs W purchased. They believe this constitutes a breach of contract which Oplo are also jointly liable for under S75.

The PR also included various other allegations which, in addition to the misrepresentations, they believe renders the relationship with Oplo (under the purchase and loan agreements) unfair pursuant to section 140A of the CCA ("S140A"). in particular, the PR alleged:

- the payment of commission to A was hidden from Mrs W;
- Mrs W was aggressively targeted and pressured into entering into the loan agreement;
- Mrs W wasn't provided with the necessary information to allow her to make an informed decision – in breach of Regulation 12 of the TRs;
- Mrs W was under the impression the loan was part of the purchase;
- Mrs W wasn't given opportunity to consider other lenders, arrange her own finance or shop around for better rates; and
- Mrs W wasn't given time to consider the extensive paperwork running to over 100 pages.

Finally, the PR alleged no affordability checks were undertaken to ensure the loan was appropriate or affordable for Mrs W.

Having not received a response from Oplo, the PR referred Mrs W's claim to this service as a complaint. During the course of this service's investigation, Oplo responded to Mrs W's claim. In summary, They didn't agree there was any evidence to support the various allegations. They confirmed no commission had been paid to A and thought the affordability of Mrs W's loan application had been appropriately assessed. Oplo didn't uphold Mrs W's claim.

The PR didn't agree with Oplo's findings. So, one of this service's investigators considered all the evidence and information available. Having done so, they also didn't think there was any evidence to support the alleged misrepresentations. Or that there was sufficient evidence that was likely to lead a court to find that an unfair relationship existed under S140A. They also didn't think there was anything to suggest the loan was unaffordable for Mrs W.

The PR didn't agree with our investigator's findings. They thought the investigator had failed to assess the claim under S75 and S140A. In summary, the PR repeated and expanded on a number of the allegations and referenced the (alleged) experiences of other consumers when purchasing timeshare product from A. They went on to refer to the findings of the Upper Tribunal in London in relation to timeshare products sold by A and financed by another financial business from 2006 onwards in particular relating to the lack of affordability assessment undertaken.

As an informal resolution couldn't be reached, Mrs W's complaint was referred to me to consider further. Having done that, while 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 6 February 2024 giving both sides the chance to respond before I reach my final decision.

In my provisional decision, I said:

> Relevant considerations
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> From the information available, it appears the timeshare product was purchased in the joint names of Mrs W and another party. However, as the purchase was funded with a loan in Mrs W's sole name, she is the only eligible claimant and, therefore, complainant here.
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> It's also relevant to say that the original loan was provided by a different financial business. However, the loan was later purchased by Oplo. So, Oplo are the respondent here.
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> 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. Mrs W paid for the timeshare product under a restricted use fixed sum loan agreement. So, it isn't in dispute that S75 applies. This means Mrs W is afforded the protection offered to borrowers like her 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 Mrs W and Oplo 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

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

S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

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 Oplo's failure to uphold Mrs W's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.

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.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made 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 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.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by A in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that A made false statements of fact when selling the timeshare product. In other words, that they told Mrs W something that wasn't true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mrs W to enter into the purchase contract. This means I would need to be persuaded that she reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mrs W was specifically told (or not told) about the benefits of the product she purchased. It was, however, indicated that she was told these things. So, I've thought about that alongside the evidence that is available from the time. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mrs W's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says she was told. In particular, the ability for other family members to use the product or any specific accommodation locations and their availability.

Specific reference is made within the purchase agreement to the Standard Information Document, the Rules of Membership, the Reservation Rules and the Deed of Trust. But I haven't seen copies of these documents such that I'm able to establish whether there's anything within them to support the allegations made. Further, neither the PR, nor Mrs W have provided any evidence to support the suggestion that bookings could not be secured in the manner alleged. Or that any suggested lack of availability contradicted anything included within the associated membership and product agreement.

Furthermore, I haven't seen anything to support the suggestion that the product was represented as an investment that could be sold at a profit. There's simply no reference to this within any of the documentation provided. I think it unlikely the product can have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, despite the PR's assertions, I've found nothing within the evidence provided to

suggest A gave any assurances or guarantees about the future value of the product Mrs W purchased. A would had to have presented the product in such a way that used any investment element to persuade her to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

And while A may have previously offered a timeshare resale service, I haven't seen any evidence to suggest that A were contractually bound to continue to do so. And even if they were, I've seen nothing that suggests they gave any guarantee of a successful sale or that a profit could be achieved.

The breach of contract claim under S75

As far as I understand, whilst A – as the seller of the product - may have entered an insolvency process, the current (replacement) management company have confirmed that timeshare owners remain able to fully utilise their timeshare products subject to the associated agreements. And it appears correspondence was promptly sent to Mrs W to clearly explain any management company changes and any effect on her product use and membership. So, in the absence of any specific explanation or evidence to support why Mrs W believes there's been a breach of contract which resulted in a loss for her, I haven't seen anything that would lead me to conclude there was such a breach.

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 (Oplo) and the debtor (Mrs W) 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).

- The pressured sale and process

The claim suggests Mrs W was pressured into purchasing the product through the use of aggressive commercial practices.

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 Mrs W approached the closing stages, she 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 Mrs W agreed to the purchase in 2018 when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to A, after the purchase, suggesting she'd agreed to it when she didn't want to. And neither the PR nor Mrs W have provided a credible explanation for why she didn't subsequently seek to cancel the transaction within the 14-day cooling off period normally permitted here.

If Mrs W only agreed to the purchase because she felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest she was obviously harassed or coerced into the agreement. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mrs W made the decision to proceed because her ability to

exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mrs W, as required under the TRs. The purchase agreement provided – which Mrs W appears to have signed - confirms that she received the Standard Information Document, the Rules of Membership, the Reservation Rules and the Deed of Trust. All documents that I would expect to be provided under the TRs.

It is possible Mrs W wasn't given sufficient time to read and consider the contents of the documentation at the time of the sale. And I acknowledge what the PR has said about the extent of the paperwork. But even if I were to find that was the case – and I make no such finding – I believe she still had 14 days to consider her purchase and raise any questions or concerns she might've had. Or seek independent advice, should she have thought it appropriate. Ultimately, if she was unhappy or uncertain, she could've cancelled the agreement without incurring any costs.

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

- A's responsibilities and disclosure of commission paid

Part of Mrs W's S140A claim is based upon the status of A (as the introducer of the loan) and their (and Oplo's) resultant responsibilities towards her. In particular, it's argued that the payment of commission by Oplo to A was kept from her. In response to the claim, Oplo confirm that no commission was paid here.

That said, I don't think any payment of commission by Oplo to A would've been incompatible with their role in the transaction. A weren't acting as an agent of Mrs W, but as the supplier of contractual rights she 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 A's role to make an impartial or disinterested recommendation, or to give Mrs W advice or information on that basis. As far as I'm aware, she was always at liberty to choose how she wanted to fund the transaction. And if she'd subsequently decided to fund the purchase using another lender or source of funds, she had the ability to cancel the loan agreement within the 14 days permitted here.

What's more, I haven't found anything to suggest Oplo were under any regulatory duty to disclose any amount of commission paid in these circumstances. Nor is there any suggestion or evidence that Mrs W requested those details from Oplo (or A) at any point. 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 Mrs W's complaint.

Were the required lending checks undertaken?

There are certain aspects of Mrs W's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Oplo undertook a proper credit assessment. Mrs W's allegation suggests the loan was provided irresponsibly. In particular that no affordability checks were undertaken by A or Oplo.

Regulated lenders each use their own systems, methods and processes when assessing loan applications. These are normally in conjunction with their own lending policies, regulatory guidelines and appetite at the time. In responding to Mrs W's claim, Oplo have provided an overview of the process conducted in order to complete an appropriate affordability assessment. If I were to find that they hadn't completed all the required checks and tests – 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 Mrs W in order to uphold her complaint here. A simple failure to meet the regulatory requirements wouldn't, in my opinion, lead to the loan being unenforceable. There would need to be a clearly attributable loss.

Accepting that the amount borrowed wasn't insubstantial, I haven't seen any evidence to show that the loan was unaffordable or unsuitable for Mrs W. And I've not seen anything that supports any suggestion of financial difficulty from that time, or since. There's certainly nothing to suggest that Mrs W previously raised affordability concerns with Oplo. And as far as I'm aware, repayments have always been maintained in a timely manner. So, with no other specific information about Mrs W's actual financial situation at the time and no supporting evidence that suggests she's struggled to maintain loan repayments, I can't reasonably conclude the loan was unaffordable for her. Or that she's suffered any loss as a consequence.

Other considerations

In responding to our investigators' findings, the PR has referred to the alleged experiences and findings relating to other consumers when purchasing timeshare products from A. However, I can't see how those (alleged) experiences assist me in establishing the facts of what actually happened in Mrs W's specific case.

Further, the PR have referenced the findings of the Upper Tribunal in relation to loans provided by another financial business. But again, I can't see that this is relevant in the specific circumstances of Mrs W's complaint. That particular financial business wasn't involved here. And as far as I'm aware, there have been no specific findings in relation to finance provided by Oplo for such timeshare purchases. So, I don't think those findings help me in establishing the facts associated with Mrs W's complaint.

Summary

I would like to reassure Mrs W that I've carefully considered everything that's been said and provided in reviewing her complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that Oplo's failure to uphold her claim was ultimately unfair or unreasonably. While I realise she will be very disappointed, I don't currently intend to ask them to do anything more here.

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.

Oplo have confirmed they have nothing further to add following my provisional decision. Despite follow up by this service, neither the PR nor Mrs W have provided and further comments or evidence for me to consider.

In the circumstances, I've no reason to vary from my provisional findings. And for that reason, I won't be asking Oplo to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mrs W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 3 April 2024.

Dave Morgan
Ombudsman