DRN-4730020

The complaint

Mr G complains that he was mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Honeycomb Finance Ltd (Honeycomb) and has, more recently, been purchased by Oplo PL Ltd, trading as Oplo. For ease I will refer to Oplo throughout this decision.

Mr G has been represented in bringing this complaint by a claims management business, so any reference to his arguments and submissions include those made on his behalf.

What happened

I issued a provisional decision on this complaint in February 2024. An extract from that provisional decision is set out below.

In June 2018 Mr G purchased a membership of a timeshare with a company I will call "Az". He funded that purchase through a fixed sum loan with Honeycomb Finance Ltd and that loan was purchased by Oplo in August 2022.

Mr G complained to Oplo in August 2022. His claim was detailed but in essence he said he had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented to him and there had been an unfair relationship. He also said that Oplo hadn't performed adequate checks to ensure that the agreement was affordable for him; that they hadn't disclosed that commission was being paid; that the broker wasn't authorised to broker the agreement; and that there had been a breach of contract as the supplier had been liquidated.

Oplo didn't uphold Mr G's complaint, so he escalated it to this Service.

Our investigator considered what had happened but wasn't persuaded there was sufficient evidence to support the complaint.

Mr G didn't agree, and the complaint has been referred to me, an ombudsman, to make a decision.

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 see we didn't respond to all of the issues. I'm not currently expecting to uphold the complaint.

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 claim under the CCA

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 CCA 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 G 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 G and the lender.

It's not for me to decide the outcome of a legal claim Mr G may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether the lender was reasonable to reject Mr G'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 G says the agreement was misrepresented to him as an investment and that he was promised his share of the property would increase in value. He also says he was promised he could sell it back, and that he would have availability anytime of the year. While I understand Mr G asserts otherwise I don't think his testimony alone is sufficient to persuade me the misrepresentations he claims were made, had been. Mr G purchased points to be used to secure accommodation, or use of luxury products such as yachts. But I don't think the documentation I have been provided with suggests he purchased a specific property that he could rely on to increase in value and provide a return., or that he was guaranteed he could resell the points he'd purchased.

Mr G says that the supplier went into liquidation. He says that means there has been a breach of contract. I understand that the timeshare club didn't cease trading as a new club management team was appointed. In those circumstances, I don't think Mr G's membership rights were interrupted, and I don't think there has been a breach of contract.

I don't, therefore, think Oplo were unreasonable to reject Mr G's section 75 claim.

Broker authorisation

Mr G argues that the broker wasn't authorised by the Financial Conduct Authority to arrange the credit agreement on Oplo (then Honeycomb's) behalf.

The broker isn't clear from the finance document and the pre-contract credit information; there are several companies mentioned. But, having checked all of the parties listed on those documents, I haven't seen any entity that wasn't regulated at the time of sale, to broker the loan.

So, I don't uphold this part of Mr G's complaint.

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 G's representatives say that a termination provision in Mr G's timeshare agreement meant he would forfeit the entire purchase price if he missed payments. They referred to the case of Link Financial v Wilson [2014] which they said showed a court agreed that a similar foreclosure clause to the one in Mr G's agreement, gave rise to an unfair relationship. I've not seen that Mr G experienced any loss as a result of that clause and I am not persuaded that the mere existence of a similar foreclosure term in Mr G's agreement, when it wasn't operated unfairly, would likely lead a court to find the debtor-creditor relationship was unfair on this occasion.

Commission

One of the main aims of both the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR's) 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 S.140A.

Honeycomb have explained that no commission was paid in relation to this agreement but, even if I'm wrong about that, I don't think payment of commission by the lender was incompatible with its role in the transaction. The supplier wasn't acting as an agent of Mr G 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 the supplier's role to make an impartial or disinterested recommendation or to give Mr G advice or information on that basis. I think it's unlikely a court would find that the failure to disclose commission (if indeed there was any) in this case created an unfair relationship under s.140A.

Overall, I don't think Oplo were wrong to reject the claim under s140A.

Was the loan irresponsible?

Mr G says that Oplo (then Honeycomb) was in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan.

Mr G has provided a breakdown of his income and expenditure and some supporting documentation that he says demonstrates he couldn't sustainably afford the loan.

When providing credit, the business should check it's sustainably affordable. The type of checks which a business should carry out should be proportionate, so (for instance) a mortgage lender will ask for bank statements and payslips, but a store card offering a low credit limit doesn't have to go into so much detail.

In considering this complaint, I've looked at whether Oplo (then Honeycomb) carried out proportionate checks, and at what information they had been given about Mr G's financial circumstances. The methods the business used to establish affordability were for them to decide but the practices and procedures they used had to be effective. And the depth of their analysis could be proportionate to the amount of money being requested.

I've seen the original business' Loan Application Comments and their Loan Application Summary. That shows that Mr G told them he earned £33,000 a year and that the business verified that income. They used statistical data to estimate household expenses and apportioned all of those expenses to Mr G, therefore making no assumptions about any contribution that may have been available from Mr G's partner. They also completed a review of Mr G's credit commitments, including his mortgage payment and, having done that, they established that Mr G would have sufficient disposable income to sustainably afford repayments towards this loan.

I think they were reasonable and proportionate checks given the amount of credit being advanced and I don't think Oplo would have needed to dig any deeper. They would, therefore, not have needed to ask for bank statements that may have, as Mr G asserts, demonstrated Mr G was in financial difficulty.

I don't, therefore, think the business were irresponsible to provide the credit they did.

My provisional decision

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

Further comments and/or evidence

Neither party provided any additional comments or evidence in response to my provisional decision.

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.

As I've not been provided with any additional information I have not found reason to change my provisional decision. That provisional decision now 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 G to accept or reject my decision before 7 May 2024.

Phillip McMahon
Ombudsman