DRN-4761163

The complaint

Mr N complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") unfairly turned down his claim under section 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a loan they provided to purchase a timeshare product.

What happened

In or around May 2012, Mr N – together with his wife – met with a timeshare supplier, who I'll refer to as "D". During the course of that meeting, Mr and Mrs N agreed to purchase a timeshare product from D consisting of membership and points rights to be used against holiday accommodation from within a portfolio provided by D. The purchase price agreed was £8,250. After payment of a deposit of £1,650, the balance of £6,600 was funded under a fixed sum loan agreement with BPF over 120 months in Mr N's sole name.

In April 2017, using a claims management company ("the CMC"), Mr and Mrs N submitted a claim to BPF under section 140A of the CCA ("S140A"). Specifically, it was alleged that BPF had paid a commission to D which neither they, nor D disclosed to Mr and Mrs N. The CMC believe that D was acting as an agent of Mr and Mrs N in arranging the loan creating a fiduciary relationship. And the failure to disclose the commission received – under that relationship - renders the credit relationship between Mr N and BPF unfair pursuant to S140A.

BPF didn't uphold the claim. They didn't agree that D acted as Mr and Mrs N's agent, or that they were under any obligation to disclose information relating to any alleged commission payment to them.

The CMC didn't accept BPF's response. So, referred Mr and Mrs N's claim to this service as a complaint. In doing so, they included further allegations not previously included within the claim submitted. In particular that:

- D and BPF failed to conduct a proper assessment of Mr and Mrs N's ability to afford the loan; and
- D had unduly pressured Mr and Mrs N into entering into a contract and the finance agreement.

One of this service's investigators asked BPF to consider the additional allegations included by the CMC when referring the complaint. But BPF weren't able to provide a response to the additional allegations within the timeframe given. So, our investigator considered all the information and evidence available. Having done so, they didn't think BPF's decision to turn down the claim was unfair or unreasonable.

The CMC didn't agree with our investigator's findings. In doing so, they included further additional allegations about the documentation provided to Mr and Mrs N, the basis of annual management charge calculations, the product benefits (which they believe were overstated), breaches of the contract and ultimately resultant breaches of various legislation and regulations that applied.

The CMC subsequently provided further submissions including:

- a 51 page document prepared by Counsel headed, *"Generic submissions on behalf of complainants";*

- observations about the provision of credit generally to consumers purchasing timeshares;
- a request that further detailed information and documentation be provided by BPF;
- a suggestion that this service should consider the timeshare purchase experiences of all consumers as a whole; and
- their own detailed observations and comments regarding the sale of timeshare products by D.

As an informal resolution couldn't be reached, the complaint was passed to me to consider further and reach a decision. Having done that, whilst I reached a similar outcome to that of our investigator, I'd considered various aspects that I felt weren't fully addressed or explained previously. So, I issued a provisional decision on 20 March 2024 giving Mr N and BPF the opportunity to respond to my findings before I reach a final decision.

In my provisional decision, I said:

> Relevant considerations
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> Whilst the timeshare product was purchased in the joint names of Mr and Mrs N, the purchase was funded with a loan in Mr N's sole name. This means that only Mr N is an eligible claimant under the CCA, and consequently, the only eligible complainant 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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> S140A looks at the fairness of the relationship between Mr N and BPF arising out of any credit agreement (taken together with any related agreements). And where the product purchased was funded under a credit agreement, it's deemed to be a related agreement. 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 referred to this service specifically relates to whether I believe BPF's treatment of Mr N's claim was fair and reasonable given all the evidence and information available to me. This service isn't afforded powers to determine any legal claim itself. That is the role of the courts.
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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 do not provide a legal service. And as I've said above, 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, it 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 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.

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

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 N) 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).

- Fiduciary responsibilities and disclosure of commission paid

Mr N's original claim submitted under S140A is primarily based upon the status of D (as the introducer of the loan) and their resultant responsibilities towards him. In particular, it's argued that the payment of commission by BPF to D was kept from him. But I don't think the fact that BPF might have paid D a commission was incompatible with its role in the transaction.

I don't agree that D was acting as an agent of Mr N. Rather, they were acting 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 D's role to make an impartial or disinterested recommendation, or to give Mr N advice or information on that basis. As far as I'm aware, Mr N was always at liberty to choose how he wanted to fund the transaction.

What's more, I haven't found anything to suggest BPF were under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr N previously requested those details from BPF. As I understand it, the typical amounts of commission paid by BPF to suppliers (like D 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 the non-disclosure and payment of commission created and unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

- The allegation of pressure

It's been subsequently alleged that D unduly pressured Mr N into entering the agreement. Neither the CMC nor Mr N have provided any specific details about what happened at the sales presentation Mr N attended. But I can understand why it may be argued that a prolonged presentation might have felt like a pressured sale – especially if, as he 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 N agreed to the purchase in 2012 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to D, after the purchase, to suggest he'd agreed to it when he didn't want to. And I haven't been provided with a credible explanation for why he didn't subsequently seek to cancel the purchase within the 14-day cooling off period usually permitted here.

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

likely to have been – significantly impaired contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations ("CPUT").

Were the required lending checks undertaken?

There are certain aspects of Mr N's claim that could be considered outside of S140A. In particular, in relation to whether BPF undertook an appropriate credit assessment, as required under the rules and regulations that applied. The CMC allege D didn't undertake a proper affordability check.

BPF haven't provided any details of the credit assessment they undertook. 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 N 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 directly resulted in a loss for Mr N as a consequence.

I've seen no specific information about Mr N's actual financial position at the time of the purchase and no supporting evidence to suggest he struggled to maintain repayments. In fact, I've seen a statement which demonstrates that loan repayments were maintained under the agreement until such point as it was fully repaid early in July 2014. Because of that, even if it was found that BPF hadn't completed the necessary checks and tests, I can't reasonably conclude the loan was unaffordable for him. Or that he suffered any loss as a consequence.

Other considerations

The CMC have submitted various documents together with their observations and comments to support their belief that Mr N's complaint should be upheld. However, given the generic nature of most of the documents and comments, I don't think they're helpful in establishing the facts of what actually happened in Mr N's specific case.

Further, in response to our investigator's findings, the CMC raised further new allegations that weren't included in the original claim submitted to BPF. Some of these relate to the nature of the purchase contract and the fairness of its terms, albeit I've seen very little of the documentation that specifically applied to Mr and Mrs N's purchase. As none of these were formally raised with BPF previously, I don't think it would be fair or reasonable for me to consider them further as part of the claim and resultant complaint that was actually submitted.

Summary

I would like to reassure Mr N that I have carefully considered everything that's been said and provided, even if I haven't specifically commented on some aspects above. Having done so, and for the reasons explained above, I'm not currently inclined to uphold his complaint. I appreciate that Mr N will be very disappointed, but I don't intend to ask BPF 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 acknowledged receipt of my provisional decision confirming they have nothing further to add. Despite follow up by this service, neither Mr N nor the CMC have provided any response to my provisional findings.

In these circumstances and having not been provided with anything new to consider, I've no reason to vary from my provisional findings. So, I won't be asking BPF to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr N's complaint against Clydesdale Financial Services Limited trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 22 May 2024.

Dave Morgan
Ombudsman