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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 2438 (Admin)



No. CO/4312/2021

Royal Courts of Justice

Wednesday, 13 July 2022

Before:

MRS JUSTICE LANG DBE

B E T W E E N :

THE QUEEN
on the Application of
CLYDESDALE FINANCIAL SERVICES LIMITED
T/A BARCLAYS PARTNER FINANCE

Claimant

- and -

THE FINANCIAL OMBUDSMAN SERVICE LIMITED

Defendant

- and -

(1) GORDON HOPWOOD
(2) CLC RESORT DEVELOPMENTS LIMITED

Interested Parties

MR R JAFFREY QC and MR R FAKHOURY (instructed by Hogan Lovells) appeared on behalf of the Claimant.

MR J STRACHAN QC (instructed by The Financial Ombudsman) appeared on behalf of the Defendant.

THE FIRST INTERESTED PARTY did not attend and was not represented.

MR J KIRK QC and MR L FINCH (instructed by Hamblins LLP) appeared on behalf of the Second Interested Party.

J U D G M E N T

MRS JUSTICE LANG:

- 1 This is the claimant's application for permission to apply for judicial review of a decision of the Ombudsman dated 6 October 2021, made under section 228 of the Financial Services and Markets Act 2000.
- 2 The Ombudsman upheld a complaint made by the first interested party ("IP1") against the claimant regarding the provision of finance for the sale to him of a Timeshare and Membership of a "fractional point owners' club ("FPOC") with the second interested party ("IP2") for an apartment in Malaga. The claimant provided a loan of £15,899 to IP1 for a 15 year term.
- 3 The grounds for judicial review may be summarised as follows:
 - Ground 1 – the Ombudsman erred in finding that under the Timeshare Regulations 2010, or alternatively the RDO Code, the seller of an asset backed Fractional Timeshare Contract is required to provide the buyer with a current and future valuation of the property rights acquired under the contract.
 - Ground 2 – the Ombudsman erred in law in taking IP2's alleged breaches of the Timeshare Regulations into account when considering the fairness of the credit relationship with the claimant under section 140A of the Consumer Credit Act 1974 ("CCA").
 - Ground 3 – the Ombudsman's findings in relation to allegedly unfair terms in the timeshare contract were based on a number of material errors in his construction of relevant contractual provisions.
 - Ground 4 – the Ombudsman failed properly to consider how the allegedly unfair terms had been operated in practice when assessing the fairness of the credit relationship for the purposes of section 140A CCA or for the purposes of determining appropriate relief under section 140B CCA.
- 4 Calver J refused permission on 16 May 2022, finding that ground 2 was unarguable, and that even if grounds 1, 3 and 4 were arguable, section 31(3C) and (3D) of the Senior Courts Act 1981 applied as the outcome for the claimant would not have been substantially different, in particular, because of the unchallenged finding that IP2 had breached Regulation 14(3) of the Timeshare Regulations 2010 by marketing and selling membership of the FPOC as an investment, which induced IP1 to make the purchase.
- 5 I have well in mind the case law which establishes that the Ombudsman has a broad discretion in assessing and determining what is fair and reasonable in all the circumstances of the case, and the court will only interfere with his decisions where there has been an error of law.
- 6 There are currently hundreds of complaints to the Ombudsman concerning fractional timeshare products and the Ombudsman selected this claim as a lead case. Calver J granted permission to the creditor bank in the other lead case, *R(Shawbrook Bank) v Financial Ombudsman Service Limited* CO/506/2022, on grounds which partially overlap with this claim. In *Shawbrook*, ground 2 contends that the supplier was not required to provide a current and future valuation of the rights of the debtor in relation to an allocated property associated with the agreement. In *Shawbrook*, ground 4 contends that the Ombudsman erred in law in his approach to sections 56 and 140A(1) CCA 1974 by attributing to the creditor,

through the supplier's agency, matters which extended beyond the legal responsibility of the creditor. In *Shawbrook*, ground 5 contends that the Ombudsman erred in finding the terms of the agreement to be a source of unfairness and/or in the approach to the grant of relief under sections 140A and 140B CCA 1974.

- 7 In my view it is inconsistent to refuse permission on the comparable grounds in this claim.
- 8 I am not persuaded that the Ombudsman's finding in respect of Regulation 14(3) of the Timeshare Regulations means that it is highly likely that the Ombudsman would have reached the same conclusion even if the claimant's other grounds were successful, or were made out. Under ground 2, the claimant submits that the Ombudsman was not entitled to take the breach of Regulation 14(3) of the Timeshare Regulations into account for the purpose of assessing the fairness of the credit relationship under section 140A CCA. In my view this point is just arguable for the reasons put forward by the claimant.
- 9 Further or alternatively, the Ombudsman's conclusion about the fairness of the credit relationship was based on an assessment of the cumulative effect of a range of factors. I agree with Mr Jaffrey that it cannot be assumed that the same outcome would have been reached if the only relevant factor was the breach of Regulation 14(3), which he found in this case.
- 10 The *Shawbrook* claim will not resolve all the issues in this claim because the providers in the contracts in the two cases are different. Presumably that is why the Ombudsman selected both these cases as lead cases, not just *Shawbrook*. There are other complaints in the pipeline relating to contracts of the type that is under consideration in this case, and therefore there is a wider benefit in clarifying the issues raised in grounds 3 and 4 on the terms of this contract and the appropriate remedy, if any. For these reasons I grant permission to apply for judicial review on all grounds.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.