

The complaint

Mr M, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In September 2009 Mr M purchased a holiday product from a company I will call D. It cost £3,500 and was funded by a loan from BPF. I gather Mr M has made further purchases from D, but the initial one was funded by BPF and it alone is the subject of this complaint.

In May 2018 PR submitted a letter of claim to BPF. Both parties are aware of the details of the claim so in this decision I will simply set out a short summary. PR said that Mr M had been targeted while on holiday.

- The product had been misrepresented and he was not told he was buying a timeshare.
- The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT") had been breached.
- Insufficient information had been provided in order for Mr M to make an informed decision.
- Mr M felt he was unable to leave until he signed the agreement.
- D failed to conduct a proper assessment of Mr M's ability to afford the loan.
- D unduly pressured Mr M into entering the contract and taking finance from BPF.

BPF did not accept the claim and PR brought a complaint to this service on behalf of Mr M. It was considered by one of our investigators who didn't recommend it be upheld. PR asked that the matter be considered by an ombudsman, but didn't supply any further arguments, but did provide a copy of a generic counsel's opinion.

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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision 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 available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld. I will explain why.

Sections 56 and 75 of the Consumer Credit Act

Under s. 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

Misrepresentation

A 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 induces the other party into the contract.

I have noted Mr M's personal testimony and the documentation provided by PR. Mr M says he asked if D was selling timeshares, but was told he was being offered holiday ownership. He was also persuaded by the high standard of the accommodation he saw and what he considered to be the good value the product offered.

However, the key information document Mr M signed sets out the exact nature and content of the rights he was acquiring. In essence this states that he was being offered four weeks of accommodation at any of the properties detailed in D's portfolio. These four weeks could be taken individually, together (as a four week holiday) or in any other weekly combination and at any time of the year. He could also purchase up to four additional weeks of self-catering accommodation at the member-only discounted rate of £199.00.

I am not clear as to what the distinction Mr M thought lay between a timeshare or a holiday ownership. He was purchasing membership of a holiday club which gave him access to holiday accommodation. This is what D delivered. I cannot see that the product was misrepresented. As for the issue of value this is a subjective matter and I believe Mr M was given sufficient information to decide if the product met his requirements.

I appreciate the atmosphere of the sales meeting was friendly, but that is not the basis for saying the product was misrepresented. Nor have I seen any evidence that Mr M was forced to stay until he signed.

S.140 A

Only a court has the power to decide whether the relationships between Mr M and BPF were unfair for the purpose of s. 140A. But, as it's relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under Section 140A is “an action to recover any sum recoverable by virtue of any enactment” under Section 9 of the LA, I've considered that provision here.

It was held in *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel v Patel*') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Mr M could be said to have a cause of action in negligence against BPF anyway.

His alleged loss isn't related to damage to property or to him personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

Yet I've seen little or nothing to persuade me that BPF such responsibility – whether willingly or unwillingly.

As I was not present at the sales meeting I cannot say what was actually said by the sales representative. It is known for these products to be sold as investments in future holidays which is not the same as financial investments.

PR says that some terms of the contract are “unfair” and D breached the Consumer Protection from Unfair Trading Regulations (CPUT) 2008”). That is not for me to say, although I must have regard to relevant law, including CPUT. The remedy if a contractual provision is “unfair” is however that the provision is unenforceable against the consumer – not that the whole contract falls.

In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mr M and BPF.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if BPF did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr M lost out as a result of its failings. No evidence has been submitted to show the loan was unaffordable.

Conclusion

It is not for me to decide whether Mr M has a claim against D, or whether he might therefore have a “like claim” under the Consumer Credit Act. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr M's

complaint. In the circumstances, I think that it was fair and reasonable for BPF not to uphold Mr M's claims.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 3 May 2024.

Ivor Graham
Ombudsman