DRN-3596400

The complaint

Mr A complains that a timeshare product was mis-sold to him and his wife. Because the purchase was financed with a loan from Clydesdale Financial Services Limited, he says that it is responsible, along with the seller, for the mis-sale and other concerns he has raised.

Clydesdale Financial Services Limited trades as Barclays Partner Finance, and I'll refer to it as "BPF". Mr A has been represented by a claims management business, which I'll call "F", so when I refer to his arguments and submissions, I include those made on his behalf.

What happened

Mr and Mrs A were existing timeshare owners and members of Club Infiniti, a timeshare and holiday club.

In November 2013 they entered into a contract for the purchase of 20,000 membership points at a cost of £4,450. Membership points could be exchanged on an annual basis for holiday accommodation and other benefits. The purchase was funded with a 10-year loan from BPF in favour of Mr A.

Mr and Mrs A made a further purchase in 2016, also with the help of a BPF loan. That is the subject of a separate complaint.

In or around February 2022 F complained to BPF on behalf of Mr A. F said that the loan and timeshare points had been mis-sold. It raised the following issues:

- pressure selling;
- lack of availability of accommodation;
- affordability of the loan;
- breaches of relevant regulations;
- misrepresentation; and
- unfairness of the relationship with BPF.

BPF did not accept that it had any liability, primarily on the basis of the time that had passed since the purchase of the timeshare points. Mr A did not accept BPF's response and referred the matter to this service. Our investigator did not however recommend that the complaint be upheld. Mr A asked that an ombudsman review the case.

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.

The complaint about affordability

Before agreeing a loan or other credit facility, lenders should take steps to ensure that the facility is affordable for the borrower. What is required will vary depending on the circumstances, including the regulatory regime in place at the time.

However, our own rules say that we cannot generally consider a complaint unless it is referred to us within six years of the event complained of or, if later, within three years of the date on which the complainant knew, or ought reasonably to have known, that he had cause for complaint.

The event complained of in this case is the credit assessment that BPF carried out (or did not carry out) in November 2013. Mr A is likely to have known fairly soon after that date if he was having difficulty making repayments. He certainly would have known by the time the loan was repaid in 2021. It is arguable therefore that this part of the complaint should have been referred to this service by no later than 15 November 2019 – six years from the date Mr A took the loan out – and that, because it was not, we have no power to consider it.

If I were to take a different view on that (perhaps because Mr A cannot be expected to know what checks BPF should have carried out), I have not seen anything here to suggest that the lending was not affordable or that the loan was otherwise not appropriate for Mr A. I note that the loan was repaid in line with its terms. That does not necessarily mean it was affordable or that appropriate checks were carried out, of course, but I think Mr A would have contacted BPF earlier it he was having difficulty making payments. And It's unlikely he would have taken out a further loan in 2016.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 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 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.

It is clear in this case that the loan financed the purchase of the club membership. The exact nature of the relationship between the seller of the points (Leisure Dimensions Limited, a company registered in Ireland) and BPF is less clear, but I have approached the case on the basis that the arrangements were such that section 75 might apply. I have therefore considered Mr A's claim that the timeshare product was misrepresented to him.

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.

There is little detail in this case about what was said to Mr A at the time of the sale and little evidence to show that any of it was untrue. For example, F says that Mr A was told he could surrender his points after ten years. That is, however, an accurate reflection of what the contract said. F says too that Mr and Mrs A had difficultly finding suitable holiday accommodation. They have however provided no evidence to support that allegation – such as evidence of failed attempts to make bookings, or correspondence with the Club about any difficulties.

Be that as it may, under the Limitation Act 1980 an action (that is, court action) based on misrepresentation cannot generally be brought after six years from the date on which the cause of action accrued. Any statements which might have induced Mr A into the contract for the purchase of the points were made on or before 15 November 2013. He did not however raise any complaint with BPF until February 2022, more than eight years later. I think it very likely therefore that a court would conclude that any claim against Leisure Dimensions was made outside the time limit in the Limitation Act.

It is not for me to decide whether any particular claim against the seller is now out of time under the Limitation Act, or whether it would succeed in any event. Rather, I must decide whether the response of BPF to the claim under section 56 and/or section 75 was reasonable. Given the real possibility that a court would say that the claims are time-barred, I think it was.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments.

In considering whether a credit agreement creates an unfair relationship, a court can have regard to any linked transaction.

I think it likely that the timeshare agreement in this case was a “linked transaction” within the meaning of section 19 of the Consumer Credit Act. In any event, I have approached it on that basis.

BPF said that this part of Mr A’s claim was also out of time, because the loan had been repaid in 2015, but no claim was made until more than six years later. Mr A provided evidence showing that the loan was not in fact repaid until 2021. I accept that evidence and so have considered what has been said about sections 140A and 140B.

Only a court can make orders under section 140A and 140B of the Consumer Credit Act. In deciding what’s fair and reasonable, however, I must take into account any relevant law, And I have power to make a wide range of awards, and could, if I thought it fair and reasonable to do so, require a lender to, for example, refund loan payments or write off a loan. I do not believe however that I should do so here.

The allegations made in support of the section 140A are generic and vague. For example, F has described the loan terms as “*egregious*”, but has not identified any term which fits that description or explained why that is.

F says too that Mr and Mrs A were put under pressure as part of the sales process. Again, no detail is provided; nor is it explained why they did not raise the issue until more than eight years later. And I note as well that Mr and Mrs had 14 days in which to cancel the sale and loan agreements if they did not want to go ahead. Had they felt they had only signed as a result of undue pressure, I think they would have sought to cancel both agreements.

In addition, the Club’s standard sale documents included statements signed by customers to say they had not been placed under pressure. It’s likely that Mr and Mrs A signed such statements.

F says that the seller failed to disclose any commission arrangements it had with BPF. I do not believe however that it was under any obligation to do so. Leisure Dimensions was not

acting as Mr A's broker or adviser – on the contrary, the effect of section 56 of the Consumer Credit Act was that it was acting as BPF's agent. It does not appear that F asked about any commission arrangements before making the non-disclosure allegation, but I have no reason to think BPF would not have disclosed them if asked.

My final decision

For these reasons, my final decision is that I do not uphold Mr A's complaint and do not require Clydesdale Financial Services Limited to do anything more to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 31 January 2024.
Mike Ingram
Ombudsman