

The complaint

Mr H complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance ("BPF"), unfairly turned down his claim under the Consumer Credit Act 1974 ("CCA"). Mr H is represented by a professional representative ("PR").

What happened

In March 2010 Mr and Mrs H purchased points from a timeshare company I will call D. This cost £8,400 and was funded by a loan from BPF in Mr H's name. The loan was repaid on 14 September 2010.

Additional points were purchased December 2012 at a cost of £8,150 funded in part by a credit card payment and the balance with a loan from BPF in Mr H's name. The loan was repaid on 11 August 2013. Although the purchases were made by Mr and Mrs H jointly the complaints are made by Mr H alone since only he entered into agreements with BPF. In this decision, for simplicity, I will refer to Mr H as the purchaser.

According to D Mr H made extensive use of his points and made 47 reservations in the period between February 2011 and June 2017.

In October 2017 PR submitted a claim under s.75 CAA in respect of the 2010 purchase. BPF rejected this and said it had been made out of time. In October 2019 PR made a second

claim under s.140A CAA in respect of the 2012 purchase. This too was rejected by BPF. In June 2018 PR submitted a complaint to this service on behalf of Mr H. It has raised numerous points which I will summarise in brief:

S 75 Claim

- D misrepresented the product by making a number of false claims.
- Mr H was pressurised into making the purchase.
- Due to the actions of D the time limit for the claims was extended by s. 32 of the Limitation Act 1980.

S. 140A Claim

- D misrepresented the product by making a number of false claims.
- D was in breach of contract due to breaking Spanish law and it should be treated as being null and void.
- D had breached the EU Directive 2008/122/EC.
- BPF paid a commission to C and as such was in breach of fiduciary duty.

- There was an unfair relationship due to the commission paid, plus a variety of other related reasons.

The complaint was considered by one of our investigators who didn't recommend it be upheld. He said the claims under s.75 were out of time and s.32 LA wasn't relevant. He also thought the s.140A claims had been made in time. On the question of unaffordable lending he didn't believe this had any merit. He also addressed other issues such as the alleged breach of contract and didn't consider the actions of D or BPF contravened UK law.

PR didn't agree and said the conclusion reached by our investigator was manifestly wrong. It submitted a generic Counsel's Opinion and then a paper addressing the activities of D. It later requested that this service submit a list of question to BPF and refer the answer to it.

Our investigator said the additional generic material did not cause him to change his mind.

I issued a provisional decision as follows:

"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.

PR has sent us a considerable amount of information and submissions in an effort to explain what it thinks the outcome of this complaint should be. However, as this service is designed to be a quick and informal alternative to the courts, my role as an ombudsman isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint. And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my

reasons for reaching them. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to this complaint, when doing that.

The S. 75 Claims for Misrepresentation

S. 75 of the CCA states that, when a debtor (Mr H) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (BPF) is equally and concurrently liable for that claim – enabling the debtor to make a ‘like claim’ against the creditor should they choose to.

A claim for misrepresentation against D would ordinarily be made under s. 2(1) of the Misrepresentation Act 1967 (the ‘MA’). And it was held in Green v Eadie & Others [2011] EWHC B24 (Ch) (‘Green v Eadie’) that a claim under s. 2(1) of the MA is an action founded in tort for the purposes of the LA. So, the limitation period expires six years from the date on which the cause of action accrued (see s. 2 of the LA).

Mr H made like claims against BPF under s. 75 of the CCA and the limitation period for those claims is the same as the underlying misrepresentation claims. As noted in paragraph 5.145 of Goode: Consumer Credit Law and Practice, BPF may adopt any defence that would have been or would be open to the Supplier, including that of limitation.

There is no difficulty in treating the debtor's rights under sub-s (1) as a “like claim” against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited his liability, the creditor may shelter behind that exclusion or limitation.

So, this means that Mr H had six years from the date on which the causes of action accrued to make his s. 75 claim.

The date on which the causes of action accrued is the point at which Mr H entered into the purchase and credit agreements. I say this because the Letters of Claim and Complaint say that he entered into the purchase agreements based on the alleged misrepresentations of D.

And as the loans from BPF in 2010 and 2012 were used to help pay for the purchases, it was when he entered into the credit agreements that he suffered a loss.

It follows, therefore, that the causes of action accrued in March 2010 and December 2012 – which means that, at the latest, he had six years from when he entered into the relevant credit agreements to make his claims. But as he didn't do that until October 2017 and October 2019, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, his claims are likely to have been too late. And for that reason, I think BPF has a defence to them under the LA.

The claim under s.140A CCA

Under this section a court may make an order under section 140B CCA in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but this is relevant law and I said that I had taken it into account.

The LA applies to a claim under s.140A CCA too. It was held in Patel v. Patel [2009] EWHC 3264 (QB) that when considering s.140A CCA, the time for limitation purposes ran from the date that the credit agreement ended if it was not still running at the time the claim was made. As with an action under s.75 CCA, the limitation period is six years. That is because the claim Mr H made is for repayment of sums he paid to the loan, which is an action for sums recoverable under statute to which s.9 LA applies. That meant Mr H would have to bring an action within six years of March 2010 and December 2012 at the latest. As he didn't do that, I consider he brought the claim too late.

Could the limitation period be extended?

The LA provides for extensions of the time limits in certain circumstances. Having considered the facts of this complaint, I didn't think the time limits I set out above could be extended under any of the provisions of the LA. I considered several reasons specifically raised in more detail.

PR has suggested s.32 LA is relevant. It states that in cases where an action is based on the fraud of the defendant or a fact relevant to the right of action has been deliberately concealed from the claimant by the defendant, the limitation period only starts to run from when a claimant discovers the fraud or concealment (or could have discovered it using reasonable diligence). It has been suggested that the payment of commission and the fact that the alleged misrepresentations were fraudulent could engage this provision.

I considered what PR said about the amount of commission that might have been paid by BPF to the timeshare provider for arranging the loan. PR argued that BPF should have told him about that. From what I had seen across the industry, I understand that if commission was ever paid it tended to be low and of less than 10%. I am satisfied BPF didn't breach any duty in making such a payment, nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances. Further, I didn't think the levels of commission that were normally paid in this situation were sufficiently high to mean that BPF should have appreciated not disclosing commission to Mr H risked the relationship being unfair under section 140A CCA.

For those reasons, I am not persuaded that Mr H is able to rely on s.32 LA here. For the avoidance of any doubt, I would make it clear that I have seen nothing to show that the timeshare supplier was acting as agent to Mr H. I can't see that its role was to make an impartial or disinterested recommendation about taking out the loan. And I don't think the timeshare provider needed to disclose the fact that it might have received a commission to

Mr H. So I can't say BPF acted improperly in paying a commission to the timeshare supplier, if any such commission was paid.

As I said, I thought any commission paid here was unlikely to be more than 10%. So, even if I was satisfied that Mr H could rely on s.32 LA to assist with this part of his complaint, I am not persuaded it was likely a court would conclude that any commission paid created an unfair debtor-creditor relationship.

I have also considered whether s.32 LA assisted Mr H if the alleged misrepresentations were fraudulent. For there to be a cause of action for a fraudulent misrepresentation, and therefore one which BPF could be jointly liable for under s.75 CCA, there would need to be a number of things needed to be found. There would need to be a false representation by the fraudster, that representation would need to have been made knowing it was false (or being reckless as whether it was false), the fraudster would need to intend the claimant acts in

reliance of the representation and as a result of that, they suffered a loss. Here I couldn't see any evidence that any of those four elements were satisfied. In particular, I don't consider Mr H has set out in any level of detail the false statements of fact that were allegedly made to them by the supplier.

I also note that Mr H and his family were able to make extensive use of the points and this somewhat undermines some of the claims made by PR on his behalf. According to D: "They had difficulties getting an upgraded apartment size for an existing booking in April 2015, were unable to get a booking at a specific resort in Lanzarote for June 2014 when they contacted us in May 2014 (although they did successfully secure a reservation at another

resort on the same island for their desired dates), and could not find any availability for Tenerife in November 2011 when they contacted us in September 2011, but these are the only issues I've spotted. It should be pointed out that on both of the latter two occasions, the resorts had been available for them to book for many months at the time that they contacted us."

The Lending Decision

While PR says that Mr H suffered detriment because the right checks weren't carried out before BPF lent to him, very little has been said about this particular allegation. And even if I were to find that BPF failed to do everything it should have when it agreed to lend (and I make no such finding), I'd have to be satisfied that the lending was unaffordable for Mr H before also concluding that he lost out as a result. As I haven't seen anything to persuade me that was the case, I don't currently think this is a reason to uphold this complaint given its circumstances.

I have noted the Counsel's Opinion and the latest submissions by PR including the request for this service to seek further information. The points made in these generic documents do not give me reason to uphold the complaint and I do not consider it necessary to seek further information to reach a reasonable and fair conclusion in this complaint.

Conclusion

Overall, I thought BPF fairly considered the things it needed to when it said the claims were brought too late. It is ultimately for the courts to decide whether or not any claim that Mr H may have against the supplier or BPF has expired under the LA. But, as far as I can see from the information available, any claim that Mr H might have against the supplier and/or BPF had most likely exceeded the time limits set out in the LA. I thought it was reasonable to take that into account in these circumstances. I also think it was also entitled to conclude that the claims also failed on their merits. Overall I am not persuaded that BPF acted unfairly in declining the claims."

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 responded to say it had nothing further to add. Despite being reminded PR has not responded. As such I have been given no reason to alter my provisional decision.

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 H to accept or reject my decision before 18 August 2023.

Ivor Graham
Ombudsman