

The complaint

Mrs S, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected her claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. I gather the purchase was made by Mr and Mrs S, but as the finance agreement was in Mrs S' name she is the eligible complainant. In this decision for simplicity I will refer to Mrs S as the sole purchaser.

What happened

In 2009 Mr and Mrs S purchased a holiday product from a company I will call C. This was funded by a loan in Mr S's name and this has been the subject of a separate complaint. In October 2010 on a visit to one of C's resorts they upgraded their membership at a cost of £7,403. This was funded by a loan from BPF in Mrs S's name and this is the subject of this complaint.

In December 2018 PR submitted a letter of claim to BPF. The letter went into some detail but as this is well known to both parties I will simply set out the grounds. PR made a claim under s.75 CCA for both misrepresentation and breach of contract. It said BPF was liable for procuring a breach of fiduciary duty and there had been an unfair relationship under s.140A CCA.

BPF issued a holding letter, but I have not seen a final response. In May 2019 PR brought a complaint to this service which broadly repeated the main elements in the letter of claim. It was considered by one of our investigators who didn't recommend it be upheld. He said the claim for misrepresentation under s.75 had not been brought in time. He also said that he could not identify any breach of contract. On the matter of the alleged unfair relationship he did not believe this had been demonstrated. Nor did he consider there were grounds to declare the agreement null and void. Finally he said there was no evidence submitted to show the loan was unaffordable.

PR didn't agree and submitted a generic counsel's opinion. Subsequently it wrote to express concern about the way finance was sold to its clients including Mrs S and suggested we obtain further information from BPF.

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.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mrs S) 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.

It's important to note that, as BPF was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

However, under the Limitation Act 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 Mrs S into the contract were made in October 2010, but no claim was made until December 2018, more than eight years later. I think it very likely therefore that a court would conclude that any claim for misrepresentation against C would be outside the relevant time limit in the Limitation Act.

In the circumstances, I think that it would be reasonable for BPF to reject the claim of misrepresentation.

On the matter of breach of contract PR argues that the contract was illegal under Spanish law although it is governed by English law. It said C demanded a deposit immediately, but I note the contract says there is no deposit. Nor can I see how the alleged breach of the 2010 Timeshare regulations could have led to a breach of contract. As such I can see no basis for the claim of breach of contract.

S.140 A

Only a court has the power to decide whether the relationships between Mrs S 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 s. 140A is "an action to recover any sum recoverable by virtue of any enactment" under s. 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 Mrs S could be said to have a cause of action in negligence against BPF anyway.

The alleged loss isn't related to damage to property or to her 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 assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that BPF owed Mrs S a duty of care to ensure that C complied with the 2010 Regulations and it argues at length that the payment of commission created an unfair relationship. As for the issue of commission BPF has not denied that commission was paid. In my experience of this industry the sums paid were not such that they could be said to have led to an unfair relationship.

Indeed although PR has not submitted all the documentation signed by Mrs S I am aware that C's Member's Declaration usually includes a paragraph that mentions that commission is paid and details can be made available. While I cannot say if this was included in the paperwork given to Mrs S I think it likely that she could have asked for details of the commission paid.

Is the loan agreement voidable?

PR has referenced an EU Directive, Spanish law and a Spanish court judgement. However, I can see no reason why the agreement would be voidable under English law (the law that applies in this case). It follows, I do not think the associated BPF credit agreement is voidable.

Further, the EU Directive was enacted into English law in the Timeshare Regulations 2010. I'm not aware that any of those provisions prohibited the sale of timeshares like the one bought by Mrs S. In fact, in a recent House of Commons Library Briefing Paper, "Timeshares: common problems faced by UK owners", it was said that a 'floating week' or 'points'-based timeshare were basic timeshare models that were not described as being problems in and of themselves. Based on the evidence I have seen; I don't think the timeshare agreement - nor the related credit agreement - was voidable.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible.

Our investigator said that he could not see any evidence that Mrs S found the loan unaffordable. 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 Mrs S lost out as a result of its failings. Following the issue of our investigator's view PR has made generic points about affordability, but has not provided evidence that she would have found, or did find, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

I appreciate Mrs S is dissatisfied with her purchase and she has my sympathies for this, but, in summary I cannot see why any of her claims were likely to have succeeded. So overall I think that BPF acted reasonably in not accepting the claims under s.75 and s. 140A CCA.

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 Mrs S to accept or reject my decision before 7 December 2023.

Ivor Graham
Ombudsman