DRN-4279241

The complaint

Mrs O complains that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) ('BPF') didn't fairly or reasonably deal with claims under Sections 75 and 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a timeshare in December 2008. She also says that the credit agreements she entered into with BPF were unenforceable. Mrs O acquired the timeshare points along with Mr I, but the loan was in her name alone so I will refer to her as the purchaser.

What happened

Mrs O bought membership of a timeshare (the 'Club') from a third party I will call C on 11 December 2008. She had previously bought a trial membership in August 2008 and upgraded this at a net cost of £10,699. She took out a loan with BPF for £13,789 to cover the outstanding balance from an earlier loan. The second loan was repaid in March 2019.

In June 2021, using a professional representative ('PR') Mrs O made claims under s.75 and 140A of the CCA for misrepresentation and an unfair relationship.

The reasons for the claims under s. 75 and s.140 were as follows:

"A. The Timeshare sold by The Resort is Null and Void as it is not a timeshare as defined by the EU Directive. Due to The Resort's agreement being Null and Void, the Bank's loan agreement creates an unfair relationship, under section 140A of the Consumer Credit Act, between the Bank and our Client. The Bank's loan agreement is therefore Null and Void.

B. The misrepresentations made by The Resort at the time of sale of The Timeshare has caused financial detriment to our Client. Our Client therefore has a claim against the Bank for the breaches by the Resort due to the misrepresentations under section 75 of the Consumer Credit Act. As a result, the Bank's loan agreement is Null and Void.

C. The Bank did not carry out an affordability assessment on the Client's ability to pay the Bank's loan instalment in accordance with FCA regulations Cone 5.2.2 R (1) and Conc 5.3.1G(4). As a result, the Bank's loan agreement is Null and Void. Similarly, Bank did not ask the client how will she be able to pay the maintenance fees".

I understand that BPF didn't issue a substantive response and a complaint was brought to this service in September 2021. PR submitted a complaint form and a copy of the Letter of Claim along with numerous documents. Much of this restated what had been put in the claim.

The complaint was passed to an investigator who, having considered the information available, concluded that Mrs O's claim under s. 75 was out of time under the LA.

On the matter of s.140A she didn't consider there was evidence of misrepresentation. She also addressed the claim on an unfair relationship and said that she didn't think:

- The contractual terms were unlikely to be operated unfairly against Mrs O.

- There were any aspects of the relationship between Mrs O and the business that were so unclear that she agreed to the purchase without knowing something that was important to that decision.

- The business' conduct fell so short of the standard that could have been reasonably expected that it made the relationship unfair.

She added that she didn't think the Spanish court judgement applied given the contract was governed by English law. Nor did she think the references to the EU Directive led to the conclusion reached by PR that the agreement was null and void.

Nor did she think that the payment of commission amounted to a breach of duty by BPF. Finally, she said no evidence had been provided to show the loan had been unaffordable.

PR disagreed with the investigator's assessment. Much of what it had to say repeated what the Letters of Claim and Complaint said. So, I won't repeat those elements. But, in summary, it did say the following in relation to the limitation period that the investigator thought was relevant to her outcome:

Mrs O's relationship with the Bank ended on 11 March 2019. The decision in Smith v RBS [2021] EWCA Civ 1832 makes clear that once the debt has been repaid, that is the point of time that limitation runs from.

Section 14A of the LA gives Mrs O more time to make her claims because BPF ought to have known about European Directive 94/47/EC before providing Mrs O with the finance to make the purchases in question. In PR's view, therefore, BPF owed Mrs O a duty of care and shouldn't have provided her with finance to purchase the timeshare that was in breach of the relevant regulations. It set out its interpretations of s. 14 as follows:

"S.14 LA Interpretation

1. CLC breached both Timeshare Regulations – 1992 Act – by selling our Clients the Points timeshare as described above

2. As a result of breaches of the law, the Bank as principal of its agent – CLC – is responsible for the actions of its agent.

3. These breaches of the law has resulted in the Bank being negligent as the Bank had a duty of care to the Client to ensure all laws were being complied with.

4. The Bank cannot claim ignorance of CLC's actions as a defence as the Bank and the CLC agreement were "linked agreements" so the Bank had a duty of care to ensure all laws were being complied with.

5. As highlighted in the Barclays Partner Finance v FCA case (Appendix 7), the Bank is responsible for the actions of its agent.

6. S14 extends the time the client has to make a claim to the Bank to 3 years from the date of knowledge of when the Client became aware of these breaches – when the Client contacted [PR]

7. The Client's claim is therefore not time barred"

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 currently 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 (Mrs O) 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 C 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).

Mrs O 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 Mrs O had six years from the date on which the causes of action accrued to make her s. 75 claims.

The date on which the causes of action accrued is the point at which Mrs O entered into the purchase and credit agreements. I say this because the Letters of Claim and Complaint say that she entered into the purchase agreements based on the alleged misrepresentations of C.

And as the finance from BPF in 2008 was used to help pay for the purchases, it was when she entered into the credit agreements that she suffered a loss.

It follows, therefore, that the causes of action accrued in December 2008 – which means that, at the latest, she had six years from when she entered into the relevant credit agreements to make her claims. But as she didn’t do that until September 2021, and as I can’t see a reason why the limitation period is likely to be postponed in keeping with the LA, her claims are likely to have been too late. And for that reason, I think BPF has a defence to them under the LA.

Grounds to Extend Time

S. 14A of the LA provides claimants with a “Special time limit for negligence actions [in which] facts relevant to cause of action are not known at date of accrual”. And PR says that this provision gives Mrs O more time to make her claims. In its view, BPF acted negligently when it paid the C what remained of the purchase price in 2008 because it owed Mrs O a duty of care to ensure that the 1992 Act was complied with by C.

The PR has suggested that both the s.140A and s.75 claims were made in time because s.14A of the LA. However, as I will discuss below the claim under s.140A was made in time without the need to rely on s.14A.

A claim for negligence is a cause of action in tort. And as noted in paragraph 32.35 of Goode: Consumer Credit Law and Practice, s. 75 of the CCA can’t find a claim in tort against the creditor except on the basis of a fraudulent or negligent misrepresentation. But on my reading of this complaint, Mrs O’s allegations of misrepresentation don’t set out in any detail the representations that are said to have been made by C – let alone assert, with that detail in mind, that C owed her a relevant duty of care when making such representations. So, to the extent that there were s. 75 claims for misrepresentation, s. 14A of the LA doesn’t help Mrs O’s cause.

Nor does the case of Smith v RBS assist Mrs O since it addresses claims under s.140A and not s.75.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationships between Mrs O 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 as I understand it the loan was repaid in 2019 and the claim was made in September 2021 and it was made in time.

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

Mrs O's 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 – over and above ensuring that Mrs O could afford to repay what she was borrowing.

PR seems to suggest that, because C was BPF's statutory agent under s. 56 of the CCA, BPF owed Mrs O a duty of care to ensure that C complied with the 1992 Act. And PR says that BPF breached that duty by failing to carry out – before granting Mrs O credit and paying C – the due diligence necessary to ensure that the product purchased by Mrs O wasn't sold by C in breach of the 1992 Act.

However, English law recognises that there can't be a duty of care owed to everyone, in every situation and against all forms of harm. And there are legal tests to ascertain whether a duty of care is owed to someone in a given situation. They are:

1. A three-stage test set down in Caparo Industries v Dickman [1990] – which asks whether:

i. The damage was foreseeable.

ii. There was a sufficiently proximate relationship between the parties.

iii. It's fair, just and reasonable in all the circumstances to impose a duty of care.

2. The "assumption of responsibility test" in Henderson v Merrett Syndicates Ltd [1995], which was concerned with whether the defendant had taken on the responsibility of exercising reasonable care and skill towards the claimant.

3. Situations in which a duty of care was owed to the claimant by the defendant because such a duty had already been established by the courts.

Yet despite PR's lengthy submissions, it hasn't persuaded me with reference to any of these tests or relevant authorities that the lender owed the debtor and the purchaser of a timeshare a duty of care to ensure that the product they were purchasing wasn't sold by C in breach of a relevant regulation – particularly one that imposed a criminal sanction.

PR also seems to suggest that Mrs O had a cause in negligence against BPF because it breached the 1992 Act directly by making payments to C during Mrs O's withdrawal period. But, in my view, it wasn't possible for BPF to breach the 1992 Act.

And on my reading of the legislation, it was only C – or its agent – who could breach it. After all, it was only a timeshare provider or its agent who could enter into a timeshare agreement in the course of business.

As things stand, therefore, I can't see why any of Mrs O's claims were likely to have succeeded.

Commission

I know PR says that Mrs O has concerns about undisclosed commission. But had such a payment been made to C by BPF, I haven't seen anything to suggest BPF would have breached a duty by making it – nor have I seen anything to suggest it was under a regulatory duty to disclose the amount of commission paid in these circumstances. What's more, as I understand it, the typical amounts of commission paid by BPF to suppliers (like the supplier in this case) was unlikely to be much more than 10%.

So, in the absence of evidence to the contrary, I think it's unlikely that the levels of commission normally paid in situations like the one in question were high enough to put BPF on notice that not disclosing commission to Mrs O risked making the debtor-creditor relationship unfair.

The Purchase Agreement

PR's argument that the purchase agreement was 'null and void' was framed as giving rise to an unfair debtor-creditor relationship under s. 140A.

However, "providing credit or otherwise being a creditor under a regulated consumer credit agreement" was an activity covered by the Financial Ombudsman Service's Compulsory Jurisdiction in December 2008. As the PR's argument here is to suggest that the credit agreement couldn't and shouldn't have been enforced by BPF because the associated purchase agreements were unenforceable, I've considered the argument separately to Mrs O's s. 140A claims.

It's possible that the purchase agreements entered into by Mrs O in December 2008 failed to comply with the information requirements in the 1992 Act. But nowhere in that Act (nor the European Directive 94/47/EC) can I see that a purchase agreement could be rescinded by a consumer if the information in question wasn't provided. And that's both a relevant and important consideration here as, generally speaking, a purchase agreement isn't rescindable simply because it – or part of it – was or became unenforceable.

The legal basis on which PR makes its argument here isn't entirely clear as it hasn't drawn my attention to any general points of law or authorities that deal with the situation in which a supply contract was/is unenforceable against the consumer.

I recognise that it was held by the Supreme Court in Durkin v DSG Retail [2014] UKSC 21 ('Durkin') that, if a debtor rescinds a supply contract that they have the right to rescind, they can also rescind a credit agreement whose purpose had been to finance the debtor's entry into that supply contract.

The legal mechanism by which this occurs is an implied term that deems the credit agreement contingent on the survival of the supply contract.

But, in the absence of any case law, I don't think the decision in Durkin can be said to have any application in a situation in which a supply contract was/is unenforceable against the consumer. An unenforceable purchase agreement under the 1992 Act is very different from one that the consumer is entitled to rescind. And even when the unenforceability of a purchase agreement is invoked by a consumer to support a CCA claim (as here), I've seen nothing to persuade me that it equates to terminating the contract, let alone unwinding it from the start.

So, the fact that the purchase agreement entered into by Mrs O might have been (and still might be) unenforceable against her has very different legal consequences to those which flow from the rescission of a supply contract. Any attempt to apply Durkin here would require a considerable extension of its reasoning by the courts. And for that reason and those above, I'm not currently persuaded that this is a reason to uphold this complaint.

As for the judgment of the Spanish Supreme Court that PR says is relevant, I don't think it helps Mrs O's cause either. My understanding is that agreements with C were to be construed in accordance with English law.

And I've seen nothing to suggest the purchase agreement entered into at the time of the purchase was any different. So, I can't see how the judgment of a Spanish court can be applied directly to the question as to whether the relevant purchase agreement was/is voidable under English law. And for that reason, I don't currently think there are any implications on the credit agreement that justify upholding this complaint.

The Lending Decision

While PR says that Mrs O suffered detriment because the right checks weren't carried out before BPF lent to her, 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 Mrs O before also concluding that she 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."

PR submitted a detailed response which I will summarise briefly. It addressed the s.140A claim and the linked 1992 Timeshare Regulations with particular reference to a recent judicial review judgement.

The judicial review decision concerned the 2010 Timeshare Regulations, but PR said that in the relevant areas the two were the same or similar.

It said C had failed to disclose necessary information as required by the Timeshare Regulations which meant the withdrawal period was extended to three months and 10 days. The payment by BPF before the end of that withdrawal period was material a breach.

The breaches by C were also the responsibility of the bank since s.56 states that any antecedent negotiations by C were deemed to have been done by of BPF.

It sought to draw out similarities between this complaint and those cases decided by the judicial review again referencing the material breach made when payment was made before the withdrawal period was complete.

It said the decision also supported its view that s.140A gave protection to Mrs O and so one had to consider there had been an unfair relationship. This stemmed from breaches of the Timeshare Regulations.

It did not accept my view that as Mrs O's loss was financial that this did not mean that it was recoverable in a claim of negligence. It argued that the link between C and BPF which existed due to s.11, s.12, s.56 and s.140A CCA meant the loss wasn't purely financial since it was property related.

It said there had been a misunderstanding and that it hadn't argued that BPF owed a duty of care to ensure C complied with the Timeshare Regulations. It said it was making the point

which it has made in several different guises that s.56 creates a statutory agency which makes BPF responsible for any breaches by C.

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.

Firstly I would like to address what PR has said about the findings of the High Court following the recent judicial review of the Financial Ombudsman Service and the approach PR thinks it should take to this complaint, which in simple terms is that I should take an identical approach.

As I set out in my provisional decision I consider that Mrs O's claims under s.75 and s.140A were made out of time and as the question of limitation wasn't part of the judicial review it isn't directly relevant to this complaint. The High Court did affirm that my fellow ombudsman's findings on s.56 CCA and the extent to which it creates a statutory agency relationship between a creditor and a supplier when there is a debtor-creditor-supplier agreement in place – such that any negotiations between Mrs O and C before her purchase are deemed to have been conducted by C as an agent of BPF. PR argued this complaint should be treated in the same way, but I do not agree.

The complaints at the centre of the judicial review were concerned with a particular type of asset backed timeshare known as a 'fractional ownership timeshare.' Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a share in the 'ownership' of a specific property. They didn't usually confer any rights to stay in that property. But under the terms of the purchase agreement the property is usually set to be sold at the end of the membership period and the net proceeds distributed on a pro rata basis among the fractional owners.

However, that is not the type of timeshare Mrs O bought and I do not consider that it follows that the same decision should be reached in this complaint as in those addressed by the judicial review.

While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction to consider when determining what a fair and reasonable outcome to a complaint might look like.

I accept that some non-fractional timeshares may share a number of contractual terms that were subject of the judicial review and may fall foul of the relevant law on unfair contract terms. However, an assessment of unfairness under s.140A CCA does not necessarily stop at a regulatory breach. It's often necessary to then assess the impact of that breach on the consumer. That much is clear from case law and – including the latest judicial review.

In other words, complaints must be decided on their individual merits which is what I will do in this case.

Extension of the Time Limit

PR argues that C failed to provide the required information under the Timeshare Act 1992, as amended by the 1994 EU Directive (94/47/EC). Section 1A "Obligations to provide information" of the Timeshares Act 1992 says:

“(1) A person who proposes in the course of a business to enter into a timeshare agreement to which this Act applies as offeror (an “operator”) must provide any person who requests information on the proposed accommodation with a document complying with subsection (2) below.

(2) The document shall provide – (a) a general description of the proposed accommodation, (b) information (which may be brief) on the matters referred to in paragraphs (a) to (g) and (i) of Schedule 1 to this Act […], and (c) information on how further information may be obtained.

Sub-section (7) goes on to say: “In this section “the proposed accommodation” means – (a) The accommodation which is the subject of the proposed agreement, or (b) The accommodation in the pool of accommodation which is the subject of the proposed agreement, as the case may be.

Section 1C “Obligatory terms of timeshare agreement” says: “(1) A person must not in the course of a business enter into a timeshare agreement to which this Act applies as offeror unless the agreement includes, as terms set out in it, the information referred to in Schedule 1 to this Act.”

Schedule 1 sets out a “Minimum list of items to be included in a timeshare agreement to which section 1C applies”. This list includes the following, which PR argues were not specified in the timeshare agreement:

“(c) When the timeshare accommodation has been determined, an accurate description of that accommodation and its location.”

“(h) The exact period within which the right which is the subject of the agreement may be exercised and, if necessary, its duration;”

Firstly, based on the extracts above and my wider reading of the Act, the 1992 Act makes provision for timeshare accommodation being from a pool of accommodation, so I think it was drafted with those types of arrangements in mind. Nothing in the 1992 Act makes me think selling those types of timeshares was prohibited. So, I don’t think all timeshare agreements had to refer to a specified apartment or set week to comply with the 1992 Act in the way PR argues. I think setting out the resorts Mrs O could use (in other words, the ‘pool’ of accommodation) was sufficient for the purposes of the regulations.

So, I am not persuaded R failed to comply with the Timeshare Act 1992 requirements on this point.

This means I also don’t think the longer withdrawal period applies, or that C or BPF breached the Timeshare Act 1992 by taking advance payments within the withdrawal period.

In any event, there is nothing in the Timeshare Act 1992 that means the timeshare agreement would be unenforceable, even if the minimum standard information requirements or other requirements under the Timeshare Act were not complied with. Given I still do not agree that C breached the Timeshare Act 1992 in the way PR has argued, I also still don’t think Mrs O had a claim for negligence against either C or BPF on this basis. It follows that I also still disagree that section 14A of the LA should apply to extend the applicable time limits for Mrs O’s claims under the CCA.

S. 140 A

PR has argued that breaches in the 1992 Regulations made the relationship unfair and so it

should be unwound. However, I think PR is conflating and confusing the part played by s.56 CCA in an assessment of unfairness under s.140A with limitation and whether Mrs O's claims were made in time under the LA.

Mrs O's claims under s.140A weren't made under a provision of the CCA intended to reproduce, against a creditor, the relevant damages claim which a complainant enjoys against a supplier (like s.75 does). However, claims under s.140A are only concerned with whether there was an unfair debtor-creditor relationship. And while C's alleged breaches of the 1992 Regulations (and alleged negligence) would undoubtedly be relevant to an assessment of unfairness because of the statutory relationship created by s.56 between C and BPF, PR hasn't pointed me to any relevant authorities to demonstrate that a claim under s.140A that happens to involve allegations of negligence by a timeshare provider changes that claim, for the purpose of limitation, from an 'action to recover any sum recoverable by virtue of any enactment' governed by s.9 of the LA, to a claim for negligence governed by s.14A.

As such I am not persuaded that s.14A gave Mrs O more time to make her s.140A claims.

I would add that I appreciate PR's attempt to turn a financial loss into a property loss simply because there was accommodation which Mrs O could use as part of her purchase. However, she acquired membership of a club, not of a property and her loss, if any, was financial.

In conclusion I remain unpersuaded that this complaint should be upheld or that BPF should respond differently to the claim made by Mrs O.

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 O to accept or reject my decision before 15 September 2023.

Ivor Graham
Ombudsman