DRN-4253523

The complaint

Mr H and Miss P complain that Clydesdale Financial Services Limited, trading as Barclays Partner Finance ("BPF"), unfairly turned down their claims under the Consumer Credit Act 1974 ("CCA"). Mr H and Miss P are represented by a professional representative ("PR").

What happened

In January 2009 Mr H and Miss P purchased a holiday product from a company I will call L at a cost of £3,445. Miss P took out a loan from BPF in January 2009 details of which are unknown. Apparently this was replaced with a second loan for £3,445 taken out in June 2009. In September 2009 a second holiday product was purchased at a cost of £9,245. Mr H took out a loan from BPF for £9,245.

BPF has told this service that Miss P's June loan was sold in October 2015 and Mr H's was written off in June 2011.

PR submitted a detailed letter of claim to BPF on 30 August 2018. It responded with a detailed letter rejecting the claim. In addition to rebutting the merits of claim it said that it had been made out of time.

PR brought a complaint to this service on behalf of Mr H and Miss P. It said the products had been misrepresented as follows:

- They were told the only way they could exit their membership was to purchase a new product.
- They were told that their son would be responsible for management charges after their death.
- They were told they could sell the product back to the resort or to a third party, but this was not true.
- They were told they were joining an exclusive club.
- They were told they would receive luxury accommodation.

It also argued there had been a breach of contract because the agreement lasted for more than 50 years. It added that BPF had broken the European Timeshare Directive and breached its fiduciary duty. It also argued there had been an unfair relationship under s. 140A CCA.

The complaint was considered by one of our investigators who didn't recommend it be upheld. He concluded the s.75 claim was made out of time as was the s.140A claim for the second purchase. He didn't consider PR had established an unfair relationship between BPF and Mr H. Nor did he think there was evidence of unaffordable lending.

PR didn't agree and submitted a generic Counsel's Opinion on timeshares and L. Later it

forwarded an email from Miss P with information stating she had stopped making payments on her loan in December 2014 and Mr H's loan had ended in January 2011. She said the repayments they had been offered were affordable, but they had been asked to pay more. She also said that an earlier claim had been made in 2016, but without providing any details of this claim.

Subsequently, PR requested that we ask BPF a list of questions and share the answers with it. PR argued that this information was relevant to the s.140A claim and was needed to ensure fairness. It suggested that our approach on affordability was at odds with the Financial Conduct Authority's ("FCA") view.

I issued a provisional decision as follows:

"*What I've provisionally 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.

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 and Miss P) 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.

In this case it has been disputed as to whether the required agreement is in place as BPF has suggested the payment was made to another company. My understanding is that the company receiving the payment and L are connected and that means s. 75 has effect, but I make no finding on that point since it is not material to my decision.

A claim for misrepresentation against L 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 and Miss P 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 and Miss P had six years from the date on which the causes of action accrued to make their s. 75 claim.

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

And as the finance from BPF in 2009 was used to help pay for the purchases, it was when he entered into the credit agreements that they suffered a loss.

It follows, therefore, that the causes of action accrued in January and June 2009 – which means that, at the latest, they had six years from when he entered into the relevant credit agreements to make their claims. But as they didn't do that until August 2018, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, their claims are likely to have been too late. And for that reason, I think BPF has a defence to them under the LA.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationships between Mr H and Miss P 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 agreements – which it does, in part at least.

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.

It appears the loan taken out by Miss P in January 2009 was closed in June 2009. That means it falls outside the limitations period. The second loan taken out by her continued until at least 2015 and so any claim under s.140A has been made in time. But, I have seen no evidence that this second loan was used to pay L and so it has no relevance to any claim under s.140A. It may have been used to clear the first loan, but that does not mean it falls within the ambit of s.140A in regard to the claim made by PR.

The loan taken out by Mr H was ended in 2011 and so falls outside the limitation period. Ultimately it is for a court to decide if either claim falls within the time limits, but my view is that it was reasonable for BPF to reject the claims as being made out of time.

However, even if the claims were made in time I'm not persuaded that Mr H or Miss P could be said to have a cause of action in negligence against BPF anyway.

Their alleged loss isn't related to damage to property or to them 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 Mr H and Miss P could afford to repay what they were borrowing.

PR seems to suggest that, because L was BPF's statutory agent under s. 56 of the CCA, BPF owed Mr H and Miss P a duty of care to ensure that L complied with the 1992 Act. And PR says that BPF breached that duty by failing to carry out – before granting them credit and paying L – the due diligence necessary to ensure that the products purchased by them weren't sold by L 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 L in breach of a relevant regulation – particularly one that imposed a criminal sanction.

PR also seems to suggest that Mr H and Miss P had a cause in negligence against BPF because it breached the 1992 Act directly by making payments to L during their withdrawal

periods.

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 L – 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, if for reasons that have not been made clear the claims were made in time, I can't see why any of Mr H or Miss P's claims were likely to have succeeded.

Commission

I know PR says that Mr H and Miss P have concerns about undisclosed commission. But had such a payment been made to L 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 Mr H and Miss P risked making their 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 the s. 140A claims.

It's possible that the purchase agreements entered into by Mr H and Miss P 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 agreements entered into by Mr H and Miss P might have been (and still might be) unenforceable against them 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.

The Lending Decision

While PR says that Mr H and Miss P suffered detriment because the right checks weren't carried out before BPF lent to them, very little has been said about this particular allegation other than generic comments from PR. 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 before also concluding that they lost out as a result. I am aware they failed to repay the loans, but not that this was due to their being unaffordable. 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 would add that prior to April 2014 consumer credit was regulated by the Office of Fair Trading (OFT) and not the FCA as suggested by PR. Under the OFT regime the lending checks required were different from those required by the FCA."

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 said it had nothing to add and PR asked for an extension. This was granted until 12 July, but it 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 and Miss P to accept or reject my decision before 18 August 2023.

Ivor Graham
Ombudsman