

The complaint

Ms R has complained that Clydesdale Financial Services Limited, trading as Barclays Partner Finance (“BPF”) has unfairly turned down her claim under the Consumer Credit Act 1974 (“CCA”).

What happened

Ms R, along with another, bought a timeshare membership from a timeshare supplier (“the Supplier”) in September 2006. The total cost of membership was £22,327, which was paid by Ms R taking out a loan in her sole name for that amount with BPF. This was repaid in full in August 2007.

In April 2022, Ms R (using a professional representative (“PR”)) made a claim against BPF under the CCA. In particular, it was said:

- The Supplier had been found to have undertaken fraud in Spain to circumvent consumer protection legislation by selling timeshare memberships as investments.
- Here the membership sold to Ms R was sold on the basis that it was an asset capable of being resold by the Supplier and at a profit.
- It was important to Ms R that the Supplier resold the timeshare for her. She would not have bought it otherwise
- A number of representations were made to Ms R to induce her to take out membership, including that the membership was in great demand and that it was a ‘no lose’ situation, so she would get her money back. Ms R was told that the product was self-financing, meaning the sale would cover the loan cost.
- Ms R was told that the membership would be sold before maintenance became due and that the Supplier was experienced at selling this type of property quickly and for a profit. It was said that the loan taken to pay for membership was short-term and it would be repaid in full from the proceeds of sale. Ms R was told that the investment would be realised the *“following year, or within a few years’ time at least”*.
- PR also alleged that it was represented to Ms R that the Supplier was a bona fide, reputable and solvent company.
- All of these representations turned out to be false and BPF were therefore responsible for answering a claim for misrepresentation under s.75 CCA. Further, the failure of the Supplier to arrange the sale was a breach of contract that BPF was also responsible for under s.75 CCA.
- The Supplier went into liquidation in 2020, at which time Ms R realised that she had been misled over the fact that her membership had been listed for resale and that there was an active resale market.
- PR argues that the Supplier deliberately concealed the matters around the resale market from Ms R, and so she can rely on s.32 Limitation Act 1980 (“LA”) to extend the time to make a claim. Part of the deceit was that the Supplier was telling different things to different customers and this could only be discovered years later when different recollections can be compared and contrasted.
- PR also said there was an unfair debtor-creditor relationship between Ms R and BPF as set out in s.140A CCA. This was down to the problems set out above, unfairness in the terms of the membership and breaches of Spanish law.

BPF responded to the claim. It said that the claims made for misrepresentation and for an unfair debtor-creditor relationship were brought too late under the provisions set out in the LA. It accepted that, when the Supplier went into liquidation, some of the accommodation available under the timeshare memberships was lost. But there was no evidence Ms R had been affected, so it didn't think she'd suffered a loss due to a breach of contract.

Unhappy with the outcome of BPF's investigation into her claim, Ms R brought a complaint to our service. One of our investigators considered the complaint, but didn't think BPF needed to do anything further. He agreed that the claims made under s.75 CCA had been brought too late as he thought that Ms R had six years to bring those claims, but didn't do so until well after that time had passed. He considered s.32 LA, but didn't think it helped Ms R to argue that her claim was brought in time. He also thought that s.140A CCA didn't apply to Ms R's loan as it was closed before the date when s.140A CCA came into effect for loans such as hers.

PR disagreed and provided submissions as to why it thought s.32 LA extended the time to bring Ms R's claims. PR also asked for an ombudsman to reconsider Ms R's complaint.

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.

Under the rules that govern how I decide complaints, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice, when I make my decision.

I also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been supplied to me, I may not address every point that has been raised.

Several claims have been made to BPF. I will deal with each in turn.

The misrepresentation claims under s.75 CCA

Ms R said that the Supplier misrepresented the nature of the membership to her when she bought it and that she has a claim for misrepresentation against the Supplier under the Misrepresentation Act 1967 ("MA"). Under s.75 CCA, BPF could be jointly liable for the alleged misrepresentations made by the Supplier. But BPF argued that any claim brought was made too late. I've considered that argument and, having done so, I agree with what BPF has said. For the avoidance of doubt, I've not decided whether the limitation period has expired as that would be a matter for the courts should a legal claim be litigated. Rather, I've considered whether BPF has acted fairly in turning down the claim.

It was held in Green v Eadie & Ors [2011] EWHC B24 (Ch) [2012] Ch 363 that a claim under s 2(1) MA is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).

Here Ms R brought a like claim against BPF under s.75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which 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. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in diminution or extinguishment of his liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])'

Therefore, the limitation period for the s.75 claim expires six years from the date on which the cause of action accrued.

The date on which a 'cause of action' accrued is the point at which Ms R entered into the agreement to buy the timeshare. It was at that time that she entered into an agreement based, she says, on the misrepresentations of the timeshare supplier and suffered a loss. She says, had the misrepresentations not been made, she would not have bought the timeshare. And it was on that day that she suffered a loss, as she took out the loan agreement with BPF that she was bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in September 2006, so Ms R had six years from then to bring a claim. But she didn't make a claim against BPF until April 2022, which was outside of the time limits set out in the LA. So I think BPF acted fairly in saying this misrepresentation claim had been brought too late.

The breach of contract claims under s.75 CCA

Ms R has said that her agreement with the Supplier was breached as it failed to resell the membership as promised. Alternatively, the representations made became collateral contracts that were also breached.

Ms R hasn't set out what steps she took to market or seek to sell her membership. But it appears that PR isn't arguing on her behalf that there was a specific point in time when a term of the contract was breached, rather it says that the Supplier never had any intention of doing what it said it would do and therefore the contract was breached from its inception.

S.5 LA provides a six year limitation period for a breach of contract claim from the date on which the cause of action accrued, that being the date the contract was breached. But as PR say that happened at the inception of the contract, any claim would have to be brought within six years of September 2006. But as that wasn't done, I think BPF acted fairly in turning down this breach of contract claim.

I've also thought about whether any of the representations that the Supplier would sell the membership were terms. I can't see that Ms R was given a guaranteed date by which her membership would have been sold, but it was said "*the purchase was an investment which could be realised the following year, or within a few years' time at least*". I'm not sure such an imprecise promise could form a term of the agreement but, even if it did, any breach would have happened much more than six years prior to when Ms R brought a claim.

BPF did say that it would offer compensation if Ms R was able to show that she was entitled to use the accommodation rights she had under the membership at the time of the Supplier's liquidation. But as I can't see Ms R provided any evidence that the membership was still running at that time, nor has Ms R asked me to consider this point further, I can't say that BPF needs to pay any compensation for Ms R losing any membership rights.

The claims under s.140A CAA

Ms R's loan was repaid in August 2007. But s.140A CCA only applies to loans that were either taken out after 6 April 2007 or, if taken out before then, were still open on 6 April 2008. As Ms R's loan falls outside of those categories, s.140A CCA can't apply to her loan.

Could limitation be extended?

The LA provides for extensions of the time limits in certain circumstances. I've considered the facts of this complaint and I don't think the time limits set out above can be extended under any of the provisions of the LA.

I have been asked to consider s.32 LA, which states that, in cases in which 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 argued that the Supplier deliberately concealed its false representations from Ms R at the time of sale, in particular PR has uncovered evidence that different people were being told different things at the same time. PR has a number of clients that were sold timeshare memberships by the Supplier at the same time. In summary, it is alleged that the Supplier would tell existing customers that their timeshare memberships in one apartment type ("Type A") were not reselling in the way anticipated, so they needed to upgrade to a different apartment type ("Type B") to get a future sale. But at the same time, the Supplier told other customers that Type A memberships were a good investment that would lead to a return in a short time period. PR says this could only be uncovered once it had spoken to a number of the Supplier's customers and realised the inconsistent things being said, therefore customers were unable to know what they'd been told was wrong until PR had undertaken this exercise.

I think it would be helpful to set out the wording of s.32(1) LA, which deals with the postponement of limitation periods in the case of fraud, concealment or mistake:

"... where in the case of any action for which a period of limitation is prescribed by this Act, either—

- (a) the action is based upon the fraud of the defendant; or*
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
- (c) the action is for relief from the consequences of a mistake;*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

Here, PR alleges that the Supplier committed a fraud and also concealed important matters from Ms R. Further, by virtue of s.56 CCA, the Supplier was acting as BPF's agent, so s.32 LA is engaged. For the purposes of this decision, but without making formal findings, I accept that it's possible that the Supplier's representations, if wrong, were fraudulent to the extent that they were made either with the knowledge they were wrong or simply not caring as to their truth. I also accept, for the purposes of this decision, that it's possible the Supplier said different things to different customers as alleged.

I've also seen advice prepared by counsel for a number of PR's clients dealing with s.32 LA. The advice was prepared on the basis that the Supplier deliberately concealed from its customers that they weren't purchasing a genuine capital asset, that the profitability of the 'investments' were not going to be met, that there was no great demand for timeshare memberships and that the Supplier was not a bona fide seller of memberships. Again, for the purposes of this decision, but without making any formal findings, I accept that it's possible that the Supplier didn't explain these things to Ms R.

I've also thought about what Ms R said happened, as set out in PR's letter of claim. She said the timeshare membership was sold to her as an investment, in other words it was "*a capital asset capable of being resold and at a profit*". Ms R said she was told the only way of relinquishing her earlier timeshare was by taking out membership from the Supplier (although I can't see any reference is made to an earlier timeshare in any sales documentation). The Supplier allegedly said that the membership would be sold at a profit (or for at least the purchase price) within a fixed period of time and the Supplier "*promised that the apartments would be sold before maintenance [fees] became due.*" Further, "*the fundamental selling point was that this purchase was an investment which could be realised the following year, or within a few years' time at least, upon the resale of the units.*" In fact, nothing was ever resold, and Ms R has said she paid maintenance fees.

Ms R has said that she first knew of these issues when she took advice from PR after the Supplier entered liquidation and, as I've detailed above, PR said some of the concerns could only be uncovered once it spoke to multiple customers of the Supplier. But I also need to consider whether Ms R, with reasonable due diligence, could have discovered the alleged fraud and concealments. Here, I think the essential elements needed for Ms R to bring a claim was knowledge that what she'd been told was wrong and that she'd suffered a loss because of it, not that the Supplier said different things to different customers.

I've not been given any details of attempts Ms R took to sell her membership. But it must have been clear to her that, when the membership wasn't sold within two years or a short period, or before any maintenance fees were due, what she'd been told wasn't right. I can't see that Ms R ever asked the Supplier why her membership didn't sell or took steps to enquire why. Nor is it alleged by Ms R that, in a similar way to the concerns PR identified in its investigations, the Supplier told her that she would have to upgrade or change her membership to enable it to sell in the future. The fact that the membership didn't sell within the timescales promised would, I find, be something that put Ms R on notice of the need to investigate. It was from that point that Ms R should have exercised reasonable diligence to find out what had happened. And had she done so at the time, I think she would have been able to find out there was no realistic prospect of selling her membership. But I can't see she took any steps to investigate what had happened and I've had no explanation why she did nothing further until she came into contact with PR in 2022.

PR has said that the precise deceit that was held from Ms R was that the Supplier told one thing to one customer and then a completely different thing to another and that there was never any intention to sell the properties. But that isn't the claim that Ms R makes – rather she says that she was told things that induced her to take out membership that subsequently turned out not to be true, i.e. a claim for misrepresentation. Here, she must have known within a short period of time that the things she was told weren't right, namely that the properties weren't sold for a profit or at all. I can't see that anything about that was concealed from Ms R or that the alleged fraudulent misrepresentations weren't known to her within a short timeframe – she might not have known the precise nature of any the background to the alleged fraud, but she would have known there was a breach of contract or misrepresentation.

For s.32 LA to assist her, Ms R would need to show that she couldn't have discovered the

alleged frauds or concealments before April 2016, which was six years before her claim was made. But for the reasons I've set out above, I think she could have discovered these matters within a few years of the membership being taken out and certainly long before April 2016. I think that any extension of the limitation period Ms R was entitled to under s.32 LA would only have been short. It follows I think BPF had a defence to Ms R's claims and it acted fairly in turning them down.

My final decision

I don't uphold Ms R's complaint against Clydesdale Financial Services Limited, trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 15 September 2023.

Mark Hutchings
Ombudsman