DRN-4279214

The complaint

Mr T 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 2009. He also says that the credit agreements he entered into with BPF were unenforceable. The purchase was made by Mr T and Mrs R, but the credit agreement was in Mr T's name alone. However, as they relate to purchases made by him and Mrs R, I'll refer to them jointly at times throughout this decision.

What happened

Mr T and Mrs R bought membership of a timeshare (the 'Club') from a third party I will call C 21 December 2009. This cost £10,194 and was funded by a loan from BPF which I gather was repaid in October 2018.

In March 2021, using a professional representative ('PR') Mr T 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 Bank loan agreement which includes the extortionate interest rate, creates an Unfair Term under the Unfair Contract Terms Regulations. In addition, the undisclosed secret commissions also is an unfair term. All of these terms makes the loan agreement unenforceable.

C. 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.

D. 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 Conc 5.2.2 R (1) and Conc 5.3.1G(4). As a result, the Bank's loan agreement is Null and Void. The client went into an IVA programme in 2013.

I understand that BPF didn't issue a substantive response and a complaint was brought to this service in February 2022. This repeated much of what and been put in the claim to BPF and added:

“1. Clients were not given sufficient information as to the terms and conditions of the loan agreement required by law;

2. There were no major credit checks made as to the affordability of the repayments such as income versus outgoings reports;

3. The length of the loan agreements were not explained, with client under the impression that they were for two years;

4. Clients were pressured into signing these agreements;

5. False representations were made to clients relating to the financial impact of regulated agreements;

6. Clients were subject to long high pressure sales tactics to purchase the timeshares;

7. Clients were sold timeshares which were not appropriate for them;

8. Vulnerable consumers were treated inappropriately;

9. Concerns about commission arrangements and disclosure thereof.”

The complaint was passed to an investigator who, having considered the information available, concluded that Mr T’s claim under s. 75 was out of time under the LA.

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

- The contractual terms were so problematic as to be unfair in themselves.
- There were any aspects of the relationship between Mr T and the business that were so unclear that he 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.

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 any of that. But, in summary, it did say the following in relation to the limitation period that the investigator thought was relevant to her outcome:

Section 14A of the LA gives Mr T more time to make his claims because BPF ought to have known about European Directive 94/47/EC before providing Mr T with the finance to make the purchases in question. In PR’s view, therefore, BPF owed Mr T a duty of care and shouldn’t have provided him 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. The Bank breached the Timeshare Regulations – 1992 Act by making payments within the Client’s withdrawal period.

3. The Bank as principal of its agent, is responsible for the actions of its agent.

4. These breaches of the law have 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.

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

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

7. As a result of these breaches of the law where the Bank's was negligent, the relationship between the Bank and the Client is unfair under S140A of the CCA.

8. S14A extends the time the Client has to make a claim to the Bank due to the Bank's negligence.

9. Under S14A, the Client has to make a claim to the Bank within 3 years from the date of knowledge of when the Client became aware of these breaches – when the Client contacted [PR] which is within the 3 year limit.

10. 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 (Mr T) 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).

Mr T 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 T had six years from the date on which the causes of action accrued to make his s. 75 claims.

The date on which the causes of action accrued is the point at which Mr T 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 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 he suffered a loss.

It follows, therefore, that the causes of action accrued in December 2009 – 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 March 2021, 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.

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 Mr T more time to make his claims. In its view, BPF acted negligently when it paid the C what remained of the purchase prices in 2009 because it owed Mr T 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, Mr T'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 him 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 Mr T's cause.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationships between Mr T 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 2018 and the claim was made in March 2021 and it was made in time.

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

Mr T's alleged loss isn't related to damage to property or to him 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 to nothing to persuade me that BPF assumed such responsibility – whether willingly or unwillingly – over and above ensuring that Mr T could afford to repay what he was borrowing.

PR seems to suggest that, because C was BPF's statutory agent under s. 56 of the CCA, BPF owed Mr T 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 Mr T credit and paying C – the due diligence necessary to ensure that the product purchased by Mr T 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 Mr T had a cause in negligence against BPF because it breached the 1992 Act directly by making payments to C during Mr T's withdrawal period. But, in my view, it wasn't possible for BPF to breach the 1992 Act.

Regulation 10 of the Timeshare Regulations 1997 inserted the following provision into the 1992 Act in relation to "advance payments":

(1) "A person who enters, or proposes to enter, in the course of a business into a timeshare agreement to which this Act applies as offeror must not (either in person or through another person) request or accept from the offeree or proposed offeree any advance payment before the end of the period during which notice of cancellation of the agreement may be given under section 5 or 5A of this Act.

(2) A person who contravenes this section is guilty of an offence and liable

a. on summary conviction, to a fine not exceeding the statutory maximum, and

b. on conviction on indictment, to a fine.

See Murphy v Brentwood District Council [1991].

(3) Subsection (1) above only applies if the offeree or proposed offeree

a. is an individual, and

b. is not acting in the course of a business.

(4) Subsection (1) above only applies if

a. the accommodation which is the subject of the agreement or proposed agreement is accommodation in a building, or

b. some or all of the accommodation in the pool of accommodation which is the subject of the agreement or proposed agreement is accommodation in a building, as the case may be."

And on my reading of that provision, 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 and request or accept payment before the end of the withdrawal period.

As things stand, therefore, I can't see why any of Mr T's claims were likely to have been made in time under the LA.

Commission

I know PR says that Mr T 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 Mr T 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. But as I've already explained why the claims under that provision were likely to have been made out of time under the LA, it isn't necessary to consider this argument in that context.

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 2009. 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 Mr T's s. 140A claims.

It's possible that the purchase agreements entered into by Mr T in December 2009 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 Mr T might have been (and still might be) unenforceable against him 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 Mr T'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 Mr T 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 T 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."

PR didn't agree and submitted a detailed response. In summary it said:

- C had breached the Timeshare Regulations. In particular Mr T was not given key information about the properties.
- C had contravened the Consumer Protection from Unfair Trading ("CPUT") Regulations 2008 by not providing relevant information leading to a misleading omission.
- As the key information had not been provided the withdrawal period was extended to three months and 14 days during which BPF should not have made payment to C. However it had paid the money over after some 17 days.
- Mr T and Mrs R were unduly pressurised and Mrs R was pregnant at the time and fainted during the meeting.
- Mr T and Mrs R were subsequently made bankrupt.
- Under s.56 the legislation for unfair relationships, s.140A, had effect and due to the failure to provide the necessary information this claim should succeed.

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.

Mr C argues that R failed to provide the required information under the Timeshare Regulations 2010. I have only been provided with some documentation from the sale and so it is impossible to say what information was provided. They require amongst other things in Schedule 1:

Short description of the product (e.g. description of the immovable property):

Exact nature and content of the right(s):

Exact period within which the right which is the subject of the contract may be exercised and, if necessary, it duration:

Date on which the consumer may start to exercise the contractual right:

If the contract concerns a specific property under construction, date when the accommodation and services/facilities will be completed/available:

Part 3

where the contract concerns a specific immovable property, an accurate and detailed description of that property and its location; where the contract concerns a number of properties (multi-resorts), an appropriate description of the properties and their location; where the contract concerns accommodation other than immovable property, an appropriate description of the accommodation and the facilities,"

Firstly, based on the extracts above and my wider reading of the Act, it makes provision for timeshare accommodation being from a pool of accommodation, so I think it most likely was drafted with those types of arrangements in mind. Nothing in the 2010 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 Act in the way PR argues. I think setting out the resorts Mr T could use (in other words, the 'pool' of accommodation) was sufficient for the purposes of the regulations. And PR hasn't argued that Mr T and Mrs R didn't know which properties they could use, or that the relevant properties weren't disclosed to them. So, I am not persuaded C failed to comply with the Timeshare Act 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 by taking advance payments within the withdrawal period.

In any event, there is nothing in the Timeshare Act 2010 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 2010 in the way PR argued, I also still don't think Mr T 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 Mr T's claims under the CCA.

Consumer Protection from Unfair Trading ("CPUT") Regulations 2008

PR says that information omitted by C contravened CPUT Regulations. These state:

"6.(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

(a)the commercial practice omits material information,

(b)the commercial practice hides material information,

(c)the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

(d)the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."

I don't believe this is an argument which was raised with BPF, but I believe it is reasonable for me to consider it since it is linked to the other arguments raised in connection with s.140A

PR has indicated that it considers the non-disclosure of information required by regulation 12 of the Timeshare Regulations was also a material breach for CPUT. However, as I explain above I do not consider there was a failure under the Timeshare Regulations. I believe Mr T was aware he was buying a timeshare which gave him access to holiday accommodation. Not specifying a property is not misleading information.

PR said in its claim that: "Our client was finding it more and more difficult to secure holidays…" This indicates that he had taken some holidays which suggests that he made use of his purchase. In other words I don't believe that PR has demonstrated there was a material omission which would allow me to uphold this complaint.

Affordability

PR has submitted a 'Letter of Discharge of Debtor' for Mr T and one for his wife. This shows that he was discharged in August 2017. It appears that he entered bankruptcy in or around September 2013. His loan account with BPF records monthly payments of £152.96 being made up to and including January 2013. From April 2013 through to September 2013 Mr T made reduced payments. The loan balance of £9,311. 23 was written off in October 2018 after a lump sum payment of 1,030.79.

I have no other information about Mr T's financial position and I cannot say what led to his bankruptcy. PR simply says that the bankruptcy came about due to the levels of debt, but does not explain with any detail the role played by this loan. Nor does it set out Mr T's financial position at the time it was taken out. He was able to maintain payments for some three years and this does not indicate that the loan repayments were unaffordable until much later.

The Sale

Mrs R has said they were put under pressure during the meeting to make the purchase. I appreciate that the sales representatives will have endeavoured to get a sale, but I am not persuaded that it was not open to Mr T to say no. He also had a 14 day window in which to withdraw from the agreement which he did not take. Overall, I do not consider this would allow me to uphold this complaint.

Conclusion

While I have every sympathy with Mr T I do not consider I can uphold his complaint.

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 R and Mr T to accept or reject my decision before 25 September 2023.

Ivor Graham
Ombudsman