

The complaint

Mrs C and Mr S, who are represented by a professional representative ("PR") complain that First Holiday Finance Limited ("FHF") rejected their claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product purchased in November 2009.

What happened

In July 2007 Mrs C and Mr S purchased trial membership of a timeshare from a company I will call C. In November 2009 they took a bonus week holiday as part of that membership and were required to attend a presentation. They purchased a points based membership at a cost of £19,684 which was funded in part by a loan from FHF.

In November 2021 PR submitted what it describes as a complaint, but this would appear to be a letter of claim. This was wide ranging and as both parties are aware of the contents and in the interests of brevity I will set out a short summary.

PR alleged that the product was misrepresented in numerous ways and Mrs C and Mr S were pressurised. It claimed that C breached the requirements of the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT"). It said that FHF had not carried out an assessment of Mrs C and Mr S' creditworthiness and had breached Office of Fair Trading's guide for creditors.

FHF referred the letter to C which rebutted the claims in detail. Amongst other things it said that Mrs C and Mr S had always been able to take the holidays they requested at the place of their choice or similar. It noted they had requested to end the agreement which C would have accepted, but they had withdrawn that request.

PR brought a complaint to this service on behalf of Mrs C and Mr S. It was considered by one of our investigators who didn't recommend it be upheld. Firstly she addressed the matter of jurisdiction and decided the complaint was one we could consider. She then considered the merits and concluded the claim under s.75 CCA had been made out of time and she didn't believe the misrepresentation claim under s.140A had any merit. Nor did she consider there had been an unfair relationship or evidence of unaffordable lending.

PR didn't agree and said the claim made under s.75 CCA had been made in time as it was submitted within three years of the decision by FHF to reject it. PR set out what it considered to be the relevant sections of CPUT but didn't specify how it thought C had breached the legislation. Subsequently it submitted a generic counsel's opinion on the activities of C. FHF did not consider PR's arguments had any merit whatsoever.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

“(1) relevant:

(a) law and regulations;

(b) regulators’ rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time.”

And when evidence is incomplete, inconclusive, incongruent or contradictory, I’ve made my decision on the balance of probabilities – which, in other words, means I’ve based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don’t think this complaint should be upheld. I will explain why.

The misrepresentation claims under s.75 CCA

PR seems to confuse the rules covering the jurisdiction of this service and the time limits for making a complaint with the rules for making a claim as set out in the Limitation Act.

PR says that C misrepresented the nature of the membership to Mrs C and Mr S when they bought it and that they have a claim for misrepresentation against C. Under s.75 CCA, FHF could be jointly liable for the alleged misrepresentations made by C.

But our investigator says that any claim brought by Mrs C and Mr S for any alleged misrepresentations was made too late. I’ve considered that argument and, having done so, agree. 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 FHF 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) of the Misrepresentation Act 1967 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 Mrs C and Mr S brought a like claim against FHF 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 Mrs C and Mr S entered into the agreement to buy the timeshare. It was at that time that they entered into an agreement based, they say, on the misrepresentations of C and suffered a loss. They say, had the misrepresentations not been made, they would not have bought the product. And it was on that day that they suffered a loss, as they took out the loan agreement with FHF that they were bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in 2009, so Mrs C and Mr S had six years from then to bring a claim. But they didn't make a claim against FHF until November 2021, which was outside of the time limits set out in the LA. So I think it is open to FHF to reject the misrepresentation claim.

The breach of contract claim under s.75 CCA

PR has said that C failed to provide exclusive accommodation which could be considered a breach of contract. However, as I understand it Mrs C and Mr S were able to take holidays and I can find no basis for concluding that there was a breach of contract. Nor have I seen any evidence that they were promised exclusivity.

S.140 A

Only a court has the power to decide whether the relationships between Mrs C and Mr S and FHF 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 s. 9 of the LA, I've considered that provision here.

It was held in *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel v Patel*') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Mrs C and Mr S could be said to have a cause of action in negligence against FHF 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 FHF assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that FHF owed Mrs C and Mr S a duty of care to ensure that C complied with the relevant regulations and it argues at length that these were breached. C has stated that the regulations were not broken and given I have no evidence that they were I cannot safely conclude that the claim under s.140A CCA has merit.

I have also considered the impact of CPUT. PR says that C made statements which were untrue, the presentation was disguised and Mrs C and Mr S were targeted and plied with alcohol. It also says C used bait and switch tactics and told consumers that the price was only available for a limited time. Finally it said that Mrs C and Mr S had not been told that

there was no end date for their liability.

C has addressed each of these points and said the claims are wrong. The difficulty Mrs C and Mr S have is that they have not been able to provide any corroboration of what happened on the day. I have not seen any testimony setting out in detail what happened and I appreciate it would be difficult for them to do so given the purchase was made many years before the claim was made.

I have noted that they were able to terminate the agreement and according to C they did so, only to withdraw the request. I cannot say that the claim they were unable to terminate the agreement is accurate and I find it difficult to conclude the other claims are an accurate reflection of what happened.

Affordability

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

Our investigator said that he could not see any evidence that Mrs C and Mr S found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if FHF did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mrs C and Mr S lost out as a result of its failings. As I have not I do not consider I have grounds to uphold this element of their complaint.

Conclusion

I appreciate Mrs C and Mr S are dissatisfied with their purchase and they have my sympathies for this, but, in summary I cannot see why any of their claims were likely to have succeeded. So overall I think that FHF acted reasonably in not accepting the claims under s.75 and s. 140A CCA.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr S to accept or reject my decision before 12 January 2024.

Ivor Graham
Ombudsman