DRN-3471161

The complaint

Mrs H, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected her claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In November 2006 Mrs H purchased a holiday product from a company I will call S. It cost £5,253 and this was funded in part by a loan from BPF. In February 2021 PR submitted a letter of claim to BPF. It said that:

- S was now in liquidation and this meant it had breached the contract.
- The terms of the agreement were unfair and commission paid by BPF had been hidden.
- Mrs H had been pressurised.
- False and misleading representations had been made.

BPF rejected the claim and said that it had been made out of time. PR didn't agree and in the meantime had already brought a complaint to this service. In addition to the points raised in the letter of claim it said that S had not conducted a proper assessment of Mrs H's ability to afford the loan. It said that the product had been purchased as an investment and the booking of holidays by Mrs H was irrelevant. It claimed that Mrs H had been affected financially since she had used a lump sum from her pension to repay the loan.

The complaint was considered by one of our investigators who didn't recommend it be upheld. He said the claims had been made out of time and he had not seen any evidence that the loan was unaffordable.

PR didn't agree and asked that the matter be referred to an ombudsman. It said it would submit further arguments but after a considerable time it has not done so.

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, but firstly I would point out that little in the way of documentary evidence has been submitted by either party. I mention this not as a criticism of either party but simply to put some of my findings – and the assumptions on which they have been based – into context.

Sections 56 and 75 of the Consumer Credit Act 1974

The nature of the loan means that it would have been a regulated credit agreement covered by the Consumer Credit Act. I have assumed that S acted as credit broker as well as being the seller of the timeshare.

Under s. 56 of the CCA statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender. In this case, that means that anything S said about the timeshare or the loan is to be treated in the same way as if it had been said by BPF.

In addition, one effect of s. 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

I am satisfied that the loan financed the purchase of the club membership. I must therefore consider what the position might be if Mrs H were to bring a claim or claims against S, either for misrepresentation of for breach of contract.

Misrepresentation

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

I would make the general comment that the allegations about what was said in 2006 are quite vague in this case. That is understandable, given the passage of time.

However, under the Limitation Act an action (that is, court action) based on misrepresentation cannot generally be brought after six years from the date on which the cause of action accrued. Any statements which might have induced Mrs H into the timeshare contract were made in 2006, but no claim was made until February 2021, more than 14 years later. I think it very likely therefore that a court would conclude that any claim for misrepresentation against S would be outside the relevant time limit in the Limitation Act.

In the circumstances, I think that BPF's response was reasonable.

Breach of contract

The relevant time limit for claims for breach of contract is six years from the date of breach. F says that S breached its contract with Mrs H when it went into liquidation. That was in February 2020.

I am not persuaded however that the liquidation of the seller of the timeshare means that it has breached its contract with Mrs H. The key issue in my view is whether Mrs H is still being provided with what she agreed to buy. BPF said in its response to the complaint that the current management of the resort has confirmed that customers are still able to book holidays and that the resort is still operating.

PR has argued that Mrs H didn't purchase the product to use the accommodation for holidays, but as an investment. It has not elaborated on that and I have seen no evidence to support that claim. In my experience of such products the representative may often refer to them as being investments in future holidays and not as financial investments. It is possible that Mrs H purchased it as an investment but I cannot say it was sold as one. Nor can I say that S offered investment advice.

I do not know if Mrs H made use of the accommodation, but I note that in the complaint to this service PR said that Mrs H's ability to book holidays was irrelevant as the product was bought as an investment. This suggests that she did make some use of it.

In short I am not persuaded that PR and Mrs H have shown that there is a breach of contract here, and again I think that BPF's response to this part of the complaint was reasonable.

Commission

PR says that the loan agreement created an unfair relationship (within the meaning of s. 140A of the Consumer Credit Act) because S failed to disclose the commission it was receiving from BPF. It says that it was not sufficient for S to say that it would receive commission – it had to say how much it would be. I infer from that statement that Mrs H was told in general terms that commission would be paid.

The general duty to disclose commission did not arise until 1 April 2014. CONC 4.5.3R (a rule in that part of the Financial Conduct Authority's Handbook dealing with consumer credit) came into effect on that date and requires a broker to disclose the existence and nature of any commission that could actually or potentially "… affect the impartiality of the credit broker in recommending the credit agreement…" CONC 4.5.4R makes it a general requirement to disclose the amount of commission if a borrower asks for it.

Earlier case law said that commission should be disclosed where, for example, there is a conflict of interest. I do not believe that was the case here, however. I understand that S was not introducing BPF from a range of providers paying different levels of commission; it could only arrange the loan with BPF. It is not apparent that there was any actual or potential conflict of interest.

The courts (and this service) have also found that many lenders acted unfairly when they sold payment protection insurance alongside loans but failed to disclose the very high commissions received from the insurers. That is however a very different scenario from what happened in this case.

Regulatory rules (such as CONC) do not generally relax obligations which businesses must

meet. If anything, they tend to strengthen and add to them. I do not believe that S would have had to disclose the amount of any commission if it had arranged the loan on or after 1 April 2014 (unless Mrs H had asked, of course), so I think it unlikely that it had to do so in 2006.

In any event, Mrs H does not suggest that she did ask about the amount of any commission. If she had asked, there is no reason to think that S would not have told her how much it was, or that its response would have affected her decision to buy the timeshare or take out the loan.

The claim under s.140A CCA

While only a court has the power to make a determination under s.140A CCA, as it is relevant law, I have to consider it when deciding what is a fair and reasonable outcome. Much like a claim under s.75 CCA, the LA also applies to claims under s.140A CCA. Under s.9 LA, Mrs H had to make her claim within six years of when the loan ended – which I gather was in 2008. But as the claim was made in February 2021, it was made outside of the time limit that applies.

Could limitation be extended?

The LA provides for extensions of the time limits in certain circumstances. Having considered the facts of this complaint, I do not think the lime limits set out above could be extended under any of the provisions of the LA.

I think Mrs H's claims made under the CCA have been made too late and outside of the limitation periods. That finding is not to be confused with the Financial Conduct Authority's ("FCA") Dispute Resolution Rules (DISP) that set out when the Financial Ombudsman Service can consider complaints about the activities of firms the FCA regulates.

Mrs H made claims under the CCA. Such claims are first made to the responsible business and, if the business does not accept them, a consumer has several options. They could refer their claim to a court and ask a judge to determine it, or, as has happened in this case, they could ask our service to consider a complaint about the business' decision to turn down their claim.

DISP says that a consumer has six years in which to complain about an event or, if longer, three years after they realised or ought reasonable to have realised that they had a reason to complain. Those rules apply to complaints about regulated financial activities, which in the current context, is the way in which BPF exercised its rights and duties under a regulated agreement when it assessed the CCA claims.

The claim was dealt with less than six years before the complaint was referred to our service. Further, while there was more than six years between the sale and the claim, I cannot see anything that would have triggered Mrs H to realise she had a possible reason to complain about the things she did before she spoke with PR. However, Mrs H made legal claims to BPF and, when it considered those claims, it relied on defences available under the LA. So that is why I have considered that legislation.

I have considered s.32 LA, which states that in cases where 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).

One reason it has been suggested this applies is because the timeshare provider concealed

from Mrs H that it was illegal to sell a timeshare as an investment, following Regulation 14(3) of the Timeshare Regulations 2010.

S. 32(1)(b) applies where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant". However the Timeshare Regulations 2010 did not come into effect for several years after Mrs H bought her timeshare, so I cannot see that the timeshare provider concealed anything about how its sale complied with the Timeshare Regulations 2010. Nor do I think there is any evidence that the way in which the timeshare worked in practice was deliberately concealed from Mrs H. So I do not think s.32 LA assists her.

I have also considered what F says about the amount of commission that might have been paid by BPF to the timeshare provider for arranging the loan. PR argues that BPF should have told Mrs H about that.

From what I have seen across the industry, if commission was ever paid it tended to be low and usually less than 10%. I am satisfied BPF did not breach any duty in making such a payment, nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances. Further, I do not think the levels of commission that are normally paid in this situation were sufficiently high to mean that BPF should have appreciated not disclosing commission to Mrs H risked the relationship being unfair under s.140A.

For these reasons, I am not persuaded that Mrs H is able to rely on s.32 LA here either. For the avoidance of any doubt, I should also make it clear that I have seen nothing to show that S was acting as agent to Mrs H. I cannot see that its role was to make an impartial or dis-interested recommendation about taking out the loan. And I do not think the timeshare provider needed to disclose the fact that it might have received a commission to Mrs H.

As I have said, I think any commission paid here was unlikely to be more than 10%. So, even if I was satisfied that Mrs H could rely on s.32 LA to assist with this part of her complaint, I am not persuaded it is likely a court would conclude that any commission paid created an unfair debtor-creditor relationship.

Overall, I think BPF fairly considered the things it needed to when it said the s.75 CCA misrepresentation and s.140A CCA claims were made too late. It is ultimately for the courts to decide whether or not any claim that Mrs H may have against the supplier or BPF has expired under the LA. But, as far as I can see from the information available, those claims that Mrs H might have against the timeshare supplier and/or BPF have most likely exceeded the time limits set out in the LA. I think it is reasonable to take this into account in these circumstances. And I am not persuaded that BPF acted unfairly in declining the claims.

Conclusion

It is not for me to decide whether Mrs H has a claim against S, or whether she might therefore have a "like claim" under s. 75 CCA. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mrs H's complaint. In the circumstances, I think that BPF's response to Mrs H's claims was fair and reasonable.

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 H to accept or reject my decision before 28 November 2023.

Ivor Graham
Ombudsman