

The complaint

Mr A, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product purchased in January 2008. I gather the purchase was made by Mr and Mrs A, but as the finance agreement was in Mr A's name he is the eligible complainant. In this decision for simplicity I will refer to Mr A as the sole purchaser.

What happened

Mr A and his wife have made a number of purchases of holiday products. While on holiday in 2008 Mr A says he was approached by a representative of a company I will call S. As a result he purchased another holiday product at a cost of £25,000 funded by a loan from BPF. This loan was repaid by January 2015.

In July 2021 PR submitted a letter of claim to BPF. It said the product had been mis-sold as Mr A had been told it was an investment and he had been pressurised. PR said a proper affordability check had not been carried out and Mr A had not been told of any commissions which may have been paid. It said this made the agreement unfair. It also said that S had ceased trading.

In September 2021 PR brought a complaint on behalf of Mr A to this service. Our investigator asked for further information from BPF and it said it was considering a refund for a later purchase, but that the claim relating to this one was out of time. Our investigator concluded the claims had been made out of time.

PR didn't agree and made a detailed submission. Much of this related to the merits of the claim, but it also addressed the issue of whether the time limit for the claims could be extended. It said S had not supplied clear information about its status and domicile. PR went on to say the product had been misrepresented as an investment. It made general comments about the activities of S and said much of the reality of the market had been kept from Mr A. It referenced Mr A's age and said he would not be able to obtain the full benefit of the contract. PR said the maintenance fees and interest rate made the purchase a liability.

PR argued that there was an unfair relationship under s.140A CCA. It suggested this began with earlier loans and continued with subsequent ones. It said Mr A didn't know S's business model contravened European law and was based on improbably optimistic assumptions. It said this concealment was similar to that in *Potter v Canada Square Operations* and the limitation period did not begin until Mr A discovered these facts.

I issued a provisional decision as follows:

"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 says that S misrepresented the nature of the membership to Mr A when he bought it and that he has a claim for misrepresentation against S. Under s.75 CCA, BPF could be jointly liable for the alleged misrepresentations made by S.

But BPF says that any claim brought by Mr A for any alleged misrepresentations was made too late. I've considered that argument and, having done so, 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) 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 Mr A 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 Mr W entered into the agreement to buy the timeshare. It was at that time that he entered into an agreement

based, he says, on the misrepresentations of S and suffered a loss. He says, had the misrepresentations not been made, he would not have bought the timeshare. And it was on that day that he suffered a loss, as he took out the loan agreement with BPF that he was bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in January 2008, so Mr A had six years from then to bring a claim. But he didn't make a claim against BPF until July 2021, which was outside of the time limits set out in the LA. So I think BPF acted fairly in not accepting his misrepresentation claim.

The breach of contract claim under s.75 CCA

PR has said that the S became insolvent and that was a breach of contract. However, as I understand it this purchase was disposed of before that happened and BPF has agreed to pay proportionate redress for the subsequent purchase. As such this is not something I can consider in this complaint.

The claim under s.140A CCA

Under this section a court may make an order under s.140B CCA in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but this is relevant law and I have taken it into account.

Mr A made his claim to BPF in July 2021. But the loan account closed either in January 2010 or January 2015, so over six years from the date a claim was first made.

The LA applies to a claim under s.140A CCA too. It was held in Patel v. Patel [2009] EWHC 3264 (QB)1 that when considering s.140A CCA, the time for limitation purposes ran from the date that the credit agreement ended if it was not still running at the time the claim was made. As with an action under s.75 CCA, the limitation period is six years. That is because the claim Mr A wishes to make it for repayment of sums he has paid to the loan, which is an action for sums recoverable under statute, to which s.9 LA applies. That means Mr A would have to bring an action within six years of January 2015 at the latest. As he didn't do that, I think he brought his claim too late.

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 I've set out above can be extended under any of the provisions of the LA. I've considered several reasons specifically raised in more detail.

I have been asked to consider s.32 LA. The relevant parts of that provision read:

"(1)...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.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty...

In short, PR alleges that S marketed and sold the membership to Mr A as an investment, which was a breach of Regulation 14(3) of the Timeshare Regulations. It says this breach was deliberate and falls under s.32(2) LA. It also argues that the fundamentals of the business were not disclosed which would have allowed Mr A to conclude it was not a viable business.

PR also say that Mr A was led to believe, by S, that the marketing of the membership as an investment was lawful. It would have been clear to S that the sale breached Regulation 14(3), but this was hidden from Mr A. Further, PR points to the judgment in Canada Square Operations Ltd. v. Potter [2021] EWCA Civ 339, ("Potter") that held that the creation of an unfair relationship under s.140A CCA can amount to a breach of duty and, for the purposes of s.32 LA, limitation does not run until the facts related to the unfair relationship could have been discovered with reasonable diligence.

Having considered what PR has said, there is nothing to make me think a court would conclude Mr A had longer to bring his claim than the time set out above, namely by January 2021.

Potter concerned a claim in which the Defendant business had not disclosed to the Claimant

that it received a very large commission out of the sale of an insurance policy. It was held that the Defendant's failure to disclose the amount could amount to a concealment for the purposes of s.32(1)(b) LA. Further, it was held that the concealment was deliberate and s.32(2) LA could apply to the claim.

But the issue in Mr A's claim is very different to that in Potter. Here, Mr A alleges that S sold him membership as an investment. That was necessarily something he must have known at the time of the sale as either S sold membership to him as an investment or it didn't. Nothing about that part of the sales process was concealed from him as he says it was an inducement to take out membership.

Further, I can't see that Mr A was given any assurance that the way the membership was sold to him was in compliance of any regulation, rule or law. I appreciate that Mr A might not have realised at the time of sale that there was a prohibition on timeshare memberships being sold as investments, but not knowing that wouldn't extend the limitation period where he was aware of the underlying facts of the claim – namely that the timeshare was sold to him as an investment.

Nor do I consider that the claim that S would have known its business model was unsustainable at the time of sale has been demonstrated. The fact that it failed some years later does not show that the model was unsustainable in 2008. Indeed S continued trading for many years after that.

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 Mr A 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 BPF 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 Mr A lost out as a result of its failings. Following the issue of our investigator's view PR has made generic points about affordability, but has not provided evidence that they would have found, or did find, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

For the reasons set out above, I currently think BPF acted fairly in not accepting Mr A's claims."

BPF responded to say it had nothing further to add and PR said Mr A didn't agree, but submitted no further evidence or arguments, nor did it say that it would supply anything further.

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.

In the absence of any further evidence or arguments that would allow me to alter my provisional decision I can only conclude that this complaint should not be upheld.

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 A and Mr A to accept or reject my decision before 12 January 2024.

Ivor Graham
Ombudsman