DRN-4130475

The complaint

Mr B says that Clydesdale Financial Services Limited (who I'll call "CFS") unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare he was sold.

Mr B has been represented by a professional representative and he's submitted his claim on behalf of himself and his wife, but as Mr B is named on the credit agreement, and for convenience, I will refer only to him in this decision. I mean no disrespect to Mr B's wife or his representative when doing so.

What happened

I issued my provisional decision on this complaint in May 2023. An extract from that provisional decision is set out below.

What happened

Mr B purchased a timeshare in September 2007. He financed the deal through a fixed sum loan with CFS. The finance agreement was settled in August 2009 and Mr B has explained that his timeshare membership has now ended.

Mr B complained to CFS in February 2021. He said that the timeshare had been misrepresented to him and that he had a like claim against the credit provider (CFS) as he did against the supplier under section 75 of the CCA. He said there had also been an unfair relationship and that he therefore also had a claim under section 140A of the CCA. He also explained that CFS hadn't conducted reasonable and proportionate checks to ensure that the credit was affordable for him. He referred to an EU Directive that said if the contract does not accurately describe the accommodation, including the specified time the purchaser of the timeshare has use of the accommodation, then the contract is Null and Void; he said that applied to his agreement.

Mr B cited a number of reasons why his claim should succeed - it isn't practical to list them all here, but Mr B's assertion is that he wouldn't have proceeded with the timeshare deal had it not been for the unfair relationship and the misrepresentations.

Our investigator didn't think Mr B's complaint should be upheld. It was her view that a court would likely conclude that the claims under section 75 and section 140A had been made too late. She also didn't think Mr B had provided sufficient evidence for her to conclude it was likely the finance was unaffordable.

Mr B didn't agree. His representatives explained "breaches of the law [have] resulted in the Bank being negligent (my emphasis) as the Bank had a duty of care to the Client (Mr B) to ensure all laws were being complied with…". And, in those circumstances, they said that Mr B's claim wasn't time barred under the Limitations Act 1980 ("LA") because Mr B was entitled to rely on section 14A of that Act. That section explains that in some circumstances, the limitation period can be extended to three years after the claimant first had the knowledge required to make a claim after the date the cause of action actually accrued.

The complaint has therefore been referred to me, an ombudsman, for a decision.

What I've provisionally 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.

I know it will disappoint Mr B, but I think his claims under the CCA have been made too late and I don't think there's sufficient evidence to suggest the finance was unaffordable for him. I can't see, however, that our investigator considered his representative's view that the agreement was voidable so I'm issuing a provisional decision on the complaint.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act (2000). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my final decision.

The Limitation Act 1980 and the Consumer Credit Act 1974

When something goes wrong and the payment was made with a certain type of fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the Consumer Credit Act (1974) says that in certain circumstances, the borrower under a credit agreement has the same right to make a claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier. From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

Section 56 of the CCA is also relevant to the claim under section 140A of the CCA as the pre-contractual acts or omissions of the broker will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Mr B and CFS.

It's not for me to decide the outcome of a claim Mr B may have under sections 75 or 140A but I'm required to take them into account when deciding whether CFS would be reasonable to reject Mr B's claims.

A claim under section 75 for misrepresentation against CFS had to be made within six years of when Mr B had everything he needed to make such a claim. And in this complaint, I think that was when he purchased the timeshare at the Time of Sale (September 2007). After all, he says that he entered into the agreement to purchase the timeshare because of misrepresentations. And as the upshot of the claim was that he would not have made the purchase but for the misrepresentations at the Time of Sale, it was at that time that he suffered a loss because he ended up borrowing money from CFS. So, Mr B had until September 2013 to raise a section 75 claim with CFS. As he didn't do so until February 2021, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, I think it's likely a court would consider his section 75 claim to be time

barred. That would give CFS a complete defence to it.

The LA applies to a claim under s.140A CCA. It was held in Patel v. Patel [2009] 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. Here the limitation period is six years. That is because the claim Mr B wishes to make is for repayment of sums he has paid, which is an action for sums recoverable under statute, to which s.9 LA applies. That meant Mr B would have to bring an action within six years of the date the credit was repaid. Bank statements show that was in August 2009 and that means at the latest Mr B would have needed to raise his claim under s140A by August 2015. As he didn't raise his claim until February 2021, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, I think he brought his claim too late – which, in my view, is likely to give CFS a complete defence to it.

Section 14A of the Limitation Act 1980

This section deals with "Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual". For that section of the LA to apply, a claimant must have a cause in negligence against the alleged defendant. Which means CFS would have to owe a duty of care to Mr B to give rise to such a claim.

I have thought about whether CFS had such a duty to protect its customers from purchasing timeshare products that were non-compliant with the relevant timeshare regulations, by undertaking due diligence into the timeshare providers' sales process. Having done so, I am not persuaded that such a duty can be established based on what I've seen.

In support of their view that section 14A can be relied upon by Mr B, his representatives have referred me to the case of Barclays Partner Finance v FCA (2022) that they say demonstrates "the Bank is responsible for the actions of its agent". I've already explained, I don't dispute that sections of the CCA hold the bank responsible for pre-contractual acts or omissions of the broker but, having read the judge's decision in Barclays Partner Finance v FCA (2022), I don't think it provides any helpful information as to why the bank should be considered to have a duty of care in the circumstances of Mr B's case.

It's ultimately for the courts to decide whether or not any claim that Mr B may have against the supplier or CFS has expired under the LA. But, as far as I can see from the information available, any claim that Mr B might have against the supplier and/or CFS has most likely exceeded the time limits set out in the LA. I think it is reasonable to take this into account in these circumstances.

So, I'm not currently inclined to ask CFS to do anything further in response to Mr B's claims under the CCA.

Was the timeshare and therefore the loan voidable?

If the timeshare agreement was voidable, I think it likely that the related loan was also voidable on the recission of the agreement it was used to fund and that's something that could be considered under a section140A CCA claim.

Mr B's representatives referred to an EU Directive, some Spanish legislation, and a Spanish court judgment that they said, taken together, demonstrated that a timeshare that provides for a 'floating week' or the ability to use points to book holidays with a provider, was a voidable agreement.

The timeshare agreement states that it is governed by English law, not Spanish law, so I

don't think the Spanish judgment (which in any event relates to a different timeshare product to Mr B's timeshare) could be applied directly to the question as to whether the contract is voidable under English law. Having read all of the relevant legislation, rules, and regulations, I cannot see anything that would have the effect Mr B's representative seek. In fact, in a recent House of Commons Library Briefing Paper, "Timeshares: common problems faced by UK owners", it was said that a 'floating week' or 'points' based timeshare were basic timeshare models that were not described as being problems in and of themselves. Based on the evidence I have seen, I do not think the timeshare agreement, nor the related credit agreement was voidable.

Was the loan irresponsible?

Mr B says that CFS were in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan. He says they had strict obligations to complete a creditworthiness check under the Financial Conduct Authority's (FCA's) Consumer Credit Sourcebook (CONC) and failed to undertake those obligations.

However, when CFS lent to Mr B, CONC didn't apply to lending of the kind in question (the FCA began its regulation of consumer credit and issued CONC on 1 April 2014) So, it isn't relevant here. What's more, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that CFS 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 the credit granted by CFS was likely to be unaffordable and that Mr B suffered a loss as a result. As there's little evidence that he would have found, nor found, it difficult to repay what he was lent by CFS, I'm not persuaded it was unaffordable for him. Whilst Mr B has explained he was earning between £12,000 and £12,500 a year and that he feels only his earnings were taken into account, I've not seen enough evidence to support that level of earnings or evidence of Mr B's outgoings to support the suggestion that repayments of a little over £95 per month would not be sustainable for him. I'm not therefore persuaded the credit provided was unaffordable.

My provisional decision

I'm not expecting to uphold this complaint.

Further comments and evidence

Mr B's professional representatives provided a detailed response to my provisional decision. The response ran to 13 pages and it's not therefore, practical to list it in its entirety. In summary, however, they said that my decision didn't reflect the lengthy submissions they had made, and they referred me to the decision in Shawbrook Bank Ltd, R (On the Application Of) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (which I'll call the recent High Court decision).

They said:

1. They had shown that their Client's claim shared the same characteristics as the cases which were reviewed in the recent High Court decision.
2. The recent High Court decision was in agreement with this Service's approach to treating breaches of the 2010 Timeshare Regulations as material breaches, as well as linking the responsibility of such breaches to the Bank under S56 of the CCA. As a result, under S140A, the relationship between the Bank and the client was unfair.
3. The recent High Court decision covered all the points they had made in this case.

4. They would not therefore see any reason for this Service not to take the same stance with this case as we did at that recent High Court hearing.
5. The only point not covered by the recent High Court decision was whether the Bank's negligence due to the S140A unfair relationship caused by the Supplier's breaches of the timeshare law, resulted in S14A of the Limitation Act extending time for Mr B to claim against the Bank. They said they had provided evidence as to why S14A extended that time limit.

The bank asked:

"Could we ask what your service mean by the case of Barclays Partner Finance v FCA (2022) that the Ombudsman says demonstrates "the Bank is responsible for the actions of its agent". Is the Ombudsman referring to the JR application brought by BPF against FOS, or the Upper Tribunal proceedings which were against the FCA but which were not brought by BPF (Barclays Partner Finance)*?"*

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.

I'm sorry that Mr B's representatives don't think my provisional decision reflected their lengthy submissions. That was to a large extent because I decided the claim under section 75 and section 140A of the CCA had been made out of time. That meant I couldn't consider many of the details of Mr B's claims. Whilst I understand that Mr B's representatives have relied upon section 14A of the Limitation Act to suggest the limitation period should be extended, I've already explained why I don't agree with that, and I've not been provided with any further information that would lead me to change my view on it.

Limitation wasn't an issue that was considered in the recent High Court decision, and I don't therefore think I've been provided with any new information that would lead me to change my view, that claims made under the CCA have most likely exceeded the time limits set out in the LA.

The recent High Court decision regarded fractional timeshare ownership and I can't see, and neither have I been taken to, any direction regarding loan affordability or whether the agreement should be voided, that I think would assist in Mr B's case.

With regard to CFS's query on which case was being referred to, for clarity, Mr B's representatives had referred me to Barclays Partner Finance Applicants v The Financial Conduct Authority [2022] UKUT 00151 (TCC). I explained in my provisional decision that it was Mr B's representatives who had suggested the case demonstrated "*the bank was responsible for the actions of its agents"*, it was my view merely that I didn't think the case "*provided any helpful information as to why the bank should be considered to have a duty of care in the circumstances of Mr B's case".*

Ultimately, I don't think Mr B, his representatives, or CFS have provided any additional information that would lead me to change my provisional decision on this matter.

My final decision

For the reasons I've given above I therefore, don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 3 August 2023.

Phillip McMahon
Ombudsman