DRN-4227567

The complaint

Mr H and Mrs W complain that timeshare products were misrepresented to them and that the timeshare company is in breach of contract. The purchases were financed with credit provided by Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF"). Because of that, Mr H and Mrs W say they have a claim against BPF in the same way they have a claim against the timeshare company. Mr H and Mrs W are represented by a claims management business, which I'll call "PR".

What happened

In August 2009 Mr H and Mrs W initially purchased 5,000 points from a timeshare provider I will call D. A few days later they changed their minds and the agreement was amended to 4,000 points at a cost of some £6,220. This was funded in the main by a loan from BPF. In August 2010 they purchased an additional 6,000 points at a cost of some £6,810. This too was funded by finance provided by BPF, but it was repaid relatively quickly and was cleared by December 2010.

According to D Mr H and Mrs W booked 14 holidays, including two marketing breaks, between August 2010 and September 2018.

In February PR submitted a claim to BPF. It had already made a claim to D which it rejected. PR said Mr H and Mrs W had paid significant interest and the maintenance fees which had increased. It claimed that D had not told them about the potential increases.

It said that payment had been taken prior to the end of the cooling off period and argued that the contract was voidable due to a lack of specification. BPF rejected the claim and PR brought a complaint to this service.

It was considered by one of our investigators who didn't recommend it be upheld. He concluded that any claim under s.75 CAA had been made out of time as had the claim under s.140A CCA for the 2010 purchase. He didn't consider the s.140A claim for the 2009 purchase had merit as he did not consider there had been an unfair relationship.

PR didn't agree and said Mr H and Mrs W had presumed they were buying a property. It added that D had acted in contravention of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. It also argued that there was no benefit to Mr H and Mrs W as they could have simply booked holidays as they had done before. It suggested that D had broken Consumer Protections rules without explaining why it took this view.

Later it submitted Counsel's opinion on D's timeshare activity and this service's response. It then raised concerns about the way finance had been sold to Mr H and Mrs W and it asked that we ask BPF a long list of questions and copy the answer to it.

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.

Under the rules that govern how I assess complaints, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice when I make my decision.

I also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been supplied to me, I may not address every point that has been raised.

Was the claim under s. 75 of the CCA brought in time?

Mr H and Mrs W say that D misrepresented a number of points in relation to the timeshare agreement they purchased. So, they argue BPF is jointly liable for these misrepresentations under s. 75 of the CCA. But if BPF could show the s. 75 claim was brought outside of the time limits set out in the LA, it would be entitled to rely on the LA as a defence to answering the claim. I should make it clear, however, that I'm not deciding if any right Mr H and Mrs W may have to bring these claims has expired under the LA - that's a matter for the courts. In this decision

I'm considering if BPF acted fairly and reasonably in seeking to turn down the claims on this basis.

A claim for misrepresentation against the supplier would be brought under s. 2(1) of the Misrepresentation Act 1980 ("MA"). It was held in Green v Eadie & Ors [2011] EWHC B24 (Ch) [2012] Ch 363 that a claim under s. 2(1) of the MA 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 of the LA).

Here, Mr H and Mrs W brought a like claim against BPF under s. 75 of the 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."

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 in time that everything needed to make a legal claim occurred. So, in Mr H and Mrs W's case, that's when they could have brought a claim for misrepresentation against the supplier or the like claim against BPF. I think that was the date they entered into the agreements to buy the timeshare points, so in August 2009 and August 2010. It was at that time that they entered into an agreement based, they say, on the misrepresentations of D. They claim that they wouldn't have entered into the timeshare agreements if those misrepresentations hadn't been made. And it was on those days that they suffered a loss, as they took out the loan agreements with BPF.

It follows, therefore, that I think the cause of action accrued in August 2009 and August 2010, so Mr H and Mrs W had six years from that date to bring a claim. But they didn't contact BPF about the claim until February 2018, which was outside of the time limits set out in the LA. So, I think BPF acted fairly in seeking to turn down the claim on this basis.

Was the claim under s. 140A of the CCA made in time?

Mr H and Mrs W say that the relationship between them and BPF was unfair under s.140A CCA for a number of reasons. Under s. 140A a court may make an order under s. 140B 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 I think this is relevant law and I have taken it into account.

The LA applies to a claim under s. 140A of the CCA too. It was held in Patel v. Patel [2009] EWHC 3264 (QB) that when considering s. 140A of the 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. I gather the 2010 loan agreement was closed in December 2010.

As with an action under s. 75 of the CCA, the limitation period is six years, so Mr H and Mrs W would have to bring an action within six years from the date of closure. So, they had until December 2016 to make a claim. As they made his claim after that point, I think they brought their claim too late. This means I also don't think BPF acted unfairly in seeking to decline a claim under s. 140A on this basis. So, I don't think it needs to do anything further.

However, the s.140A claim in respect of the 2009 agreement was made in time and so I will consider that.

Unfair Relationship

S.140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

When considering if there was an unfair relationship I have taken due note of the sale and the process used by D along with the Counsel's Opinion. I do not consider it likely that court would conclude that D's actions as an agent of BPF generated an unfair debtor – creditor relationship.

I appreciate that according to PR Mr H and Mrs W were pressurised into taking out the agreement. I can understand why they have taken that view. My understanding is that these sales meetings ran on for many hours and the representatives of C would highlight the benefits of the product.

However, this service has learned that if a consumer said they did not want to purchase on the day, that representatives staff were instructed to take them back to their accommodation and the sales meeting would end. I have no doubt that the techniques used would have made saying no more difficult, but this does not mean that it was impossible to decline the offer.

In summary I do not have sufficient evidence to show Mr H and Mrs W were unreasonably pressurised to sign the agreement.

It is possible that the disclosure of information about the product could've been clearer. So, I've looked at whether this led to such an imbalance of information between the parties, that it gave rise to an unfair relationship.

I understand the contract used by D sets out the length of the contract term, how annual fees would be calculated, that it was subject to availability and should not be viewed as a financial investment.

I believe D supplied brochures that covered this information. So, while the sales meeting may've been overly weighted towards the aspirational lifestyle owning a timeshare could provide, I don't think the gap in knowledge between what Mr H and Mrs W thought they were acquiring and what they actually got was so significant so as to suggest it could give rise to an unfair relationship. Indeed the list of holiday reservations provided by D indicates they made full use of the accommodation at various resorts.

On balance I am not persuaded there is sufficient evidence to show that it would be likely a court would find there was an unfair relationship as set out in s 140A.

The PR has referred to the EU Directive on timeshares which has been enacted into English law in the Timeshare Regulations 2010, which amended the Timeshare Act 2010. None of those provisions prohibited the sale of timeshares like the one Mr and Mrs H bought.

However, I would point out that both purchases were made before these regulations came into effect and it would be more appropriate to consider the 1997 Regulations which do not contain the same rules.

In the 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 a problem in and of itself.

Further, these types of agreements fall within the definition of a timeshare contained within the Timeshare Regulations 2010. So I am satisfied that these types of timeshares have never been prohibited to be sold under English law, either at the time of Mr H and Mrs W's sale or after.

Based on the evidence I have seen; I do not think either the timeshare agreement or the related credit agreement is voidable for the reasons said.

Unaffordable lending

More recently Mr H and Mrs W say that the lender didn't perform adequate credit checks or review their credit file when approving the loan, and that they didn't conform to guidance from the Office of Fair Trading on lending. This was not raised with BPF as part of the claim and so I do not make a finding on this matter. That said in order to conclude this complaint I will express my view and this will allow BPF to comment if it so wishes.

I would say that 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 the lender 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 them was likely to be unaffordable and that Mr H and Mrs W suffered a loss as a result. I've not been provided with sufficient evidence from Mr H or Mrs W to suggest they didn't have enough disposable income to sustainably afford repayments against this loan, and I don't therefore think it would be reasonable to suggest the lender was irresponsible when providing the credit.

Conclusion

For the reasons set out above, I currently think BPF acted fairly in turning down Mr H and Mrs W's claim under s.75 CCA as it was brought too late and they did not meet the criteria to satisfy S140A."

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.

The bank responded to say it had nothing further to add, but neither PR nor Mr H and Mrs W replied. It follows that my provisional decision stands unamended.

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 Mr H and Miss W to accept or reject my decision before 13 September 2023.

Ivor Graham
Ombudsman