DRN-3629207

The complaint

Ms A, who is represented by a professional representative ("PR") complains that First Holiday Finance Ltd ("FHF") rejected her claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In March 2009 Ms A, along with her ex-husband purchased trial membership of a timeshare from a company I will call C at a cost of £3,295. In December 2009 this was transferred to Ms A in her name alone. In May 2010 she upgraded from the trial membership at a cost of £11,225. This was funded by trading in the trial membership for £3,295 and taking out a loan with FHF for £7,960.

I gather Ms A faced some financial challenges and entered a payment plan with FHF and after that ended continued to make full monthly payments of the loan. In August 2017 PR submitted a letter of claim to FHF. The claims are well known to both parties and so in the interest of brevity I will set out a short summary of the key points.

PR claimed that the product had been misrepresented and Ms A had been told she could sell or rent out the property and that she could make use of any resort with accommodation of the same standard as she was enjoying at the time of the purchase. It said C had breached the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") by charging management fees and indeed Ms A had not been told of these. It also said that other parts of the UTCCR had been breached.

PR said the sales pitch had been aggressive with Ms A believing she could not leave until she signed and that the price was only available that day. It added that the rate of interest charged was higher than other lenders would provide.

PR brought a complaint to this service and FHF provided a final response letter which rejected the claims. It pointed out that any claims under s.75 CAA were out of time. It also said the claim contained numerous inaccuracies including wrong dates and it noted that Ms A had upgraded in the UK before she had taken her first holiday with C. That meant she could not have been able to compare accommodation as PR claimed before and after taking out the upgrade. It also refuted all the remaining claims PR had made.

The complaint was considered by one of our investigators who didn't recommend it be upheld. She said the claim under s.75 had been brought too late. On the matter of the claim under s.140 she was not persuaded that there was misrepresentation or an unfair relationship. She also concluded that she had not been given any persuasive evidence that the lending was unaffordable.

PR didn't agree and said the complaint had been made in time. It also supplied a generic counsel's opinion on the activities of C. More recently it supplied copies of correspondence from VFL regarding the payment plan Ms A entered into.

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. I should point out that as I do not have a signed complaint from Mr A I have not considered the original loan, but I have no reason to believe my findings would differ.

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

PR says that C misrepresented a number of matters in relation to the timeshare agreement Ms A purchased. So, it argued FHF is jointly liable for these misrepresentations under s. 75 CCA. But if FHF 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 Ms A 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 FHF acted fairly and reasonably in seeking to turn down Ms A's claims on this basis.

A claim for misrepresentation against the supplier would be brought under section 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 section 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 (section 2 of the LA).

Here, Ms A 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 her 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 Ms A's case, that's when she could have brought a claim for misrepresentation against the supplier or the like claim against FHF. I think that was the date she entered into the agreement to buy the timeshare, so in May 2010. It was at that time that she entered into an agreement based, she says, on the misrepresentations of M. She claims that she wouldn't have entered into the timeshare agreement if those misrepresentations hadn't been made. And it was on that day that she suffered a loss, as she took out the loan agreement with FHF.

It follows, therefore, that I think the cause of action accrued in May 2010, so Ms A had six years from that date to bring a claim. But she didn't to contact FHF about her claim until August 2017, which was outside of the time limits set out in the LA. So, I think FHF acted fairly in seeking to turn down Ms A's misrepresentation claim on this basis.

I would add that there seems to have been some confusion in that PR has referred to the rules relating to the time limits which apply to this service considering a complaint. I agree that we can consider this complaint as it was made in time, but that does not mean that the claim was made in time.

S.140 A

Only a court has the power to decide whether the relationships between Ms A 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 Section 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 Ms A could be said to have a cause of action in negligence against FHF anyway.

Her alleged loss isn't related to damage to property or to her 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 Ms A a duty of care to ensure that M complied with the 2010 Regulations and it argues that the payment of commission created an unfair relationship. However, it is my understanding that FHF paid relatively small rates of commission and so I cannot conclude that payment of commission created an unfair relationship.

As for the other claims I am at a disadvantage since I have not been provided with full documentation from the sale in 2010 apart from a seven page purchase agreement. PR has referred to alleged claims made by the sales representative presumably based on Ms A's recollections from some seven year's previous to the claim made to FHF. It does not seem reasonable to expect FHF to have agreed the claim given the lack of evidence it received in

support of the assertions made by PR.

I have noted that FHF provided the statutory 14 day withdrawal period and if Ms A had been concerned that she had been subjected to undue pressure or not been given enough time to assimilate the agreement details she had the option of withdrawing from it.

As for the claim Ms A was told this was an investment the agreement states: "*We understand the purchase of our membership in Destinations Club is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate, and that CLC makes no representation as to the future price or value of the Destinations Club Holiday Product."* I cannot say what was said at the meeting and it is possible that the sales representatives may have referred to it as investment in future holidays. But I do not think Ms A's recollections are sufficient to allow FHF to uphold her claim, not least because they seem to contain factual inaccuracies in several areas. For example PR refers to her being shown a video, but FHF says C did not use videos until 2011.

I also note that this was her second purchase so I would have expected her to have some understanding of the product she was buying and what M was offering. PR says CPUT and the 2010 regulations were broken, but without providing any evidence in support of that claim which makes it difficult for me to uphold this complaint.

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 she could not see any evidence that Ms 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 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 Ms A lost out as a result of its failings. I have noted that later she entered into a payment plan and having maintained that she returned to making full payments. The statements I have seen show she was still making those payments in 2021.

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 Ms A to accept or reject my decision before 23 February 2024.

Ivor Graham
Ombudsman