DRN-4195300

The complaint

Mrs C, 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. I gather the purchase was made by Mrs C and her husband, but as the finance agreement was in Mrs C's name she is the eligible complainant. In this decision for simplicity I will refer to Mrs C as the sole purchaser.

What happened

Mrs C has made three purchases of points based holiday products from a company I will call M. The first was in April 2007, the second in August 2013 and the third in July 2016. The second which is the subject of this complaint cost £ 7,499 and was funded by a loan from BPF. In April 2022 PR submitted a letter of claim to BPF. Both parties are aware of the details of that claim so I will simply provide a brief summary in this decision.

PR said the product had been misrepresented and Mrs C had been pressurised to purchase it. It said she had been aggressively targeted. The product was sold as an investment and she was led to believe she could make use of it at any time, but this had not turned out to be true. It was also claimed that she would have exclusive use along with other members, but this too was not true.

She was told it was only available at a special price that day and it was sold in perpetuity with unlimited management charges. PR said M had contravened the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the 2010 Regulations") and The Consumer Protection from Unfair Trading Regulations ("CPUT").

Mrs C had not been given time to read the documentation and had been pressurised into taking out the loan. No proper affordability checks had been carried out. It said the sale had come about as a result of an unfair relationship due in part to BPF paying commission to M.

BPF said the claim under s.75 CAA had been made out of time and the unfair relationship provisions did not give this service the right to effect a remedy.

PR brought a complaint to this service on behalf of Mrs C. It was considered by one of our investigators who didn't recommend it be upheld. Our investigator concluded that the claim under s.75 had been made out of time. She didn't believe PR had established that there had been an unfair relationship or a breach of contract. Nor had she been given evidence which showed the loan was unaffordable.

PR didn't agree and repeated many of the claims it had made initially and made general comments about the industry and M more specifically. It said the complaint had been made in time. It said it was likely that M had sold the product as an investment and it didn't believe there was a reasonable market to allow it to be sold. It added that Mrs C had not been given enough information by M. Maintenance fees had been increasing sharply and M had breached the rules and regulations. PR asked that we submit a list of questions to BPF.

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 I have seen virtually no documentary evidence in support of the claim which makes it difficult for me to conclude that it should be upheld.

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

PR says that M misrepresented a number of points in relation to the timeshare agreement Mrs C purchased. So, it argued BPF is jointly liable for these misrepresentations under section 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 Mrs C 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 Mrs C'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, Mrs C 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 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 Mrs C's case, that's when she could have brought a claim for misrepresentation against the supplier or the like claim against BPF. I think that was the date she entered into the agreement to buy the timeshare, so in August 2013. 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 BPF.

It follows, therefore, that I think the cause of action accrued in August 2013, so Mrs C had six years from that date to bring a claim. But she didn't contact BPF about her claim until April 2022, which was outside of the time limits set out in the LA. So, I think BPF acted fairly in seeking to turn down Mrs C'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 Mrs C and BPF 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 Mrs C could be said to have a cause of action in negligence against BPF 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 BPF assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that BPF owed Mrs C a duty of care to ensure that M complied with the 2010 Regulations and it argues at length that the payment of commission created an unfair relationship. However, it is my understanding that BPF 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 2013 apart from an eight page purchase agreement. PR has referred to alleged claims made by the sales representative presumably based on Mrs C's recollections from some nine year's previous to the claim made to BPF. It does not seem reasonable to expect BPF to have agreed the claim given the lack of evidence it received in

support of the assertions made by PR.

I have noted that provided the statutory 14 day withdrawal period and if Mrs C 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. I also note that she made a further purchase of points in 2016 which does not indicate dissatisfaction.

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 both that she was given too much material to assimilate and that M did not supply enough information to comply with the Regulations, without specifying what was missing. Overall, I have not been given evidence that demonstrates that the product was sold as an investment or that the 2010 Regulations or the rules in CPUT were broken.

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 Mrs C 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 Mrs C lost out as a result of its failings. Mrs C has provided no evidence whatsoever that she found the loan difficult to repay. Indeed I note that as of August 2021 she had been making regular monthly payments.

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 C to accept or reject my decision before 23 February 2024.

Ivor Graham
Ombudsman