DRN-4812843

The complaint

Mr W complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") acted unfairly and unreasonably by (1) participating in an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (the "CCA") and (2) not paying a claim under Section 75 of the CCA.

What happened

In or around September 2009 ("the Time of the Sale"), Mr W (together with another party) agreed to purchase a timeshare product from a supplier who I'll refer to as C. Mr W already held an existing timeshare product with C jointly with the other party. After trade in of that existing product, a purchase price for the new product was agreed of £10,329. The purchase price was funded in Mr W's sole name under a Fixed Sum Loan Agreement with BPF repayable over 180 months.

In November 2021, using a professional representative (the "PR"), Mr W wrote to BPF to complain about:

1. Misrepresentations by C at the Time of the Sale giving him a claim under Section 75 of the CCA ("S75").
2. BPF's participation in an unfair credit relationship under the Credit Agreement and related timeshare agreement for the purposes of Section 140A of the CCA ("S140A").

Mr W's S75 complaint

The PR allege:

- C told Mr W he could use the product to travel to different parts of the world and be able to sell the timeshare product in the future;
- Mr W found it difficult to secure holidays when he wanted as dates were unavailable and needed to be booked a long way in the future;
- the issue of regular unavailability was not disclosed to Mr W by C;
- Mr W didn't realise he'd bought a floating timeshare product rather than a specified apartment for a fixed week; and
- C and BPF's paperwork *"misrepresented the investment as a timeshare"*.

Mr W's S140A complaint

The PR allege that the misrepresentations, together with other things done (or not done) by C and alleged breaches of the regulations that applied, render the relationship with BPF under the agreements, unfair pursuant to section 140A. In particular, the PR allege:

- Mr W, as a vulnerable consumer, was coerced and pressured in to entering into the purchase agreement and the loan with BPF;
- Mr W wasn't afforded the required 14 day cooling off period for either the timeshare purchase or the loan;
- the terms of the timeshare purchase and loan agreements resulted in unfairness;

- C didn't provide sufficient time for Mr W to fully digest the information about the timeshare purchase and loan; and
- the loan was approved without completing proper affordability checks.

To support these allegations, the PR reference various legislation and regulations together with how they believe these were breached by C and BPF at the Time of the Sale and since. I don't propose to list all of these at this point. But if appropriate, I shall refer to them throughout my decision where I believe it's appropriate and helpful.

It doesn't appear that a response to Mr W's complaint was provided by BPF. So, the PR referred matters to this service.

One of this service's investigators considered all the information and evidence available. Having done so, they thought BPF were entitled to rely upon the fact that Mr W's complaint had been brought to them beyond the time permitted within the Limitation Act 1980 (the "LA"). And because Mr W's loan was closed and sold to another financial business in 2012, our investigator thought any responsibility under S140A had passed to that business.

Our investigator also though Mr W's complaint about the lack of affordability checks had been brought too late under the Dispute Rules in the FCA[1] Handbook. Because of that, our investigator didn't think BPF needed to do anything more.

The PR didn't agree with our investigator's findings and responded at length with further comprehensive explanations referencing various legislation and guidelines to support their arguments. In particular, referring to alleged breaches of those by C and BPF, their interpretation of how the LA applies and further commenting on BPF's alleged income assessment and affordability check failures.

As an informal resolution couldn't be achieved, Mr W's complaint was passed to me to consider further.

I issued a Provisional Decision ("PD") on 9 May 2024 in which I provisionally found that:

1. Mr W's complaint about BPF's participation in a credit relationship that was unfair to him wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the "FCA") Dispute Resolution Rules ("DISP").
2. Mr W's complaint about BPF's decision to reject his concerns about C's alleged misrepresentations under Section 75 of the CCA ("S75") was made in time under DISP 2.8.2 R (2). But BPF didn't act unfairly or unreasonably by coming to the decision they did.
3. Mr W's concern that BPF approved his loan without completing proper affordability checks also wasn't within this Service's jurisdiction because it wasn't made in time under the limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the "FCA") Dispute Resolution Rules ("DISP").

BPF didn't respond to my PD but the PR did confirm they have nothing further to add. So, Mr W's complaint has been passed back to me to issue my final decision on the aspects I believe this service has jurisdiction to consider.

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.

Having done that, I still don't think Mr W's complaint should be upheld insofar as it relates to his concerns about BPF's responsibility under S75 for the alleged misrepresentations.

[1] Financial Conduct Authority

As I said in my PD, S75 operates quite differently to S140A and, when it applies, it can give borrowers a very different ground for complaint against a lender. Whereas S140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, S75 simply creates a financial liability that the creditor is bound to pay. Liability under S75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the supplier (here that's C). S75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid S75 claim, it should pay its liability. And if it fails or refuses to do so, that can give rise to a complaint to this service.

So, when a complaint is referred to this service on the back of an unsuccessful S75 claim, the act or omission that engages this service's jurisdiction is the creditor's refusal to accept or pay the debtor's claim. This is distinct from anything that occurred before the claim was made such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

However, I don't think it would be fair or reasonable to uphold Mr W's complaint for reasons relating to his S75 claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr W's S75 claim was time-barred under the LA before it's put to BPF.

As I've explained, a claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Mr W could make against C. A claim for misrepresentation against C would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim under S75, like this one, is also *"an action to recover any sum by virtue of any enactment"* under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued here was the Time of the Sale. I say this because Mr W entered into the purchase of his timeshare product at that time based upon the alleged misrepresentations of C – which Mr W says he relied upon. And as the loan from BPF was used to help finance that purchase, it was when he entered into the Credit Agreement that he allegedly suffered the loss.

Mr W first notified BPF of his S75 claim in November 2021. And as more than six year had passed between the Time of the Sale and when he first put his claim to BPF, I don't think it's unfair or unreasonable for BPF to reject Mr W's concerns about C's alleged misrepresentations.

The PR suggest that the provisions of Section 14A (S14A) of the LA apply here insofar as the limitation period can be extended in instances of negligence. In doing so, the PR have presented arguments to support why they believe C and BPF were negligent, such that the provisions of S14A should be applied.

I don't think this is something this service is able to decide. As I said earlier, only a court is able to make a ruling under the LA. I'm not persuaded by the PR's arguments here, although should Mr W not accept my findings, this doesn't prejudice his right to pursue his claim in other ways. My role here is to decide whether BPF's failure to uphold his complaint was fair and reasonable given all the information available. It's not to decide any claim or make legal findings.

My final decision

For the reasons set out above, I don't uphold Mr W's complaint insofar as it relates to concerns about BPF's responsibility under section 75 of the CCA for alleged misrepresentation by the supplier.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 20 June 2024.

Dave Morgan
Ombudsman