

The Complaint

Mr M says that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) ('BPF') didn't fairly or reasonably deal with his claim under the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product on 30 August 2006 (the 'Time of Sale').

The claim, which is the subject of this complaint, is Mr M's because only he was named on the credit agreement that gave rise to it. But as the holiday product that the claim related to was in his name and that of his wife (Mrs M), I'll refer to both of them at times throughout this decision.

Background to the Complaint

Mr and Mrs M purchased membership of a holiday club at the Time of Sale from a provider (the 'Supplier'). And they helped to pay for that purchase by taking finance from BPF in Mr M's name (the 'Credit Agreement').

Unhappy with the purchase, Mr M made a CCA claim using a professional representative ('LF') on 5 June 2019 (the 'Letter of Claim'). And that Letter focused, in the main, on alleged misrepresentations by the Supplier and made it clear at the beginning and at the end that Mr M was making a claim pursuant to Section 75 of the CCA.

As the reasons for Mr M's claim are likely to be familiar with both sides, I won't repeat them here. However, the upshot of that claim was that Mr and Mrs M wouldn't have made the purchase in question but for the Supplier's misrepresentations.

As BPF didn't respond to Mr M's claim, a complaint about its handling of the claim was referred to the Financial Ombudsman Service. And on notifying BPF of the referral, it said that it hadn't received the claim.

Nonetheless, BPF told an investigator that it thought Mr M's claim had been made out of time under the Limitation Act 1980 (the 'LA').

The complaint was then looked at by another investigator who, having considered the information available to him, rejected the complaint on the basis that Mr M's claim was late under the LA.

Mr M, who was now represented by a different professional representative ('M'), disagreed. And, in summary, M asked the investigator to consider the following:

- Irresponsible lending as no affordability checks were undertaken by the Supplier.
- Pressure as the sales presentation lasted 4 to 5 hours and Mr and Mrs M weren't allowed to leave – which clearly gives rise to an unfair relationship contrary to Section 140A of the CCA.
- Tactics used by the Supplier were nothing short of undue influence.
- Mr and Mrs M were told that their membership was an investment when it clearly wasn't.
- Mr and Mrs M should have had the opportunity to thoroughly review the contract and make an informed, unpressured decision.
- The Supplier was not authorised by the Financial Conduct Authority, such that the Credit Agreement was void in light of a breach of Section 19 of the Financial Services and Markets Act 2000.
- The Supplier received undisclosed commission from BPF – which would give rise to an unfair relationship under Section 140A of the CCA.
- The Supplier was selling the same product to many consumers knowing full well that, if they all wanted to holiday at the same time as Mr and Mrs M, it wasn't possible to accommodate that. So, each and every misrepresentation by the Supplier was fraudulent.
- Mr and Mrs M could not have known that the Supplier's misrepresentations were fraudulent or what remedy was available to them until they instructed M who, in turn, told them that the misrepresentations were fraudulent.
- Mr M can rely on Section 32 of the LA to extend the time available to claim.

In response, the investigator told M that the complaint about irresponsible lending hadn't been made before. So, it needed to put the allegation to BPF first before he could consider it. And as for M's other arguments, he wasn't persuaded that any of them led him to a different conclusion to that which he arrived at in his assessment.

However, as an informal resolution couldn't be reached, the complaint was referred for an ombudsman's decision – which is why it was passed to me.

I issued a Provisional Decision ('PD') on 3 August 2022. And, in summary, I thought the substance of this complaint was confined to BPF's handling of a Section 75 claim for misrepresentation – which I also thought had been made out of time under the LA.

Neither side added to what had been said and/or provided in response to my PD. And as the deadline for responses has now been and gone, I've considered the complaint for a Final Decision.

My Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I still don't think it should be upheld.

As I've said before, the Letter of Claim focused, in the main, on alleged misrepresentations by the Supplier and the Letter made it clear at the beginning and at the end that Mr M was making a claim pursuant to Section 75 of the CCA.

I acknowledged in my PD that the Letter of Claim was headed “RE: S.75 AND / OR S.140A CONSUMER CREDIT ACT 1974”. But as I also said in my PD, the Letter of Claim didn’t assert at any stage that Mr M’s claim was pursuant to Section 140A or clearly suggest that the relationship between him and BPF was unfair – nor, in my view, was there enough in the substance of the Letter from which I could reasonably infer that such a claim was being made in practice even though there wasn’t any express reference to it. And as Mr M’s Complaint Form did nothing to suggest otherwise when this complaint was referred to the Financial Ombudsman Service, on my reading of this complaint, I thought it was confined to BPF’s handling of a Section 75 claim for misrepresentation – which I still think is the case now.

So, while I continue to recognise Mr M might have a number of concerns about the way in which the product in question was sold to him and Mrs M that M says led to an unfair relationship, as I said in my PD, BPF must be given an opportunity to deal with those first as part of a separate Section 140A claim.

The same can also still be said of the complaints about the finance being granted irresponsibly and the Supplier not being an authorised credit broker.

The Section 75 Claim for Misrepresentation

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967 (the ‘MA’). And 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 in tort for the purposes of the LA. So, the limitation period expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

Mr M made a like claim against BPF under Section 75 of the CCA and the limitation period for that claim is the same as the underlying misrepresentation claim. So, this means that he had six years from the date on which the cause of action accrued to make a claim.

The date on which a ‘cause of action’ accrued is the point at which Mr M entered into the purchase and Credit Agreements. I say this because he entered into the purchase agreement based on the misrepresentations of the Supplier – which he relied on. And as the finance from BPF was used to help finance the purchase, it was when he entered into the Credit Agreement that he suffered a loss.

It follows, therefore, that the cause of action accrued when Mr M entered into the purchase agreement or, if later, the Credit Agreement – which means he had six years from either of those points in time to make a claim. But as he didn’t do that until June 2019, his claim is likely to have been late. And for that reason, I still think BPF had and has a defence to it under the LA.

Grounds to Extend Time

M says that the Supplier’s misrepresentations were fraudulent – which he could not have known until he was told that was the case by M. It also says that Mr M can rely on Section 32 of the LA to extend the time available to claim.

However, I still can’t see why the mere fact that the Supplier sold the same product to a number of consumers who may have wanted to holiday at similar times of the year automatically leads to the conclusion that “each and every misrepresentation” (if made) would have been fraudulent. And based on what I’ve seen, I’m still not persuaded that the elements necessary to make such a finding are satisfied.

Section 32(1)(b) applies when “*any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant*”. And as I said in my PD, M seems to suggest, though it’s still not entirely clear, that the undisclosed commission received by the Supplier engages that provision. But given the allegations fuelling Mr M’s Section 75 claim, it remains the case that I can’t see why that particular issue prevented him from making the claim in question earlier.

So, I’m still not persuaded that there’s a reason why time might be extended in keeping with the provisions of the LA.

My Final Decision

For the reasons set out above, I don’t uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 29 September 2022.

Morgan Rees
Ombudsman