DRN-3818002

The Complaint

Mr N says that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) ('BPF') didn't fairly or reasonably deal with claims under Sections 75 and 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product on 13 September 2009 (the 'Time of Sale'). He also says BPF used an unauthorised credit broker to facilitate the credit he took to help pay for the purchase and failed to carry out a "sound and proper credit assessment".

This complaint is in Mr N's name only because the credit agreement that gives rise to the claims and complaint described above was only in his name. However, as the purchase that they relate to was in his name and that of his wife (Mrs N), I will refer to Mr and Mrs N at times during this decision.

Background to the Complaint

Mr and Mrs N purchased membership of Club Heritage International ('CHI')[1] from Business A at the Time of Sale at the cost of £10,200. And they helped to pay for the purchase using running credit granted by BPF at the Time of Sale in Mr N's name (the 'Credit Agreement').

The CHI Purchase Application (the 'Purchase Agreement') entered into by Mr and Mrs N was made at the Time of Sale between them and Business A – which was authorised to sell membership of CHI.

The "statement of facts" (the 'Statement of Facts') that accompanied the Purchase Agreement stated that Mr and Mrs N had contracted for a one-bedroom apartment during the "Super Red" season for 1 floating week each year at CHI's "Silver Resort".

Unhappy with what happened at the Time of Sale, Mr N – using a professional representative ('PR') – made the following claims and complaint on 8 August 2018 (the 'First Letter of Claim'):

1. A claim for breach of contract under Section 75 of the CCA – for reasons that weren't made clear at that time;
2. A claim for an unfair relationship under Section 140A of the CCA based, largely, it seems on Business A's alleged failure to disclose that it was paid commission by BPF;
3. A claim for *"procuring [a] breach of fiduciary duty"* in line with the authorities of "Wilson [2007]" and "McWilliam [2015]";
4. A complaint about BPF's use of an unauthorised credit broker; and
5. A complaint about BPF's failure to carry out a "sound and proper credit assessment".

PR acknowledged in the First Letter of Claim that the Credit Agreement was entered into more than six years before the claim was submitted to BPF. But it argued that Section 32 of the Limitation Act 1980 (the 'LA') extended the limitation period.

[1] A holiday product operated by Heritage Resorts Limited.

It doesn't look like BPF responded to the First Letter of Claim with anything other than a number of holding letters – the last of which was dated 18 March 2019.

On 1 July 2019, a complaint was referred to the Financial Ombudsman Service by PR on Mr N's behalf. The Complaint Form repeated much of what the First Letter of Claim had to say. But it did say that the relationship between Mr N and BPF was unfair because of the decision BPF made to lend to him and because of the pressure he was put under by Business A.

Accompanying that referral was a letter (the 'Second Letter of Claim') from PR adding to the allegations that had already been made – arguing that there had been a breach of the:

- Consumer Credit Directive applicable to credit agreements entered into on or after 1 February 2011 – specifically paragraphs 2.17, 3.24 and 3.25.
- Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') – specifically Regulations 3, 5, 6 and 7 along with paragraph 4.8 in Schedule 1.

On notifying BPF of the complaint, it argued that any claim for misrepresentation and an unfair relationship was likely to have been out of time under the LA. It also said that the Financial Ombudsman Service had already dealt with a complaint from Mr N about BPF's handling of a claim in relation to the holiday product in question.

BPF provided an investigator with a letter it got in September 2015 in which a different professional representative to PR (which I'll refer to as PR2) made a claim under Section 75 because its client (Mr N) believed that the holiday product in question had been "[mis-sold]/ misrepresented" because of the following breaches:

- *"No person may accept any consideration from the consumer before the end of the withdrawal period in relation to the contract.*
- *A trader must not offer an opportunity to enter into a regulated contract to a consumer at a promotion or sales event unless it clearly indicates the commercial purpose and key information is made available.*
- *Before entering into a regulated contract a trader must draw the attention of the consumer to the following matters – a right of withdrawal under the contract, the length of the withdrawal period, the prohibition on advance consideration during the withdrawal period."*

PR2 also said that it was aware that Business A had been investigated by the Spanish judicial system and ordered to give some of its clients a refund because it was found guilty of "financial mis-practice". PR2 then went on to compare that finding to an order the Office of Fair Trading imposed on a number of similar traders.

BPF also submitted a copy of an adjudicator's assessment – which dealt with a complaint about BPF's handling of the Section 75 claim that had been made in 2015. On my reading of that assessment, it made the following findings:

1. That Mr N had knowingly agreed to enter into the Credit Agreement.
2. While Business A may have become "aggressive" at the Time of Sale, Mr N was provided with his cancellation rights under the Credit Agreement and so could have cancelled after making his purchase from Business A.

As a result of that assessment, the complaint the Financial Ombudsman Service dealt with in 2015 appears to have been resolved without an ombudsman's decision.

This complaint was then looked at by an investigator who, having considered the information available, came to the view that he could only consider Mr N's Section 140A claim because the Financial Ombudsman Service had already considered what appeared to be the same complaint in relation to a misrepresentation claim under Section 75. Having done that, the investigator concluded that the Section 140A claim was made out of time under the LA. And he wasn't persuaded that the finance from BPF had been arranged by an unauthorised credit broker.

Mr N disagreed because he continued to have concerns about the steps taken by BPF to ensure he could afford the credit extended to him. He also made the point that he and Mrs N had been "bullied and coerced" into the purchase by Business A.

So, as an informal resolution couldn't be reached, the complaint was passed to me to decide.

I issued a Provisional Decision ('PD') on 7 October 2022. And, in summary, I thought the claim under Section 140A of the CCA had been made out of time under the LA. I wasn't persuaded that a claim for breach of contract under Section 75 of the CCA should succeed. And I also wasn't persuaded, by the information available, to uphold the complaint for reasons relating to the credit broker and BPF's decision to lend to Mr N.

BPF had nothing further to add. PR disagreed and, along with its reasons for doing so (which, insofar as they relate to what I said in my provisional findings, I've summarised below), it provided an email from the FCA that it says demonstrates that the Credit Agreement entered into by Mr N was arranged by a broker that wasn't authorised to carry out that activity:

- The unfair relationship between Mr N and BPF continues along with his liability to pay maintenance fees year in year out.
- The high-pressure marketing process, the bundling of the holiday product with finance and the complexity of the product (which Mr N didn't understand until years later), including unfair contract terms in relation to the products ongoing costs, lend credibility to his complaint about the relationship between him and BPF being unfair.
- Mr N is still indirectly repaying what he borrowed from BPF because he borrowed against his house in order avoid paying the higher interest under the Credit Agreement. As such, there remains an unfair relationship between him and BPF.

- The fact that the holiday product was for life was unlawful – as declared by the Spanish Supreme Court:

  "This law implemented into Spanish law the European Directive 94/47/EC on timesharing. Currently, Spanish law is contained in Law 4/2012, of 6 July implementing Directive 2008/122/EC. In particular, Law 42/1998 required that contracts had a maximum duration of 50 years (Arts. 1.6 and 3.1). According to Art.1.7 of the same law, contracts of longer duration were null and void. Notwithstanding this, Law 42/1998 also contained some transitory rules on the adaptation of [pre-existing] rights of longer duration. Moreover, transitional rule N. 3 of Law 42/1998 created a nullity action for [pre-existent] situations not adapted to the law in a two [year] period.

As for the deadline for responses to my PD has now been and gone, the complaint has come back to me to consider 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.

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.

Having read and considered all the available evidence and arguments, I still don't think this complaint should be upheld.

Under Sections 75 and 140A of the CCA, a "*debtor-creditor-supplier agreement*" is a precondition to claims under those provisions. As I said in my PD, BPF didn't dispute that Mr N entered into such an agreement. And it still doesn't dispute that now.

The Section 75 Claim for Breach of Contract

As I've said before, on my reading of this complaint, the only Section 75 claim made by Mr N in August 2018 was for a breach of contract rather than misrepresentation. And as a complaint about BPF's handling of such a claim doesn't appear to have been dealt with before by the Financial Ombudsman Service (because such a claim doesn't look like it was made before August 2018), I still can't see why it would be inappropriate to consider it here.

However, it remains the case that very little has been said and/or provided in relation to the suggestion that there had/has been a breach of contract. So, it's still not clear why the assertion was and is being made. And as I've said before, without knowing what specific rights Mr N thinks he had/has lost, I can't say that there's been a breach of contract that BPF is likely to be jointly liable for.

The Credit Broking

PR alleged in the First Letter of Claim that the Credit Agreement Mr N entered into was arranged by an unauthorised credit broker – relying, it said, on documentation supplied by Mr N that *"clearly states that the finance was brokered by Heritage Resorts and Hotels/Club Heritage International/Heritage Resort Sales Limited."*

PR also said the *"FCA have confirmed they hold no record located in reference to registration with themselves or the OFT"*.

In response to my PD, PR provided a copy of an email it got from the FCA on 30 May 2018 in which it said the following:

"The Financial Services Register is a public record that shows details of firms, individuals and other bodies that are, or have been, regulated by the FCA. I have searched the register for Heritage Resorts and Hotels and Heritage Sales Ltd and I can confirm these firms are not authorised or regulated by the FCA; these firms do not hold […] permissions for consumer credit activity or introducing."

So, PR argued and continues to argue that the Credit Agreement entered into by Mr N was unenforceable.

However, as I suggested in my PD, the business[2] referred to as the credit broker in the First Letter of Claim (as above) wasn't specifically named on the Credit Agreement as the business that arranged the Agreement.

I acknowledge that "Heritage Resorts" was referred to as the name of the *retailer* on the Credit Agreement. It's *possible* that means it was Heritage Resorts Limited that brokered the Agreement. But I don't find that probable. After all, "Heritage Resorts" was only referred to as the retailer on the Agreement rather than the *credit intermediary* – which, in my view, is likely to reflect the fact that Mr and Mrs N had purchased, from Business A, membership of a holiday product operated by Heritage Resorts Limited. And as Business A was already in the position to arrange the Credit Agreement because it looks like it held a Consumer Credit Licence at the Time of Sale, in the absence of any persuasive evidence to suggest otherwise, it seems unlikely to me that Heritage Resorts Limited would have stepped into a sale with which it doesn't appear to have had much if any direct involvement to broker the relevant finance when it doesn't look like it held a Consumer Credit Licence.

So, as PR still hasn't provided any supporting evidence to reliably corroborate its assertion that it was Heritage Resorts Limited that brokered the finance in question rather than Business A when (1) it was with Business A that Mr and Mrs N contracted for the purchase of membership of CHI rather than Heritage Resorts Limited and (2) Business A held a Consumer Credit Licence at the Time of Sale, given the information available, I still think it's more likely than not that the Credit Agreement was brokered by Business A.

[2] Of the names referred to as the credit broker in the First Letter of Claim, only Heritage Resort Sales Limited looks like a business as Club Heritage International was the holiday product that Mr and Mrs N became members of and Heritage Resorts and Hotels strikes me as a trading name.

The Lending Decision

The suggestion in the Complaint Form that BPF didn't carry out the right checks when it lent to Mr N was framed as giving rise to an unfair debtor-creditor relationship under Section 140A. But, as I've explained below, that claim was likely to have been made out of time under the LA.

Lending money under a regulated credit agreement of the kind in question was an activity covered by the Financial Ombudsman Service's Compulsory Jurisdiction at the Time of Sale. But it remains the case that very little has been said about this particular allegation. And as I said in my PD, even if I were to find that BPF failed to do everything it should have when it agreed to lend (and I make no such finding), I'd have to be satisfied that the lending was unaffordable for Mr N before also concluding that he lost out as a result. As I haven't seen anything to persuade me that was the case, I still don't think this is a reason to uphold this complaint given its circumstances.

The Section 140A Claim for an Unfair Relationship

Only a court has the power to decide whether the relationship between Mr N and BPF was unfair for the purpose of Section 140A. But, as it's relevant law, I do have to consider it if it applies to the Credit Agreement – which it does.

BPF says that the fairness of a relationship has to be determined at the point at which the relationship ended – which, on this occasion, it says was when Mr N repaid what he borrowed from BPF to pay for the purchase in question rather than when his account was closed on 26 January 2013 as per BPF's internal records. And as Mr N did that on 18 March 2010, BPF says that he had to make his claim no later than 18 March 2016 in order to be in time for the purpose of the relevant provision of the LA.

So, as Mr N made his claim in August 2018, BPF argues that it was out of time under the LA.

A claim under Section 140A is a claim for a sum recoverable by statute – which is governed by Section 9 of the LA. As a result, the time limit for making such a claim is six years from the date on which the cause of action accrued.

In *Canada Square Operations Ltd v Potter* [2021], the Court of Appeal set out how the provisions of the LA apply to the unfair relationship provisions. In so doing, it relied (at paragraph 26) on the analysis of Mr Leggatt QC (as he was then) in *Patel v Patel* [2009].

As Mr Leggatt QC explained:

"The critical question is: what is the relevant date at which the fairness or otherwise of the relationship has to be determined? In principle, it seems to me that the determination should be made having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination. This means that if the relationship between the creditor and the debtor has ended, the determination should be made at the date when the relationship ended; and if the relationship is still ongoing, the determination should be made as at the time of the trial".

The upshot of this dicta is that the time limit to make a Section 140A claim, for the purpose of the LA, only begins to run when the relationship between the creditor and debtor comes to an end.

However, as I said in my PD, the Court of Appeal more recently considered how the limitation period applies to unfair relationship claims – this time in *Smith and Burrell v Royal Bank of Scotland plc* [2021] [*S&B v RBS* [2021]). That case concerned the claim that there was an unfair debtor-creditor relationship due to the levels of commission paid as a result of a Payment Protection Insurance policy ('PPI') taken to protect the repayments on a credit card.

The Court took the view that the relevant date when assessing unfairness didn't always and necessarily have to be the date when the debtor-creditor relationship ended (assuming that the relationship had ended by the time a court considered the matter). The Court thought that a relationship could change over time – being subject to periods of fairness and periods of unfairness. And for that reason, an earlier period of unfairness may not mean that the relationship is unfair at a later date.

As a result, Birss LJ held that the relevant relationship up until the date of the last PPI repayment was unfair. But once those sums had been repaid and no liability remained, the fact that the defendant continued to leave claimants in ignorance of the commission did not justify a finding that the unfairness continued, particularly when the credit agreement alone was not unfair. And as the claimants had failed to allege or prove that any economic effect or consequence of the PPI agreement persisted after the relevant sums had been repaid, the Court held that the unfair relationship came to an end when those sums had been repaid.

It seems to me, therefore, that while *S&B v RBS* [2021] leaves the longstops[3] in *Patel v Patel [2009]* untouched, it can now be argued that a limitation period may start at an earlier date. In other words, the limitation period can be said to start when the credit relating to a related agreement has been paid off, rather than only when the relevant credit agreement is formally brought to an end and the entire debtor-creditor relationship ends.

But that isn't necessarily the case if there is continuing financial detriment and/or ongoing contractual obligations that continue to render a debtor-creditor relationship unfair. And I say that because of what Birss LJ had to say in paragraph 68:

*"**The consequences of that unfairness in the present case will have included accruing a liability to make payments required by the PPI agreement and paying those sums.** If the customer still owed sums under the credit agreement which had arisen from the PPI agreement but were outstanding even after the PPI agreement itself had ended, then in such a case the unfairness would still exist at that later stage. However once all sums due had been paid and **no liability remained**, the fact that the bank continued to leave the customer in ignorance of the **commission well after the customer's liability to make any payments has ceased**, does not justify the conclusion the judge reached, all the more so when the credit agreement alone, absent the PPI agreement, was not itself unfair. The relationship was unfair in January 2000 when Ms Smith entered into the PPI agreement in ignorance of the commission and was unfair up to April 2006 because Ms Smith was still obliged to and was in fact making payments to RBS of sums which only arose because of that PPI agreement. **However the relationship changed after April 2006 because the PPI agreement ended.** There was no case, alleged or proved, that any economic effect or consequence of the PPI agreement for Ms Smith persisted after April 2006 or existed in 2015."* [my emphasis added]

[3] These are either the end of the relevant relationship or the date of trial.

So, while *S&B v RBS* [2021] doesn't specifically consider the situation in which a debt is repaid but a burdensome related agreement survives, I can see an argument for saying in such a case that the relationship between the creditor and the debtor arising out of the credit agreement taken with the related agreement continues to be unfair for so long as the debtor continues to be afflicted with fresh financial liabilities and/or contractual obligations, which they ought never to have assumed, because of the related agreement – unless, of course, the relationship between the debtor and creditor ended at an earlier date because the credit agreement was formally brought to an end.

With that said, when the allegations of unfairness vary, it's more difficult to establish precisely when the alleged unfairness is likely to have ended and, in turn, when the relevant limitation period started and ended. And for that reason, it's necessary to carry out a factual analysis of the relevant relationship and its fairness first before considering limitation. So, that's what I've done.

Was there any ongoing unfairness after 18 March 2010?

When PR first made a Section 140A claim on Mr N's behalf (in the First Letter of Claim), it said the following under the heading "Unfair Relationship":

"It is clear that the unfairness of the agreement, together with the related agreement with the Timeshare Owner, falls into two broad and distinct categories.
Firstly, there is the issue of the commission […]"

But the First Letter of Claim didn't set out what the second category was. So, the claim at that time was based, in my view, entirely on Business A's failings in relation to the alleged payment of commission to it by BPF.

However, as I've already said, the 'Second Letter of Claim' added to the allegations that had already been made by PR. And as it was after the First and Second Letters of Claim that BPF set out its position on Mr N's claims and this complaint, I've considered all of the allegations that make up his Section 140A claim when carrying out the factual analysis I've described above.

As I said in my PD, once Mr N repaid in full what he drew down from his £20,000 credit limit (which he did on 18 March 2010), such that no liability remained under the Credit Agreement, even if BPF had paid commission that wasn't disclosed or adequately explained to Mr N when it should have been, I think a court is likely to conclude that any unfair relationship as a result of that payment (if there ever was one[4]) came to an end when Mr N settled his outstanding balance under the Credit Agreement.

And I say this because I'm still not persuaded a court is likely to find that there was any continuing unfairness between Mr N and BPF given the facts and circumstances of this complaint.

[4] I haven't been provided with any evidence to persuade me that any commission paid by BPF was, in practice, likely to have risked making relationship between it and Mr N unfair under Section 140A.

Given the information available, I still can't see any ongoing or recurrent contractual obligations, whether or not they were financial in nature, that were *objectionable* and likely to have contributed to an unfair relationship between Mr N and BPF *after* 18 March 2010. I acknowledge, as I did in my PD, that Mr N had to pay annual maintenance fees as a member of the holiday club in question. But I still haven't seen anything to demonstrate that those were likely to have been governed and/or operated in a way that was and/or could be unfair.

On my reading of *S&B v RBS* [2021], it's possible that even perfectly reasonable contractual obligations could have contributed to an ongoing unfair relationship. But the allegations that are said to have given rise to an unfair relationship on this occasion still aren't accompanied by supporting evidence or detailed recollections from Mr N that are persuasive – while some of the allegations are difficult to square with the testimony I've seen. So, based on what I've seen so far, I'm not persuaded that simply being party to the Purchase Agreement was a source of continuing unfairness either.

I have considered PR's argument about the Credit Agreement being voidable because the holiday product was unlawful. But PR hasn't provided any evidence to persuade me that the contract entered into by Mr N was/is to be construed in accordance with Spanish law. And even if it was/is, PR also hasn't explained, with reference to the facts and circumstances of this complaint, why the judgment in question can be applied directly to the question as to whether the Purchase Agreement was/is voidable – thus rendering the Credit Agreement voidable.[5]

As a result, once Mr N settled his outstanding balance under the Credit Agreement on 18 March 2010, I think it's unlikely a court would find that the relationship between him and BPF continued to be unfair after that date.

The Limitation Act 1980

For the reasons set out above, I still think BPF is entitled to rely on the LA as a defence to this claim given its timing. After all, Mr N's asking for a refund of the payments he made as a result of his purchase. That means Section 9 of the LA applies to the claim – giving him six years in which to make it. But as he didn't do that until August 2018, I think it was made out of time under that Act.

Grounds to Extend Time

PR argued in the First Letter of Claim that Mr N had more time to make his Section 140A claim under Section 32 of the LA because the payment of commission by BPF was deliberately concealed.

But had such a payment been made, I still haven't seen anything to suggest BPF would have breached a duty by making it – nor have I seen anything to suggest it was under a regulatory duty to disclose the amount of commission paid in the circumstances. And as I haven't been provided with anything to persuade me that any commission paid by BPF was likely to have put it on notice that *not* disclosing the payment(s) to Mr N risked making their debtor-creditor relationship unfair under Section 140A, I'm not persuaded that there's a reason why time might be extended in keeping with the provisions of the LA.

[5] As lending money under a regulated credit agreement of the kind in question was an activity covered by the Financial Ombudsman Service's Compulsory Jurisdiction at the Time of Sale, if the Purchase Agreement was null and void for the reason PR suggests, such that it was 'voidable', I acknowledge that may have implications for the Credit Agreement that could be considered separately to Mr N's Section 140A claim. But as the allegation wasn't put to BPF when the claim and complaint in question were first made to it, it wouldn't be appropriate to consider the assertion as a separate cause of complaint before BPF has had the chance to do so first.

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 N to accept or reject my decision before 23 December 2022.

Morgan Rees
Ombudsman