



The complaint

Mr W, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

Mr W has made three purchases of holiday products from a company I will call M. The first was in September 2008, the second in September 2009 and the last in October 2014. This complaint concerns the one purchased in October 2014. It cost £10,450 and was funded by a loan from BPF.

In April 2022 PR submitted a letter of claim to BPF on behalf of Mr W. The details are well known to both parties so I will set out a short summary in this decision. PR said the product had been misrepresented and Mr W had been pressurised to purchase it. It said he felt he could not leave the meeting. The product was sold as an investment and he was led to believe he could make use of it at any time, but this had not turned out to be true.

He 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").

Mr W had not been given time to read the documentation and had been pressurised into taking out the loan. No 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 Mr W. 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.

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. PR 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 also pointed out that Mr W was elderly when he took out the agreement and would be well over 100 when it was due to end. It added that he had not been given enough information by M. 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 Mr W 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 Mr W 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 Mr W'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, Mr W 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 his 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 Mr W's case, that's when he could have brought a claim

for misrepresentation against the supplier or the like claim against BPF. I think that was the date he entered into the agreement to buy the product, so in October 2014. It was at that time that he entered into an agreement based, he says, on the misrepresentations of M. He claims that he wouldn't have entered into the timeshare agreement if those misrepresentations hadn't been made. And it was on that day that he suffered a loss, as he took out the loan agreement with BPF.

It follows, therefore, that I think the cause of action accrued in October 2014, so Mr W had six years from that date to bring a claim. But he didn't contact BPF about his 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 Mr W'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 Mr W 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 s. 140A is “an action to recover any sum recoverable by virtue of any enactment” under s. 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 Mr W could be said to have a cause of action in negligence against BPF anyway.

Their alleged loss isn't related to damage to property or to him 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 Mr W 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 any documentation from the sale in 2014 apart from a one page purchase agreement. PR has referred to alleged claims made by the sales representative, presumably based on Mr W's recollections from some eight years 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.

Although I cannot say with certainty as I have not seen the contract, but I believe M provided

the statutory 14 day withdrawal period and if Mr W had been concerned that he had been subjected to undue pressure or not been given enough time to assimilate the agreement details he had the option of withdrawing from it.

I also note that this was his third purchase so I would have expected him to have some understanding of the product he was buying and what M was offering. PR says both that he 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. This does not allow me to reach the conclusion PR is proposing.

It is usual for these agreements to make it clear that the customer is not purchasing real estate or an interest in real estate and the options for selling the product on are also explained. While it may have been suggested that Mr W was making an investment in future holidays there is no evidence that the product was sold as a financial investment.

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 Mr W 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 Mr W lost out as a result of its failings. Mr W has provided no evidence whatsoever that he found the loan difficult to repay. Indeed I note that as of March 2020 he 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 Mr W to accept or reject my decision before 23 February 2024.

Ivor Graham
Ombudsman