

The complaint

Mr B, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claim under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. The product was purchased by Mr and Mrs B, but the loan is in Mr B's name which makes him the eligible complainant. For simplicity, in this decision I will refer to him as the sole purchaser.

What happened

In November 2016 Mr B purchased points in a timeshare holiday product from a company I will call M at a cost of £13,950 which was funded by a loan from BPF. He had previously purchased membership points and PR says he was persuaded to purchase more in 2016.

In July 2022 PR submitted a letter of claim to BPF. Both parties are aware of the details of the claims so in this decision I will simply set out a short summary. The claims were made under s.140A CAA. It said there had been misrepresentation and irresponsible lending.

PR said Mr B had concerns about existing availability of accommodation and while on holiday he attended a meeting with one of M's representatives. It is claimed he was told he needed to buy more points and if he had enough he would be able to surrender those to buy a property. It said a sense of urgency was created as the planned properties were to be built soon. The additional points increased his annual maintenance fees and he had not been advised that he could simply relinquish his existing product. PR said this created an unfair relationship.

It also said that no meaningful affordability checks were carried out and the interest rate charged was high. It noted no representative from BPF was present at the sale and Mr B sought a refund of his money.

BPF sent a holding response and PR brought a complaint to this service on behalf of Mr B. BPF responded to say it had not heard from M, but in the absence of any supporting evidence from Mr B it did not accept the claims. It noted Mr B had a 14 day cooling off period and there was no evidence of an affordability issues. It also sent a copy of its assessment of Mr B's application.

The complaint was considered by one of our investigators who didn't recommend it be upheld. He noted the Memorandum of Understanding which Mr B signed states that he may trade the points against any future properties that may become available for sale. He was satisfied the documentation was clear that properties that may become available, but it didn't guarantee that a property would be available at any specific time. In addition he had not seen evidence that the loan had been unaffordable. PR didn't agree and asked that the matter be referred to an ombudsman.

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.

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

S.140 A

Only a court has the power to decide whether the relationships between Mr B 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 Mr B could be said to have a cause of action in negligence against BPF anyway.

His alleged loss isn't related to damage to property or to them 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 such responsibility – whether willingly or unwillingly.

As I was not present at the sales which took place over two days I cannot say what was actually said by the sales representative. It is known for these products to be sold as investments in future holidays which is not the same as financial investments. As our investigator has pointed out the documentation allows for the points to be used in the future purchase of property and there is no guarantee as to when this may happen.

I appreciate that Mr B believes he was given to understand that this would happen in the

relatively near future, but the documentation does not support this claim.

PR says that some terms of the contract are “unfair”, I presume within the definition in the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”). That is not for me to say, although I must have regard to relevant law, including UTCCR. The remedy if a contractual provision is “unfair” is however that the provision is unenforceable against the consumer – not that the whole contract falls.

In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mr B and BPF.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. BPF has said that it carried out the appropriate credit checks before approval and it has provided documentary evidence of this.

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 B lost out as a result of its failings. I have noted he maintained his monthly payments and repaid the loan early. No evidence has been submitted to show the loan was unaffordable.

Conclusion

It is not for me to decide whether Mr B has a claim against A, or whether he might therefore have a “like claim” under the Consumer Credit Act. Nor can I make orders under s.140A and s.140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr B’s complaint. In the circumstances, I think that BPF’s response to Mr B’s claims was fair and reasonable.

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 B to accept or reject my decision before 2 April 2024.

Ivor Graham
Ombudsman