DRN-4798900

The complaint

Mr B complains that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) ('BPF') didn't fairly or reasonably deal with claims under ss. 75 and 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a timeshare in October 2008. He also says that the credit agreements he entered into with BPF were unenforceable. The purchase was made by Mr B and two others, but the credit agreement was in Mr B's name alone so he is the eligible complainant. For simplicity, in this decision I will refer to him as the sole purchaser.

What happened

Mr B bought a trial membership of a timeshare (the 'Club') from a third party I will call C in 2004. He made a number of subsequent purchases and on 4 October 2010 he bought 1001 additional points at a cost of £12,400. This was funded by a loan from BPF, which I gather was written off in September 2015. It is this purchase which is the subject of this complaint.

Mr B made two later purchases which were of a fractional timeshare membership. These are not part of this complaint.

In April 2019, using a professional representative ('PR') Mr B made claims under s. 75 and s. 140A of the CCA for misrepresentation and an unfair relationship.

Both parties are aware of the claim, but in summary PR said that:

- The product was misrepresented in a number of ways.
- Mr B was told he could easily sell the product.
- There was a lack of availability and he had to book up to 18 months in advance.
- The resorts were not exclusive.
- He was pressurised to make the purchase and felt he could not leave until he made a purchase.
- C had broken the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").
- The loan was at a higher rate of interest than offered by other lenders.
- A proper affordability analysis had not been undertaken and the lending had been irresponsible.
- There had been an unfair relationship as set out in s.140A.

I understand that BPF didn't issue a substantive response and a complaint was brought to this service. The complaint was passed to an investigator who, having considered the

information available, concluded that Mr B's claims under s. 75 CCA were out of time under the LA. He also believed the claim concerning unaffordable lending had been brought out of time. Finally, he didn't consider there had been an unfair relationship.

PR disagreed with the investigator's assessment. It said this was fractional timeshare and referred to a witness statement from Mr B which I have not seen. It argued that the fractional timeshare was sold as an investment and was similar to the case decided in the recent Shawbrook judicial review.

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 currently think this complaint should be upheld.

PR has sent us a considerable amount of information and submissions in an effort to explain what it thinks the outcome of this complaint should be. However, as this service is designed to be a quick and informal alternative to the courts, my role as an ombudsman isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint. And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my reasons for reaching them. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to this complaint, when doing that.

I must make clear that the claim made by PR to BPF on Mr B's behalf states that it only relates to the 2010 purchase. The 2015 purchase of fractional membership was funded by another lender and PR did not identify how the 2016 purchase had been funded. So, this is not a complaint about a fractional timeshare product.

The S. 75 Claims for Misrepresentation

S. 75 of the CCA states that, when a debtor (Mr B) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that

relates to a transaction financed by the agreement, the creditor (BPF) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

A claim for misrepresentation against C would ordinarily be made under s. 2(1) of the Misrepresentation Act 1967 (the 'MA'). And it was held in Green v Eadie & Others [2011] EWHC B24 (Ch) ('Green v Eadie') that a claim under s. 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 s. 2 of the LA).

Mr B made like claims against BPF under s. 75 of the CCA and the limitation period for those claims is the same as the underlying misrepresentation claims. As noted in paragraph 5.145 of Goode: Consumer Credit Law and Practice, BPF may adopt any defence that would have been or 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.

So, this means that Mr B had six years from the date on which the causes of action accrued to make his s. 75 claims.

The date on which the causes of action accrued is the point at which Mr B entered into the purchase and credit agreements. I say this because the Letters of Claim and Complaint say that he entered into the purchase agreement based on the alleged misrepresentations of the Club.

And as the finance from BPF in 2010 was used to help pay for the purchase, it was when he entered into the credit agreement that he suffered a loss.

It follows, therefore, that the causes of action accrued in October 2010 – which means that, at the latest, he had six years from when he entered into the relevant credit agreements to make his claims. But as he didn't do that until April 2019, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, his claims are likely to have been too late. And for that reason, I think BPF had and has a defence to them under the LA.

Grounds to Extend Time

S. 14A of the LA provides claimants with a "Special time limit for negligence actions [in which] facts relevant to cause of action are not known at date of accrual".

A claim for negligence is a cause of action in tort. And as noted in paragraph 32.35 of Goode: Consumer Credit Law and Practice, s. 75 of the CCA can't find a claim in tort against the creditor except on the basis of a fraudulent or negligent misrepresentation. But on my reading of this complaint, Mr B's allegations of misrepresentation don't set out in any detail the representations that are said to have been made by the Club – let alone assert, with that detail in mind, that the Club owed him a relevant duty of care when making such representations. So, to the extent that there were s. 75 claims for misrepresentation, s. 14A of the LA doesn't help Mr B's cause.

Unfair Relationship

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 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.

Even if BPF had accepted that responsibility I have not been given persuasive evidence that there was an unfair relationship.

In line with laws designed to protect timeshare buyers, however, I believe Mr B had 14 days in which to cancel the purchase agreement and he had 14 days in which to cancel he loan agreement with BPF. If Mr B felt he had been unduly pressured into the purchase, I think it likely that he would have cancelled. I also note he has made numerous purchases from the Club and this was not the last one. That suggests he was aware what he was purchasing and he had been satisfied with what the Club was offering.

Under section 56 of the Consumer Credit Act, the Club acted as agent for BPF, not as Mr B's agent. I am not persuaded therefore that it owed any fiduciary duty towards him, or that BPF procured, or could have procured, a breach of any such duty. The Club sold the timeshare and introduced Mr B to BPF. It was not his financial adviser and was not recommending any particular financial product from a range of products.

I am not persuaded there was any breach of the Timeshare Regulations. Mr B was given 14 days in which to withdraw from the agreement and acknowledged receipt of the Standard Information Form for Timeshare Contracts. Even if there were a breach of the Timeshare Regulations, that would not necessarily give rise to a claim which an individual club member could bring against the Club. Nor would it necessarily mean that the loan agreement created an unfair relationship between Mr B and BPF.

PR says that some terms of the contract are "unfair" within the definition in 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. Mr B has not said whether any of the provisions which he says is unfair has been relied on by the Club or what the effect has been on him. 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.

The Lending Decision

While PR says that Mr B suffered detriment because the right checks weren't carried out before BPF lent to him, very little has been said about this particular allegation. And 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 B before also concluding that he lost out as a result. I note the loan was written off in September 2015, but that does not indicate that it was unaffordable at the time it was taken out. As I haven't seen anything to persuade me that it was unaffordable, I don't think this is a reason to uphold this complaint given its circumstances.

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 28 October 2024.

Ivor Graham
Ombudsman