

The complaint

Mr K complains 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 several timeshares.

What happened

Mr K and his late wife purchased three timeshare memberships on 16 February 2008, 25 January 2009 and 7 February 2015. They cost respectively £16,950, £23,500 and £20,776. These were funded in part by loans from BPF which ended on 13 January 2009, 17 May 2014 and 3 May 2016 respectively.

On 12 July 2022 Mr K made claims for breach of contract and misrepresentation under s. 75 of the Consumer Credit Act 1974 ('the CCA') and an unfair relationship under s.140A of the CCA. Mr K set out his claims in some detail.

BPF says it sought to make contact with Mr K to seek further information as it thought he may have a claim for breach of contract since the supplier had ceased to trade. It says it didn't receive the information it needed and so it rejected his claim. However, it said it would review his claims if at a later date he was able to provide the necessary information.

Mr K brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. He said the claims had been brought out of time for misrepresentation. However, he agreed with BPF that there might have been a breach of contract as a result of the supplier going into liquidation, but there wasn't sufficient evidence to show that Mr K still retained his membership at the date of liquidation.

Mr K responded to say that BPF was reviewing all the loans sold by the supplier and considering offering redress. He asked that we defer making a decision. I asked BPF if Mr K's loans were part of its review. It confirmed they were and it would be contacting Mr K in due course. Our investigator contacted Mr K to let him know and to explain it was likely that BPF would want evidence that he was still a member at the time of the liquidation. He said a decision could be issued as it was unlikely it would prejudice his position. Mr K agreed. He also said that he still had the original ownership documents which he would have had to have returned if he relinquished his membership.

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.

Mr K has sent us a considerable amount of information and submissions in an effort to explain what he 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.

The S. 75 Claims for Misrepresentation

S. 75 of the CCA states that, when a debtor (Mr K) 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 the supplier 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 K 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 K 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 K entered into the purchase and credit agreements. I say this because the Letters of Claim and Complaint say that he entered into the purchase agreements based on the alleged misrepresentations of the supplier.

And as the finance from BPF in 2008, 2009 and 2015 were used to help pay for the purchases, it was when he entered into the credit agreements that he suffered a loss.

It follows, therefore, that the causes of action accrued in 2008, 2009 and 2015 – 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 July 2022, 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 has a defence to them under the LA.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationships between Mr K 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 as I understand it the last loan was repaid in May 2016 and the claim was made in July 2022 which means it was made out of time.

However, I'm not persuaded that Mr K could be said to have a cause of action in negligence against BPF anyway.

Mr K's 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 to nothing to persuade me that BPF assumed such responsibility – whether willingly or unwillingly – over and above ensuring that Mr K could afford to repay what he was borrowing.

I am not persuaded that BPF owed Mr K a duty of care to ensure that the product they were purchasing wasn't sold by the supplier in breach of a relevant regulation – particularly one that imposed a criminal sanction.

As things stand, therefore, I can't see why any of Mr K's claims for misrepresentation were likely to have been made in time under the LA or that he would have a claim if they had been made in time..

Breach of Contract

I agree that Mr K may have a valid claim for breach of contract since the supplier went into liquidation. However, in order for that to succeed he needs to show that he was still a member of the timeshare club at the time of liquidation. While he has circumstantial evidence I have not seen anything definitive that would allow me to uphold his complaint.

I have seen a maintenance fee invoice dated 10 December 2018 for the memberships, but there's no evidence that this was paid.

I have also noted the email from the liquidators dated 13 October 2020 addressed 'To All Known Members of Club Paradiso.' I cannot safely conclude this shows Mr K was an active member at the time, as it isn't personally addressed to him.

Even holding the original certificates does not of itself prove that Mr K was still a member at the time of liquidation. It was possible that he defaulted on payments and his membership was terminated or he simply stopped making the annual maintenance payments.

However, I would explain that my role is not to determine if his claim should succeed, but whether it was fair and reasonable for BPF to have rejected it on the basis of the evidence it had been given. I have concluded that BPF was entitled to reach the decision it did.

That said, I should make it clear that this should not in any way prejudice BPF's review of the loans which it is currently carrying out.

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 K to accept or reject my decision before 15 September 2023.

Ivor Graham
Ombudsman