DRN-3561523

## The complaint

Mr F 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 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 and Mrs F, but the credit agreement was in Mr F's name alone. However, as they relate to purchases made by him and his wife, I'll refer to Mr and Mrs F at times throughout this decision.

## What happened

Mr and Mrs F bought membership of a timeshare (the 'Club') from a third party I will call C on 26 October 2008. They acquired 1,000 points at a cost of £13,310 plus £1,398 for membership fees being a total of £14,699. This was funded by a loan from BPF which I gather was repaid in August 2009.

In November 2021, using a professional representative ('PR') Mr F made claims under s. 75 and s. 140A of the CCA for misrepresentation and an unfair relationship.

The reasons for the claims under s. 75 were described in the following terms:

"A. The Timeshare sold by CLC is Null and Void as it is not a timeshare as defined by the EU Directive.

Due to CLC's agreement being Null and Void, The Bank's loan agreement creates an unfair relationship, under section 140A of the Consumer Credit Act, between the Bank and our Client. The Bank's loan agreement is therefore Null and Void.

B. The Bank loan agreement which includes the extortionate interest rate, creates an Unfair Term under the Unfair Contract Terms Regulations. In addition, the undisclosed secret commissions also is an unfair term. All of these terms makes the loan agreement unenforceable.

C. The misrepresentations made by CLC at the time of sale of The Timeshare has caused financial detriment to our client. Our Client therefore has a claim against the Bank for the breaches by CLC due to the misrepresentations under section 75 of the Consumer Credit Act. As a result, the Bank's loan agreement is Null and Void.

D. The Bank did not carry out an affordability assessment on the Client's ability to pay the Bank's loan instalment in accordance with FCA regulations Conc 5.2.2 R (1) and Conc 5.3.10(4). As a result, the Bank's loan agreement is Null and Void.

E. The contract which was declared illegal and therefore null & void consisted of "floating weeks", these have also been deemed illegal as they hold no value or substance. There was also no end date on the contract, so it was what is known as perpetuity. The law clearly states that contracts should be no longer than 50 years in duration and the termination date must clearly be shown."

I understand that BPF didn't issue a substantive response and a complaint was brought to this service in February 2022. This repeated much of what and been included in the claim to BPF and added:

"1. Clients were not given sufficient information as to the terms and conditions of the loan agreement required by law;

2. There were no major credit checks made as to the affordability of the repayments such as income versus outgoings reports;

3. The length of the loan agreements were not explained, with client under the impression that they were for two years;

4. Clients were pressured into signing these agreements;

5. False representations were made to clients relating to the financial impact of regulated agreements;

6. Clients were subject to long high pressure sales tactics to purchase the timeshares;

7. Clients were sold timeshares which were not appropriate for them;

8. Vulnerable consumers were treated inappropriately;

9. Concerns about commission arrangements and disclosure thereof."

The complaint was passed to an investigator who, having considered the information available, concluded that Mr F's claims under s. 75 and s.140A of the CCA were out of time under the LA.

PR disagreed with the investigator's assessment. Much of what it had to say repeated what the Letters of Claim and Complaint said. So, I won't repeat any of that. But, in summary, it did say the following in relation to the limitation period that the investigator thought was relevant to his outcome:

It argued that s. 14A of the LA gave Mr F more time to make his claims because BPF ought to have known about European Directive 94/47/EC before providing Mr F with the finance to make the purchases in question. In PR's view, therefore, BPF owed Mr F a duty of care and shouldn't have provided him with finance to purchase points-based timeshares that were in breach of the relevant regulations. It set out its interpretations of S 14 as follows:

"S14 LA Interpretation

1. CLC breached both Timeshare Regulations – 1992 Act – by selling out Clients the Points timeshare as described above

2. The Bank breached the Timeshare Regulations – 1992 Act by making payments within the Client's withdrawal period.

3. The Bank as principal of its agent, is responsible for the actions of its agent

4. These breaches of the law have resulted in the Bank being negligent as the Bank had a duty of care to the Client to ensure all laws were being complied with.

5. The Bank cannot claim ignorance of Resort's actions as a defence as the Bank and the Resort agreement were "linked agreements" so the Bank had a duty of care to ensure all

laws were being complied with.

6. As highlighted in the Barclays Partner Finance v FCA case (Appendix 5), the Bank is responsible for the actions of its agent.

7. As a result of these breaches of the law where the Bank's was negligent, the relationship between the Bank and the Client is unfair under S140A of the CCA.

8. S14A extends the time the Client has to make a claim to the Bank due to the Bank's negligence.

9. Under S14A, the Client has to make a claim to the Bank within 3 years from the date of knowledge of when the Client became aware of these breaches – when the Client contacted [PR] which is within the 3 year limit.

10. The Client's claim is therefore not time barred."

I issued a provisional decision as follows:

*"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.*

*The S. 75 Claims for Misrepresentation*

*S. 75 of the CCA states that, when a debtor (Mr F) 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 F 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 F 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 F 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 C.*

*And as the finance from BPF in 2008 was 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 October 2008 – 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 November 2021, 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.*

*The S 140A Claims for an Unfair Relationship*

*Only a court has the power to decide whether the relationships between Mr F 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. As the limitation period is six years, and as this claim was only made in November 2021, I think BPF was and is entitled to rely on the LA as a defence to the claim under this provision of the CCA too as Mr F doesn't dispute that the credit agreement ended in August 2009.*

*I know PR says that Mr F has concerns about undisclosed commission. But had such a payment been made to C by BPF, I 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 these circumstances. What's more, as I understand it, the typical amounts of commission paid by BPF to suppliers (like the supplier in this case) was unlikely to be much more than 10%.*

*So, in the absence of evidence to the contrary, I think it's unlikely that the levels of commission normally paid in situations like the one in question were high enough to put BPF on notice that not disclosing commission to Mr F risked making their debtor-creditor relationship unfair.*

*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". And PR says that this provision gives Mr F more time to make his claims. In its view, BPF acted negligently when it paid the C what remained of the purchase prices in 2008 because it owed Mr F a duty of care to ensure that the 1992 Act was complied with by C.*

*It isn't entirely clear whether PR is saying that both types of CCA claim made by Mr F (i.e., his s. 75 and s.140A claims) were made in time because of s. 14A of the LA or one over the other. But either way, I don't think s. 14A gave Mr F more time to make any of his claims.*

*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 found 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 F's allegations of misrepresentation don't set out in full detail the representations that are said to have been made by C – let alone assert, with that detail in mind, that C 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 F's cause.*

*As for Mr F's s. 140A claims, when they were made to BPF and referred to the Financial Ombudsman Service, they related to PR's allegation that the credit agreement was "null and void" because the purchase agreement Mr F entered into didn't provide certain information as required under the 1992 Act. It seems that his s. 140A claims were only concerned with breaches of a statutory duty by C rather than BPF's negligence. And as s. 14A of the LA doesn't apply to such breaches, I don't think it helps Mr F's cause here either.*

*However, even if I'm wrong about the nature of Mr F's s. 140A claims, I'm not persuaded that Mr F could be said to have a cause of action in negligence against BPF anyway.*

*Mr F'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 F could afford to repay what he was borrowing.*

*PR seems to suggest that, because C was BPF's statutory agent under s. 56 of the CCA, BPF owed Mr F a duty of care to ensure that C complied with the 1992 Act. And PR says*

*that BPF breached that duty by failing to carry out – before granting Mr F credit and paying C – the due diligence necessary to ensure that the product purchased by Mr F wasn't sold by C in breach of the 1992 Act.*

*However, English law recognises that there can't be a duty of care owed to everyone, in every situation and against all forms of harm. And there are legal tests to ascertain whether a duty of care is owed to someone in a given situation. They are:*

*1. A three-stage test set down in Caparo Industries v Dickman [1990] – which asks whether:*

*i. The damage was foreseeable.*

*ii. There was a sufficiently proximate relationship between the parties.*

*iii. It's fair, just and reasonable in all the circumstances to impose a duty of care.*

*2. The "assumption of responsibility test" in Henderson v Merrett Syndicates Ltd [1995], which was concerned with whether the defendant had taken on the responsibility of exercising reasonable care and skill towards the claimant.*

*3. Situations in which a duty of care was owed to the claimant by the defendant because such a duty had already been established by the courts.*

*Yet despite PR's lengthy submissions, it hasn't persuaded me with reference to any of these tests or relevant authorities that a lender owed a debtor and the purchaser of a timeshare a duty of care to ensure that the product they were purchasing wasn't sold by C in breach of a relevant regulation – particularly one that imposed a criminal sanction.*

*PR also seems to suggest that Mr F had a cause in negligence against BPF because it breached the 1992 Act directly by making payments to C during Mr F's withdrawal period.*

*But, in my view, it wasn't possible for BPF to breach the 1992 Act.*

*Regulation 10 of the Timeshare Regulations 1997 inserted the following provision into the 1992 Act in relation to "advance payments":*

*(1) "A person who enters, or proposes to enter, in the course of a business into a timeshare agreement to which this Act applies as offeror must not (either in person or through another person) request or accept from the offeree or proposed offeree any advance payment before the end of the period during which notice of cancellation of the agreement may be given under section 5 or 5A of this Act.*

*(2) A person who contravenes this section is guilty of an offence and liable*

*a. on summary conviction, to a fine not exceeding the statutory maximum, and*

*b. on conviction on indictment, to a fine.*

*See Murphy v Brentwood District Council [1991].*

*(3) Subsection (1) above only applies if the offeree or proposed offeree*

*a. is an individual, and*

*b. is not acting in the course of a business.*

*(4) Subsection (1) above only applies if*

*a. the accommodation which is the subject of the agreement or proposed agreement is accommodation in a building, or*

*b. some or all of the accommodation in the pool of accommodation which is the subject of the agreement or proposed agreement is accommodation in a building, as the case may be."*

*And on my reading of that provision, it was only C – or its agent – who could breach it. After all, it was only a timeshare provider or its agent who could enter into a timeshare agreement in the course of business and request or accept payment before the end of the withdrawal period.*

*As things stand, therefore, I can't see why any of Mr F's claims were likely to have been made in time under the LA.*

*The Purchase Agreement*

*PR's argument that the purchase agreement was 'null and void' was framed as giving rise to an unfair debtor-creditor relationship under s. 140A. But as I've already explained why the claims under that provision were likely to have been made out of time under the LA, it isn't necessary to consider this argument in that context.*

*However, "providing credit or otherwise being a creditor under a regulated consumer credit agreement" was an activity covered by the Financial Ombudsman Service's Compulsory Jurisdiction in October 2008. As the PR's argument here is to suggest that the credit agreement couldn't and shouldn't have been enforced by BPF because the associated purchase agreements were unenforceable, I've considered the argument separately to Mr F's s. 140A claims.*

*It's possible that the purchase agreements entered into by Mr F in October 2008 failed to comply with the information requirements in the 1992 Act. But nowhere in that Act (nor the European Directive 94/47/EC) can I see that a purchase agreement could be rescinded by a consumer if the information in question wasn't provided. And that's both a relevant and important consideration here as, generally speaking, a purchase agreement isn't rescindable simply because it – or part of it – was or became unenforceable.*

*The legal basis on which PR makes its argument here isn't entirely clear as it hasn't drawn my attention to any general points of law or authorities that deal with the situation in which a supply contract was/is unenforceable against the consumer.*

*I recognise that it was held by the Supreme Court in Durkin v DSG Retail [2014] UKSC 21 ('Durkin') that, if a debtor rescinds a supply contract that they have the right to rescind, they can also rescind a credit agreement whose purpose had been to finance the debtor's entry into that supply contract.*

*The legal mechanism by which this occurs is an implied term that deems the credit agreement contingent on the survival of supply contract.*

*But, in the absence of any case law, I don't think the decision in Durkin can be said to have any application in a situation in which a supply contract was/is unenforceable against the consumer. An unenforceable purchase agreement under the 1992 Act is very different from one that the consumer is entitled to rescind. And even when the unenforceability of a purchase agreement is invoked by a consumer to support a CCA claim (as here), I've seen nothing to persuade me that it equates to terminating the contract, let alone unwinding it*

*from the start.*

*So, the fact that the purchase agreements entered into by Mr F might have been (and still might be) unenforceable against him has very different legal consequences to those which flow from the rescission of a supply contract. Any attempt to apply Durkin here would require a considerable extension of its reasoning by the courts. And for that reason and those above, I'm not currently persuaded that this is a reason to uphold this complaint.*

*As for the judgment of the Spanish Supreme Court that PR says is relevant, I don't think it helps Mr F's cause either. My understanding is that agreements with C were to be construed in accordance with English law.*

*And I've seen nothing to suggest the purchase agreement entered into at the time of the purchase was any different. So, I can't see how the judgment of a Spanish court can be applied directly to the question as to whether the relevant purchase agreements were/are voidable under English law. And for that reason, I don't currently think there are any implications on the credit agreement that justify upholding this complaint.*

*The Lending Decision*

*While PR says that Mr F 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 F before also concluding that he lost out as a result. As I haven't seen anything to persuade me that was the case, I don't currently think this is a reason to uphold this complaint given its circumstances."*

**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.

BPF responded to say it had nothing further to add. PR did not agree and sent a detailed response. I should say that this service is designed to be a quick and informal alternative to the courts and this means my role is not to address every single point which has been raised. Rather I have to decide what is fair and reasonable. For that treason I will only address those points which I consider to relevant to the complaint. That said, having read all the points made by both parties I will continue to keep in mind all of the points made.

In summary PR said:

The product purchased by Mr F was regulated by the 1992 Act and C had failed to comply with a number of requirements set out in the legislation. It said that insufficient information had been supplied and BPF had paid over money to C before it should. It said this was a material breach.

It also referenced the judgment in a recent judicial review of two decisions on complaints about finance provided for the purchase of timeshare products. It argued that this said that the court had concluded that s.56 CCA allowed s. 140A and s.140B to have effect. This meant that this service could consider that the breaches by C led to an unfair relationship.

It said that s.14 LA mean the time limit being extended to three years from the date Mr F became aware of BPF's alleged negligence.

Firstly I would like to address what PR has said about the findings of the High Court following the recent judicial review of the Financial Ombudsman Service and the approach PR thinks it should take to this complaint, which in simple terms is that I should take an identical approach.

As I set out in my provisional decision I consider that Mr F's claims under s.75 and s.140A were made out of time and as the question of limitation wasn't part of the judicial review it isn't directly relevant to this complaint. The High Court did affirm that my fellow ombudsman's findings on s.56 CCA and the extent to which it creates a statutory agency relationship between a creditor and a supplier when there is a debtor-creditor-supplier agreement in place – such that any negotiations between Mr F and C before his purchase are deemed to have been conducted by C as an agent of BPF. PR argued this complaint should be treated in the same way, but I do not agree.

The complaints at the centre of the judicial review were concerned with a particular type of asset backed timeshare known as a 'fractional ownership timeshare.' Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a share in the 'ownership' of a specific property. They didn't usually confer any rights to stay in that property. But under the terms of the purchase agreement the property is usually set to be sold at the end of the membership period and the net proceeds distributed on a pro rata basis among the fractional owners.

However, that is not the type of timeshare Mr F bought and I do not consider that it follows that the same decision should be reached in this complaint as in those addressed by the judicial review.

While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction to consider when determining what a fair and reasonable outcome to a complaint might look like.

I accept that some non-fractional timeshares may share a number of contractual terms that were subject of the judicial review and may fall foul of the relevant law on unfair contract terms. However, an assessment of unfairness under s.140A CCA does not necessarily stop at a regulatory breach. It's often necessary to then assess the impact of that breach on the consumer. That much is clear from case law and – including the latest judicial review.

In other words, complaints must be decided on their individual merits which is what I will do in this case.

S. 75 Claim for Misrepresentation

I set out the legislative background in my provisional decision which I will not repeat. Quite simply Mr F made a like claim against BPF under s.75 and the limitation period is the same as the underlying misrepresentation claim. That means BPF can adopt any defence against that claim that would have been available to C.

The date on which the cause of action accrued was the date Mr F entered into the purchase agreement. This is what PR says, that he entered the agreement as a result of misrepresentations made by C. As I have set out above the claim was made outside the six year time limit and BPF has a defence against the claim.

S.140 A claim for an Unfair Relationship and s.14 LA

PR has argued that breaches in the 1992 Regulations made the relationship unfair and so it should be unwound. However, I think PR is conflating and confusing the part played by s.56 CCA in an assessment of unfairness under s.140A with limitation and whether Mr F's claims were made in time under the LA.

Mr F's claims under s.140A weren't made under a provision of the CCA intended to reproduce, against a creditor, the relevant damages claim which a complainant enjoys against a supplier (like s.75 does). However, claims under s.140A are only concerned with whether there was an unfair debtor-creditor relationship. And while C's alleged breaches of the 1992 Regulations (and alleged negligence) would undoubtedly be relevant to an assessment of unfairness because of the statutory relationship created by s.56 between C and BPF, PR hasn't pointed me to any relevant authorities to demonstrate that a claim under s.140A that happens to involve allegations of negligence by a timeshare provider changes that claim, for the purpose of limitation, from an 'action to recover any sum recoverable by virtue of any enactment' governed by s.9 of the LA, to a claim for negligence governed by s.14A.

As such I am not persuaded that s.14A LA gave Mr F more time to make his s.140A claims.

In conclusion I remain unpersuaded that this complaint should be upheld or that BPF should respond differently to the claim made by Mr F.

**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 F to accept or reject my decision before 23 August 2023.

Ivor Graham
**Ombudsman**