

The complaint

Mrs O complains that Clydesdale Financial Services Limited - trading as Barclays Partner Finance ("BPF") - has unfairly turned down her claim under section 140A of the Consumer Credit Act 1974 ("CCA") in respect of timeshare products they financed.

What happened

Mrs O (jointly with her husband) has held various timeshare product memberships with a company (who I'll refer to as "D") since around 1999.

In particular, the following membership and upgrades were purchased in relation to a timeshare product scheme operated by D as follows:

- March 2009 – purchased 3,000 points at a cost of £4,260 funded under a finance agreement with BPF in Mrs O's sole name;
- November 2011 – purchased 4,000 points at a cost £4,800 funded under a finance agreement with BPF in Mrs O's sole name;
- February 2012 – purchased 10,000 points at a cost of £6,500 funded under a finance agreement with BPF in Mrs O's sole name; and
- November 2012 – purchased 2,000 points at a cost of £3,500 funded with a deposit of £700 by card payment and £2,800 under a finance agreement with BPF in Mrs O's sole name.

On or around 23 June 2017, using a Claims Management Company (the "CMC"), Mrs O¹ submitted claims to BPF under the CCA. The CMC allege that D had incorrectly told Mr and Mrs O that the only way to exit their membership was to transfer their existing points holding towards purchasing a different type of membership. The CMC also thought there was a breach of contract due to the terms of the different membership subsequently taken by Mr and Mrs O. And under section 75 ("S75") of the CCA, BPF were jointly liable for any misrepresentation and/or breach of contract.

The CMC also gave reasons why they believe an unfair relationship exists under section 140A ("S140A") of the CCA.

In responding to Mrs O's claims, BPF thought the alleged misrepresentation and breach of contract didn't specifically relate to any products they'd funded. They also didn't agree with the allegations of unfairness, or that there were any other grounds to support Mrs O's claim, based upon the information provided.

Unhappy with BPF's response, the CMC referred various aspects of Mrs O's claim to this service. The CMC don't appear to have referred all aspects of the original claims. In particular, the CMC haven't asked this service to consider BPF's response to the various allegations under S75. However, they have asked this service to consider the allegations of unfairness under S140A. Specifically:

- both D and BPF failed to conduct a proper credit assessment of Mrs O's ability to afford the loan(s);

¹ While the purchases in question were made in joint names of Mrs O and her husband, in each case, the finance was held in Mrs O's sole name. So, under the CCA, Mrs O is the only eligible Claimant.

- BPF paid commission to D which was not declared to Mrs O; and
- Mrs O was unduly pressured into entering into a contract with D and a finance agreement with BPF.

Our investigator considered all the information available. Having done so, the investigator thought any claim for misrepresentation in respect of the purchase completed in March 2009 had been brought too late under the Limitation Act 1980 ("LA"). They also didn't find any evidence to support any claim for misrepresentation in respect of the purchases in 2011 and 2012. And because the claim for breach of contract related to another purchase not financed by BPF, they weren't able to investigate that.

Our investigator also didn't agree that there was any evidence or reason likely to risk making the relationship unfair under S140A.

The CMC didn't agree with our investigator's findings and asked for time to obtain detailed submissions from Counsel on the points product sold by D. The CMC subsequently provided a 51-page document containing "*Generic submissions on behalf of complainants*" for consideration in relation to Mrs O's claim.

As an informal resolution couldn't be reached, Mrs O's complaint has been referred to me to consider further. The CMC have also provided a six-page commentary specifically relating to timeshare memberships provided by D for this service to consider.

Having considered the relevant information about this complaint, while I reached the same outcome as our investigator, I'd considered a number of aspects which I don't feel were previously fully addressed. Because of that, I issued a provisional decision ("PD") on 4 July 2023 – giving the CMC, Mrs O and BPF the opportunity to respond to my findings before I reached a final decision.

In my provisional decision, I said:

Relevant Considerations

When considering what's fair and reasonable, DISP 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

It's important to distinguish between the complaint being considered here and the legal claim. The complaint referred to this service specifically relates to whether I believe BPF's response to Mrs O's claim was fair and reasonable given all the evidence and information available to me, rather than deciding the legal claim itself.

In particular, it's relevant to recognise that the CMC have not referred all aspects relating to Mrs O's claim to this service. So, I've focussed specifically upon the parts of Mrs O's claim the CMC have referred.

It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made 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 evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for

that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

The claim under S75

Whilst this formed part of the original claim to BPF – in particular relating to allegations of misrepresentation and breach of contract. I can't see that these aspects have been specifically referred to this service. And as there's no indication that the CMC (or Mrs O) are disagreeing or challenging BPF's findings on those specific aspects, I haven't considered them further.

The unfair relationship claim under S140A

A claim under Section 140A is a claim for a sum recoverable by statute which is governed by Section 9 of the LA. As a result, the time limit for making such a claim is six years from the date on which the cause for action accrued.

However, in determining whether or not the relationship complained of was unfair, the High Court's decision in *Patel v Patel (2009)* decided this could only be determined by "*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*". In that case, that was the date of the trial or otherwise the date the relationship ended.

So, having considered this, I believe any relationship between Mrs O and BPF continues while the related finance agreements remain live. So, that relationship only ends once an agreement ends and the borrowing under it has been repaid.

The purchase in March 2009 was funded under a loan agreement with BPF which provided a total credit facility of £20,000, albeit the amount financed at that time was £4,260. I've seen statements of Mrs O's account with BPF which show that this amount was repaid in full in September 2009. So, it appears Mrs O may have had six years from that point in which to make any claim under S140A in respect of the purchase made in 2009. But the claim wasn't submitted to BPF until June 2017. So, it's possible a court would find that Mrs O's claim was made too late under the provisions of the LA. However, as the underlying credit facility itself remained live, I think it's likely the trigger point for the six-year limit was later than this.

Any claim relating to the subsequent purchases and associated loan agreements in 2011 and 2012 all appear to have been made in time. So, I've considered these in my decision.

Disclosure of Commissions

Mrs O's S140A claim is primarily based upon the status of D (as the introducer of the loans) and their resultant responsibilities towards her. In particular, it's argued that the payment of commission by BPF to D wasn't declared to Mrs O. But I don't think the fact that BPF might have paid D commission was incompatible with their role in the transaction. D wasn't acting as an agent for Mrs O, but as the supplier of contractual rights obtained under a timeshare product agreement. And, in relation to any loan, based upon what I've seen so far, it doesn't appear it was D's role to make an impartial or disinterested recommendation or to give Mrs O advice or information on that basis. As far as I'm aware, Mrs O was always at liberty to choose how she wanted to fund any purchase and there was no requirement or duty upon D to provide funding recommendations or options.

What's more, I haven't found anything to suggest BPF were under any regulatory duty to disclose the amount of commission paid in these circumstances. Nor is there any suggestion or evidence that Mrs O requested those details from BPF. As I understand it, the typical amounts of commission paid by BPF to suppliers (like D in this case) was unlikely to be much more than 10%. And on that basis, I'm not

persuaded it's likely that a court would find that any non-disclosure and payment of commission created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

The allegations of pressure

The CMC's letter suggests that Mrs O was pressured into entering into the timeshare and finance agreements. But they haven't provided any explanation or evidence to support that claim.

Against the straightforward measure of pressure as it's commonly understood, and in the absence of any explanation or evidence, I think it's very difficult to say that Mrs O agreed to each purchase at the time of each sale when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to D, after each purchase, that suggests she'd agreed to the purchases and finance when she didn't want to. And she hasn't provided a credible explanation for why she didn't subsequently seek to cancel the purchases within the 14-day cooling off period permitted each time.

If it's suggested she only agreed to the purchases because she was pressured, I find this aspect difficult to reconcile. I haven't seen anything substantive to suggest Mrs O was obviously harassed or coerced into the purchases. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mrs O made any decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations ("CPUT")

Credit Assessment

There are certain aspects of Mrs O's claim that could be considered outside of S140A. In particular, in relation to whether BPF undertook a proper credit assessment. In their response to Mrs O's claim, BPF said she was required to complete a finance application as part of the loan documentation at the time of each sale. This application contained details of her annual income and was used to underwrite the loans and confirm they were affordable for her.

BPF haven't provided specific evidence of their credit assessments or details of Mrs O's credit file or credit score at the time. And given the passage of time, it's possible that information is no longer available. If I were to find that BPF hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that loan repayments weren't sustainably affordable for Mrs O in order to uphold her complaint here. However, I've not seen any information about Mrs O's actual position at the time. And as account statements for Mrs O's loans with BPF don't appear to suggest that she struggled to maintain repayments, I can't reasonably conclude the loans were unaffordable for her. And given each loan now appear to have been fully repaid, there doesn't appear to be any evidence of loss here either.

Summary

As I've explained above, this service is only able to consider complaints aspects specifically referred to it. In Mrs O's case, this relates to BPF's response to her claim(s). And in particular, it appears the CMC have only asked that we consider the aspects that relate to allegations of unfairness under S140A.

I have considered the various additional submissions provided by the CMC. In particular, the generic submissions prepared by Counsel together with the CMC's overview of timeshare products provided by D. However, as these were generic points and not specific to Mrs O's own purchases or recollections, I don't think they offered much help in making factual findings in Mrs O's case.

I want to reassure Mrs O that I've carefully considered all the information and evidence that's been provided. Having done so, I can't reasonably conclude that BPF's response to her claim was unfair or unreasonable based upon everything I've seen. So, I don't intend to ask BPF to do anything more here.

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 have acknowledged receipt of my PD and confirmed they have nothing further to add.

The CMC submitted a request to this service for copies of any documents and evidence relied upon in reaching my PD. That information has been provided but no further comment or evidence has been received by this service.

In these circumstances, and in the absence of anything further to consider here, I've no reason to vary from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Mrs O's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 31 August 2023.

Dave Morgan
Ombudsman