

## **The complaint**

Mr K, 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.

## **What happened**

Mr K has purchased eight holiday products from a company I will call M. The first purchase was made in 2002 and the last in January 2019. The subject of this complaint is a purchase made in October 2013 of a points based product. This was for 40,000 Infiniti points at a cost of £6,000 which was funded by a loan from BPF.

In June 2022 PR submitted a letter of claim to BPF. In summary this claimed that:

- Mr K had not been told of commission paid to M by BPF.
- He had been aggressively targeted and subjected to excessive pressure.
- He was told he would have a 10 year surrender option.
- The agreement was in perpetuity.
- The resorts were not exclusive despite being told they would be.
- He was told the following year he could remedy any issues by making another purchase.
- He was told the product was available at a special price if he made the purchase that day.
- The contract terms were unclear due to being included in voluminous documents and Mr K was unable to understand what he was purchasing.
- He was not given time to consider what he was purchasing.
- No proper affordability checks were carried out.

BPF rejected the claim. It said a claim under s.75 CAA was out of time and this service had no power to give any remedy. PR brought a complaint to this service on behalf of Mr K and it was considered by one of our investigators who didn't recommend it be upheld. They agreed that the claim under s.75 CAA was made out of time and there was insufficient evidence to show there was an unfair relationship under s.140 CAA. Nor was evidence that the loan was unaffordable.

PR didn't agree and said the claim was inside the jurisdiction of this service. It set out some background thoughts on M and the timeshare industry. It referred to some of the purchases made by Mr K and said that he had been caused distress by M. It said maintenance fees

had been increasing over the years and he had been led to believe he could sell the points and obtain better availability. The product had been sold as an investment and Mr K had been persuaded to buy at a reduced price on that day only.

PR said that M had breached the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (“the Regulations”) by not giving Mr K sufficient information. Mr K was elderly when he made the purchase and the agreement had an expiry date in 2050. Finally, it said it had concerns about the way finance was sold generally to timeshare customers and asked that we pose a long list of questions to BPF.

### **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. I should point out that I have seen virtually no documentary evidence in support of the claim which makes it difficult for me to conclude that it should be upheld.

Was the claim under s. 75 of the CCA brought in time?

PR says that M misrepresented a number of points in relation to the timeshare agreement Mr K purchased. So, it argued BPF is jointly liable for these misrepresentations under s. 75 CCA. But if BPF could show the s. 75 claim was brought outside of the time limits set out in the LA, it would be entitled to rely on the LA as a defence to answering the claim. I should make it clear, however, that I’m not deciding if any right Mr K may have to bring these claims has expired under the LA - that’s a matter for the courts. In this decision I’m considering if BPF acted fairly and reasonably in seeking to turn down Mr K’s claims on this basis.

A claim for misrepresentation against the supplier would be brought under section 2(1) of the Misrepresentation Act 1980 (“MA”). It was held in *Green v Eadie & Ors* [2011] EWHC B24 (Ch) [2012] Ch 363 that a claim under section 2(1) of the MA is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (section 2 of the LA).

Here, Mr K brought a like claim against BPF under s. 75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which 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.”

Therefore, the limitation period for the s. 75 claim expires six years from the date on which the cause of action accrued.

The date on which a cause of action accrued is the point in time that everything needed to make a legal claim occurred. So, in Mr K's case, that's when he could have brought a claim for misrepresentation against the supplier or the like claim against BPF. I think that was the date he entered into the agreement to buy the timeshare, so in October 2013. It was at that time that he entered into an agreement based, he says, on the misrepresentations of M. He claims that he wouldn't have entered into the timeshare agreement if those misrepresentations hadn't been made. And it was on that day that he suffered a loss, as he took out the loan agreement with BPF.

It follows, therefore, that I think the cause of action accrued in October 2013, so Mr K had six years from that date to bring a claim. But he didn't contact BPF about his claim until June 2022, which was outside of the time limits set out in the LA. So, I think BPF acted fairly in seeking to turn down Mr K's misrepresentation claim on this basis.

I would add that there seems to have been some confusion in that PR has referred to the rules relating to the time limits which apply to this service considering a complaint. I agree that we can consider this complaint as it was made in time, but that does not mean that the claim was made in time.

S.140 A

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 the claim was made within this period.

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

Their 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.

PR seems to suggest that BPF owed Mr K a duty of care to ensure that M complied with the

2010 Regulations and it argues at length that the payment of commission created an unfair relationship. However, it is my understanding that BPF paid relatively small rates of commission and so I cannot conclude that payment of commission created an unfair relationship.

As for the other claims I am at a disadvantage since I have not been provided with any documentation from the sale in 2013. PR has referred to alleged claims made by the sales representative presumably based on Mr K's recollections from some nine years previous to the claim made to BPF. It does not seem reasonable to expect BPF to have agreed the claim given the lack of evidence it received.

Although I cannot say with certainty as I have not seen the contract, but I believe M provided the statutory 14 day withdrawal period and if Mr K had been concerned that he had been subjected to undue pressure or not been given enough time to assimilate the agreement details he had the option of withdrawing from it. I also note that Mr K has made numerous purchases from M and it is reasonable to conclude he had some understanding of its products and of what he was buying.

#### Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Our investigator said that she could not see any evidence that Mr K found the loan unaffordable. 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 K lost out as a result of its failings. Mr K has provided no evidence whatsoever that he found the loan difficult to repay. Indeed I note that as of December 2020 he had been making regular monthly payments.

#### **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 February 2024.

Ivor Graham  
**Ombudsman**