

The complaint

Mrs A complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, won't refund to her the money that she paid for some holiday club membership points. Her husband is also involved in her complaint and she's being represented by a claims management company.

What happened

Mrs A and her husband had bought a trial membership of a holiday club and they entered into an acquisition agreement in September 2008 to trade-in the trial membership and buy some membership points in the holiday club. The purchase price of the points, with membership dues, was £18,294 from which a trade-in value of £5,995 was deducted so the amount due from them was £12,699. Mrs A entered into a fixed sum loan agreement with a finance provider for a loan of £15,360.97 (which included £2,661.97 of credit that was being refinanced).

Mrs A and her husband entered into another acquisition agreement in February 2009 to buy some more holiday club membership points. The purchase price of the additional points, with membership dues, was £9,651. Mrs A entered into a fixed sum loan agreement with Barclays Partner Finance for a loan of £25,565 to pay that amount to the holiday company and to refinance her September 2008 loan. She agreed to make 180 monthly repayments of £382.16 to Barclays Partner Finance.

Mrs A's representative made claims, on Mrs A's behalf, to Barclays Partner Finance under sections 75 and 140A of the Consumer Credit Act 1974 in July 2019. It said that Barclays Partner Finance was liable for: breaches of contract, misrepresentation and negligence of the holiday company; procuring a breach of fiduciary duty; and an unfair relationship.

Barclays Partner Finance didn't provide a substantive response to those claims so Mrs A complained to this service. Her complaint form says that: the holiday company and Barclays Partner Finance failed to conduct a proper assessment of her ability to afford the loan; Barclays Partner Finance paid a commission to the holiday company which wasn't declared to her and the holiday company unduly pressured her and her husband into entering into the acquisition agreement and her into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A.

Our investigator didn't recommend that Mrs A's complaint should be upheld. He said that Barclays Partner Finance was entitled to rely on the timing of the section 75 misrepresentation claim to turn it down and he didn't think that the holiday company had breached the contract. He said that he hadn't seen enough to suggest that the relationship between Mrs A and Barclays Partner Finance was unfair and he wasn't persuaded that a court would reach the conclusion that the relationship was unfair. He didn't consider that Barclays Partner Finance had acted incorrectly in connection with any commission paid to the holiday company and he said that he hadn't seen anything persuasive to suggest that the lending was unaffordable for Mrs A.

Mrs A's representative, on behalf of Mrs A, has asked for this complaint to be considered by an ombudsman. It has provided a generic submission from counsel about the holiday company and the unfair terms that it uses and it has raised its serious concerns about the way that the finance was sold to Mrs A. It also says that the holiday company didn't broker proper credit, the provision of finance was unfair and failed to reach the standard expected of a regulated firm, and Mrs A has suffered harm as a result of the actions of both the holiday company and Barclays Partner Finance.

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.

Having done so, I agree with our investigator that Mrs A's complaint shouldn't be upheld for these reasons:

- we don't have a free hand to consider every complaint that's referred to us and our rules, which we're required by law to follow, say – amongst other things – that we can't normally deal with a complaint if it's referred to us more than six years after the event complained of; or (if later) more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;
- Mrs A's claims were made under sections 75 and 140A and her complaint is about Barclays Partner Finance's response to those claims - I accept that she referred her complaint to this service within six years of her claims being made but I need to consider whether the Limitation Act 1980 applies to her claims;
- I'm not determining the outcome of those claims in this decision as only a court would be able to do that - I'm considering whether or not Barclays Partner Finance's response to them was fair and reasonable in the circumstances but Barclays Partner Finance didn't provide a substantive response to those claims so I can't say that its response to them was fair or reasonable;
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met);
- Mrs A's claim under section 75 is that there's been a breach of contract by the holiday company and that the membership points were misrepresented to her and her husband and that they wouldn't have bought them if they hadn't been misrepresented to them;
- if the criteria for a claim under section 75 were met, Barclays Partner Finance would be expected to consider that claim unless the claim was brought outside of the time limits set out in the Limitation Act in which case it would be entitled to rely on the Limitation Act and to not consider the claim;
- the time limit for a misrepresentation claim (whether under section 2 or 9 of the Limitation Act) is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);
- I consider that Mrs A could have made a claim to the holiday company or Barclays Partner Finance about the misrepresentations that she says induced her and her husband into buying the membership points in February 2009 as that was the latest time that any misrepresentations would have been made and any loss would have been incurred as that was when she also entered into the loan agreement with Barclays Partner Finance;

- I consider that her cause of action accrued at that time, so she would have had six years from then to bring a misrepresentation claim against either the holiday company or Barclays Partner Finance – but a misrepresentation claim wasn't made to Barclays Partner Finance until July 2019, more than ten years later so was outside of the time limits set out in the Limitation Act and I consider that Barclays Partner Finance would have had a defence to her section 75 misrepresentation claim and I find that it wouldn't have been unreasonable for it to have rejected that claim;
- Mrs A's representative says that because of the unfair terms in the contract, it's unenforceable and Mrs A and her husband are entitled to rescind it and to recover from Barclays Partner Finance all of the money that they have paid to it under section 75, but our investigator didn't think that the holiday company had breached the contract;
- I'm not persuaded that there's enough evidence to show that there's been a breach of contract by the holiday company and the time limit for a breach of contract claim is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);
- I consider that Mrs A could have made a claim to the holiday company or Barclays Partner Finance about the unfair terms in the contract soon after she entered into the contract and I consider that her cause of action accrued at that time, so she would have had six years from then to bring a breach of contract claim against either the holiday company or Barclays Partner Finance – but a breach of contract claim wasn't made to Barclays Partner Finance until July 2019, more than ten years later so was outside of the time limits set out in the Limitation Act and I consider that Barclays Partner Finance would have had a defence to her section 75 breach of contract claim and I find that it wouldn't have been unreasonable for it to have rejected that claim;
- Mrs A's representative's July 2019 letter to Barclays Partner Finance says that it's liable for the negligence of the holiday company but the letter provides no further information about the alleged negligence and I'm not persuaded that there's enough evidence to show that there's been any negligence by the holiday company for which Barclays Partner Finance would be liable under section 75;
- that letter also says that Barclays Partner Finance is liable for procuring a breach of fiduciary duty because it paid a commission to the holiday company but didn't obtain Mrs A's informed consent to the commission;
- I've not been provided with any evidence to show what commission, if any, was paid by Barclays Partner Finance to the holiday company and, from what this service has seen across the industry, if commission was ever paid it tended to be low and of less than 15% and I'm satisfied that Barclays Partner Finance wouldn't have breached any fiduciary duty in making any such payment – nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances;
- Mrs A's representative says that there was an unfair relationship between Mrs A and Barclays Partner Finance and Mrs A's complaint form says that the holiday company and Barclays Partner Finance failed to conduct a proper assessment of her ability to afford the loan; Barclays Partner Finance paid a commission to the holiday company which wasn't declared to her and the holiday company unduly pressured her and her husband into entering into the acquisition agreement and her into entering into the loan agreement;
- the courts have said, when considering section 140A, that the time for limitation purposes runs from the date that the credit agreement ended (if it was not still running at the time the claim was made) and the limitation period for a claim under section 140A is six years;

- Barclays Partner Finance has provided a loan account statement which shows that Mrs A's loan was still active in June 2023 so I consider that Barclays Partner Finance should have responded to her section 140A claim - section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;
- Barclays Partner Finance hasn't provided any evidence to show what assessment it conducted of Mrs A's ability to afford the loan and neither Mrs A nor her representative has provided any evidence to show that the loan wasn't affordable for Mrs A in February 2009 when it was made to her;
- the loan account statement shows that Mrs A made the monthly loan repayments of £382.16 from March 2009 to June 2023 and that the outstanding balance of her account in June 2023 was £2,661.97;
- Mrs A and her husband signed a member's declaration in February 2009 which said: *"We understand clearly what we have purchased and, having carefully considered this, and our other financial commitments, are able to pay the amounts due on the dates agreed"*;
- I've seen no evidence to show that Mrs A asked Barclays Partner Finance for any information about its affordability assessment before July 2019 – as the loan was made to her in February 2009 I consider that it would be reasonable to expect her to have raised any concerns about the affordability assessment that it conducted before then;
- I'm not persuaded that there's enough evidence to show that the loan was mis-sold to Mrs A, that the holiday company brokered the loan to Mrs A incorrectly, that the provision of the loan to her was unfair or that the holiday company or Barclays Partner Finance failed to reach the standard expected of a regulated firm,
- I don't consider that the level of commission that was normally paid in this type of situation was sufficiently high to mean that Barclays Partner Finance should have appreciated that not disclosing any commission to Mrs A risked the relationship being unfair under section 140A;
- Mrs A's complaint form says that the holiday company unduly pressured Mrs A and her husband into entering into the acquisition agreement and Mrs A into entering into the loan agreement – but Mrs A and her husband signed the member's declaration which said: *"We have read and fully understand all of the above"*;
- the loan agreement that was signed by Mrs A says: *"You have the right to cancel this agreement. You have until [specified date in February 2009] in which to do so (this date must be at least fourteen days after the day you signed the agreement)"*; but I've seen no evidence to show that Mrs A contacted Barclays Partner Finance about any issues with the loan or the membership points until July 2019, more than ten years later;
- Mrs A and her husband had previously bought a trial membership, they bought some membership points in September 2008 and they then bought more membership points in February 2009 - if they were concerned about the way that the membership points had been sold to them in February 2009 and didn't want to buy the additional points, I consider that it would be reasonable to expect them to have contacted either the holiday company or Barclays Partner Finance about their concerns – but I've seen no evidence to show that they said that they'd been unduly pressured into entering into the agreements until July 2019, more than ten years later;

- I'm not persuaded that there's enough evidence to show that Mrs A and her husband were unduly pressured into entering into the acquisition agreement, that Mrs A was unduly pressured into entering into the loan agreement or that the holiday company used unacceptable sales practices against them;
- Mrs A's representative has provided a generic submission from counsel about the holiday company and the unfair terms that it uses but it would be for a court to determine whether or not any of the terms in those agreements were unfair;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated in practice and whether the operation of that term caused the relationship to be unfair;
- I'm not persuaded that there's enough evidence to show that the terms of the documents that were signed by Mrs A and her husband in February 2009 have been applied or operated unfairly against them or that there's been a breach of any applicable regulation or EU directive and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mrs A and Barclays Partner Finance;
- I'm not persuaded that there's enough evidence to show that Mrs A's relationship with Barclays Partner Finance was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mrs A and Barclays Partner Finance in these circumstances;
- Barclays Partner Finance didn't issue a substantive response to Mrs A's claims so I can't say that its response to her claims was fair or reasonable – but if it had properly responded to her claims I consider that it would have been fair and reasonable for it not to have upheld them; and
- I sympathise with Mrs A for the issues that she and her husband have had with their membership points, but I find that it wouldn't be fair or reasonable in these circumstances for me to require Barclays Partner Finance to refund to her any of the money that she's paid for the points, to cancel her loan agreement, to pay her any compensation or to take any other action in response to her complaint.

My final decision

My decision is that I don't uphold Mrs A's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 17 August 2023.

Jarrold Hastings
Ombudsman