

## **The complaint**

Mr S says that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, who I'll call BPF, unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare product he was sold in November 2010.

Mr S has been represented by a professional representative who I'll call "PR" and he entered into the timeshare agreement with his partner, but as the finance agreement was in his sole name, I will refer only to Mr S or his representatives in this decision. I mean no disrespect to Mr S's partner when doing so.

## **What happened**

I issued my provisional decision on this complaint early this year. An extract from that provisional decision is set out below.

*In November 2010 Mr S and his partner purchased a timeshare product from a supplier I'll call "D". They financed the deal through a fixed sum loan with BPF. That finance agreement was regulated by the CCA.*

*In June 2018 Mr S complained to BPF about problems he had encountered with the timeshare product. There were a number of allegations and it's not practical to reproduce them all here, but I have taken note of them. He said the nature of the timeshare had been misrepresented to him, so he was able to make a claim against the lender under section 75 of the CCA ("section 75"). He also said that there was an unfair debtor-creditor-supplier-relationship under section 140A of the CCA.*

*BPF rejected Mr S claim as they said it was time barred under the Limitations Act 1980 ("LA").*

*Our investigator thought the claim under section 75 had been made too late and that it was therefore fair for BPF to rely on the LA to reject it. She didn't think the claim under section 140A was time barred but having considered that she didn't think there was sufficient evidence of an unfair relationship.*

*The PR disagreed and suggested the date relied on should be the date Mr S had knowledge of the misrepresentation and not when the transaction was incepted. They explained they would be relying on section 32 (1) (a-c) of the Limitation Act and wanted that to be considered. The complaint has therefore been referred to me, an ombudsman, for a decision.*

## **What I've provisionally 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.*

*I'm issuing a provisional decision here as it's been some time since the investigator provided her view.*

*I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.*

*The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.*

### **The Limitation Act 1980 and section 75 of the CCA**

*When something goes wrong and the payment was made with a certain type of fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the Consumer Credit Act (1974) says that in certain circumstances, the borrower under a credit agreement has the same right to make a claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.*

*A claim under section 75 for misrepresentation against BPF had to be made within six years of when Mr S had everything he needed to make such a claim. And in this complaint, I think that was when he purchased the timeshare in November 2010. After all, he says that he entered into the agreement to purchase the timeshare because of misrepresentations. And as the upshot of the claim was that he would not have made the purchase but for the misrepresentations at the time of sale, it was at that time that he suffered a loss because he ended up borrowing money from BPF. So, Mr S had until November 2016 to raise a section 75 claim with BPF. As he didn't do so until June 2018, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, I think it's likely a court would consider his section 75 claim to be time barred. That would give BPF a complete defence to it.*

### **Section 32 of the LA**

*Section 32 relates to the extension of time for starting an action if fraud, mistake, or concealment are found (or could with reasonable diligence have been discovered).*

*It's possible that the contractual paperwork accompanying Mr S's purchase agreement was lengthy and difficult to understand in places. But that isn't the same as saying the Supplier deliberately withheld information from Mr S in a way that engages Section 32(1)(b) of the LA. There may be allegations that was the case, but those allegations aren't reliably corroborated by any supporting evidence. So, based on the limited information I've seen, I'm not persuaded that Section 32(1)(b) is likely to be engaged and I don't think a court would find there was a reason to extend the limitation period.*

### **The Limitation Act 1980 and section 140A of the CCA**

*Section 140A looks at the fairness of the relationship between a debtor and a creditor arising out of the credit agreement (taken with any related agreement).*

*Section 56 of the CCA is also relevant to the claim under section 140A of the CCA as the pre-contractual acts or omissions of the broker will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair*

*relationship existed between Mr S and BPF.*

*The LA applies to a claim under section 140A CCA. It was held in Patel v. Patel [2009] that, when considering section 140A CCA, the time for limitation purposes ran from the date that the credit agreement ended if it was not still running at the time the claim was made. Here the limitation period is six years. That is because the claim Mr S wishes to make is for repayment of sums he has paid, which is an action for sums recoverable under statute, to which s.9 LA applies. That meant Mr S would have to bring an action within six years of the date the credit was repaid. The account was settled in January 2015 and Mr S raised his claim with BPF in June 2018 which is within six years. So, I don't think BPF were reasonable to reject his section 140A claim and I'll therefore consider that element.*

### **The claim under section 140A**

*We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that Mr S's ability to exercise choice was significantly impaired by the lengthy presentation and the pressure he says was applied, as that may have created an unfair relationship between him and the supplier.*

*Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and taking account of all of its features and circumstances, it:*

- a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and*
- b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.*

*Regulation 7(2) went on to say that consideration must be given to the timing, location, nature, and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision."*

*I don't think I've been provided with sufficient information to suggest Mr S didn't understand he didn't have to say yes to the agreement or that he didn't understand he could walk away without entering into it. He was also provided with a 14 day cooling off period and I think, even if he wasn't allowed much time to think during the presentation, the cooling off period allowed him to reflect and withdraw from the agreement and the loan if he wished.*

*Overall, I'm not persuaded that Mr S's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.*

*Mr S says that BPF were in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan.*

*However, even if BPF didn't complete adequate affordability checks (and I make no finding about that) when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So, for me to say BPF needed to do something to put things right, I would need to see that the credit granted by BPF was likely to be unaffordable and that Mr S suffered a loss as a result. As*

*there's little evidence that he would have found, nor found, it difficult to repay what he was lent by BPF, I'm not persuaded the agreement was unaffordable for him or that a court would come to that conclusion.*

*Mr S says that the non-disclosure of commissions paid to D by BPF rendered the relationship unfair. BPF have confirmed that no commission was paid in this transaction so I don't think a court would think there was an unfair relationship on that basis.*

*Mr S has referred to various pieces of legislation which he says has been breached by D and BPF and he suggests that this gives rise to an unfair relationship. I've considered those points carefully but taking everything into account, they do not change my opinion and I don't think BPF have been unreasonable to reject his claim.*

### **My provisional decision**

*For the reasons I've given above I'm not expecting to uphold this complaint.*

### **Further evidence and/or information**

Neither Mr S nor BPF provided any additional evidence or information for me to consider.

### **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.

I've not been provided with any additional information that would lead me to change my provisional decision. That provisional decision, therefore, becomes my final decision on this complaint.

### **My final decision**

For the reasons I've given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 December 2023.

Phillip McMahon  
**Ombudsman**