

The complaint

Mr C says that Clydesdale Financial Services Limited trading as Barclays Partner Finance (“BPF”) unfairly handled his claim under section 75 and 140A of the Consumer Credit Act 1974 (“CCA”).

What happened

In or around April 2012, Mr C (jointly with Mrs C) agreed to purchase a timeshare product from a supplier who I’ll refer to as “S”. The purchase price of the timeshare product was £24,648 and included recission of an existing timeshare product held by Mr and Mrs C. The total purchase price was funded under a fixed sum loan agreement with BPF in Mr C’s sole name.

In May 2020, using a professional representative (“the PR”), Mr C submitted a claim to BPF under the CCA. It isn’t practical to repeat the entire contents of the claim in full, but I will provide a summary of the key points as follows.

The PR allege that Mr C purchased the timeshare product having relied upon misrepresentations made by S and, under section 75 of the CCA (“S75”), BPF is jointly liable for those misrepresentations. The PR also allege that those misrepresentations, amongst other things, resulted in an unfair debtor-creditor relationship under section 140A of the CCA (“S140A”).

In particular, the PR allege:

- S sold the timeshare product as an investment contrary to section 14 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (“the TRs”) rather than as a timeshare;
- S sold the timeshare product when they knew (or ought to have known) there was no secondary timeshare market;
- the terms of the agreement are so egregious as to be unfair themselves since an aspect of the relationship was hidden from view – that being a payment of commission;
- S charged annual maintenance fees which increased year on year;
- S sold the timeshare product under extreme pressure using aggressive sales practices;
- S didn’t give Mr C time to read and consider the information provided;
- S didn’t allow a review of any other financial products;
- S didn’t advise Mr C he could consider other creditors
- a proper affordability assessment for the loan wasn’t undertaken; and
- the product purchased was unsuitable and failed to provide the advantages promised.

Further, the PR said that S was now in liquidation and is unable to provide the service sold. They consider this a breach of contract which is also covered under S75.

Having not received a response to Mr C's claim, the PR referred Mr C's complaint to this service whereupon one of our investigators referred matters to BPF for their comments and observations. In response, BPF said they believe that Mr C's claim was made too late under the provisions of the Limitation Act 1980 ("the LA"). They also didn't uphold the claim for breach of contract because the resort was still in operation and the liquidation of S had not affected Mr C's ability to use his timeshare.

Having considered everything that had been said and provided, our investigator didn't think BPF's response was unfair or unreasonable. Our investigator also didn't think there was any evidence to suggest the loan BPF provided was unaffordable for Mr C. Or that there was any other reason to uphold Mr C's complaint.

The PR didn't agree with our investigator's findings and asked for additional time to provide further information and submissions to support their arguments. The PR subsequently provided a 12-page document in support of Mr C's claim. I don't intend to repeat everything that the PR has said and provided as the content is quite lengthy and detailed. But in summary, the PR have provided arguments to suggest:

- our investigator's findings included various inaccuracies;
- the alleged breach of contract should not be limited to Mr C's ability to use his timeshare but should include any loss of legal recourse to S;
- there is provision within section 32 of the LA to postpone limitation due to deliberate and/or fraudulent concealment;
- S's failure to comply with the relevant legislation, regulations and code of practice was concealed from Mr C and he only discovered this once he engaged the PR in September 2019;
- failure to comply with the applicable law and regulations reasonably constitutes a breach of contract which was concealed and not obvious to Mr C;
- BPF's affordability assessment was flawed and irresponsible and wasn't discovered by Mr C until he engaged the PR in September 2019;
- Mr C couldn't reasonably have become aware he had cause for complaint prior to the involvement of the PR and as a consequence, his complaint to this service was made in time under the provisions of DISP¹ rule 2.8.2 R (2) (b); and
- this service has more scope for discretion in extending time limits than the courts and is entitled to look at an outcome that is fair and reasonable, not simply an order the courts would make.

As an informal resolution couldn't be achieved, Mr C's complaint was passed to me to consider and reach a final decision. Having done that, while I was inclined to reach the same outcome as our investigator, I'd considered some issues which I don't feel had previously been fully addressed. So, I issued a provisional decision on 28 September 2023 giving both parties the opportunity to respond with any new information or evidence for me to consider before I reach 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.

¹ The Dispute Resolution Sourcebook from the Financial Conduct Authority's Handbook of Rules and Guidance

S75 provides protection to consumers for goods or services bought using credit. Mr C paid for the timeshare product using a restricted use fixed sum loan. So it isn't in dispute that S75 applies here. This means that Mr C is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr C and BPF arising out of the credit agreement (taken together with any related agreement). And because the product purchased was funded under the credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Given the facts of Mr C's complaint, relevant law also includes the LA. This is because the original transaction - the purchases funded by a loan with BPF - took place in 2012. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered the effect this might also have.

It's 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. So, in Mr C's case, this service is only able to consider whether BPF's response to his claim was fair and reasonable given all the information and evidence available. 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.

Was the claim of misrepresentation under S75 made in time?

The PR says the supplier misrepresented the nature of the purchase agreement and benefits to Mr C when he agreed to purchase the product. And they believe this brings cause for a claim under S75.

But a section 75 claim is *"an action [that is, court action] to recover any sum by virtue of any enactment"* under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. So here, Mr C had to make a claim within six years of when he entered into the purchase contract and credit agreement. The PR confirm this took place in April 2012. That's because this is when they say Mr C lost out having relied upon the alleged false statements of fact at that time.

Details of the alleged misrepresentations were submitted by the PR to BPF in May 2020. But as this was more than 6 years after the purchase was completed and Mr C first says he lost out; I believe a court is likely to find that his claim falls outside of the time limit permitted in the LA.

Was the unfair relationship claim under S140A made in time?

A claim under Section 140A is a claim for a sum recoverable by statute – which is also governed by Section 9 of the LA. As a result, the time limit for making such a claim is also 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 the trigger point here is slightly different. Any relationship between Mr C and BPF continued while the finance agreement remained live. So, that relationship only ended once the agreement ended and any borrowing under it was repaid.

BPF said that Mr C's loan account was closed on 9 October 2012. And as this was more than six years before Mr C's claim was submitted to BPF, I believe it's likely a court would find that his S140A claim also falls outside of the time limit permitted in the LA.

Could the limitation period be postponed?

The PR have provided lengthy and detailed arguments to support their belief that the limitation period should be extended under Section 32 of the LA. The PR suggest there were aspects of the transaction and associated agreement, together with alleged breaches of applicable legislation and regulations, that were concealed (fraudulently or otherwise) from Mr C. And as a non-sophisticated consumer, the PR believes Mr C couldn't reasonably have been aware of those alleged concealments.

Section 32(1)(b) applies when "*any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant*". But the PR haven't provided me with anything persuasive to suggest that S deliberately concealed anything from Mr C. And as I can't see why, given the allegations fuelling each claim, these particular issues prevented Mr C from making his claim or simply raising a complaint earlier, my view is that this particular argument by the PR doesn't help his cause.

The PR have, for example, referenced the allegation that the product purchased was represented as an investment contrary to the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs"). However, the documentation signed and initialled by Mr C at the time of the sale was clear in saying, "*We understand that the purchase of timeshare weeks/club membership is for the primary purpose of holidays and is not a financial investment and any subsequent resale of timeshare weeks/club memberships at a profit is a speculative venture and that [S] do not offer any guarantees of resale times*".

So, while acknowledging Mr C's own recollections, I think S made it very clear the transaction wasn't an investment. Because of that, I can't say that S deliberately (or otherwise) concealed that fact from him. And as I think a court is likely to find that the misrepresentation claim was made too late, I don't believe I need to consider this aspect further.

I also don't think the contract can have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to Mr C's timeshare. And in any event, I've found nothing within the evidence provided to suggest S provided any assurances or guarantees about the future value of the product purchased. S would have had to have presented the membership in such a way that used its investment element to persuade Mr C to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

It's argued that the payment of any commission by BPF to S was deliberately concealed from Mr C. I don't think the fact that BPF might have paid S commission was incompatible with their role in the transaction. S wasn't acting as an agent of Mr

C, but as the supplier of contractual rights obtained under the timeshare product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was S's role to make an impartial or disinterested recommendation or to give Mr C advice or information on that basis.

What's more, I haven't found anything to suggest BPF were under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr S had previously requested those details from BPF or S. So, I can't reasonably conclude that any (alleged) failure to disclose would constitute concealment under S32.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide time could be extended under the provisions of S32. However, the PR have suggested that the time limits within the LA do not apply as the increase in annual management fees gives Mr C a fresh right of action each year. I don't agree on this point. This aspect formed part of the contract Mr C signed, and I think Mr C would've been aware of the annual fee increase. Particularly as he would have experienced the documented year on year annual fee changes from the early stages of his timeshare ownership. There's no evidence he raised concerns or a complaint about this.

DISP² rule 2.8.2 R (2) (b)

The PR have referenced this particular rule in their submissions to this service. They believed the claim wasn't time barred as Mr C only became aware he had cause to complain in or around September 2019. And as Mr C's claim was then made within three years, they believe it was made in time.

However, the DISP rules specifically relate to complaints against regulated businesses in respect of financial products and services provided. They do not apply to legal claims. As I've explained above, the rules and timescales that apply to legal claims are set out in the provisions of the LA.

The complaint this service is considering relates to Mr C's dissatisfaction with BPF's response to his claim – not the legal claim itself. As I've said above, this service isn't able to make findings on legal claims. I can only consider whether BPF's response to it was fair and reasonable. So, I don't agree that DISP 2.8.2 applies to Mr C's legal claim. Only to his complaint - which was made in time under those rules.

The breach of contract claim under S75

BPF said that whilst S may have entered an insolvency process, the current management company have confirmed that timeshare owners remain able to fully utilise their timeshare products subject to the associated agreements. The PR suggest that a breach arises as Mr C no longer has legal recourse to S under the original agreement. But in the absence of any specific explanation or evidence to support why Mr C believes there's been a breach of contract which directly resulted in a loss for him, I haven't seen anything that would lead me to conclude there was such a loss.

The PR have further extended their arguments about what they believe constitutes a breach of contract. In particular referencing alleged failures in S's adherence to applicable legislation, regulations and codes of conduct. I can't see that these specific contract breach allegations formed part of the original claim submitted to BPF in May 2020. As such, BPF haven't been given an opportunity to investigate and respond. So, I can't see how they can form part of the complaint that's being considered here.

² The Dispute Resolution Sourcebook from the Financial Conduct Authority's Handbook of Rules and Guidance

Credit Assessment

Accepting that I believe Mr C's claim was brought too late, there are certain aspects that could be considered outside of S140A. In particular, in relation to whether a proper credit assessment was undertaken. Neither S nor BPF have provided any explanation or evidence to support how and if a credit assessment was completed. And given the passage of time, it's now likely this information may no longer be available anyway.

If I were to find that the required checks and tests hadn't been completed – 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 Mr C in order to consider upholding his complaint here. However, I haven't seen any information or evidence about his actual financial situation at the time. And there's no obvious suggestion or evidence that he struggled to maintain repayments.

And given Mr C confirms he repaid the loan with BPF from personal savings well within 12 months of first taking it up, there doesn't appear to be any evidence of loss here either.

Summary

Having considered everything available, and for the reasons mentioned above, I believe it's likely a court would find that Mr C's claim was brought to BPF too late under the provisions of the LA. And as I've found no other reason to uphold his complaint, I don't currently intend asking 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.

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BPF confirmed their agreement to my provisional findings. Despite follow attempts by this service, neither Mr C nor the PR have provided any response to my provisional decision.

In the circumstances and having received nothing new to consider, I've no reason to vary from my provisional findings. So, for the reasons already explained, I will not be asking BPF to do anything more here.

My final decision

Your text here

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 28 November 2023.

Dave Morgan
Ombudsman