

The complaint

Miss C complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") didn't deal fairly with her claims under the Consumer Credit Act 1974 (CCA) in relation to her purchase of a timeshare and that it had failed to check if she could afford the finance.

Miss C is represented by a legal representative, but I'll refer to anything that's been said on their behalf as if Miss C had said it herself.

What happened

Miss C says that in 2009 she was invited to attend a presentation and having done so was then provided with a free weekend abroad which she took in September 2009. By taking this holiday, she also agreed to attend a presentation which turned out to be a sales pitch for a timeshare product.

Miss C says this presentation was much longer than the original one she'd attended and that during the sales pitch the salesperson misrepresented the timeshare by telling her there would be no issue with availability of accommodation, that it was an investment and that, if she bought it today, she would get a discounted rate. Miss C also says she wasn't given long enough to look at the documents and increases in the maintenance fees weren't properly explained.

Miss C agreed to enter into the contract for the timeshare and financed this with a fixed sum loan via BPF. The loan was for 180-months. Miss C says there were no affordability or credit checks carried out by BPF to check she could repay the credit agreement. Miss C says that, due to difficulties booking the holiday accommodation, she stopped using the timeshare after June 2010. She continued to repay the loan amount and also to pay the maintenance fees.

In January 2019 Miss C made a complaint about the sale of the timeshare to BPF. She also raised claims under sections 75 and 140A of the Consumer Credit Act 1974.

BPF didn't uphold her claims. It said that in regard to any claim under Section 75 for misrepresentation or breach of contract this was now out of time. BPF also said that it hadn't seen sufficient evidence to find that there had been an unfair relationship between Miss C and the holiday company that had provided the timeshare.

Miss C was unhappy at BPF's response and so complained to this service. She said she had been subjected to an aggressive selling technique and had signed up to a contract for a timeshare that was for 58 years which hadn't been explained to her. Miss C says there were misrepresentations made such as the availability of accommodation and that the resorts would be exclusive when they weren't. She also says there were no checks undertaken by BPF that she could afford the loan.

Our investigator didn't recommend that Miss C's complaint should be upheld. She said that she agreed with BPF that it would have a defence to a misrepresentation claim due to the

amount of time that had passed.

Our investigator also said that on the information she had seen she didn't think that the contractual terms were so problematic as to be unfair in themselves; that Miss C hadn't agreed to the purchase without knowing something that was important to that decision and that the business' conduct hadn't fallen so far short of what would reasonably be expected that it made the relationship between Miss C and BPF unfair.

In regard to Miss C's complaint that BPF hadn't carried out affordability checks, our investigator said that under the Dispute Resolution Rules (DISP), rule 2.8.2R(2) says that we can't look at a complaint that's made more than six years after the event being complained about – or (if later) more than three years after the complainant was aware, or ought to have been aware of the cause for complaint. She said this complaint was now out of time. Miss C disagreed with the view of our investigator. She asked that I consider a 46-page opinion from a barrister covering a number of generic submissions as she said the relationship between herself and the holiday company that had supplied the timeshare was unfair.

I issued a provisional decision along the following lines.

As I've said above, Miss C had submitted an opinion by a barrister called "*Generic submissions on behalf of complainants*". As Miss C suggested that the opinion was relevant to this complaint, I took it into account but only insofar as it discussed points that were of direct relevance to what has been raised by Miss C.

Under the rules that govern how I consider and decide complaints, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice. I must also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been said and provided, I might not have addressed every point that had been raised.

Miss C's Section 75 claim

Section 75(1) of the Consumer Credit Act sets out that a consumer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a credit provider. Those conditions include that the goods or services bought cost more than £100 and less than £30,000 and that the credit financed the contract giving rise to the claim, either in whole or in part.

A claim under Section 75 is a legal claim and I'd seen that BPF had said that a complaint about misrepresentation would now be out of time under the Limitation Act 1980. In order to find that a misrepresentation had occurred, there must be enough evidence that a false statement of fact had been made and that it was this false statement which had induced the consumer to enter into the agreement. I didn't know what had been actually said during the meeting between Miss C and the holiday company when the purchase was made. Miss C had said it was a pressured sale, and I would accept that a sales representative would prioritise the positives of the product they were selling, but that didn't necessarily mean this would amount to a false statement of fact.

However, there is a time limit for bringing actions for misrepresentation which is set out by the Limitation Act 1980. This act sets out that the time limit for a misrepresentation claim (whether under Section 2 or Section 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). As Miss C would have suffered a loss at the point she had entered into an agreement based on an alleged misrepresentation, her cause of action would have arisen in

September 2009, at the point she had signed the agreement. Miss C would therefore have had six years from then to bring a misrepresentation claim against either the holiday company or BPF. As set out above, no claim regarding misrepresentation had been made to BPF until 2019 so around 10 years later, which was outside of the time limits set out in the Limitation Act.

I therefore thought that BPF was likely to have a defence to Miss C's Section 75 claim for misrepresentation under the Limitation Act 1980.

Miss C's Section 140A claim

Although, as set out above, I thought a claim for misrepresentation would have been caught by the Limitation Act, I also considered what Miss C said she had been told about the timeshare by the holiday operator when assessing unfairness under Section 140A.

Miss C said that there had been an unfair relationship between herself and BPF due the actions of the holiday company that supplied the timeshare. She had raised that there had been a pressured selling technique; that she hadn't been able to concentrate on the paperwork, that there had been no disclosure statement or, if there was, there hadn't been sufficient time to review it and the fees were unclear and unfair. She had raised The Unfair Terms Consumer Contracts Regulations 1999 and Consumer Protection from Unfair Trading Regulations 2008. Only a court has the power to decide whether there was an unfair relationship between Miss C and BPF for the purpose of section 140A. But, as it was relevant law, I needed to consider it along with what I thought a court was likely to conclude.

Miss C said she was subjected to a pressured/aggressive sales technique and that the presentation lasted all morning unlike the first presentation she had attended in the UK around two years ago. But I hadn't seen sufficient information to suggest that Miss C hadn't understood that she didn't have to say yes to the agreement and that she could walk away.

Miss C said she wasn't given sufficient time to look at the terms and conditions of the agreement, but I'd seen that there was a 14-day cooling off period provided which was clearly set out. I'd also seen that Miss C appeared to say she was aware of that in one of the submissions she had made to this service. So, even if she hadn't been given sufficient time to think about the purchase before she had signed the agreement, she had a window in which she could have reflected upon it and cancelled it if she had changed her mind.

I also thought the agreement had set out that the product wasn't an investment, and no resale programme was operated by the supplier. It also provided the rate of interest that was being charged.

Miss C had raised the duration of the timeshare, which was to end in 2067, so the contract wasn't in perpetuity. The membership term was set out in the contract, so I thought it was reasonable to think she had been able to consider whether this was something she had wanted. Further, in some circumstances members may be able to relinquish their membership early and although Miss C had ceased using the timeshare in 2010, I hadn't seen any evidence that she had tried to do this.

Miss C had stopped using the timeshare less than a year after acquiring it, and, looking at the time scale, I didn't think it would be reasonable to say this had been as a direct result of repeatedly not being able to book a holiday. I hadn't seen sufficient evidence to say she had been misled as to the availability of holiday accommodation.

Miss C also had concerns about the lack of transparency when it came to the terms and conditions governing the ongoing costs of membership. But I couldn't see that the terms in question had been operated unfairly by the supplier. So, even if there had been problems

with the way in which the terms were written and/or presented, I wasn't persuaded they had caused or contributed to an unfair relationship between her and BPF.

Overall, therefore, on balance, I wasn't persuaded that there was sufficient evidence to show that it would be likely a court would find there was an unfair relationship as set out in s 140A.

The Lending Decision

Miss C said that she didn't believe any credit or affordability checks had been carried out prior to her taking out the fixed sum loan. Our investigator said that, under our DISP rules, this part of Miss C's complaint was out of jurisdiction because it had been made too late.

However, looking at the second limb of DISP 2.8.2 (when Miss C knew, or ought reasonably to have known, that she had cause for complaint), it was suggested that she had first become aware that she had cause for complaint in 2019 when she had sought professional advice. And under DISP 2.8.2R (2)(b), this may mean that she had three years from 2019 to complain.

If the loan had been unaffordable, I thought I would expect Miss C to have realised this much earlier, but I accepted this isn't the same as her knowing she had cause for complaint against BPF. And as I couldn't be certain that Miss C knew (or ought reasonably to have known) that she had cause for complaint against BPF regarding affordability before she took advice in 2019, I thought she had brought this part of her complaint to us within three years of that and so I had gone on to consider this.

I didn't know what financial information had been gathered by BPF before it had decided the loan was affordable for Miss C. Miss C had provided bank statements for one account covering the three months prior to the date the loan was agreed. Looking at these, it was unclear what Miss C's actual income had been at that time, as there were occasional large lump sums moved in and out of the account as well as a regular monthly income of £2,182 being paid on the same date each month. There were also smaller amounts being paid in on an ad hoc basis. Her regular outgoings were also unclear. It appeared from these statements that Miss C had access to other accounts. I wasn't able to reasonably say these bank statements had set out a clear picture of Miss C's income and outgoings at the time the loan had been provided to her.

As Miss C's account had been in overdraft for the majority of this three-month period, I would have expected BPF to have queried her finances before providing the loan. Without any information about those enquiries, I didn't think I could reasonably say that I was satisfied that BPF had completed reasonable and proportionate checks to satisfy itself that Miss C would be able to repay the loan in a sustainable way. But just because such checks hadn't been carried out, didn't mean the loan was unaffordable as I still needed to consider that if BPF had been carried out these checks, what they would have shown.

I hadn't seen any evidence as to Miss C's financial circumstances once she had taken out the loan. I'd seen she had said it wasn't easy to make payments at the start, though after she had paid off her credit card debt, she said the payments had become easier. So, I thought it was reasonable to consider that Miss C had been able to manage her credit repayments. I'd also seen she hadn't defaulted on the loan repayments and had made each payment when due. She had also paid the annual maintenance fees. I didn't think that being in overdraft for a period of time was enough on its own to say the loan hadn't been affordable.

So, although I didn't think BPF had carried out proportionate enquiries as to affordability I hadn't seen anything to persuade me that if they had they would have found the loan wasn't

sustainably affordable for Miss C. And I didn't think this was a reason to uphold this complaint given its circumstances.

So, for the reasons set out above, I didn't currently think Miss C's complaint should be upheld.

Miss C hasn't asked me to re-consider any parts of my provisional decision however BPF has said that Miss C ought to have been reasonably aware she had cause to complain when she knew the loan had become unaffordable and not when she was advised she could bring that complaint against BPF.

BPF says the loan agreement provided Miss C with details of how to make a complaint to BPF and she knew it was the provider of the loan when she had entered into it and so it was reasonable that she would have understood she could bring a complaint about the loan to BPF from the moment she had entered into it

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 have looked again at the evidence provided for this complaint and I haven't changed my view. I still think BPF had a defence under The Limitation Act 1980 to Miss C's section 75 claim in respect of the timeshare. And I also think there wasn't enough evidence to show there had been an unfair relationship between Miss C and BPF.

In regard to the affordability, I'm still satisfied that on balance Miss C was able to raise this part of her complaint under DISP 2.8.2R (2)(b), meaning she had three years from 2019 to complain. Despite what BPF has said, I don't think I can reasonably say Miss C would have known she could make a complaint about the loan being unaffordable until she had been advised she could.

However, as set out above, although I think Miss C was able to make a complaint about the loan's affordability and I didn't think that BPF had made proportionate enquiries when it was considering providing the loan to her, I'm not upholding that part of Miss C's complaint. That's because I hadn't seen clear financial information from Miss C which showed the loan wasn't sustainably affordable for her at the time, she took it out and that position hasn't changed.

So, for the reasons set out above, I'm not upholding Miss C's complaint.

My final decision

For the reasons given I'm not upholding Miss C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 6 November 2023.

Jocelyn Griffith
Ombudsman