

The complaint

Mr P complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") unfairly declined his claims under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA").

What happened

In or around May 2012, Mr P agreed to purchase a timeshare product from a supplier who I'll refer to as "S". The purchase price agreed was £20,972 which was funded under a fixed sum loan agreement with BPF.

In or around February 2020, using a professional representative, Mr P submitted claims to BPF under sections 75 and 140A of the CCA. The original letter of claim is detailed in its content, so it isn't practical to repeat everything said in full here. But I will provide a summary of the key points below.

The PR allege that Mr P 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 further suggest there's been a breach of contract as S entered an insolvency process and is unable to provide the service sold. And under S75, they think BPF are jointly liable for that breach.

The PR also allege that the misrepresentations, amongst other things, mean that an unfair debtor-creditor relationship exists under section 140A of the CCA ("S140A"). Included within the PR's allegations of unfairness was a suggestion that S didn't undertake a proper affordability check before the loan was granted.

In response, BPF didn't uphold Mr P's claim/complaint. They thought Mr P's claims had been submitted too late under the provisions of the Limitation Act 1980 ("the LA"). They also didn't agree there'd been a breach of contract as the management company operating the timeshare product purchased had confirmed that timeshare owners could still book holidays and list their timeshares for resale subject to and in accordance with their agreement.

The PR didn't agree with BPF's findings and referred Mr P's complaint to this service. So, one of our investigators considered all the information and evidence provided. Having done so, they thought BPF had a valid defence to the claims under the LA. They also didn't think there was any evidence that Mr P hadn't been provided with something he was contractually entitled to under the timeshare agreement.

The PR didn't accept our investigator's findings and asked for further time to consider their response and arrange for further submissions to be prepared by counsel in support of Mr P's claim and resultant complaint.

As an informal resolution couldn't be reached, Mrs R's complaint was passed to me to consider further and reach a final decision. Having done so, while I reached a similar outcome to that of our investigator, I considered various aspects that I feel weren't fully addressed previously. Because of that, I issued a provisional decision on 19 October 2023 giving Mr P and Clydesdale Financial Services Limited trading as Barclays Partner Finance the opportunity to respond to my findings 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.

S75 provides protection to consumers for goods or services bought using credit. Mr P paid for the timeshare products under a fixed sum loan agreement with BPF. So it isn't in dispute that S75 applies here. This means that Mr P 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 P and BPF arising out of the credit agreement (taken together with any related agreement). And because the product purchased was funded under the loan 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 P's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded by a regulated 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. 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 S misrepresented the nature of the purchase agreement and benefits to Mr P 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 P 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 May 2012. That's because this is when they say Mr P 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 February 2020. But as this was almost 8 years after the purchase was completed and Mr P 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 thought about this, I believe the trigger point here is slightly different. Any relationship between Mr P 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 have confirmed that Mr P settled his loan on 17 December 2012. And as this was more than 7 years before his 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

The claim for breach of contract under S75

BPF have 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. So, in the absence of any specific explanation or evidence to support why Mr P believes there's been a breach of contract which resulted in a loss for him, I haven't seen anything that would lead me to conclude there was such a breach.

Credit Assessment

Accepting that I believe Mr P'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 before agreeing the loan. BPF haven't provided any explanation or evidence to support how and if a credit assessment was completed. And given the passage of time, it's likely this information is no longer available anyway.

If I were to find that BPF hadn't completed all the required checks and tests – 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 P in order to uphold his complaint here. However, I haven't seen any information about his actual financial situation at the time. And there's no obvious suggestion or evidence that he struggled to repay the borrowing. So, I can't reasonably conclude that the borrowing under the loan agreement was unaffordable for him. And given the loan was fully repaid in December 2012, 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 P's claims for misrepresentation (under S75) and unfairness (under S140A) were brought to BPF too late under the provisions of the LA. And, as such, BPF appear to have a valid defence on that basis.

I also haven't found anything that persuades me that a claim for breach of contract is likely to be successful either. So, I can't say that BPF's response to Mr P's claim was

unfair or unreasonable. And as I've found no other reason why Mr P's complaint should be upheld; 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.

BPF acknowledged my provisional findings and confirmed they have no further comments to add. Despite follow up by this service, the PR haven't provided any response or acknowledgment. In these circumstances, and in the absence of anything new to consider, I've no reason to vary from my provisional findings. So, my final decision remains unchanged.

My final decision

For the reasons set out above, I don't uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 15 December 2023.

Dave Morgan
Ombudsman