

The complaint

Mr H complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, won't refund to him the money that he paid for a holiday club membership. He's being represented in his complaint by a claims management company.

What happened

Mr H and his partner entered into a purchase agreement to buy a holiday club membership from a holiday company in April 2016. The purchase price of the membership was £26,270 and, with other the costs, the total amount payable by them was £26,623. I understand that Mr H entered into a fixed sum loan agreement with Barclays Partner Finance for a loan of £26,623 and that he agreed to make 180 monthly repayments of £299.99 to Barclays Partner Finance.

Mr H's representative made claims, on Mr H's behalf, to Barclays Partner Finance under sections 75 and 140A of the Consumer Credit Act 1974 in January 2020. It said that: there were breaches of contract and negligence by the holiday company; the membership was misrepresented to Mr H and his partner; commission was paid by Barclays Partner Finance to the holiday company but it didn't obtain Mr H's and his partner's informed consent so there was a breach of fiduciary duty; and Mr H's relationship with Barclays Partner Finance was unfair.

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

Our investigator didn't recommend that Mr H's complaint should be upheld. She wasn't persuaded that there was a misrepresentation at the time of sale and she didn't think that the holiday company had breached the contract. She said that she hadn't seen enough to suggest that the relationship between Mr H and Barclays Partner Finance was unfair and she wasn't persuaded that a court would reach the conclusion that the relationship was unfair. She also said that she didn't consider that Barclays Partner Finance had acted incorrectly in connection with any commission paid to the holiday company. She then said that she wasn't persuaded that the money lent to Mr H was likely to have been unaffordable.

Mr H's representative, on behalf of Mr H, has asked for this complaint to be considered by an ombudsman. It has raised its serious concerns about the way that the finance was sold to Mr H. It says, in summary and amongst other things, that; the membership was a fractional property ownership as the contract clearly states that the property will be sold after the expiration of Mr H and his partner's certificate and the net proceeds of the sale will be distributed between the members of good standing; and the finance company didn't comply with its obligations to conduct assessments of the affordability of the loan for Mr H and his creditworthiness.

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 Mr H's complaint shouldn't be upheld for these reasons:

- Mr H and his partner signed the purchase agreement in April 2016 and bought a holiday club membership which gave them the right to occupy a two bedroom premier suite at a specified resort for seven days each year until December 2050 (unless extended) – the purchase agreement also referred to 9,600 membership points;
- they also signed the holiday company's standard information form and Mr H would have signed the loan agreement but I've not been provided with a copy of the loan agreement;
- Mr H's representative made claims to Barclays Partner Finance in February 2019 and Mr H then made a complaint to this service in April 2019 – his complaint form referred to claims under section 140A and there was no reference to claims under section 75 but his representative's claim letter referred to claims under sections 75 and 140A;
- 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) and 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;
- I'm not determining the outcome of Mr H's claims under sections 75 and 140A as only a court would be able to do that but I'm considering whether or not Barclays Partner Finance's response to his claims was fair and reasonable in the circumstances – and, as it didn't provide a substantive response to those claims, I can't say that its response was fair or reasonable;
- Mr H's representative's February 2019 letter described the misrepresentations that it says were made to Mr H and his partner, including that they were advised that: they would be acquiring *"free holidays for the next 20 years"*, but that they only became aware that they would have to pay ever-increasing maintenance fees following the conclusion of the contract; and the products they were purchasing were worth the sum paid, but the membership is worth little or nothing;
- neither Mr H nor his representative has provided a detailed account of the circumstances in which the alleged misrepresentations were made, the conversations that took place or the information that was provided to them;
- the purchase agreement that was signed by Mr H and his partner says that the first year's total maintenance/management charge was £864.45 and: *"The maintenance/management charge for the current year will be due by me/us when payment is requested by the [holiday company]. The maintenance/management charge for the following and each subsequent year will be due in each year on such date as the Management Company may determine"* and information about the maintenance/management charge was also included in the standard information form;

- I consider that Mr H and his partner were aware, or ought reasonably to have been aware, of the maintenance and management charges before they signed the purchase agreement so would have been aware that they were required to pay those charges each year;
- Mr H and his partner were prepared to pay £26,270 for the membership and the purchase agreement gave them the right to occupy a two bedroom premier suite at a specified resort for seven days each year until December 2050 (unless extended) and 9,600 membership points;
- I'm not persuaded that there's enough evidence to show that the membership was misrepresented to Mr H and his partner by the holiday company or that they were induced into entering into the purchase agreement by any such misrepresentations;
- the February 2019 letter also says that, because of the misrepresentations, Mr H and his partner are entitled to rescind their contract with the holiday company but it hasn't provided any more information about a breach of contract by the holiday company or its negligence - and I'm not persuaded that there's been a breach of contract by the holiday company for which Barclays Partner Finance would be liable under section 75;
- Mr H's representative says that commission was paid by Barclays Partner Finance to the holiday company but it didn't obtain Mr H's and his partner's informed consent so there was a breach of fiduciary duty by Barclays Partner Finance;
- I've not been provided with any evidence to show what commission, if any, was paid by Barclays Partner Finance to the holiday company but, 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 duty in making any such payment – nor was it under any regulatory duty to disclose the amount of any commission paid in these circumstances - and I don't consider that the level of any commission that was normally paid in this type of situation would have been sufficiently high to mean that Barclays Partner Finance should have appreciated that not disclosing the amount of the commission to Mr H risked the relationship being unfair under section 140A;
- I'm not persuaded that there's been a breach of any fiduciary duty in these circumstances;
- Mr H's representative says that the holiday company and Barclays Partner Finance failed to conduct a proper assessment of Mr H's ability to afford the loan - but neither Mr H nor his representative has provided detailed evidence about Mr H's financial position in April 2016 or to show that the loan wasn't affordable for him at that time;
- Mr H sent an e-mail to the holiday company about the 2018 maintenance/management charge in which he said that the timeshare had been mis-sold and that he was being *"milked for pretend fees"* but there was no reference in that e-mail to the fees not being affordable for him – he wrote to his representative in October 2018 and asked for feedback about the action that it could take on both the timeshare loan and the maintenance fee and he said that he felt ripped off and the annual maintenance fee wasn't explained to him and his partner, but there was no reference in that letter to the loan and maintenance fee not being affordable for him;
- the loan was made to Mr H in April 2016 but I've seen no evidence to show that he asked Barclays Partner Finance for any information about the affordability assessment that it conducted before his representative made claims to it in February 2019, nearly three years later, and if the loan wasn't affordable for him at the time that it was made to him I consider that it would be reasonable to expect him to have

raised any concerns about the affordability of the loan with Barclays Partner Finance before then;

- I'm not persuaded that enough evidence has been provided to show that the loan wasn't affordable for Mr H when it was made to him in April 2016 or that the loan was mis-sold to him;
- Mr H's complaint form says that the holiday company unduly pressured Mr H and his partner into entering into the purchase agreement and unduly pressured Mr H into entering into the loan agreement but the standard information form that was signed by Mr H and his partner said that they had the right to withdraw from the purchase agreement without giving any reason within 14 calendar days;
- if Mr H and his partner were concerned about the way that the membership had been sold to them and didn't want to buy it, I consider that it would be reasonable to expect them to have contacted either the holiday company or Barclays Partner Finance within the withdrawal period to withdraw from the purchase agreement – but I've seen no evidence to show that they did so;
- Mr H and his partner entered into the purchase agreement in April 2016 but I've seen no evidence to show that they raised any concerns about the way that the agreements had been sold to them with either Barclays Partner Finance or the holiday company until Mr H's representative made claims to Barclays Partner Finance in February 2019, nearly three years later, and if they'd been unduly pressured into entering into the agreements I consider that it would be reasonable to expect them to have raised their concerns before then;
- I'm not persuaded that there's enough evidence to show that Mr H and his partner were unduly pressured into entering into the purchase agreement, that Mr H was unduly pressured into entering into the loan agreement or that the holiday company used unacceptable sales practices against them;
- Mr H's representative says that the membership was a fractional property ownership as the contract clearly states that the property will be sold after the expiration of Mr H and his partner's certificate and the net proceeds of the sale will be distributed between the members of good standing;
- fractional ownership products were sold as an investment and related to a specified property but the membership that was bought by Mr H and his partner didn't relate to a specified property and wasn't sold to them as an investment – so even though the standard information form says that the property will be sold after the expiration of Mr H and his partner's certificate and the net proceeds of the sale will be distributed between the members of good standing, I'm satisfied that the membership that was bought by Mr H and his partner isn't a fractional ownership product;
- both fractional and non-fractional products were often sold in similar ways and may have had similar contractual documentation but the operation and effect of the contractual documentation would be significantly different for a fractional product than for a non-fractional product;
- I'm not persuaded that there's enough evidence to show that Mr H'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 Mr H and Barclays Partner Finance in these circumstances;
- Barclays Partner Finance didn't issue a substantive response to Mr H's claims so I can't say that its response to his claims was fair and reasonable – but if it had properly responded to his claims I consider that it would have been fair and reasonable for it not to have upheld them; and

- I sympathise with Mr H for the issues that he and his partner have had with their membership, but I find that it wouldn't be fair or reasonable in these circumstances for me to require Barclays Partner Finance to refund to him any of the money that he's paid for under the loan agreement, to cancel his loan agreement, to pay him any compensation or to take any other action in response to his complaint.

My final decision

My decision is that I don't uphold Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 9 August 2023.

Jarrold Hastings
Ombudsman