

The complaint

Mr H says that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, who I'll call "BPF", should uphold claims he made to them under the Consumer Credit Act 1974 (the 'CCA') in relation to timeshares he financed through agreements with them.

Mr H has been represented by a professional representative who I'll refer to as "PR". Where I refer to Mr H's submissions I include those made on his behalf.

Mr H entered into the timeshare agreements with his partner, but as the finance agreements were in his sole name, I will refer only to Mr H or his representatives in this decision. I mean no disrespect to Mr H's partner when doing so.

What happened

I issued my provisional decision on this complaint in May 2023. An extract from that provisional decision is set out below.

Mr H purchased a timeshare from a company I'll call "A", in March 2008 (the Time of the First Sale). He financed the deal through a fixed sum loan with BPF. The timeshare membership agreement gave him the right to a floating weeks holiday for a week of every year. The finance agreement was settled in 2010.

In June 2010 Mr H upgraded his membership and purchased a further timeshare. He financed the balance due on that agreement through a further fixed sum loan with BPF.

Mr H complained to BPF in February 2019. He said he had claims under section 75 and section 140A of the Consumer Credit Act 1974 (the CCA). It's not practical to list the complaint in detail here but in summary he claimed that the timeshare agreement had been misrepresented to him, that there'd been a breach of fiduciary duty as commission wasn't disclosed to him, and that there had been an unfair relationship, he also said BPF hadn't completed adequate affordability checks.

Our investigator noted that Mr H had expanded his claim since referring it to this Service, he explained that we could only consider a complaint after the business had been allowed to, and as BPF had only been able to consider the complaint points referred to them by Mr H's representatives in February 2019, they were the issues he'd look at. He thought Mr H's claim about his first agreement had been made out of time according to the time limits established by the Limitations Act 1980. He thought Mr H's section 75 claim about the second agreement was also out of time, but he did think we could consider the claim under section 140A as it was in time. However, he wasn't persuaded there was sufficient evidence of an unfair relationship.

Mr H and his representatives didn't agree with the investigator's view, they said a termination provision contained in the timeshare agreement, which involved forfeiting the entire purchase price if maintenance payments were missed, was an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR's). They asked for a decision by an ombudsman.

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 his view and I can't see we've responded to all of the issues that were initially referred to BPF.

This service can't usually consider the merits of new complaints if they haven't been made to the business first. I'm therefore only considering the merits of the complaint Mr H and his representatives made to BPF in February 2019.

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 final decision.

The Limitation Act 1980 and the Consumer Credit Act 1974

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. From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

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 exists between Mr H and BPF.

It's not for me to decide the outcome of a claim Mr H may have under sections 75 or 140A but I'm required to take them into account when deciding whether BPF would be reasonable to reject Mr H's claims.

Under the Limitation Act 1980 (the LA) a claim under section 75 for misrepresentation against BPF had to be made within six years of when Mr H had everything he needed to make such a claim. And in this complaint, I think that was when he purchased the timeshare agreements in March 2008 and June 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 those times that he suffered a loss because he ended up borrowing money from BPF. So, Mr H had until March 2014 and June 2016, respectively, to raise his section 75 claims with BPF. As he didn't do so until February 2019, 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 claims to be time barred. That would give BPF a complete defence against them.

The LA applies to a claim under s.140A of the CCA as well. The time for limitation purposes runs 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 H wishes to make is for repayment of sums he has paid, which is an action for sums recoverable under statute, to which section 9 of the LA applies. That meant Mr H would have to bring an action within six years of the date the credit was repaid. The March 2008 agreement was repaid in 2010 but as Mr H didn't raise his claim until February 2019, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, I think he brought that claim too late – which, in my view, is likely to give BPF a complete defence to it. The June 2010 finance agreement was repaid in 2014 and Mr H therefore raised that complaint in time. I'll therefore consider that claim.

The claim under section 140A of the CCA regarding the second agreement

Section 140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement). Mr H says he was told he could take free holidays but that he subsequently found that maintenance fees were payable. I've seen a copy of the Reservation Rules; it's not clear if those Rules are the ones related to the second agreement but in the absence of other documents it seems likely that they were. Those Rules explain that management fees are payable, and I think it's reasonable to suggest that Mr H would have been aware of that. I also think he would have been very likely to have complained about the presence of management fees earlier than he did, if he didn't understand there was a commitment to pay them. I'm not therefore persuaded there was an unfair relationship.

Mr H also says the agreement was unfair because it was poor value for money. The cost of the agreement was clearly set out, and Mr H agreed to pay that amount. I can't see how that "deal" could therefore be considered unfair as it seems it was both transparent and consensual.

Whilst I understand Mr H asserts he was told he could sell the product for a profit I can't see that could be the case here. Mr H wasn't purchasing an asset, he was purchasing a floating week at the Resort. Whilst there were subsequent purchases of fractional products that Mr H may be referring to here, they were not funded by the finance agreement with BPF. I don't therefore think there has been sufficient evidence of an unfair relationship in that respect. Mr H's representatives say that a termination provision in Mr H's timeshare agreement meant he would forfeit the entire purchase price if he missed payments, and was therefore unfair. They explained that it would cause a significant imbalance in the parties' rights and obligations and was contrary to Regulation 5 and 6 of the UTCCR's. But Mr H cancelled his contract in April 2011 when he exchanged it for a fractional product. So, it would seem at that point he was no longer obliged to pay maintenance fees and, regardless, he hadn't suffered any loss even if the term was unfair.

Mr H's representatives say BPF failed to disclose the commission paid.

One of the main aims of both the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 and the UTCCR's was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. If a supplier's disclosure and/or the terms of a bargain didn't recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully

understand at the time of contracting, that may amount to unfairness under Section 140A.

I don't think the fact that BPF may have paid the Supplier commission was incompatible with its role in the transaction. The Supplier wasn't acting as an agent of Mr H but as the supplier of contractual rights he obtained under the purchase agreement. And, in relation to the loan, based on what I've seen, I don't think it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr H advice or information on that basis. What's more, I haven't seen any persuasive evidence that the typical amounts of commission paid by BPF to suppliers (like the Supplier) when loans were interest bearing (as was the case on this occasion) was likely to be high enough to create an unfair debtor-creditor relationship given the circumstances of this particular complaint. I think it's unlikely a court would find that the failure to disclose commission in this case created an unfair relationship under s.140A.

Ultimately, I don't think a court would find evidence to suggest there was an unfair relationship and I'm not therefore persuaded it would be reasonable to expect BPF to uphold Mr H's s140A claim.

Was the loan irresponsible?

Mr H 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 H 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 agreements were unaffordable for him.

My provisional decision

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

Further comments and evidence

Mr H's representatives replied to my provisional decision and said:

"We are of the view that the finance agreements are manifestly unfair, as the credit intermediary in each case was not regulated to do the work.

Moreover, this was a fractional timeshare product, where Our Clients were promised a return on investment."

BPF had no further comments.

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 already explained why I don't think there's sufficient evidence the agreement Mr H entered into was a fractional product. As Mr H's representatives haven't provided any new information in support of their assertion, I'm not persuaded to change my view on that issue.

I can't see that Mr H raised concerns with BPF about the credit intermediary not being regulated. I explained in my provisional decision that, "*This service can't usually consider the merits of new complaints if they haven't been made to the business first. I'm therefore only considering the merits of the complaint Mr H and his representatives made to BPF in February 2019*". Mr H will therefore need to raise any complaint he may have about the credit intermediary's regulation to BPF, before this Service can consider it.

Ultimately, having considered Mr H's representative's additional comments, I've not seen anything that would lead me to change my provisional decision, and that now 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 H to accept or reject my decision before 8 August 2023.

Phillip McMahon
Ombudsman