

## The complaint

Mr B says that Clydesdale Financial Services Limited – trading as Barclays Partner Finance (“BPF”) didn’t fairly or reasonably deal with his claims under the Consumer Credit Act 1974 (“the CCA”) in relation to a timeshare product he purchased in September 2010.

The claims, which are the subject of this complaint, are Mr B’s to make because they stem from a credit agreement in his name only. However, as they relate to purchases made by him and his wife (Mrs B), I may refer to Mr and Mrs B at times throughout this decision.

## What happened

In or around October 2009, Mr and Mrs B chose to upgrade their trial membership and purchase full membership in a timeshare product with C.

In or around September 2010, Mr and Mrs B visited one of C’s resorts as part of a “*Promotional Prelude Holiday*” provided by C. A condition of the promotion required them to attend a meeting with C’s sales team during their visit. Having attended that meeting, Mr and Mrs B agreed to upgrade their membership status again.

The cost of the upgrade purchased was £25,543. And after a trade in allowance of £21,143 against their existing membership, there was a remaining balance to pay of £4,400. This was funded under a Fixed-Sum Loan Agreement provided by BPF. The total loan was for £17,003 and included consolidation of an existing loan they had with BPF.

Towards the end of September 2015, Mr B contacted BPF to explain problems they’d had with advance bookings through C. He said there’d been ongoing issues over three years which C had either ignored or failed to resolve. In particular, he said they’d been told their membership entitled them to make bookings two years in advance. But they weren’t able to do that.

BPF raised a claim, on Mr B’s behalf, under section 75 of the CCA (“S75”). They looked into Mr B’s concerns and contacted C as part of their investigation. Having completed that, BPF didn’t uphold Mr B’s complaint. They issued their response in writing and explained that all membership bookings were subject to availability. They didn’t agree that this aspect of Mr B’s membership had been misrepresented to him.

But Mr B didn’t receive BPF’s written response to his complaint, despite contacting them again on three occasions. So, Mr B decided to refer his complaint to this service. In doing so, Mr B provided further details of his claims and concerns. In particular, he said:

- he thought the loan term was seven years but has since discovered it’s actually 15 years;
- they were told they could book two years in advance but found they couldn’t;
- C don’t appear to own “*half of the resorts*” available;
- they were told membership was exclusive;
- C “*badgered*” them with attempts to “*upsell*”;
- C weren’t aware they can’t take deposits from them, but presented this as buying promotional points; and

- C hadn't explained everything to them at the time of the sale.

One of this service's investigators looked into the circumstances of Mr B's complaint. In doing so, they didn't think there was evidence C had misrepresented the product purchased to Mr D. Our investigator also considered whether an unfair debtor-creditor relationship existed under section 140A of the CCA ("S140A"). But given all the circumstances, didn't think that was the case.

Mr B didn't agree with our investigator's findings. He insisted they'd been mis-sold the product and still hadn't been provided with a copy of the contract.

As an informal resolution couldn't be reached, Mr B's complaint was passed to me to consider and reach a final decision. Having done so, I issued a provisional decision on 19 July 2023 giving Mr B and BPF the opportunity to consider my findings and provide any further comment or evidence they feel might be relevant before I issue my final decision.

In my provisional decision, I said:

When considering what's fair and reasonable, DISP<sup>1</sup> 3.6.4R of the Financial Conduct Authority ("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 B paid for the timeshare product under a regulated agreement with BPF, so it isn't in dispute that S75 applies here. This means Mr B 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 B and BPF arising out of the credit agreement (taken together with any related agreements). And because the product was funded under the credit agreement, they are 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 B's complaint, relevant law also includes the Limitation Act 1980 ("the LA"). This sets out time limits within which legal claims can be made. Claims under S75 and 140A are legal claims. Only a court is able to make a ruling under the LA. But as it's relevant law, and because the original transaction - the purchase funded by a loan with BPF - took place around September 2010, I need to consider how the provisions of the LA may impact any claim.

It's important to stress that this service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe BPF's treatment of Mr B's claim was fair and reasonable given all the evidence and information available, rather than deciding the claim. This service isn't able to make legal findings. As I've already said, that's the role of the courts. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. Where Mr B doesn't accept my findings, this doesn't prejudice his right to pursue his 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 based upon the evidence that's available from the time and the wider circumstances.

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<sup>1</sup> The Dispute Resolution Sourcebook from the FCA's Handbook of Rules and Guidance

### The claim for misrepresentation

A section 75 claim for misrepresentation is “*an action [that is a 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 B had to make a claim within six years of when he entered into the purchase contract and credit agreement. He confirms this took place in September 2010. So, that is when he says he lost out having relied upon the alleged false statements of fact at that time.

Details of the alleged misrepresentation relating to the two-year booking benefit were submitted to BPF in 2015. And as this was less than six years after the purchase, the claim appears to have been made in time. So, I’ve considered whether BPF’s findings and outcome were fair and reasonable.

But the subsequent claims weren’t raised until Mr B referred his complaint to this service. This means BPF hadn’t previously been asked or given opportunity to consider these. BPF have confirmed that to be the case. And as the additional points were first raised more than six years after the purchase was completed; I believe a court is likely to find that these elements of his claim falls outside the time limit permitted in the LA. So, I don’t think I can consider these in relation to BPF’s original response to Mr B’s S75 claim. But, as I’ll explain later, I do think they could be considered under a separate provision within the CCA.

Mr B’s original complaint to BPF in September 2015 was based upon an allegation that C had told them they could book holidays and accommodation two years in advance. But when Mrs B had attempted to do that in 2012, she discovered that wasn’t the case.

I’ve seen various documents from the time of the sale. In particular, the acquisition agreement and the Members declaration. These appear to have been signed by Mr and Mrs B. And in the case of the declaration, the various numbered points have also been individually initialled by them.

Having considered these documents, I can’t find any reference to any guarantee, or otherwise, that Mr and Mrs B would be able to make bookings two years in advance. However, I have seen and am familiar with the underlying terms and conditions that relate to membership types like the one purchased by Mr and Mrs B. While their membership level may well allow bookings to be made up to two years in advance, the conditions are very clear that all bookings are subject to availability. And it appears C made this clear to Mrs B when she contacted them in 2012 and thereafter. In other words – if there’s availability, bookings can be made up to two years in advance.

I realise this is different to Mr and Mrs B’s own interpretation. But based upon the evidence available from the time, I can’t reasonably conclude that C misrepresented this product feature in the way Mr B alleges.

### The claim under S140A

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. In simple terms, any relationship between Mr B and BPF continues while the finance agreement remains live. So, that relationship only ends once the agreement ends and the borrowing under it has been repaid. And as it appears Mr B's loan was still live at the time of his original complaint and his subsequent referral to this service; I believe any claim under S140A is likely to have been made in time under the provisions of the LA.

Under S140A, in determining if the relationship is unfair, the courts must have regard for *"anything done (or not done) by or on behalf of the creditor [BPF]"*. So, I think the subsequently alleged misrepresentations were, therefore, relevant here. Even though I don't think the additional claims Mr B raised, when referring his complaint to this service, can be considered under S75 due to limitation.

That being said, I haven't found any evidence from the time of the sale that supports the various allegation made. In particular:

- I think the various documentation and associated terms and conditions make it clear that not all resorts and accommodation available are exclusively owned by C, and they may be owned and operated by other providers and/or affiliates.
- there appears to be no specific definition of what is meant by *"exclusive"*. So, I can't reasonably say that Mr B's own interpretation that accommodation would only be available to members of C's products was based upon anything said by C.

#### The term of the loan

I've seen a copy of the loan agreement` Mr B signed in September 2010. It clearly states, *"you will pay to us 180 monthly Repayments of £254.50"*. So, I don't agree the loan repayment term had been represented as seven years. And even if it was found that C had said that – and I make no such finding - Mr B's right to withdraw from the loan agreement within 14 days, without giving any reason, is clearly detailed in the agreement. But there's no evidence that Mr B questioned the term of the loan or tried to exercise his right to withdraw.

#### Time to consider and understand the purchase agreement

Other aspects of Mr B's claim could also be considered under S140A based upon whether these may have contributed to creating an unfair relationship between him and BPF. Mr B says C didn't explain everything to them at the time of the sale. But in the members Declaration, which Mr and Mrs B signed and initialled, it confirms they:

- *"received a copy of our Agreement together with the notices required under the Timeshare Act 1992 (as amended) and a Disclosure Statement (July 2010)"*;
- *"understand clearly what we have purchased [...]"*; and
- *"read and fully understand all of the above"*.

Furthermore, I believe the purchase application and agreement was also subject to the regulatory 14-day cooling off period. So, even if I were to find that Mr and Mrs B weren't given adequate opportunity to read and consider the purchase documentation at the time of the sale, or they weren't fully explained - and I make no such finding - I would expect them to have had sufficient time in which to consider their decision within the subsequent 14 days based upon that documentation. And, where appropriate, raise any questions or concerns before the loan was drawn and

the purchase completed. There's no suggestion or evidence that they did raise any questions or concerns prior to the sale being completed. Or that they demonstrated any intention of cancelling the purchase agreement.

#### Sales Pressure

Mr B alleges that C regularly "*badgered*" him in an attempt to upsell products.

I acknowledge what Mr B says and how this might have felt like a pressured sale. However, against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr B agreed to the purchase when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to C, after the purchase, to suggest he'd agreed to it when he didn't want to. And he hasn't provided a credible explanation for why he didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted. So, if he only agreed to the purchase because he was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr B was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate that Mr B made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired.

#### Acceptance of deposits

Mr B suggests that C "*doesn't know that they can't take deposits*". The regulations that apply require that no upfront payment is received by C until expiry of the cooling off period. Mr B's claim here specifically relates to the purchase in September 2010. The application was completed on 14 September 2010. Mr B's loan account statements show that the loan wasn't drawn until 28 September 2010 – after expiry of the 14-day cooling off period. On that basis, it doesn't appear any payment was made to or received by C, contrary to the regulations that applied.

#### Summary

I realise Mr B will be disappointed. Particularly as it's clear he's now very unhappy with the product he purchased. But, based upon my findings above, I can't say that BPF's response to his claim was ultimately unfair or unreasonable. And because of that, I don't currently intend to ask them to do anything more.

### **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 issued my provisional decision, BPF responded confirming they had nothing further to add. Despite follow up communication from this service, Mr B didn't respond to my provisional decision.

With no further information for me to consider here, I've no reason to vary from my original findings. So, my final decision will remain unchanged.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 14 September 2023.

Dave Morgan  
**Ombudsman**

