

## The complaint

Mr A complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") unfairly responded to his complaint relating to loans they provided to him in 2007 and 2015 for the purchase of timeshare products.

## What happened

In or around September 2004, Mr and Mrs A purchased a trial membership with a company, I'll refer to as "M", at one of their holiday resorts. Mr A says he was told he could use the membership for exclusive stays at any of M's resorts in the world of his choosing.

In or around April 2007, Mr and Mrs A decided to upgrade their trial membership and become part of M's points system, effectively increasing their grade of membership. They understood the more points they held, the more benefits they'd receive. The purchase was financed under a loan agreement provided by BPF in Mr A's sole name. This loan was repaid and closed in October 2014.

In or around June 2015, Mr and Mrs A decided to purchase further points from M in order to upgrade their membership further. The purchase price of £7,400 was financed under a new 10-year fixed sum loan agreement provided by BPF in Mr A's sole name. This loan was repaid and closed in February 2018.

In May 2021, Mr A complained to BPF about the loans they'd provided in 2007 and 2015. He said he had serious concerns, as following enquiries to the Financial Conduct Authority ("FCA"), it seemed the intermediaries who introduced the loans to him weren't permitted or authorised to do so under section 19 of the Financial Services and Marketing Act 2000 ("FSMA"). Mr A also asked BPF to provide evidence of what checks were undertaken concerning his loans and their suitability and asked them to provide copies of all information they held about him relating to the loans.

BPF acknowledged his letter by sending him two separate letters in early June 2021. One related to the loan agreed in 2015 and confirmed that his complaint was being investigated. The other gave BPF's response to his complaint in relation to the loan provided in 2007.

BPF didn't uphold Mr A's complaint in relation to the 2007 loan. They said that under sections 2 and 9 of the Limitation Act 1980 ("LA"), Mr A had six years from the date of a cause of action to bring a complaint. And because the loan in 2007 related to a timeshare product purchased at that time, it appears that was the point of loss. And as his claim/complaint was brought to them more than six years later, they thought any claim was out of time.

BPF also responded to an allegation of unfairness under section 140A ("S140A") of the Consumer Credit Act ("CCA") *"due to the purported misrepresentations and non-disclosure of the precise amount (if any) of commission paid by [BPF...]"*. They said the loan had been repaid and closed in 2014. So, under the LA, Mr A had six years from that point during which to submit any claim/complaint. But his complaint was made outside of that period.

In early December 2021, using a professional representative ("PR"), Mr A<sup>1</sup> referred his complaint to this service. The PR's referral appears to extend the scope of Mr A's complaint

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<sup>1</sup> The PR referral to this service was in the joint names of Mr and Mrs A. Whilst the products were purchased in joint names, the loans were in Mr A's sole name only. Therefore, Mr A is the only eligible claimant/complainant under the CCA.

beyond that of his original letter to BPF. In particular, the PR said the loan(s) is/are void and unenforceable on the grounds of misrepresentation and unlawful authority of the intermediary/ies due to breach of regulatory formalities in FSMA. The PR alleged M made the following misrepresentations:

- Mr and Mrs A would receive more benefits with their upgraded membership(s);
- they could easily book and would be given priority; and
- M denied the product was a timeshare.

Due to the alleged misrepresentations, Mr and Mrs A said they were unable to book the holidays they wanted due to a lack of availability and wouldn't have purchased the products had they known they related to a timeshare. The PR allege Mr and Mrs A were pressured into entering into the contracts and the interest rate on the loan(s) was *"much higher than those applicable generally in the particular market sector [...]"*.

The PR believe the misrepresentations and the high interest rate created an unfair relationship under S140A. They also believe BPF's failure to provide details of the checks they conducted before agreeing to the loan(s) means they failed to comply with the requirements of CONC<sup>2</sup>.

The PR didn't agree with BPF's findings. They said the complaint about the relationship and resultant losses is ongoing – not just from six years ago. And in any event, any claim isn't subject to a six-year limitation as it is a *"claim in specialty"*, which is subject to a limitation period of 12 years after the loan agreement ended.

One of our investigators considered the circumstances of Mr A's complaint. In doing so, they didn't agree that BPF's response was ultimately unfair or unreasonable. In particular, they also thought any claim for misrepresentation had been brought too late under the provisions of the LA. Further, as it was more than six year since the loan taken in 2007 was repaid and closed, any claim under S140A was also too late under the provisions of the LA.

As regards the checks and assessments completed (or not) by BPF, our investigator didn't think there was any evidence suggesting the loan was unaffordable for Mr A. And also, didn't think that any non-disclosure of commissions paid by BPF was likely to risk making the relationship unfair under S140A.

In response to our investigator's view, the PR stressed that Mr A's complaint centres around what they allege were unlawful practices. They said that under the provisions within DISP<sup>3</sup> 3.6.4R, this service is *"free to depart from the relevant law in determining what is fair and reasonable"*. They allege there were fraudulent misrepresentations which were only revealed once Mr A sought advice. And they argue that the facts relevant to Mr A's cause of action weren't known at the point he entered into the second loan in 2015. Because of the alleged fraudulent misrepresentations and concealment, they believe that postponement of the limitation period is afforded under the provisions of section 32 ("S32") of the LA.

The PR also didn't agree that just because there was no evidence found suggesting the loan(s) were unaffordable (and Mr A denies they were affordable), it doesn't mean BPF met their obligations under CONC 5.2.4R. And even if there was a credit check done to assess credit worthiness, it doesn't necessarily address affordability.

Finally, the PR argued that M – as the credit intermediary – owed a fiduciary duty to Mr A and, as such, the failure to disclose any procurement fee (commission) paid by BPF was a breach leading to unfairness under S140A.

As an informal resolution couldn't be reached, Mr A's complaint has been passed to me to consider further.

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<sup>2</sup> The FCA Consumer Credit Sourcebook ("CONC")

<sup>3</sup> The FCA's Dispute Resolution: Complaints Sourcebook

Having considered the relevant information about this complaint, whilst I ultimately came to the same outcome as our investigator, I'd considered certain aspects not previously addressed. Because of that, I issued a provisional decision ("PD") on 14 June 2023 – giving the PR, Mr A and BPF the opportunity to respond to my findings before I reached a final decision.

In my provisional decision, I said:

#### Relevant Considerations

When considering what's fair and reasonable, DISP 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 for consumers for goods or services bought using credit. Mr A paid for the timeshare points with restricted use fixed sum loan agreements, so it isn't in dispute that S75 applies here. This means that Mr A 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 A and BPF arising out of the credit agreements (taken together with any related agreements). And because the product points purchased were funded under the credit agreements, they are deemed to be a 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 A's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded by a loan with BPF - took place around April 2007. 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 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 A's claim was fair and reasonable given all the evidence and information available. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service. And as I've already said, 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.

#### Mr A's original complaint

As I've already highlighted above, Mr A's letter to BPF in May 2021 makes no overt reference to any claims of misrepresentation by M under S75. It focusses upon the authorised status of the credit intermediaries and consequently their role in introducing the two loans provided by BPF. It also questions the checks undertaken by BPF when they agreed the loan(s). However, it appears BPF's response, in respect of the April 2007 loan, does address the wider issue of misrepresentation

and any alleged unfairness of the relationship. So, as BPF appear to have engaged on these points, I have considered these aspects in reaching my decision here.

BPF told this service that the loan agreed in June 2015 hasn't been raised as part of this complaint. And as such, they haven't issued a response and it hadn't been referred to this service. However, Mr A's original letter to BPF specifically references the June 2015 loan agreement. BPF acknowledged this in a separate letter in June 2021 but haven't issued a response. And as the PR's submissions refer to both loans, I think the circumstances of both product purchases and the respective loans should be considered here.

#### This service's jurisdiction

There are various aspects of this complaint that I think it's important to provide clarity about before I consider matters further.

Prior to 1 April 2014, Consumer Credit licenses were provided by the Office of Fair Trading ("OFT"). This service's Consumer Credit Jurisdiction started on 6 April 2007 and was extended to cover all businesses that held a standard license from the OFT. So, before then our jurisdiction didn't extend to cover the activities of those licenced by the OFT. Mr A's first loan was agreed on 2 April 2007 – before this service's Consumer Credit Jurisdiction. But as the loan carried on beyond the date of our new jurisdiction, I think this service is able to consider any complaint relating to it.

On 1 April 2014, the regulation of consumer credit businesses transferred from the OFT to the FCA. So, it was at this point that activities previously licensed by the OFT under the CCA became regulated under FSMA. As a consequence, this service's Consumer Credit Jurisdiction ceased to exist, and the activities of regulated business fell under our Compulsory Jurisdiction. And as the second loan was agreed in June 2015, it falls under that Jurisdiction.

For simplicity, I propose to address the complaints and claims raised in respect of each loan separately.

#### The claim under S75 for the first loan in April 2007

The PR say the supplier misrepresented various aspects of the points purchase agreement and benefits to Mr A when he bought it, And the PR 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 A had to make a claim within six years of when he entered into the purchase contract and credit agreement – which the PR confirm was in April 2007. That's because this is when they say Mr A lost out having relied upon the alleged false statements of fact at that time.

It's unclear when details of the alleged misrepresentations were submitted to BPF – if at all. They don't appear to have been included within Mr A's complaint letter in May 2021. But as I've seen no evidence a claim under S75 was raised prior to this date, and the complaint was almost 14 years after the PR says Mr A first lost out; I believe a court is likely to find that any claim falls outside of the time limit permitted under the LA.

The PR haven't explained what M concealed or how this applies to Mr A's claim that they misrepresented the availability and exclusivity of his membership and benefits. Indeed, they've not pointed to anything in particular that they think constitutes any fraud, concealment, or mistake, or supported this with any evidence. And, based on what I've seen so far, I can't see that there was any. In any event, I think Mr A

probably had enough information about the terms of the agreement to start the time limits running not long after he purchased the product. So, I'm not persuaded that Mr M is able to rely on S32 of the LA in these circumstances.

In their original referral to this service, the PR said that Mr A's is a claim in speciality so, is subject to a limitation period of 12 years. But the claim here arose under a written contract, not a deed. So, I don't agree this is a claim in specialty, so the usual six-year limitation applies.

#### The unfair relationship claim under S140A for the first loan in April 2007

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, the trigger point here is slightly different. Any relationship between Mr A 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. It's at this point that Mr A has six years in which to make any claim under S140A.

It appears this loan was repaid in October 2014. So, as this is more than six years before any claim to BPF was made, I believe a court is likely to find this was also made too late under the LA. And, as I've already explained, I don't believe there's evidence to suggest that limitation could be postponed.

#### The claim under S75 for the second loan in June 2015

While BPF appear to have separately acknowledged Mr A's complaint relating to this loan in June 2021, I've not been provided a copy of their findings or their final response to Mr A. And because the complaint/claim appears to have been raised within six years of when the purchase was completed, I think any claim falls in time under the LA.

It's suggested that M made various representations about Mr A's ability to secure priority bookings and a certain level of accommodation. And despite this, Mr A found it difficult to secure bookings when he wanted. From the information available, I can't be certain about what Mr A was verbally told (or not told) about the benefits of the products he purchased. Limited details have been provided about these representations and Mr A's overall recollections of the sales process. I've not seen any statement (evidentially supported or otherwise) from Mr A setting out his direct and specific memories.

It was, however, indicated that he was told these things. So, I've thought about that alongside the other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports Mr A's assertions, like marketing material or documentation from the time of the sale that echoes what he says he was told. Whether in terms of booking availability or accommodation standard.

I also think it's relevant that Mr A's membership with M had been ongoing since 2004. And in particular, he'd been a member of M's points-based membership since 2007. I understand the 2015 purchase was an upgrade which entitled Mr A to more points. So, given his experience of M and their product over the preceding years, I think it's reasonable to conclude he would have a reasonable knowledge and experience of how his membership operated. And I also think it's reasonable to conclude that if he had any concerns about availability, he had ample opportunity to raise them previously. But I've seen no evidence to suggest Mr A had raised concerns with M before his complaint to BPF.

On this basis, I can't find anything that supports the assertion that M did misrepresent the points upgrade to Mr A.

### The unfair relationship claim under S140A for the second loan in June 2015

Similar to the claim under S75, I've seen no evidence this claim has been specifically raised with BPF. Or that they've provided a response. But as the loan wasn't repaid and closed until 2018, I do believe any claim is likely to have been made in time under the LA.

The PR's main arguments supporting the unfairness of the relationship relate to:

- unfairness due to the misrepresentations – I haven't found evidence of any above;
- pressure to enter into the contract;
- the high interest rate;
- affordability check;
- credit intermediary authorisation; and
- M's fiduciary responsibilities to Mr A.

### The allegation of pressure

The PR suggest M exerted pressure on Mr and Mrs A to enter into the contract by completing the purchase. But I haven't seen any evidence from the time, or statements to support that allegation. They had already purchased a trial membership of a very similar product with M and upgraded this in 2007. So, I think it would be fair to say that Mr A knew he was buying a timeshare product.

A document headed "*Declaration of Treating Customers Fairly in a Compliant Sales Practice*" appears to have been signed and initialled by Mr A. He also appears to have handwritten the following comment: "*Our thoughts & consideration were taken on board & the offer accepted to suit our requirements accordingly. We consider that we were well informed, but not pressured*".

Even if I was to find that some of the information could've been clearer during the sale – and I make no such finding – I think it's unlikely that a court might say that any perception of pressure led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

### The interest rate on the loan

I've carefully considered the rate that applied in this case and whether it feels fair in all the circumstances. Mr A accepted the loan, and the loan agreement clearly sets out the annual rate of interest (and the APR). Section 4 of the Pre-contract credit information includes Mr A's "*Right of withdrawal*". It says he has 14 days to change his mind.

There's no evidence that Mr A raised any concerns or questions about the rate at the time, or subsequently. And as far as I'm aware, he was under no obligation to accept the finance offer and could, if he desired, seek to fund the purchase through alternative means. So, I'm not persuaded that the interest rate payable for the loan demonstrates sufficient cause that a court is likely to find the debtor-creditor unfair.

### Affordability Checks

It's alleged that BPF failed to carry out a proper credit assessment. In doing so, the PR have referenced various requirements of the relevant sections of CONC. It's important to highlight that an irresponsible lending complaint could be considered under a S140A claim. If the lending were unaffordable, I think it's possible a court might conclude that gives rise to an unfair relationship.

BPF haven't provided specific evidence of their credit assessments or details of Mr A's credit score or credit file at the time. So, even 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 have revealed that the loan repayments weren't sustainably affordable for Mr A in order to uphold his complaint here.

However, neither Mr A nor the PR have provided any evidence to support any allegation that the loan was unaffordable for him. And with no information about Mr A's actual position at the time and no evidence or suggestion that he struggled to maintain repayments; I can't reasonably conclude the loan was unaffordable for him.

A failure to comply with CONC doesn't necessarily lead to the debtor-creditor relationship being unfair. There would need to be a resultant loss as a consequence. Given the loan has now been fully repaid and there doesn't appear to be any evidence that Mr A suffered any loss either, I think it unlikely a court would determine unfairness here.

#### Authorisation of the credit intermediary/ies

In his original letter of complaint, Mr A questions the authorised status of two intermediaries – both related to M. The evidence available shows that the second loan (in June 2015) was introduced to BPF by an associated company I'll refer to as "L". Our records show that L fell under this service's Compulsory Jurisdiction from 1 April 2014. And on that basis, it appears they did hold the necessary authorisation.

As regards the earlier loan, as no supporting documentary evidence has been provided, I'm unable to establish, with any certainty, who the credit intermediary was in this case. However, Mr A's original complaint letter refers to another associate business I'll refer to as "P". This particular company fell under this service's Consumer Credit Jurisdiction from 6 April 2007. And because of that, it's reasonable to conclude that it held the required OFT license prior to that. So, it appears they also held the necessary authorisation to introduce Mr A to BPF.

#### What were M's fiduciary responsibilities to Mr A?

Part of Mr A's S140A claim is based upon the status of M (and their associated businesses) as the introducer of the loan, and their resultant responsibilities towards him. It's argued that the payment of any commission by BPF to M was kept from Mr A. But I don't think the fact that BPF might have paid M commission was incompatible with their role in the transaction. M wasn't acting as an agent of Mr A, but as the supplier of contractual rights obtained under the points-based product agreements. And, in relation to the loans, based upon what I've seen so far, it doesn't appear it was M's role to make an impartial or disinterested recommendation or to give Mr A advice or information on that basis. As far as I'm aware, Mr A was always at liberty to choose how he wanted to fund the transaction.

What's more, I haven't found anything to suggest BPF were under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr A had previously requested those details from BPF. As I understand it, the typical amounts of commission paid by BPF to suppliers (like M in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely a court would find there existed an unfair debtor-creditor relationship under S140A.

#### Conclusions

Ultimately, it's for the courts to decide whether or not any claim Mr A may have against M or BPF has expired under the LA. But based upon the evidence I've seen; I think any claim in respect of the first loan in April 2007 is likely to have exceeded

the time limits set out in the LA. And I don't think it's unreasonable to take this into account.

As regards the second loan in June 2015, while BPF don't appear to have provided a response, the evidence suggests that a complaint was raised with BPF albeit not specifically in relation to claims under S75 and S140A. That said, as BPF have responded to these claims for the first loan, I think it's reasonably for me to also consider these for the second.

Having done so, I haven't found any compelling evidence that persuades me that any claim is likely to be successful for the reasons stated above. And because of that, and in the absence of any further information or evidence, I don't intend to ask 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 have confirmed they've received my PD and have nothing further to add. The PR have also confirmed they've received my PD but gave no indication of whether Mr A accepts my findings or not. Neither have they provided any further comments or information.

Given the time given for further information or responses has now passed, I've no reason to vary from my original findings. And because of that, I won't be asking BPF to do anything more here.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 August 2023.

Dave Morgan  
**Ombudsman**