

## **The complaint**

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

## **What happened**

In or around February 2007, Mrs R agreed to purchase a timeshare product from a supplier who I'll refer to as "S". The purchase price agreed was £10,000, of which £7,000 was funded under a new regulated credit card agreement with BPF.

In or around February 2021, using a professional representative, Mrs R submitted claims to BPF under sections 75 and 140A of the CCA. The original letter of claim is detailed in it's 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 Mrs R 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. In particular, the PR allege:

- S presented the timeshare product as an investment. And based upon this, Mrs R's main objective was to purchase the product for re-sale at a later date. However, this wasn't achievable, and S knew, or ought to have known, there was no secondary timeshare market; and
- Mrs R continues to incur annual maintenance fees which continue to increase each year.

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). In particular, the PR allege:

- the terms of the agreement are so egregious so as to be unfair in themselves;
- payment of commission by BPF to S was hidden from view;
- there was a breach of fiduciary duty;
- Mrs R was pressured into entering the agreement;
- Mrs R wasn't given time to read or consider any of the information provided;
- Mrs R wasn't advised she could consider other creditors;
- the product was unsuitable and failed to provide the advantages promised; and
- S didn't undertake a proper affordability check.

In response, BPF didn't uphold Mrs R's claim/complaint. They thought Mrs R'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 Mrs R could still book holidays and list her timeshare for resale subject to and in accordance with their agreement.

The PR didn't agree with BPF's findings and referred her complaint to this service. They disagreed that the LA applied to Mrs R's ability to refer her claims to this service. They also thought that various aspects of the product purchased had been deliberately concealed so that Mrs R couldn't reasonably have realised she had cause to claim prior to seeking advice from them in 2019. Because of that, they thought the limitation period should be postponed under S32 of the LA ("S32").

One of our investigators considered all the information and evidence provided. Having done so, they also thought BPF had a valid defence to the claims under the LA. They also didn't think there was a valid claim for breach of contract under S75 as it appears Mrs R is still able to use her timeshare product. Our investigator didn't think the provisions of S32 helped here as they thought Mrs R would reasonably have realised she wasn't receiving what she thought she'd purchased without needing to seek advice.

The PR didn't agree with our investigator's findings and requested time to arrange for further submissions to be prepared by counsel in support of Mrs R's claim and resultant complaint.

As an informal resolution couldn't be reached, Mrs R's complaint has been passed to me to consider further and reach a final decision.

### **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.

#### 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. Mrs R paid for the timeshare products under a regulated credit card agreement arranged at the time of the sale. So it isn't in dispute that S75 applies here. This means that Mrs R is afforded the protection offered to borrowers like her 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 Mrs R and BPF arising out of the credit agreement (taken together with any related agreement). And because the product purchased was funded under the credit 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 Mrs R's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded by a regulated credit facility with BPF - took place in 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 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 Mrs R when she 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, Mrs R had to make a claim within six years of when she entered into the purchase contract and credit agreement. The PR confirm this took place in February 2007. That's because this is when they say Mrs R 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 2021. But as this was 14 years after the purchase was completed and Mrs R first says she lost out; I believe a court is likely to find that her 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 Mrs R 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 Mrs R settled her loan on 4 October 2008. And as this was more than 12 years before her claim was submitted to BPF, I believe it's likely a court would find that her S140A claim also falls outside of the time limit permitted in the LA

#### Could the limitation period be postponed?

The PR argue that the limitation period should be extended under Section 32 of the LA because Mrs R wasn't made aware of various aspects of the product agreement. They also allege that commission was paid by BPF to S which wasn't declared to Mrs R.

Section 32(1)(b) applies when "*any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant*" [my emphasis]. But the PR haven't provided me with anything persuasive to suggest that S deliberately concealed anything from Mrs R to such an extent that she wouldn't have realised the product wasn't what she expected far sooner. So, I can't see why, given the allegations fuelling her claim, these particular issues prevented Mrs R from making her claim or, at the very least, raising a complaint earlier.

The PR argues that the terms of the agreement were so egregious as to be unfair in themselves since the payment of commission by BPF to S was kept from Mrs R. And because of that concealment, S32 applies. But I don't think the fact that BPF might have

paid S commission was incompatible with its role in the transaction. S wasn't acting as an agent of Mrs R but as the supplier of contractual rights she obtained under the timeshare agreement. And, in relation to the credit facility, based on what I've seen so far, it doesn't look like it was S's role to make an impartial or disinterested recommendation or to give Mrs R advice or information on that basis.

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 Mrs R requested those details from BPF or S at any point. And on that basis, my view is that this particular argument by the PR doesn't help Mrs R's cause here.

#### 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 Mrs R believes there's been a breach of contract which resulted in a loss for her, I haven't seen anything that would lead me to conclude there was such a breach.

#### Credit Assessment

Accepting that I believe Mrs R's claim was brought too late, there are certain aspects that could be considered outside of S140A. In particular, in relation to whether BPF undertook a proper credit assessment. 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 Mrs R in order to uphold her complaint here. However, I haven't seen any information about her actual financial situation at the time. And there's no obvious suggestion or evidence that she struggled to repay the borrowing. So, I can't reasonably conclude that the borrowing under the credit agreement was unaffordable for her. And given the borrowing was fully repaid in 2008, 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 Mrs R'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 her claim was unfair or unreasonable. And as I've found no other reason why Mrs R's complaint should be upheld; I won't be asking BPF to do anything more here.

#### **My final decision**

For the reasons set out above, I don't uphold Mrs R's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 16 November 2023.

Dave Morgan  
**Ombudsman**