DRN-4349250

The complaint

Mrs C says that Clydesdale Financial Services Limited – trading as Barclays Partner Finance ("BPF") didn't fairly or reasonably deal with her claims under the Consumer Credit Act 1974 ("the CCA") in relation to five timeshare products she purchased.

The claims, which are the subject of this complaint, are Mrs C's to make because they stem from credit agreements in her name only. Whilst the products were purchased under agreements in joint names, I will only refer to Mrs C throughout my decision.

What happened

In or around September 2009, Mrs C attended a meeting with a timeshare supplier who I'll refer to throughout this decision as "L". During that meeting, Mrs C agreed to convert an existing timeshare product she held to a new points-based products provided by L (Purchase 1).

This conversion resulted in an allocation of 111,500 points which could be used to book holiday accommodation with L. The product had a purchase price of £6,900. This was funded by BPF under a finance account agreement in Mrs C's sole name (Loan 1). This amount was later repaid in March 2010.

In or around September 2010, Mrs C agreed to upgrade her existing points holding with L by purchasing an additional 30,000 points at a cost of £5,381 (Purchase 2). Again, this amount was funded by BPF using the same "finance account" (Loan 2). This amount was repaid in March 2011.

In or around September 2012, Mrs C agreed to upgrade her existing points holding with L by purchasing an additional 60,000 points at a cost of £9,300 (Purchase 3). Again, this amount was funded by BPF using the same "finance account" (Loan 3). This amount was repaid in March 2013.

In or around September 2015, Mrs C agreed to upgrade her existing points holding with L by purchasing an additional 50,000 points at a cost of £5,950 (Purchase 4). Mrs C says this was funded by a fixed-sum loan from BPF for £5,950 in Mrs C's sole name (Loan 4).

In or around November 2017, Mrs C agreed to upgrade her existing points holding with L by purchasing an additional 99,000 points at a cost of £16,371 (Purchase 5). This was funded by a fixed-sum loan from BPF for £16,371 over a term of 180 months in Mrs C's sole name (Loan 5).

In June 2021, Mrs C wrote to BPF to raise a complaint specifically referring to the loan agreements in 2015 and 2017. In her complaint, Mrs C alleges that L didn't hold the necessary authorisation to arrange loans under section 19 of FSMA[1] ("S19"). Mrs C also asked BPF to provide details of the credit checks, searches and assessments they completed when assessing the suitability of the loan(s). However, it appears Mrs C didn't receive a response from BPF.

In November 2021, using a professional representative (the "PR"), Mrs C's referred her complaint to this service. In doing so, the PR included various additional points not previously raised with BPF. These included claims under sections 75 and 140A of the CCA.

[1] The Financial Services and Markets Act 2000

The PR's submission is quite lengthy in its content, so I don't propose to repeat everything they've said in my decision. However, they alleged the credit intermediary was not authorised under section 19 of FSMA. Further, that L misrepresented the products sold by claiming:

- the product was an exclusive holiday club membership;
- Mrs C would be given priority to stay at luxury resorts around the world at any time of her choosing; and
- the product membership wasn't a timeshare.

The PR thought an unfair debtor/creditor relationship existed due to:

- the misrepresentations;
- the *"sky high"* interest rate payable on the loans; and
- the lengthy and pressurised sales presentation.

The PR also thought there'd been

- breaches of applicable legislation, regulations and codes of practice; and
- a failure to complete an assessment of affordability and suitability of the loans.

As the legal claims and complaint points hadn't all previously been raised with BPF, one of our investigators asked BPF to consider the allegations first. It doesn't appear BPF have issued a substantive response. But they have confirmed they couldn't locate loans for the purchases made in 2010 and 2012. And as the loan taken out in 2009 was settled in March 2013, they thought any claim relating to this had been brought too late under the Limitation Act 1980 ("LA"). They also said their records showed the loan in 2015 wasn't taken up.

Having considered all the information available, our investigator didn't agree L wasn't authorised under S19. They also didn't consider the claim under purchase 4 as it appeared the loan wasn't taken up. Our investigator thought any claim for the first three loans had been brought too late under the LA. Having considered the fifth purchase and loan, our investigator couldn't find any evidence to support the allegations made, or that there was any evidence to suggest the loan was unaffordable for Mrs C. As a consequence, the investigator didn't think Mrs C's complaint should be upheld.

The PR responded at length to our investigator's findings explaining why they disagreed. Again, I don't propose to repeat everything said but would summarise as follows:

- they requested evidence to prove L's authorisation to introduce credit and that it acted lawfully under that authorisation;
- L has a conflict of interest under Principle 8 of the FCA's Principles for Businesses;
- Postponement of limitation applies pursuant to section 32 of the LA due to fraudulent misrepresentation and concealment of relevant facts;
- There was a lack of weight placed upon Mrs C's testimony and recollections;
- The PR disagrees that BPF completed the regulatory affordability checks and assessments required.

Further, the PR suggest Mrs C wasn't given time to consider the purchase and loan agreements. And also point out that verbal promises made by L to Mrs C weren't included in the paperwork such as the product being an investment. Further arguments were subsequently presented to reinforce the PR's disagreement to our investigator's findings.

As an informal resolution couldn't be achieved, Mrs C's complaint was passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our

investigator, I considered a number of aspects which I don't feel were previously fully addressed. So, I issued a provisional decision on 16 August 2023 giving both sides the chance to respond before I reached a final decision.

In my provisional decision, I said:.

> When considering what's fair and reasonable, DISP[2] 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.
>
> Section 75 of the CCA ("S75") provides protection to consumers for goods or services bought using credit. Where Mrs C paid for the timeshare products under regulated agreements with BPF, it isn't in dispute that S75 applies. This means Mrs C 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.
>
> Section 140A of the CCA ("S140A") looks at the fairness of the relationship between Mrs C and BPF arising out of the credit agreements (taken together with any related agreements). And where products were funded under credit agreements, 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 Mrs C's complaint, relevant law also includes 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 there were purchases allegedly funded by loans with BPF in 2009, 2010 and 2012, 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 Mrs C's claim was fair and reasonable given all the evidence and information available, rather than deciding the claim itself. 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 Mrs C doesn't accept my findings, this doesn't prejudice her 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.
>
> <u>The S75 claim relating to purchases 1, 2 and 3</u>
>
> A S75 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, I believe Mrs C had to make a claim within six years of when she entered into the purchase contract and credit agreement.

[2] The Dispute Resolution Sourcebook from the FCA's Handbook of Rules and Guidance

The evidence shows these purchases were completed in 2009, 2010 and 2012. And the PR agrees that was the case. So, that is when Mrs C says she lost out having relied upon the alleged false statements of fact at that time.

Details of the alleged misrepresentation were first submitted to this service in November 2021. There's no evidence any claim was raised with BPF before then. And as this was more than six years after the purchase, I think a court is likely to find that Mrs C's claim was raised too late.

The S140A claim relating to purchases 1, 2 and 3

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. Any relationship between Mrs C and BPF continued while the finance agreements remained live. So, that relationship only ended once the agreements ended and any borrowing under them was repaid.

The credit account used to fund these purchase was settled in full in March 2013. I've seen a statement and a letter BPF sent to Mrs C which confirms this. I think this is the point at which the relationship ended in respect of those loans and the associated purchase agreements.

Allegations of unfairness were also first submitted to this service in November 2021. There's no evidence any claim was raised with BPF before then. And as this was more than six years after the borrowing was repaid under the associated credit agreement, I think a court is likely to find that Mrs C's claim was raised too late here also.

Could the limitation period be postponed?

The PR argue that the limitation period should be extended under Section 32 of the LA because facts relevant to her claim were fraudulently misrepresented to her and deliberately concealed.

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 L deliberately concealed anything in relation to the various allegations that Mrs C wouldn't have realised shortly after each sale was completed. And as I still can't see why, given the allegations fuelling each claim, these particular issues prevented Mrs C from making her claim or - at the very least - raising a complaint earlier, my view is that this particular argument by the PR doesn't help her cause.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide time could be extended in keeping with the provisions of the S32 of the LA.

Is there a valid claim in respect of purchase 4?

It's suggested that this purchase was agreed and completed in 2015. However, while it appears loan documentation was issued by BPF and signed by Mrs C, BPF say the loan was never taken up. They've provided evidence from their systems to support

that assertion. And I've seen nothing from Mrs C to show that the loan was taken up, or that loan repayments to it have been made since then.

I've also looked at the Purchase Agreement forms for both the 2015 and 2017 purchases. In each case, the fifth page details the total points held by Mrs C at the point of purchase together with the points purchased under that new agreement and the resultant points holding.

The 2015 agreement shows that Mrs C held 201,500 points – this being the total of the points purchased in 2009 (111,500), 2010 (30,000) and 2012 (60,000). The agreement shows that the 2015 purchase would increase her holding to 251,500. But the 2017 agreement also shows that Mrs C still held 201,500 points at the time of that purchase. So, it appears the 50,000 allegedly purchased in 2015 weren't included.

Based upon this evidence and BPF's confirmation that the 2015 loan wasn't taken up, on balance it appears likely that Mrs C didn't complete that purchase. The evidence supports that view. And in the absence of anything to demonstrate that wasn't the case, I'm not persuaded that the purchase did, in fact, proceed. Or that the loan was taken up. For that reason, I don't believe Mrs C is able to make any claim in respect of this alleged transaction.

The S75 claim for purchase 5

It's suggested that L made various representations about the product Mrs C purchased in 2017. From the information available, I can't be certain about what Mrs C was specifically told (or not told) about the benefits of the products she purchased. Limited details have been provided about these representations and Mrs C's overall recollections of the sales process. And despite the PR's assertions in their response to our investigator, I've not seen any detailed statement (evidentially supported or otherwise) from her setting out her direct and specific memories.

It was, however, indicated that she 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 the assertions made by the PR on Mrs C's behalf. Although I've seen the purchase agreement, I've seen no marketing material or further detailed documentation from the time of the sale that echoes what she says she was told. Whether in terms of booking availability, exclusivity, flexibility or otherwise.

I also don't think the contract can have been marketed and sold as an investment contrary to The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") simply because there might have been some inherent value to Mrs C's membership. In fact, no such suggestion has been made. And in any event, I've found nothing within the limited evidence provided to suggest L provided any assurances or guarantees about the future value of the product purchased. L would had to have presented the membership in such a way that used its investment element to persuade Mrs C to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that L did in fact make the alleged misrepresentations.

The S140A claim for purchase 5

- The pressured sale and process

The claim suggests Mrs C purchased the loan following a lengthy and pressurised sales presentation. I acknowledge what the PR have said about this. So, I can understand why it might be argued that the prolonged nature of the presentation might have felt like a pressured sale – especially if, as Mrs C approached the closing stages, she was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr C agreed to the purchase in 2017 when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to L, after the purchase, to suggest she'd agreed to it when she didn't want to. And neither the PR nor Mrs C have provided a credible explanation for why she didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If she only agreed to the purchase because she felt she was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mrs C was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate she made the decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired.

In deciding whether to make a determination under S140A, *the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor* [BPF] *and matters relating to the debtor* [Mrs C*)*.

Mrs C already held existing timeshare product points she'd purchased previously from L. Importantly; the new purchase appears to relate to an upgrade of her existing timeshare product holding. It wasn't a new product purchase. And Mrs C wasn't a new customer of L. So, it's likely she would've benefitted from her previous experience and what she might expect from the meeting and sales presentation in 2017.

Whilst there could be potential for a court to decide that some of the allegations might have led to an unfair debtor-creditor relationship here, I think any decision is likely to be taken within the context of Mrs C's overall experience. And 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 a court might say this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- Time to consider the agreement

I've seen very limited documentation from the time of the sale. But there is a page within the Purchase Agreement headed *"RIGHT OF WITHDRAWAL".* It clearly states that Mrs C *"has the right to withdraw from this contract within 14 calendar days without giving any reason"* – as required under the TRs.

So, even if I were to find that Mrs C wasn't given adequate opportunity to read, consider and understand the purchase documentation at the time of the sale - and I make no such finding - I would expect her to have had sufficient time in which to consider her decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Mrs C did raise any questions or concerns prior to the sale being completed. Or that she had any intention of cancelling the agreement.

- Interest rate applied to the loan

I've carefully considered the interest rate that applied in this case and whether it feels fair in all the circumstances. Mrs C accepted and signed the loan agreement in

November 2017 which clearly set out the annual rate of interest (and the APR). I think the rate that applied to Mrs C's loan appears to be comparable with similar products and loans I've seen before, and I don't believe it was unreasonable. So, I'm not persuaded that the interest rate payable for the loan risked making the debtor-creditor relationship unfair under Section 140A.

The authorised status of L

This service's records show that L fell under our Consumer Credit Jurisdiction at the time the purchases were completed in 2009, 2010 and 2012. At the time of purchase 5 in 2017, L was included under this service's Compulsory Jurisdiction. Whilst acknowledging the PR's responses to our investigator's view, I would like to reassure them that the checks I've completed satisfy me they were appropriately authorised.

There are allegations that whilst L may have been authorised, by virtue of the suggested misrepresentations and unfairness, their authorisation was exercised unlawfully. However, as I've found no evidence to support the allegations, I'm not persuaded that was the case.

The PR also suggest L had a conflict of interest under Principle 8 of the FCA's Principles for Businesses. Such a conclusion would preclude many suppliers from introducing any form of consumer credit finance. Furthermore, L wasn't acting as an agent for Mrs C, but as the supplier of contractual rights obtained under a timeshare product agreement. And, in relation to any loan, based upon what I've seen so far, it doesn't appear it was L's role to make an impartial or disinterested recommendation or to give Mrs C advice or information on that basis. As far as I'm aware, Mrs C was always at liberty to choose how she wanted to fund any purchase and there was no requirement or duty upon L to provide funding recommendations or options. So, I don't agree such a conflict existed.

Were the required lending checks undertaken?

There are certain aspects of Mrs C's claim that could be considered outside of S75 and S140A. In particular, in relation to whether BPF undertook a proper credit assessment. The PR have made an allegation suggesting the loan was provided irresponsibly. In particular that no affordability or credit checks were undertaken by BPF.

BPF haven't provided specific details of their credit assessment for the first three loans – which appear to have been funded under a revolving credit facility. And given the passage of time, I wouldn't reasonably expect that information to still be available. I've seen a statement of the finance account with BPF that Mrs C used to fund those purchases. It shows that each advance for each purchase was promptly repaid in full well within the first year of each advance being drawn.

BPF have confirmed that Mrs C's loan application in 2017 was accepted by their credit assessment systems having passed their affordability checks. This included a review of Mrs C's credit profile at the time. I've seen a copy of the information revealed from BPF's credit checks which confirms Mrs C's income situation at the time and provides details of her credit history. Having considered this, I can't see anything adverse reported at the time that might give BPF cause for concern about her ability to sustainably repay the loan.

BPF haven't provided a detailed explanation of how their credit assessments operate. And I wouldn't expect them to do so given the commercially sensitive nature of such systems and processes. But it seems clear that checks were undertaken. If I were to find that the checks and tests completed didn't comply with the requisite regulatory requirements – and I make no such finding – I would need to be satisfied

that had the checks complied, they would've revealed that the loan repayments weren't sustainably affordable for Mrs C in order to uphold her complaint here.

The CMC have provided copies of Mrs C's bank statements covering the three months prior to the purchase and loan in 2017. I've considered these and the PR's observations together with the information from BPF. Having done so, I'm not persuaded any of the evidence demonstrates that Mrs C financial position was such that it would reasonably lead BPF to believe the loan wasn't sustainably affordable for her. And because of that, I can't reasonably conclude the loan was unaffordable for her or that she suffered loss as a consequence.

Summary

I'm mindful that the original complaint to BPF didn't include the claims under S75 and S140A, together with many of the other allegations. But BPF have been willing to consider the claim points raised following this service's referral of them. While I acknowledge that BPF haven't yet issued a substantive response to Mrs C, having carefully considered everything that's been said and provided, I can't reasonably conclude that BPF's failure to uphold the claims made was unfair or unreasonable. And because of that, I don't currently intend to ask them 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 acknowledged receipt of my provisional decision. In doing so, they confirmed they did not wish to submit any further information for me to consider. Despite a follow up request to the PR from this service, they've neither acknowledged receipt of my provisional decision nor provided any new information or comment.

The time given for responses has now passed and in the absence of anything new or different to consider, I've no reason to vary from my provisional findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 12 October 2023.

Dave Morgan
Ombudsman