DRN-4370282

The complaint

Mrs R complains about the outcome of her claim under the Consumer Credit Act 1974 ("CCA") to Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF"). The claim relates to a loan provided by BPF to fund the purchase of a timeshare product.

What happened

In or around December 2013, Mrs R and her husband were away on holiday at a popular resort outside of the UK. During their holiday, they were invited to the offices of a timeshare supplier (who I'll refer to as "S") for an update. As a consequence of that meeting, they agreed to upgrade their existing timeshare product.

The cost of the upgrade product was £18,125 and required that they rescind their existing timeshare product. The total purchase price was funded under a fixed sum loan agreement in Mrs R's sole name with BPF.

In June 2022, Mrs R wrote to BPF, essentially to bring a claim under section 75 of the CCA ("S75"). She said:

- S told them they had to upgrade their membership or would not be allowed to return to the resort;
- S said they could sell their new membership the following year and retain a smaller membership;
- they were put under a barrage of pressure;
- they were promised copies of the contract which weren't received;
- the resort club went into receivership three months later and they weren't able to use the product purchased;
- they were misled in to purchasing a product that was not fit for purpose; and
- despite contacting BPF (and S) previously, they'd received no response.

At the same time, Mrs R referred her complaint to this service and provided copies of documentation relating to the timeshare product purchased.

Having not received a response from BPF Mrs R wrote to BPF again in January 2023. She reiterated much of what had been previously said asking BPF to consider their *"personal circumstances with the mis-selling of this product under the* [CCA] *and section 140a of the* [CCA] (S140A). She said BPF *"had been found liable for the breaches of contract and have been required to put money aside to repay the clients* […]*".*

One of our investigators contacted BPF with details of Mrs R's complaint. In response, BPF confirmed that Mrs R's loan account had been opened on 8 January 2014 and closed on 10 March 2015. They agreed a breach of contract may have occurred but didn't agree the resort had entered an insolvency process when Mrs R had suggested. To consider Mrs R's claim further, they said they needed evidence she still owned the membership when S went into liquidation in 2019. They also specified the evidence they required. Details of BPF's response and requirements were provided to Mrs R by our investigator.

Having not received any of the information BPF required, our investigator considered Mrs R's complaint. Having done so, our investigator didn't think BPF had treated her unfairly.

Mrs R didn't agree. She insisted *"the resort had been locked up with no owners allowed to use their weeks"* shortly after they purchased the timeshare upgrade. She also said she'd already provided all the documentation she held.

As an informal agreement could not be reached, Mrs R's complaint has been passed to me to consider and reach a final decision. Having done that, while I was currently inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed. As a result, I issued a provisional decision on 6 September 2023 giving both parties the opportunity to respond before I reached a final decision.

In my provisional decision, I said:

> Relevant Considerations
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> 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.
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> S75 provides protection to consumers for goods or services bought using credit. Mrs R paid for the timeshare product using a restricted use fixed sum loan agreement. 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, subject to any limitation that may apply. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> 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) – again subject to any limitation that may apply. 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.
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> Given the facts of Mrs R's complaint, relevant law also includes the Limitation Act 1980 ("LA"). This is because the original transaction - the purchase funded by a loan with BPF - took place in 2013. 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.
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> It's important to stress 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 R'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 R doesn't accept my findings, that doesn't prejudice her right to pursue her claim in other ways.
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> 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

Was the claim of misrepresentation under S75 made in time?

Mrs R says S misrepresented the nature of the purchase agreements and benefits to them when they agreed to purchase the product. And she believes BPF should be held liable for those misrepresentations under S75 of the CCA.

But a S75 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, which Mrs R confirms took place in December 2013. That's because this is when she says she lost out having relied upon the alleged false statements of fact at that time.

Although Mrs R says she'd previously contacted BPF, I've not seen any evidence that details of any alleged misrepresentations were submitted to BPF before she referred her complaint to this service in June 2022. And as this was more than six years after the purchase was completed and Mrs R says she lost out; I believe a court is likely to find that her claim for misrepresentation falls outside of the time limit permitted in the LA.

Was the claim for breach of contract under S75 made in time?

As for misrepresentation, a claim for breach of contract is also covered under section 9 of the LA. So, the limitation period under that provision is six years from the date on which the cause of action accrued. Mrs R says they weren't able to use their membership, as the resort where they held their timeshare had ceased trading three months after they completed their purchase. If that was the case, under the LA, Mrs R had to make a claim within six years of the point at which her membership couldn't be used. And as this was more than six years after her complaint was raised with this service and BPF; I believe a court is likely to find that her claim for breach of contract falls outside of the time limit permitted in the LA.

All that considered, BPF say that S didn't enter into liquidation until 2019. My own research suggests the liquidator's appointment was 15 January 2020. So, if that were the case and Mrs R still held her timeshare ownership at that time, any claim would need to be made within six years of that point given that would be the point she would've lost out.

BPF have acknowledged this and asked that Mrs R provide evidence to show that her membership remained live at the point S entered into liquidation. This appears a reasonable request. Particularly as a successful claim relies upon proving that Mrs R actually lost out as a consequence. And to do that, she would need to have still had a valid and active timeshare membership at the point S entered liquidation.

Having considered the documentation available, the timeshare certificate shows that the product membership purchased runs until 1 January 2050. That is unless the membership had been rescinded or sold. I appreciate it's difficult to prove a negative – i.e., that the membership hadn't been rescinded or sold. However, if the membership was still valid in 2019, I would expect there to be something to support that.

BPF have suggested Mrs R could provide evidence that her annual maintenance fees were paid up to date to the point S entered liquidation. Alternatively, that she'd received communication from S confirming that the membership could no longer be used due to the insolvency process. But despite that request, the only evidence provided of maintenance fees paid relates to 2018 – the year before BPF say S entered liquidation. For Mrs R's claim to be considered, she would need to provide

evidence that maintenance fees had been paid for 2019 or otherwise that the product membership was still active and valid.

Was the unfair relationship claim under S140A made in time?

There are certain aspects of Mrs R's claim that could be considered under S140A. She specifically references this in her letter to BPF in January 2023. A S140A claim is a claim for sums 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, it 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 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 say that Mrs R's loan was closed in March 2015. So, she would need to have submitted a claim within six years of that point. However, as I've seen no evidence that a claim was made prior to Mrs R's referral to this service, it seems likely a court would find any claim under S140A had been made too late.

Summary

As I've explained, it appears likely that any claim for misrepresentation under S75 and an unfair relationship under S140A was brought too late under the LA. So, I can't reasonably say that BPF's failure to uphold those claims was unfair or unreasonable. However, the claim for breach of contract under S75 may still be valid if it can be proven that Mrs R's timeshare membership was still live at the point S entered liquidation in 2019/20.

By issuing a provisional decision, I'm giving Mrs R a final opportunity to provide evidence to support this. If I (or BPF) receive that evidence, it's possible such a claim can be considered further. But in the absence of any other evidence, I don't currently intend to ask BPF 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 received my provisional decision, BPF confirmed they didn't wish to submit any further information for consideration.

Mrs R responded in writing to confirm she thought my provisional findings were fair and provided nothing more for me to consider.

In the circumstances, I've no reason to vary from my provisional findings and my final decision therefore serves to formally conclude matters regarding Mrs R's complaint.

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 25 October 2023.

Dave Morgan
Ombudsman