

The complaint

Mrs R complains that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) (BPF) didn't deal fairly or reasonably with claims she made under the Consumer Credit Act 1974 (CCA) in relation to the purchase of a holiday product in 2008 and it failed to carry out proper checks before lending.

The credit provided by BPF was in Mrs R's sole name. This means she's the complainant eligible to bring a complaint to our service and that's why I've referred to her alone in this decision.

Mrs R is represented by a claims management company (that I'll call P) but I'll refer (generally) to everything that's been said on her behalf as if Mrs R said it herself, to keep things simple.

What happened

In October 2008 Mrs R and Mr R purchased a holiday club membership of Club Heritage International (CHI) that cost £5,500 with credit provided by BPF (at the point of sale) under a credit card agreement in Mrs R's name. Mrs R and Mr R are unhappy with what happened when they made the purchase and Mrs R wrote to BPF (on 19 August 2020) complaining that the broker who arranged the credit (which she said was an entity called Heritage Resorts) wasn't authorised to do so.

BPF rejected the complaint stating that any claim under section 75 CCA would need to have been raised within six years of the date of sale under the Limitation Act 1980 (LA) so it was out of time. Unhappy with this response, Mrs R brought her complaint to our service, with the assistance of P. In a letter dated 29 March 2021 P stated that the credit broker (who it said was CHI) wasn't authorised, BPF had failed to address this issue and, under section 75 CCA, BPF is equally responsible with the product supplier for misrepresentations made and breach of contract. P also stated that the relationship between Mrs R and BPF was unfair under section 140A CCA and BPF failed to carry out proper credit checks before lending.

One of our investigators looked at the evidence and she didn't recommend the complaint should be upheld. She said the credit broker didn't need authorisation by the Financial Conduct Authority (FCA) as FCA regulation only started in April 2014. And she didn't think BPF was required to carry out credit checks because Mrs R paid for the purchase using a credit card, which had a much higher limit. She thought a section 75 claim was likely out of time under the LA and it wasn't unreasonable for BPF to rely on this when it rejected that claim. She considered the section 140A claim was probably made in time under the LA but she wasn't persuaded there was enough evidence to find the relationship between Mrs R and BPF was unfair.

Mrs R didn't agree. She asked for an ombudsman to review the matter and P sent further detailed submissions. In summary, P said:-

- the investigator failed to address various arguments raised - such as the broker's

- authority - and BPF has never explained who the broker was, which is unfair;
- there was an obligation for the credit broker to be properly licensed by the Office of Fair Trading (OFT) in 2008 or the credit agreement is unenforceable;
- the investigator's analysis of the timescales for bringing the relevant claims is wrong - Mrs R couldn't have known about the details of the complaint she was making when she made the purchase, there was nothing to alert her to the facts which could have started time running for the purpose of limitation and she couldn't have found this out by the exercise of reasonable diligence until much later;
- Mrs R had an ongoing liability for maintenance fees and she continued to pay these until 2018, which is not only unfair but also inconsistent with her being aware of misrepresentations made at the outset;
- this service deals with complaints, not causes of action, our jurisdiction is inquisitorial not adversarial and there is a wide latitude within which the ombudsman can operate; and
- there's no material difference between a loan and the sort of running account credit provided by BPF as regards the ombudsman's decision making - as both types of credit are governed by the CCA.

Having considered the available evidence, I wasn't minded to uphold this complaint. My reasons weren't quite the same as the investigator's however and I considered additional issues. I thought it was fair to let the parties see my provisional findings in the circumstances and respond (if they wanted to) before I made my final decision so I issued a provisional decision on 11 August 2023. I've set out what I decided provisionally (and why) below (in italics) – this forms part of my final decision.

My provisional decision

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Where evidence is incomplete, inconclusive or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Mrs R's representatives have made detailed submissions which include references to various regulations, legislation and caselaw (amongst other things). I have to take account of law and regulations, regulators' rules, guidance and standards, codes of practice and (where appropriate) good industry practice at the relevant time, when I make my decision. And I want to assure the parties, if I don't address every single point that's been raised, it's not because I haven't thought about it. I have considered everything that's been said and sent to us but I'm going to concentrate in this decision on what I think is relevant and material to reaching a fair and reasonable outcome.

The scope of the complaint

The original complaint letter (that Mrs R sent to BPF in August 2020) refers to the question of the credit broker's authority only. BPF's response (in March 2021) doesn't address that issue directly but it does reject any claim made under section 75 CCA, on the grounds this was made too late under the LA. And I'm satisfied that BPF had the chance to consider both the section 75 and the unauthorised broker claims before this matter was referred to the Financial Ombudsman Service.

I think the letter P sent near the end of March 2021 seeks to expand the complaint - as this includes claims of an unfair relationship under section 140A CCA and unaffordable lending. This service can't usually consider the merits of new complaints if they haven't been made to the relevant financial business first - so the business has the chance to investigate and

respond. I can't see that the section 140A claim or the affordability issue were raised with BPF before Mrs R brought her complaint to the Financial Ombudsman Service. I note our investigator has included these wider issues in her view - so BPF has had some time to consider them.

BPF has objected to us looking at the complaint – but it did so on the grounds this was raised too late under our rules, not because it didn't have the opportunity to deal with every issue. A different investigator wrote to BPF to explain why she thought the complaint falls within our jurisdiction and asked if BPF had any further objections. BPF said it doesn't object to this service looking at the complaint about the section 75 claim or the broker's authority but didn't comment further on the remaining issues - or explain why (if that's still the case) it objects to this service considering those elements.

For the reasons I've set out below in more detail, I don't think Mrs R's complaints were brought to this service too late. I'm satisfied that BPF had the chance to consider the additional issues, raised after the investigator issued her view. And, given the age of this matter, I think it's likely to be in everyone's interests if I deal with the everything in this decision. If either party disagrees, it's open to them to make further submissions in response to this provisional decision.

Jurisdiction of the Financial Ombudsman Service

BPF says Mrs R was out of time to raise her complaints with this service because she's complaining about events that took place in 2008 and it was more than six years after that before she brought the matter to this service, in March 2021. BPF has told us it doesn't object to us looking into Mrs R's complaint about her section 75 claim and the authority of the credit broker, so I only need to consider whether her complaint about the additional issues comes within our jurisdiction.

The rules about the complaints that we can consider are set out in the FCA's Handbook. These are known as the DISP rules. DISP 2.8.2(2) provides (unless the failure to comply with the time limits was as a result of exceptional circumstances) that we can't consider a complaint if a consumer refers it to us more than:

- (a) six years after the event complained of, or (if later)*
- (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint.*

To decide if this complaint is one that we can look into, I've considered what Mrs R is complaining about exactly. I think she considers BPF extended credit to her irresponsibly and the acts and omissions of the product supplier resulted in an unfair relationship between her and BPF - which amounts to a claim under section 140A of the CCA. Having considered the evidence, I'm satisfied that the events complained of took place at the point of sale in 2008 and the fairness of the debtor-credit relationship whilst the credit was ongoing. I can't reasonably conclude that this part of Mrs R's complaint was brought to us within the six-year period set out in the first part of DISP 2.8.2R as outlined above. So I've gone on to consider the second limb of DISP 2.8.2 - when Mrs R knew, or ought reasonably to have known, that she had cause for complaint - to see if this extends the time under DISP 2.8.2R (2)(b).

Mrs R's representatives suggest that she first became aware she had cause for complaint when she sought professional advice, in or around 2020. From the evidence I've got, taking into account the acts and omissions complained about, I think Mrs R should reasonably have known that something might have gone wrong before that but I accept this isn't the same as Mrs R knowing that she had cause for complaint against BPF. And, whilst Mrs R may have known that something might have gone wrong with the supplier, I don't think it's reasonable to assume that she would have realised this might have made the relationship between her

and BPF unfair or that she had grounds to complain about BPF.

For that to be the case, I think Mr R would have needed to know there was a problem that caused her to lose out because of something BPF did (or didn't do). On the current evidence, I'm not persuaded that Mrs R knew (or ought to have known) that she had cause for complaint against BPF before she sought advice in 2020. I'm satisfied she brought her complaint to us within three years of that and I'm minded to find this part of the complaint comes within our jurisdiction.

Was the claim under s.75 CCA brought in time under the LA?

Our investigator thinks that any right Mrs R has to bring a claim under section 75 is probably out of time under the LA. If that's correct, I consider it's something BPF could reasonably take into account when it declined this claim. I should make it clear however that I'm not deciding if any right that Mrs R may have to bring any claim has expired under the LA. That's a matter for the courts. In this decision, I'm considering whether BPF should reasonably have accepted Mrs R's claims.

Mrs R says misrepresentations were made at the point of sale and, essentially, she wouldn't have bought the timeshare using credit provided by BPF if that hadn't happened. I think sections 2, and 9 of the LA are relevant. Section 2 applies to a claim (founded in tort) for damages under section 2(1) of the Misrepresentation Act 1967 and section 9 applies to causes of action for sums recoverable under statute. I'm satisfied that both sections impose a limitation period of six years from the date a cause of action accrues – which is the point in time that everything needed to make a legal claim occurred.

Like the investigator, I think the date on which the cause of action accrued here will be the same as the date upon which the misrepresentations alleged under section 75 became actionable. And that's the date the damage is suffered - as any relevant damage would have been incurred when Mrs R bought the timeshare and made the payment on her credit card. Among other things, it was at this stage she paid for the benefits which she says were misrepresented and thereby incurred any financial loss. It follows I think that Mrs R would have needed to bring any claim under section 75 within six years of the date of the timeshare transaction itself, in 2008.

I'm satisfied that more than six years had passed since that date before Mrs R contacted BPF in August 2020. I think the period within which she had to bring an action under section 75 had likely run out by this point. I don't think it's unreasonable for BPF to take that into account in this situation. And I can't fairly find it was unreasonable of BPF to decline Mrs R's section 75 claim.

Was the claim under s.140A CCA brought in time under the LA?

Under this section a court may make an order under section 140B in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but I think this is relevant law so I have taken it into account.

I'm satisfied that the time limit within which Mrs R had to bring a section 140A claim is six years from the date on which the cause of action accrued. As this sort of claim is about the fairness of the relationship, it's possible to argue that's likely to be when the debtor-creditor relationship ended - in other words when the debt associated with the purchase was repaid. BPF has confirmed that the credit here was repaid on 20 May 2009. P seems to agree and I think this date is probably right - because the interest free BNPL period was due to end around that time and it's reasonable to assume that Mrs R would have wanted to repay what she owed before interest was applied.

In light of the above, I think it's arguable time started running, for the purpose of any section 140A claim, in May 2009 - so Mrs R would have needed to bring any relevant claim no later than May 2015. Even if I'm wrong about that however, BPF's internal records show that the credit account closed on 26 January 2013. I'm satisfied this brought the relationship between Mrs R and BPF to an end and she'd need to raise any relevant claim by January 2019 at the latest. Mrs R didn't raise her s140A claim until after that. And I'm minded to find any right she had to bring such a claim had likely expired under the time limits set under the LA.

P has referred to Mrs R's liability for maintenance fees, which it says continued long after 2013 when the credit account closed and rendered the relationship between Mrs R and BPF unfair. P has supplied copy correspondence relating to maintenance charges levied as recently as 2018. However I think these fees probably relate to a different membership that Mrs R and Mr R acquired in 2012. That purchase was funded by a different lender and the relevant (2012) purchase application states that it supersedes the 2008 agreement. I've seen nothing to show that Mrs R had any ongoing liabilities arising out of the 2008 purchase funded by BPF after the related credit agreement ended. And I don't think a court would be likely to consider any liability for charges arising out of the later agreement means the relationship between Mrs R and BPF was unfair.

BPF didn't consider Mrs R's section 140A claim specifically (as I've explained above) but I think it's unlikely to have been upheld if BPF had done so. I can't fairly find it would be unreasonable for BPF to rely on the LA in these circumstances and I'm not presently persuaded that I can reasonably require BPF to do anything further in this regard.

Authority of the credit broker

P says the credit agreement that Mrs R entered into with BPF is unenforceable because it was arranged by an unauthorised and unidentified broker. The name of the credit broker isn't set out specifically in the credit agreement so we asked BPF for a bit more information about that. BPF says Heritage Resorts was the retailer and it held the requisite licence at the time – under a number which the investigator has supplied to P separately. I have no reason to question this, from the information I've got. And, as I've explained in more detail below, it seems to be in line with Mrs R and Mr R's own evidence that they "were told at all times, that it was Heritage who were making the arrangements for them, in particular where the loan was concerned".

The retailer identified in the credit agreement is "Heritage Resorts". On the current evidence, I think this probably refers to Heritage Resort Sales Limited (HRSL) – "the company" named in the purchase application. And, based on what I've seen so far, I'm not persuaded there's enough evidence to reasonably find the credit broker wasn't authorised to arrange the credit that BPF provided to Mrs R in October 2008.

Arguments on limitation

A number of arguments have been raised in relation to limitation. I don't accept that they all apply. P makes reference, for example, to the date when Mrs R had the knowledge required to bring her complaint. I think this may relate to the rules of our service – which I've referred to above. These rules apply to regulated complaint handling and activities and they set out the time limits within which a consumer needs to complain to a business – which, in this case, is Mrs R's complaint that BPF unfairly turned down her claims. That's the complaint I'm considering in this decision and, as I've explained, I'm not persuaded her complaint was brought too late under our rules.

I think it's reasonable to take the operation of the LA into account when I'm deciding if BPF provided a fair and reasonable response to Mrs R's claims - that's why I've referred to the LA in this decision. The LA doesn't have a provision allowing any claim to be brought within three years of a claimant realising they could start a legal action. I accept it does however

provide that time limits may be extended in some situations and I've given some thought to this below.

Section 14A LA, for example, allows for a second period in which a claim for negligence can be made in certain circumstances. For section 14A to apply to Mrs R's claims, BPF would need to owe her a duty of care. Having considered what happened here carefully, I'm not persuaded that such a duty arose - or advice was provided – that could give rise to a claim to which section 14A could apply.

I've also considered section 32 LA. This relates to the extension of time for starting an action if fraud, mistake or deliberate concealment are found - or could with reasonable diligence have been discovered. But I'm not persuaded this assists Mrs R in these particular circumstances either.

P suggests that Mrs R has more time to bring her section 140A claim under section 32 because the identity of the credit intermediary was concealed. P states that "Heritage Resorts" seems to be the "nominal term" used to describe resorts within the Heritage Group and this cannot, on its own, be the actual credit intermediary. Somewhat confusingly however, P goes on to say (in an email in May 2023) "it was Heritage Resorts that introduced the possibility of finance" and Mrs R and Mr R "were told at all times, that it was Heritage who were making the arrangements for them, in particular where the loan was concerned".

As I've explained above (under the heading "authority of the credit broker") BPF told us Heritage arranged the credit here and it was duly authorised to do so. I have no reason to question that on the current evidence. And, given Mrs R and Mr R have acknowledged (via P) that they were told Heritage was making the loan arrangements, I can't reasonably conclude that this information was concealed from them.

In light of my provisional findings, I'm not persuaded that the primary time limits under the LA referred to above can be extended in these circumstances. I appreciate Mrs R may say she didn't know about the relevant time limits but I'm afraid that's not generally accepted as grounds for prolonging the limitation period.

Irresponsible lending

P also states that BPF failed to undertake proper checks before lending. I don't have much information about the decision to provide Mrs R with this credit but, even if I were to accept that BPF failed in its obligations, I'd have to be satisfied that the lending was unaffordable for Mrs R at the relevant time. Mrs R hasn't supplied any evidence to persuade me that's likely. I've seen nothing to show that there were any affordability issues - such as late or missed payments or other financial problems. I can see she repaid the borrowing within the BNPL six month period, which doesn't suggest there were any such issues. And, on the current evidence, I'm not persuaded that Mrs R's complaint can be upheld on these grounds.

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.

I invited the parties to consider my provisional findings and let me have any new comments or evidence that I hadn't seen before by 25 August 2023 and I'd make my final decision after that.

Both parties have now responded. Mrs R's representatives told us she had nothing further to add. BPF accepts most of my provisional findings but it disagrees with my provisional

conclusions under the heading jurisdiction of the Financial Ombudsman Service. BPF says (in summary) Mrs R ought reasonably to have been aware that she had cause to complain when BPF accepted the loan application - not when she was advised that she could bring her complaint against BPF. She knew that BPF was the loan provider and the loan agreement details how to make a complaint to BPF so she would have understood she could bring a complaint about the loan to BPF from the outset.

I have considered BPF's comments and reviewed all of the available evidence. Nothing that's been said has persuaded me to change my mind. For the reasons set out in my provisional findings, I'm not persuaded that Mrs R knew (or ought to have known) that she had cause for complaint against BPF before she sought advice in 2020. And I remain of the view there aren't enough fair and reasonable grounds to uphold this complaint.

My final decision

For the reasons given above my decision is I am unable to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 29 September 2023.

Claire Jackson
Ombudsman