

The complaint

Mrs O complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF"), unfairly turned down her claims under the Consumer Credit Act 1974 ("CCA").

Mrs O is assisted in bringing her complaint by a legal representative, but for ease I'll refer to anything that's been said on her behalf as if Mrs O had said it herself.

What happened

In 2009 Mrs O took a trial membership for a timeshare and in September 2011 decided to upgrade to a full membership financing this with a fixed sum loan agreement provided by BPF. This credit agreement was for 180 months.

In October 2013 Mrs O settled the balance of the credit agreement with BPF in full.

Mrs O says the benefits of the timeshare membership were misrepresented to her; that she had been the subject of a pressured sale, that the terms of the membership were unfair (for instance the increases applied to the management fees) and that there were no affordability checks carried out by BPF before she entered into the credit agreement as she had actually been unemployed at the time.

In December 2017 Mrs O made a claim to BPF under sections 75 and 140(A) of the Consumer Credit Act 2015. She said there hadn't been an adequate transparent explanation as to the terms and conditions of the timeshare product.

BPF didn't accept Mrs O's claims. It disagreed that there had been any misrepresentations made by the holiday company or that there had been any pressure on Mrs O to take the timeshare membership. It also said the terms of the timeshare agreement were fair and had been provided to Mrs O so that she could make an informed decision before entering into the agreement. BPF said that there had been credit checks and assessments conducted by itself prior to providing the credit agreement. It said Mrs O had reported she was employed in her credit application.

Mrs O disagreed with the view of BPF and complained to this service. Our investigator didn't recommend her complaint should be upheld as she didn't think BPF had acted unfairly when looking at Mrs O claim.

In respect of Mrs O's claim under section 75, our investigator said that due to the amount of time that had passed, BPF would have a defence to a claim that the timeshare agreement had been misrepresented as it was now out of time as under the Limitation Act 1980. In respect of a claim under section 140A, our investigator said that she hadn't seen enough evidence to suggest that there were any relevant considerations that might mean the relationship between Mrs O and BPF had been unfair.

When looking at the affordability of the credit agreement our investigator said that the business checks made by BPF didn't appear to have shown any signs that Mrs O would

have found the lending sustainably unaffordable. Based on the information it appeared she had reasonable disposable income after expenses to make the payments.

Mrs O disagreed with the view of our investigator and provided a 46-page opinion from a barrister covering a number of generic submissions.

As the parties were unable to reach an agreement the complaint was passed to me. I issued a provisional decision along the following lines.

As I'd said above, Mrs O had provided an opinion by a barrister called "Generic submissions on behalf of complainants". As Mrs O had suggested that the opinion was relevant to this complaint, I took it into account but only insofar as it discussed points that were of direct relevance to this complaint. That is, as it related to the matters raised by Mrs O with BPF.

Under the rules that govern how I consider and decide complaints, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice. I must also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been said and provided, I might not address every point that has been raised.

Mrs O's section 75 claim

A claim under section 75 of the Consumer Credit Act 1974 ("section 75") can be made when a consumer uses certain types of credit to make purchases of goods or services. Under section 75 in certain circumstances the consumer has an equal right to claim against the provider of the credit or the retailer providing the goods or services if there has been a misrepresentation or breach of contract on the supplier's part.

Mrs O said that she was told that she would be able to sell her membership back to the holiday company or sell it on and recoup the costs; that she would be able to book holidays where she wanted when she wanted and that the management fees would only rise in line with inflation. She said none these things were true.

BPF disagreed that there were any misrepresentations made by the holiday company. It said that after the amount of time that had passed since September 2011 it was unrealistic to think Mrs O could recall exact statements made to her by the holiday company. It had provided a copy of the 'Member's Declaration' which had been signed by Mrs O at the time she had entered the timeshare contract. This document set out that the product wasn't an investment and that the holiday company wouldn't re-purchase it. It also said Mrs O had agreed she had been given adequate time to review the timeshare agreement paperwork before signing it.

BPF said that Mrs O had been provided with a directory which contained the resorts she would be able to book through her membership. It said it would be reasonable to expect that as bookings were on a first come first served basis, there would be times that some places wouldn't be available. It said Mrs O hadn't provided any details about the difficulties she had encountered with bookings.

BPF also said that the management fees and how these were calculated were covered in the club's rules that were provided to Mrs O. These rules hadn't stipulated that any increases wouldn't be above the rate of inflation.

Our investigator thought a claim under section 75 would be time barred under the Limitation Act 1980. And although I appreciated BPF hadn't itself raised this; I thought that it was fair I

considered whether the Limitation Act could give rise to a potential defence to BPF against Mrs O's claim. I didn't think I could reasonably ignore a potential defence if that was open to a business when deciding if it had acted fairly or unfairly when declining a consumer's claim.

So, looking at the time limits set out by the Limitation Act 1980, there is a time limit for a misrepresentation claim (whether under section 2 or section 9 of the Limitation Act) and this limit is "six years from the date on which the cause of action accrued" (which is when everything needed to make a claim had occurred). As Mrs O would have suffered a loss at the point she had entered into an agreement based on an alleged misrepresentation, her cause of action arose in September 2011; at the point she had signed the agreement. Mrs O would therefore have had six years from then to bring a misrepresentation claim against either the holiday company or BPF. But no claim regarding misrepresentation had been made to BPF until December 2017, which was outside of the time limit set out in the Limitation Act. I therefore thought BPF was likely to have a defence to a claim here.

Mrs O's Section 140(A) claim

Although, as set out above, I thought a claim for misrepresentation would be caught by the Limitation Act, I considered what Mrs O said she had been told about the timeshare by the holiday operator when assessing unfairness under Section 140A.

Mrs O said that there had been an unfair relationship between herself and BPF. She said that the sales representative(s) used a pressured selling technique to induce into entering into the contract. Only a court has the power to decide whether there is an unfair relationship between Mrs O and BPF for the purpose of section 140A. But, as it's relevant law, I needed to consider it along with what I thought a court was likely to conclude.

Mrs O had complained about the selling technique that was used in 2011. She said she was given a free holiday as a trial member, a condition of which was that she attended a sales meeting. However, I thought Mrs O would have known she didn't have to say yes at this second meeting and that she could walk away.

Mrs O complained that there wasn't an adequate transparent explanation provided at the meeting as to the terms and conditions of the timeshare membership. I haven't seen enough evidence to reasonably say she wasn't able to make an informed decision before signing the agreement or that the salesperson(s) conduct fell so short of the standard that could reasonably be expected that it made the relationship between Mrs O and BPF unfair.

Mrs O also has concerns about the lack of transparency when it comes to the terms and conditions governing the ongoing costs of membership. But I couldn't see that the terms in question were operated unfairly by the supplier. So, even if there were problems with the way in which the terms were written and/or presented, I wasn't persuaded they caused or contributed to an unfair relationship between her and BPF.

I'd seen that Mrs O had signed the member's declaration and confirmed that she had read and fully understood it. Although it was possible Mrs O had been told things that differed from what was in the documents she had signed, in this case I didn't think there was enough evidence for me to find that had happened. I thought that if this information had differed from what she had been told by the salesperson for the holiday company, then it would be reasonable to have expected her to have queried it before signing it.

Mrs O had raised the interest rate charged on the credit agreement as she said this was unfairly high. However, the interest rate and amount of interest charged on the loan amount was clearly shown on the fixed sum loan agreement. I couldn't reasonably say Mrs O wasn't aware of the rate. I thought if she was unhappy then she would reasonably have known she

could decline.

In summary, I hadn't seen enough evidence to be able to reasonably say that Mrs O had been told that the holidays would have unlimited peak time availability; that there was a ready re-sale market or that the maintenance charges would only increase with the rate of inflation. As set out above, I didn't know what had been said to Mrs O at the point of sale and I hadn't seen sufficient information to be satisfied false statements of fact had been made.

In light of the above, I didn't think Mrs O had been induced into entering into the agreement for the timeshare by misrepresentations made by the holiday company.

I also didn't think I'd seen enough evidence to show that Mrs O had been the subject of undue pressure to buy the timeshare membership in September 2011. And I wasn't persuaded Mrs O's ability to make a choice about entering into the agreement had been significantly impaired.

So, I hadn't seen enough evidence to be able to reasonably say that the terms of the agreement had actually operated unfairly against Mrs O after the sale in question. And overall, therefore, on balance, I wasn't persuaded that there was sufficient evidence to show that it would be likely a court would find there was an unfair relationship as set out in s 140A.

Mrs O's complaint about affordability checks

Mrs O said BPF had failed to carry out proper credit checks when lending to her and that she had been told the holiday company at the time she entered into the credit agreement she was about to be made redundant. She said this was a breach of the Office of Fair Trading's guidelines. Mrs O had also supplied bank statements from the relevant time with her complaint.

BPF said it was itself, and not the holiday company, that had carried out the checks and Mrs O had declared herself as employed on the application form for the fixed sum loan.

As set out above, I didn't know what had been said at the time Mrs O had entered into the credit agreement about the forthcoming change in her financial circumstances. I'd seen from the income and expenses figures that had been provided by Mrs O at the time she applied for the loan that there didn't appear to have been an issue with affordability as she had an income coming in and that her earnings weren't being used to pay for the mortgage or utilities. There was therefore sufficient disposable income to meet the loan repayments and to do so sustainably.

I didn't have enough evidence before me to reasonably say that BPF had deliberately and/or unfairly manipulated Mrs O's income and expenses form so that no account would be taken of her forthcoming redundancy. However, looking at the length of the loan I thought it would have been proportionate and reasonable for BPF to have made enquiries as to whether there were any expected changes to her financial situation. I didn't know if this question had been raised with Mrs O by BPF.

However, even if I were to conclude that BPF or its agents hadn't carried out the proper checks for creditworthiness and sustainable affordability when arranging a loan for Mrs O, I still needed to be satisfied that the lending was unaffordable for her and/or that she had lost out as a result, in order to uphold this part of her complaint. Having asked Mrs O about her circumstances following her redundancy, she had told me that she had become self-employed for the following six years. Mrs O hadn't provided me with any details as to her income and outgoings during that time or whether she had experienced any financial difficulties.

Mrs O had paid the loan repayments regularly up until October 2013 when the outstanding balance had been cleared. I'd seen this loan might have been paid off in full using an inheritance received by Mrs O's husband, though Mrs O had (very fairly) said she cannot recall if that was the case.

So, although it seemed BPF might not have carried out proportionate enquiries as to affordability with Mrs O (and I made no findings on that) I hadn't seen anything to persuade me that if it had, it would have found the loan hadn't been sustainably affordable for Mrs O. And I didn't think this was a reason to uphold this complaint given its circumstances.

For the reasons set out above, I wasn't intending to uphold Mrs O's complaint as I didn't think BPF had acted unfairly when considering her claim.

Neither party has asked me to review any parts of my provisional 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.

Although I haven't been asked to look again at my provisional decision, I have still reviewed the evidence and the conclusions that I reached. And I haven't changed my mind.

I still think that BPF has a defence to any claim about the purchase of the timeshare made under section 75 by virtue of The Limitation Act 1980. I also don't think there is sufficient evidence to show that there was an unfair relationship between Mrs O and BPF.

And as I haven't been provided with any new evidence about Mrs O's financial circumstances around the time she entered into the financial agreement, I remain unpersuaded that BPF would have found the loan unsustainably affordable for her had it made proportionate enquiries into her finances.

So, for the reasons set out above I'm not upholding Mrs O's complaint.

My final decision

For the reasons given I'm not upholding Mrs O's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 6 November 2023.

Jocelyn Griffith
Ombudsman