

## **The complaint**

Mrs W complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") has unfairly turned down her claims under section 75 and 140A of the Consumer Credit Act 1974. She also complains that BPF failed to carry out affordability checks in respect of a fixed sum loan she entered into with it.

Mrs W has been assisted in bringing her complaint by a legal representative, but I'll refer to anything that's been said on her behalf as if Mrs W had said it herself, to keep things simple.

## **What happened**

Mrs W and her husband purchased a trial membership of a holiday club and then entered into an acquisition agreement in October 2009 to trade-in their trial membership and buy some holiday club membership points. This was funded by Mrs W's husband entering into a fixed sum loan agreement with BPF.

Mrs W and her husband entered into another acquisition agreement to buy some more holiday club membership points in February 2010. The price of those membership points was £13,023 and Mrs W entered into a fixed sum loan agreement with BPF for a loan of that amount. It is this loan which is the subject of Mrs W's complaint.

In June 2022 Mrs W made claims to BPF under sections 75 and 140A of the Consumer Credit Act 1974 about the February 2010 credit agreement. Mrs W said that the membership points had been misrepresented to her and there was an unfair relationship between herself and BPF.

Mrs W also said that BPF had failed to carry out affordability checks when she had entered into the fixed sum loan.

BPF said that Mrs W was out of time under the Limitation Act 1980 to bring any claim under section 75 and that the unfair relationship provisions don't entitle this service to give any remedy. It also said Mrs W's complaint about irresponsible lending was out of time for this service to consider.

Mrs W was unhappy at BPF's response and made a complaint to this service. Our investigator didn't recommend that Mrs W's complaint should be upheld. He said that he thought that BPF was entitled to rely on the timing of Mrs W's section 75 claim to turn it down.

Our investigator also said that he hadn't seen enough to suggest that a court would reach the conclusion that the relationship between BPF and Mrs W had been unfair. He also said that he hadn't seen anything persuasive to suggest that the lending was unaffordable for Mrs W.

Mrs W disagreed with our investigator's view. She provided a detailed submission that had been prepared by her legal representative. This submission ran to 20 pages and the initial details of the complaint ran to 18 pages. So, it's not possible to set out in detail every point

made, but I have read these submissions in full. In this decision, I'll focus on the parts most important to the outcome of this complaint.

As the parties were unable to agree the complaint has been passed to me. I issued a provisional decision along the following lines.

I have considered the relevant law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice. And when evidence was incomplete, inconclusive or contradictory then I reached my decision about the merits of this complaint on the balance of probabilities – in other words, what I considered was most likely to have happened in the light of the available evidence and the wider circumstances.

I also wanted to assure Mrs W that, if I didn't address every point that had been raised, it was not because I hadn't thought about it. I considered everything that had been said and sent to us. But as set out above, I concentrated in this decision on what I thought was relevant and material to reaching a fair and reasonable outcome.

### *Mrs W's claim under Section 75*

Section 75(1) of the Consumer Credit Act sets out that a consumer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a credit provider. Those conditions include that the goods or services bought cost more than £100 and less than £30,000 and that the credit financed the contract giving rise to the claim, either in whole or in part. A claim under section 75 is a legal claim and so it wasn't my role to decide whether a claim under this section would be successful at court but to consider whether BPF had handled the claim fairly.

BPF said any claim under section 75 was now time barred under the Limitation Act 1980. Mrs W had set out a number of alleged misrepresentations that she said had been made by the timeshare provider that had induced her to take out the timeshare in question. In summary, she said that she had been told she would be staying in luxury accommodation each year, that the resorts were exclusive and that she would be able to book the holiday she wanted when she wanted. Mrs W said these things weren't true.

A claim for misrepresentation is normally brought under the Misrepresentation Act 1967, and someone normally has six years to bring any claim from the date the cause of action accrues (see section 9 of The Limitation Act). As Mrs W 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 February 2010, at the point she had signed the agreement. So, Mrs W would have had six years from then to bring a misrepresentation claim against either the holiday company or BPF. But as set out above, no claim regarding misrepresentation had been made to BPF until 2022 so around 12 years later, which was outside of the time limits set out in the Limitation Act.

Mrs W argued that she had longer than that to bring a claim due to section 32 of the Limitation Act 1980. I wasn't convinced that she would have more time for the same reasons as our investigator had given, but I make no finding on that point. That was because Mrs W had also made a section 140A claim and any misrepresentations could be considered as part of that assessment (see *Scotland & Reast v. British Credit Trust Limited* [2014] EWCA Civ 790), so any determination of limitation for Mrs W's section 75 claim becomes academic.

### *Mrs W's Section 140A Claim*

In respect of time limits and a section 140A claim, the time for limitation purposes runs from the date that the credit agreement ended (if it was not still running at the time the claim was

made) and the limitation period for a claim under section 140A is six years. Mrs W's credit agreement ended in August 2018, so I was satisfied that this claim had been raised in time.

As set out above, Mrs W's claim for misrepresentation was also relevant for her claim under section 140A. She said that untrue statements were made that:

- She would receive a number of points that could be used to book holidays each year at any resort within the holiday company's portfolio.
- She would be investing in her holidays by securing future holidays that would be significantly cheaper than would be available on the open market and that purchasing the membership points would enable them to have access to cheaper holidays worldwide through exchanges.
- There was a ready re-sale market for the membership points which meant that she would be able to sell them, so she was purchasing an asset.
- There would be good availability of 5-star accommodation in worldwide resorts at peak times of the year.
- She would have access to an exclusive holiday club and the holidays weren't available to the general public.
- The annual maintenance fees would be limited to the cost of maintenance and would only increase with the rate of inflation.
- The price of the points had only been available, at a rate significantly below market value, for a very limited period (during the course of the sales presentation).

Mrs W and her husband had signed documents in February 2010 which had included the acquisition agreement, the terms and conditions and a member's declaration. The acquisition agreement had shown that they were purchasing 901-point rights that would be credited to them each year for their use.

Looking at the member's declaration, it said: *"We understand that the purchase of our membership ... is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate, and that [the holiday company] makes no representation as to the future price or value of the ... product"*. It also said, *"We understand that [the holiday company] does not and will not run any resale or rental programmes and will not repurchase ... Points other than as a trade in against future property purchases"*.

There was information about the maintenance charge included in the member's declaration which said, *"The basis of these dues is set out in the Memorandum and Articles of Association together with the Scheme Rules and Regulations of the Company"*.

I'd seen that Mrs W and her husband had signed the member's declaration and confirmed that they had read and fully understood it. Although it was possible Mrs W and her husband had been told things that differed from what was in the documents they 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 they had been told by the salesperson for the holiday company, then it would be reasonable to have expected them to have queried it before signing it.

I'd also seen that Mrs W and her husband had attended an earlier presentation in September 2009 and acquired a number of points at that time. So, I thought having attended these presentations in the past they would have been aware that they didn't have to sign the agreement in February 2010 if they didn't want to. I thought it was more likely they had wanted to buy more points as they had wanted to add to the existing holiday rights they held.

Mrs W raised her claim with BPF in June 2022 so nearly 12 years after she had entered into the acquisition agreement. And I hadn't seen any evidence that she had complained to the holiday company about any misrepresentations that had been made or about any issues and difficulties she had faced when trying to use the holiday product.

Mrs W's representative had raised that they have been instructed by a large number of consumers making similar complaints against BPF regarding the mis-selling of holiday products by the holiday company. They said their clients have made very similar allegations to each other and this should be taken into account when considering Mrs W's complaint. But this service considers each complaint on its own merits, and I wasn't persuaded that allegations made by other clients showed that the membership points had been misrepresented to Mrs W in February 2010.

I had also been asked to consider a decision by another ombudsman and it had been suggested that I should take the same approach when determining the outcome of Mrs W's complaint. That decision had been subject to a recent judicial review<sup>1</sup> that clarified the legal approach to complaints like Mrs W's. But, in so far as I'd looked at the facts of this case and made finding on those facts, I did so independently. And just because one ombudsman might have upheld a complaint made by a different consumer about a different holiday product, didn't mean I had to uphold Mrs W's complaint.

In summary, I also hadn't seen enough evidence to be able to reasonably say that Mrs W had been told that the holidays were exclusive and would be significantly cheaper than would be available on the open market or that there would be peak time availability; that there was a ready re-sale market for the membership points, that the maintenance charges would only increase with the rate of inflation or that the price of the points was only available at that time. As set out above I didn't know what had been said to Mrs W 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 W had been induced into entering into the acquisition agreement and buying the membership points by misrepresentations made by the holiday company.

I also didn't think I'd seen enough evidence to consider that there was enough evidence to show that Mrs W was the subject of undue pressure to buy the membership points in February 2010. And I wasn't persuaded Mrs W's ability to make a choice about entering into the agreement had been significantly impaired.

Mrs W raised that the holiday company had breached the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 when she had entered into the agreement. But this particular legislation wasn't in force in February 2010, so wasn't relevant to the outcome of this complaint.

Mrs W's representative had set out the terms of the points acquisition agreement which they say were unfair. However, whether a term was unfair is for a court to decide and not me. But I didn't think that the presence of a potentially unfair or unfair term alone would mean it was

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<sup>1</sup> Shawbrook Bank Limited v. Financial Ombudsman Service Limited [2023] EWHC 1069 (Admin)

likely that a court would conclude that an unfair relationship had been created between a debtor and a creditor. This was because the court would need to consider how the term operated in practice and whether the operation of that term had caused the relationship to be unfair.<sup>2</sup>

I hadn't seen enough evidence that showed that the terms of the documents that Mrs W and her husband agreed to in February 2010 have been applied or operated unfairly against them. I therefore thought it would be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mrs W and BPF.

### *DISP Rules – Affordability*

BPF had raised the DISP rules in respect of Mrs W's complaint and said that due to the amount of time that had passed, it wasn't required to consider the merits of their complaint in respect of the issue of the loan being affordable.

The rules about the complaints 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.

Looking at the second limb of DISP 2.8.2 (when Mrs W knew, or ought reasonably to have known, that she had cause for complaint) to see if this extended the time under DISP 2.8.2R (2)(b) it was suggested that she first became aware that she had cause for complaint in 2022 - when she had sought professional advice. If the loan had been unaffordable, I thought I would have expected Mrs W to have realised this much earlier - but I accepted this wasn't the same as them knowing they had cause for complaint against BPF.

As I couldn't be certain that Mrs W knew (or ought reasonably to have known) that she had cause for complaint against BPF regarding affordability before she took advice in 2022, I think she has brought this part of her complaint to us within three years of that and so I've gone on to consider this.

### *The Lending Decision*

Mrs W said that there was no assessment or due diligence checks made by BPF as to whether the credit agreement had been affordable for her in 2010. However, even if I were to find that BPF had failed to do everything it should have when it agreed to lend (and I made no such finding), I'd have to be satisfied that the lending was unaffordable for Mrs W, before also concluding that she had lost out as a result. As I hadn't seen anything to persuade me that was the case at the time of sale, I didn't think this was a reason to uphold this complaint given its circumstances.

So, for the reasons set out above I wasn't intending to uphold Mrs W's complaint.

Neither Mrs W nor BPF has asked me to look again at 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

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<sup>2</sup> This was highlighted in the recent judicial review

reasonable in the circumstances of this complaint.

Even though neither party has asked me to review any part of my provisional decision I have still looked again at the evidence and the conclusions that I reached. And I haven't changed my view.

I still think it would be unlikely that a court would conclude in the circumstances set out above that the terms of the timeshare documents created an unfair relationship between Mrs W and BPF. Nor do I think there is sufficient evidence to reasonably say the lending to Mrs W by BPF had been unaffordable. I'm therefore not upholding Mrs W's complaint.

### **My final decision**

For the reasons set out above, I'm not upholding Mrs W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 7 September 2023.

Jocelyn Griffith  
**Ombudsman**