

The complaint

Mr G says that Clydesdale Financial Services Limited, trading as Barclays Partner Finance who I'll call "BPF", unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare he was sold in April 2018. He also says the loan wasn't affordable for him and that BPF were therefore irresponsible to extend the credit.

Mr G has been represented by a professional representative who I'll call "PR" and he entered into the timeshare agreement with his partner, but as the finance agreement was in his sole name, I will refer only to Mr G or his representatives in this decision.

What happened

I issued my provisional decision on this complaint in August. An extract from that provisional decision is set out below.

In April 2018 Mr G exchanged an existing timeshare membership for 60,000 points towards a timeshare product with a company I will call "L". He financed the cost of the points through a fixed sum loan with BPF. That finance agreement was regulated by the CCA.

In June 2021 Mr G complained to BPF about problems he had encountered with the timeshare product. There were a number of allegations and it's not practical to list them all here, but I have taken note of them. He said the nature of the timeshare had been misrepresented to him, so he was able to make a claim against the lender under section 75 of the CCA. He also said that there was an unfair debtor-creditor-supplier-relationship under section 140A of the CCA and that the lender had been irresponsible to provide him with credit he couldn't afford.

Our investigator disagreed. He didn't think there'd been a misrepresentation or that there was evidence of an unfair relationship, and he wasn't persuaded there was sufficient evidence that the loan was unaffordable for Mr G.

PR didn't think the investigator had provided sufficiently detailed reasoning about why the claim should fail. They said this Service were familiar with other similar complaints from consumers of systematic mis-selling and Mr G hadn't been provided with key information he should have been provided with until it was too late. They explained that the sales presentation was high pressured, and Mr G wasn't given sufficient time to read the documentation provided before agreeing to it. They went on to repeat many of the misrepresentations they had previously made and to provide further reasoning as to why they believed there had been an unfair relationship. With regard to the allegation of irresponsible lending, they didn't think BPF had taken into account the ongoing maintenance fees when considering if the loan was affordable for Mr G.

Mr G and the PR therefore asked for a decision by an ombudsman.

What I've provisionally 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'm issuing a provisional decision here as it's been some time since the investigator provided his view and I can't see we've responded to all of the issues in the case.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.

The Consumer Credit Act 1974

When something goes wrong and the payment was made with a fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the Consumer Credit Act (1974) says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.

From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Mr G also relies on, as the pre-contractual acts or omissions of the credit broker or supplier will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Mr G and BPF.

It's not for me to decide the outcome of a claim Mr G may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether BPF would be reasonable to reject Mr G's claims.

The claim under section 75 of the CCA

Misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue, and which materially influenced the other party to enter into the contract.

This wasn't Mr G's first transaction with the supplier. He'd been a member of a timeshare club since 2017. I think, by 2018, Mr G would be well aware of how the general timeshare product scheme worked. I don't think many of the issues Mr G claims were misrepresented to him initially can fairly be considered to have been significant reasons why he was persuaded to enter into an agreement for further points, as by that time he'd have significant experience of the "system" and how it worked. Some of the misrepresentations Mr G complains of therefore, in my opinion, fade away, but I'll consider what I think are the more pertinent ones here.

Mr G said he attended the presentation in 2018 during a holiday he'd booked through the timeshare that was active at that time. So, I think he would have been aware that the resorts

were'n't exclusive. I can't see that the documentation suggests the accommodation is exclusive either.

Mr G explains one reason for taking out additional points in 2018 was that he was persuaded he would be able to convert his points to ownership of a unit of accommodation, and that would mean he no longer had to pay maintenance fees.

The Memorandum of Understanding explained that three years after the finance was paid Mr G would be entitled to trade in his points, at a maximum of 300,000 points per property, against "any future properties that may become available for sale" through the supplier or its partners.

That Memorandum went on to explain that points traded would be valued at €100 per 1,000 points and that any balance in the price of the property after the points had been attributed would be paid by Mr G. It said that, in the event not all points are traded in, Mr G would remain liable for the applicable annual fees for the remaining points.

Mr G didn't seek to purchase any property as he advised the supplier he was surrendering his membership.

I'm not persuaded that a significant reason Mr G was persuaded to enter the agreement for points in 2018 was because he wanted to use them to purchase a property. I say that because he sought to surrender his membership before that option could be invoked. And the handling of a section 75 claim can't be determined according to a scenario that never happened.

Mr G has provided a copy of a training manual that he says demonstrates how the product was mis-sold. We've been told that the training manual is from a company who ceased trading in 2012. I'm not persuaded that a training manual from several years before the finance agreement was entered into, and from a supplier who had ceased trading well before the Time of Sale, could fairly be considered representative of the supplier's processes when Mr G entered into this agreement. I also know very little in terms of the documents provenance. For all of those reasons, I don't think the training manual can fairly be relied upon to suggest there was a misrepresentation here. I don't think a court would be likely to conclude there was a misrepresentation on that basis either.

PR have referred me to similar complaints with similar facts and I'm aware they have provided lengthy submissions on those issues in the past. This Service considers each complaint on its individual merits, and I'm not persuaded the allegations made by other clients of PR show that the purchase agreement and/or the finance agreement that funded it, have been misrepresented to Mr G.

PR have also suggested we should take the same approach in this decision as we did in a case involving a particular type of asset backed timeshare, known in the industry as a "fractional ownership timeshare". Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a "share" in the ownership of a specific property. But that isn't the type of timeshare purchased by Mr G. While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction when determining what a fair and reasonable outcome to a complaint involving a non-fractional timeshare might look like.

The claim under section 140A of the CCA

S.140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

I do not consider it likely that a court would conclude that BPF's acts and/or omissions, or those of the supplier as agents of BPF, generated an unfair debtor – creditor relationship.

The crux of Mr G's argument is the combined effect of a number of clauses within the timeshare agreement were not explained clearly and key information, including warnings of the risks associated with the purchase, and the impact of the foreclosure clause within the agreement, created an unfair relationship.

Mr G has referenced the case of Link Financial v Wilson [2014] which he says shows a court agreed that a similar foreclosure clause to the one in his agreement, gave rise to an unfair relationship. In that judgment it was held that such a term was unfair under the Unfair Terms in Consumer Contracts Regulations (1999). However, as Mr G surrendered his membership in recent years, and as I can't see that the terms governing suspension and termination were operated unfairly against them, I am not persuaded that the mere existence of a similar foreclosure term in Mr G's agreement, when it wasn't operated unfairly and couldn't have been after the membership was surrendered, would likely lead a court to find the debtor-creditor relationship was unfair on this occasion.

Mr G has explained that relevant legislation (under The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010) required the supplier to give him key information. He said that key information was provided too late and that created an unfair relationship. It's Mr G's suggestion that the information was provided but only at the end of the sales presentation, I think it's therefore likely the information would also have been provided to him, at some point, when he attended the presentation the year before and that he therefore would have been familiar with that information throughout the antecedent negotiations, as was required. I don't therefore think any unfair relationship was created.

Mr G says the supplier didn't tell him how any subsequent increases in maintenance or property point trade in values would be calculated. I've not seen evidence of how these costs increased and it's possible the supplier didn't give Mr G sufficient information, in good time. But even if that was the case, Mr G had been an existing member, albeit of another scheme, for a year by the time he entered into this new agreement. So, I think his experience as a member was likely to have given him a reasonable amount of insight into what the ongoing costs and increases were like, and might be like, going forward and I don't think a court would therefore be likely to consider there was an unfair relationship.

I have also considered the matter of commission in relation to this transaction. I don't think the fact that BPF may have paid the Supplier commission was incompatible with its role in the transaction. The Supplier wasn't acting as agent of Mr G but as the supplier of contractual rights he obtained under the purchase agreement. And, in relation to the loan, based on what I've seen, I don't think it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr G advice or information on that basis. What's more, I haven't seen any persuasive evidence that the typical amounts of commission paid by BPF to suppliers (like the Supplier) when loans were interest bearing (as was the case on this occasion) was likely to be high enough to create an unfair debtor-creditor relationship given the circumstances of this particular complaint. I think it's unlikely a court would find that the failure to disclose commission in this case created an unfair relationship under s.140A.

And as I don't think the Supplier was acting as an agent of Mr G, I don't think it was its role to make an impartial recommendation about the credit supplier or to provide alternative suppliers. And even if it's right to suggest that Mr G should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that he has suffered

a financial loss because he entered into a credit agreement with BPF rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship on this occasion given the facts and circumstances of this complaint.

Mr G says there was a failure on the supplier's part to warn him that the option to purchase property was of no real, or enforceable, benefit. I don't think there is evidence the option to purchase, or partially purchase, a property wasn't realisable. As Mr G didn't seek to exercise that option it's difficult to suggest there is evidence to that effect.

Mr G also says that the sale was conducted in a way which meant he and his partner felt they had to purchase the timeshare. I've thought about this, we know it is common that these sales often lasted for a number of hours and a focus was placed on the benefits of the timeshare and on overcoming any objections. But Mr G was not a new customer, he'd attended a similar presentation before and I think with this in mind, he would already have been likely to be familiar with the sales tactics employed and would have been likely to know he could simply walk away.

Overall, therefore, I don't think a court would likely conclude that the relationship between Mr G and BPF was unfair based on the information provided. So, for that reason, I don't think BPF has to do anything further in relation to Mr G's claim under s.140A CCA.

Was the loan irresponsible?

Mr G says that BPF was in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan. He says that they had strict obligations to complete a creditworthiness check and failed to undertake those obligations.

However, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that BPF did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that the credit granted by them was likely to be unaffordable and that Mr G suffered a loss as a result. I've not been provided with sufficient evidence from Mr G to suggest he didn't have enough disposable income to sustainably afford repayments against this loan. He's explained that his income was £55,000 at the time (about £3,300 per month net of tax and National insurance) and that he was paying £600 towards a mortgage and about £1,000 towards credit card debt. I don't think that limited information would suggest he didn't have sufficient income to sustainably afford repayments. I don't therefore think it would be reasonable to suggest BPF was irresponsible when providing the credit.

My provisional decision

For the reasons I've given above I'm not expecting to uphold this complaint.

Further evidence and/or comments

Neither Mr G nor BPF provided any additional comments or evidence.

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've not been provided with any additional information that would lead me to change my provisional decision on this complaint. My provisional decision, therefore, becomes my final decision.

My final decision

For the reasons I've given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 24 November 2023.

Phillip McMahon
Ombudsman