

The complaint

Mr P 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.

Mr P has been represented by a professional representative who I'll refer to as "PR". Where I refer to Mr P's submissions I include those made on his behalf.

Mr P entered into the timeshare agreement with his partner, but as the finance agreement was in his sole name, I will refer only to Mr P or his representatives in this decision.

What happened

I issued a provisional decision on this complaint last month. An extract from that provisional decision is set out below.

What happened

Mr P purchased a timeshare with a company I will call "L" in October 2010, using finance that was provided by BPF. The finance was settled in October 2011.

In January 2021 Mr P complained to BPF. He said the loan was unlawful because L weren't authorised by the Financial Conduct Authority (FCA) to broker finance. He also said the timeshare agreement had been misrepresented to him and he therefore had a claim under section 75 of the Consumer Credit Act 1974 (s.75) and that there was an unfair relationship pursuant to section 140A (s.140A) of the Consumer Credit Act 1974 (CCA). He suggested the BPF hadn't carried out the necessary checks to ensure the credit was affordable for him. BPF thought his claims had been made out of time under the Limitations Act 1980 (LA) and our investigator agreed. She added that she didn't believe there was sufficient evidence the loan wasn't affordable and that, as the FCA didn't regulate consumer credit activity until 2014 there was no need for L to be authorised by them.

The PR disagreed. They said that the broker should have held a license from the Office of Fair Trading at the time of sale and that section 32 of the LA provided for an extension of the limitation period and meant Mr P's CCA claims should be considered. They asked for a final 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 know it will disappoint Mr P, but I think his claims under the CCA have been made too late and I don't think there's sufficient evidence to suggest the finance was unaffordable for him or that the broker wasn't authorised. It's been some time since the investigator issued her view on this complaint so I'm issuing a provisional decision.

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). 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 final decision.

The Limitation Act 1980 and the Consumer Credit Act 1974

When something goes wrong and the payment was made with a certain type of 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 the same right to make a 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 also relevant to the claim under section 140A of the CCA as the pre-contractual acts or omissions of the broker 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 P and BPF.

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

A claim under section 75 for misrepresentation against BPF had to be made within six years of when Mr P had everything he needed to make such a claim. And in this complaint, I think that was when he purchased the timeshare in October 2010. After all, he says that he entered into the agreement to purchase the timeshare because of misrepresentations. And as the upshot of the claim was that he would not have made the purchase but for the misrepresentations at the Time of Sale, it was at that time that he suffered a loss because he ended up borrowing money from BPF. So, Mr P had until October 2016 to raise a section 75 claim with BPF. As he didn't do so until January 2021, and as I can't see a reason why the limitation period is likely to be postponed (see my comments later) in keeping with the LA, I think it's likely a court would consider his section 75 claim to be time barred. That would give BPF a complete defence to it.

The LA applies to a claim under s.140A CCA. It was held in Patel v. Patel [2009] that, when considering s.140A CCA, the time for limitation purposes ran from the date that the credit agreement ended if it was not still running at the time the claim was made. Here the limitation period is six years. That is because the claim Mr P wishes to make is for repayment of sums he has paid, which is an action for sums recoverable under statute, to which s.9 LA applies. That meant Mr P would have to bring an action within six years of the date the credit was repaid. The account statement shows that was in October 2011 and that means at the latest Mr P would have needed to raise his claim under s140A by October 2017. As he didn't raise his claim until January 2021, and as I can't see a reason why the limitation period is likely to be postponed (see my later comments) in keeping with the LA, I think he brought his claim too late – which, in my view, is likely to give BPF a complete defence to it.

Section 32 of the LA

S32 relates to the extension of time for starting an action if fraud, mistake, or concealment are found (or could with reasonable diligence have been discovered).

To conclude that there had been deliberate concealment under Section 32(1)(b) of the LA, there doesn't have to have been a free-standing contractual, tortious, or fiduciary duty to disclose a fact. It is sufficient if the non-disclosure was part of an unfair credit-debtor relationship as this was a breach of a relevant duty. That issue was discussed in Canada Square Operations Ltd v Potter [2021]. A purchaser doesn't have to show that the Supplier knew that concealment gave rise to a cause of action. It's enough that the concealment was unconscionable – which means that the Supplier concealed something and was reckless as to whether it had committed an actionable wrong.

I'm not persuaded that Mr P has provided clear evidence of deliberate concealment in his case.

It's possible that the contractual paperwork accompanying Mr P's purchase agreement was lengthy and difficult to understand in places. It's also possible that the Supplier's disclosure at the Time of Sale wasn't entirely compliant with the relevant rules and requirements at that time. But that isn't the same as saying the Supplier deliberately withheld information from Mr P in a way that engages Section 32(1)(b) of the LA. And while Mr P's representatives have made a number of allegations in that regard, none of them are reliably corroborated by any supporting evidence. So, based on the limited information I've seen, I'm not persuaded that Section 32(1)(b) is likely to be engaged for the relevant reasons Mr P's representatives have provided and I don't think a court would find there was a reason to extend the limitation period.

Was the loan irresponsible?

Mr P says that BPF were in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan. He says they had strict obligations to complete a creditworthiness check under the Financial Conduct Authority's (FCA's) Consumer Credit Sourcebook (CONC) and failed to undertake those obligations.

However, when BPF lent to Mr P, CONC didn't apply to lending of the kind in question (the FCA began its regulation of consumer credit and issued CONC on 1 April 2014) So, it isn't relevant here. What's more, 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 BPF was likely to be unaffordable and that Mr P suffered a loss as a result. As there's little evidence that he would have found, nor found, it difficult to repay what he was lent by BPF, I'm not persuaded it was unaffordable for him.

Was the broker authorised

Mr P argues that L wasn't authorised to arrange the credit agreement on BPF's behalf and therefore breached the General Prohibition (section 19 of the FSMA). While I don't think it's fair to consider this under a section 140A claim (because it was made out of time under the LA), I can consider this as a separate, stand-alone issue.

However, our records indicate that L was authorised by the OFT from at least May 2008 as it fell under our consumer credit jurisdiction at that time and wouldn't have done if it didn't have an OFT license. So, I don't uphold this part of Mr P's complaint.

The date of the agreement

There's been some confusion over the date of the finance agreement. Mr P didn't refer to the date of the purchase when he raised his claim to BPF in January 2021. The PR have provided a purchase agreement from October 2010 that aligns with the information provided by BPF about the loan to finance that agreement, and its repayment. The PR have also mentioned a further agreement that they say was entered into in July 2008. I've not seen the purchase agreement that relates to that finance, but I have seen the account statement that demonstrates that finance was settled in January 2009. As the account was settled even earlier than the 2010 purchase/finance agreement it would also seem likely that any s.75 or s.140A claim would be out of time under the LA and that a court would think that was the case. And if the broker of that agreement was also L (and I've not seen any evidence to the contrary) L was also licensed by the OFT at that time.

My provisional decision

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

Further comments and/or evidence

Neither party provided any further 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.

As I've not been provided with any additional comments or evidence I've not been persuaded to change my provisional decision. My provisional decision therefore becomes my final decision on this complaint.

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 P to accept or reject my decision before 15 September 2023.

Phillip McMahon
Ombudsman