

## **The complaint**

Mr C complains that it was unfair of Clydesdale Financial Services Limited (trading as Barclays Partner Finance) (BPF) to give him a loan to fund the purchase of a fixed term revolving agreement for timeshare weeks (“the product”) without checking if he could afford to pay back what he owed and BPF was wrong to decline claims he made arising out of the transaction.

The product agreement is in the joint names of Mr C and his partner but the loan agreement is in Mr C’s sole name. This means Mr C is the complainant who is eligible to bring a complaint to our service so I’ve referred to him alone in this decision.

Mr C is represented by a firm of solicitors but I will refer (generally) to everything that’s been said on his behalf as if Mr C said it himself, to keep things simple.

## **What happened**

Mr C purchased the product in June 2008 with a loan from BPF. It cost just under £12,000 and Mr C agreed to pay back over £18,000 (including interest) at about £150 a month for 120 months. Mr C says misrepresentations were made, he was treated unfairly during the sale process and no affordability checks were done. He wants BPF to give him a refund of the total cost.

BPF thinks it is too late, under the Limitation Act 1980 (LA), for Mr C to bring claims under sections 75 and 140A of the Consumer Credit Act 1974 (CCA). BPF also considers Mr C is out of time to refer his complaint to the Financial Ombudsman Service under our rules.

One of our investigators looked into the matter. She was satisfied that we can consider Mr C’s complaint because (in summary):-

- Mr C complains that BPF failed to fulfil its obligations because he hasn’t had satisfactory compensation for his claims;
- our rules say we can’t consider a complaint if a consumer refers it to us more than six years after the event complained of or (if later) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint - unless the failure to comply with the time limits was as a result of exceptional circumstances;
- when assessing and declining a claim under the CCA, BPF is exercising its rights and duties under a regulated credit agreement and “the event” complained of here is BPF’s decision in December 2018 to decline Mr C’s claim about the product sale, Mr C brought his complaint to us a few weeks later - within the six year time limit set out in our rules - and we can look into it.

The investigator went on to consider the merits and said:-

- under section 75 BPF is jointly and severally liable with the supplier of goods or services for any breach of contract or misrepresentation by the supplier so, if the time for bringing a claim against the supplier has expired under the LA, this would be the

same for any ‘like’ claim against BPF - which is something BPF could reasonably take into account;

- Mr C raises allegations of misrepresentation, he has six years under the LA to bring his claim and the same time frame applies for claims under statute and contract;
- misrepresentation claims can be made once the person bringing the claim has suffered damage and any damage would have occurred here when Mr C experienced a financial loss as a result of purchasing the product (in that, Mr C says the purchase caused financial loss due to the supplier’s misrepresentations and he wouldn’t have bought the product except for those misrepresentations);
- this means the point of loss for Mr C was when he entered into the transaction to buy the product in June 2008 (and accepted the cost and any potential benefit) so Mr C needed to raise his section 75 claim no later than June 2014 but he didn’t complain to BPF until November 2018;
- Mr C may not have known that he could raise concerns about misrepresentation before that but the relevant time limit starts to run from the date of loss, which may fall earlier than the date he realised that something might have gone wrong;
- under section 140A of the CCA a court may make an order under section 140B if it is determined that the relationship between the creditor and debtor arising out of the agreement is unfair to the debtor - only a court has the power to decide this but section 140A is relevant law that we need to take into consideration;
- the LA applies to a section 140A claim, Mr C had six years to bring such a claim and he would have needed to do so no later than October 2017 but he didn’t complain to BPF until more than a year later meaning this claim is more than likely time barred;
- Mr C hasn’t provided enough evidence to reasonably conclude that it was irresponsible of BPF to provide this loan and the borrowing was unaffordable for him.

The investigator thought Mr C’s claims have more than likely exceeded the relevant time limits. And, although this for the courts to decide, it’s not unreasonable for BPF to take this into account. She wasn’t persuaded that BPF’s decision to decline Mr C’s claims was unfair or unreasonable in the circumstances and she didn’t recommend the complaint should be upheld.

Mr C disagreed and asked for an ombudsman to review the matter. His representatives have made fairly detailed submissions which I’ve read carefully. I have summarised these below for ease of reference:-

- no affordability checks were undertaken and the lending was irresponsible and unaffordable;
- high pressure sales tactics were used – amongst other things, Mr C attended a sales event which lasted six hours, he wasn’t allowed to leave and had to sign complex contractual documentation without the chance to review it properly;
- Mr C was told that the product was an investment, which it wasn’t, and a further aggravating factor is the supplier brokered the loan when it wasn’t authorised to do so by the Financial Conduct Authority (FCA) - in breach of Section 19 of the Financial Services and Markets Act 2000 (FMSA);
- commission paid by BPF was never disclosed giving rise to an unfair debtor-creditor relationship under section 140A of the CCA;
- misrepresentations, that were false (and known to be false) were made with the intention of inducing Mr C to enter these agreements, he relied on what was said and experienced loss as a result, he could not have known that the misrepresentations were fraudulent - and what remedy was available - until he instructed his representatives;
- the primary limitation period hasn’t expired but, even if it had, Mr C relies on section 32 of the LA (specifically section 32(1)(b)) to extend the limitation period.

Having considered the evidence available, I wasn't minded to uphold this complaint. My reasons weren't quite the same as those of the investigator however and I issued a provisional decision on 7 January 2022 to let the parties see my provisional conclusions and make further submissions (if they wanted to) before I made my final decision. I've set out what I decided provisionally – and why – below, and 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. Having done so, I am not minded to require BPF to do anything further to resolve the matter and I've explained why below.

Where evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision about the merits of this complaint 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.

I want to assure Mr C, if I don't address every 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.

#### *Jurisdiction of the Financial Ombudsman Service*

I have considered whether this complaint comes within the jurisdiction of our service. BPF says it doesn't, because Mr C is complaining about events that took place in 2008 and it was more than six years before he brought his complaint to us.

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 Mr C is complaining about exactly. I think it's clear he's unhappy because he feels BPF failed to fulfil its obligations under the CCA when it rejected claims he made under sections 75 and 140A arising out of his purchase of the product.

#### *Jurisdiction and Mr C's section 75 claim*

I'm satisfied that the exercise of a lender's rights and duties under a credit agreement is a regulated activity under (Article 60(B)(2) of the FSMA (Regulated Activities Order 2001). A creditor has a duty to comply with the CCA and I think considering a claim under the CCA is ancillary to - and carried on in connection with - a regulated activity.

I find the "event" (as referred to at DISP 2.8.2(2)(a) above) that Mr C is complaining here about is BPF's rejection of the claim that he made under the CCA. So, the relevant date is when BPF declined his complaint in December 2018. Mr C brought this complaint to our service not long after that and I'm satisfied he's not out of time to do so. I find this part of Mr C's complaint falls within the jurisdiction of this service and we can consider it.

### *Jurisdiction and section 140A*

Mr C also considers the acts and omissions of the product supplier here resulted in an unfair relationship between him and BPF. I think that amounts to a claim under section 140A of the CCA, so I've given some thought as to whether this part of the complaint falls within our jurisdiction.

Having considered the evidence, I'm satisfied that the events complained of (for the purposes of section 140A) took place at the point of sale in June 2008. I can't reasonably conclude that this part of Mr C'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 Mr C knew, or ought reasonably to have known, that he had cause for complaint - to see if this extends the time under DISP 2.8.2R (2)(b).

Mr C's representatives say he first became aware that he had cause for complaint in 2018 when he sought professional advice. From the evidence I've got, taking into account the acts and omissions that Mr C has complained about, I think he should reasonably have known that something might have gone wrong as a result of the supplier's acts and/or omissions before that. But I accept this is not the same as Mr C *knowing* that he had cause for complaint against BPF. And, whilst Mr C may have known that something might have gone wrong with the supplier, I don't think it's reasonable to assume that he would have realised that this might have made the relationship between him and BPF unfair – or that he had grounds to complain about BPF.

For that to be the case, I think Mr C would have needed to know there was a problem that caused him to lose out because of something BPF did (or didn't do). I'm not persuaded that Mr C knew (or ought to have known) that he had cause for complaint *against BPF* before 2018. I'm satisfied he brought his complaint to us within three years of that and I find this part of the complaint comes within our jurisdiction.

### *Merits of the complaint*

In light of my findings above, I've gone on to consider the merits of Mr C's complaint. Mr C brings claims against BPF under section 75 and section 140A of the CCA and I'm considering whether BPF has provided a fair and reasonable response to those claims in this decision.

Our investigator says any right that Mr C had to bring these claims against BPF is probably out of time under the LA. If that's correct, then I think it's something that BPF could reasonably take into account when it decided to decline Mr C's claims. I should make it clear however that I am not deciding here if any right that Mr C may have to bring these claims has expired under the LA - that's a matter for the courts.

### *Section 75 CCA*

Under section 75 a borrower has an equal right to claim against a credit provider and a supplier, in certain circumstances, if there's been a breach of contract or misrepresentation by the supplier. In this complaint, Mr C claims that misrepresentations were made and 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 that a cause of action accrues. And I think the date the cause of action accrued here will be the same as the date upon which the misrepresentations alleged under section 75

became actionable – that is the date any damage is suffered.

I'm satisfied any relevant damage was incurred when Mr C purchased the product and took out the finance - in June 2008. Amongst other things, this was when he paid for the benefits which he says were misrepresented. As a consequence, I think Mr C would have needed to bring any claim under section 75 within six years of the date he entered into the transaction to purchase the product. I'm satisfied that more than six years had passed since that date before Mr C contacted BPF - in November 2018. It looks as if the period within which he had to bring an action under section 75 had run out by that point and I can't reasonably find it was wrong of BPF to decline Mr C's section 75 claim.

I note that BPF says the relationship between the debtor, creditor and supplier (d-c-s) required under section 75 isn't present here. As I'm not minded to uphold this complaint for other reasons, I haven't considered whether the necessary d-c-s relationship is present.

### *Section 140A CCA*

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 debtor 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 and I have taken it into account.

I'm satisfied that the time limit applicable is six years from the date the debtor-creditor relationship ended. Mr C says (in a statement I've seen) that he paid off his loan in 2013 - but I'm not persuaded that's right. I think it looks as if the loan Mr C complains about here - ending in 474 - was paid off in October 2011. I've seen a statement of account that shows the balance on the account ending 474 was settled in October 2011. Customer contact notes that BPF supplied (which seem to be reasonably detailed and contemporaneous) record that Mr C asked for a settlement amount and then a requested a "paid in full" letter around the same time. And I have also seen a letter that BPF sent Mr C on 26 October 2011 confirming that his account had been settled in full.

I can see that Mr C had another loan from BPF (account ending 083) which may explain the confusion. But I'm satisfied, on balance, that he repaid the loan BPF provided to purchase the product in October 2011. I've seen nothing to suggest that Mr C borrowed any further on the account ending in 474 after that. So, I think he would have needed to bring any claim under section 140A no later than October 2017. I'm satisfied that this claim wasn't raised with BPF until over a year later – in November 2018. That's more than six years after the date time started running. I think any right Mr C had to bring a claim under section 140A had likely expired by that stage. And I'm not persuaded it was unreasonable for BPF to decline this claim.

### *Section 32 LA*

I appreciate Mr C may say he didn't know about these time limits but I'm afraid that's not generally accepted as grounds for extending the limitation period. I have given some thought to his representative's reference to section 32 of the LA – which 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). I can't see that specific allegations of this sort were put to BPF previously. But, even if I were to accept that section 32 applied, I think Mr C probably had enough information to start the clock running in the particular circumstances not long after he purchased the product.

I say this because it looks as if Mr C used the product fairly soon after purchase. In his statement he says he noticed that standards of accommodation, for example, weren't what

he was led to expect. On balance, I find the evidence suggests that Mr C was probably aware then that benefits he says he was told at the outset would be provided might have been misrepresented early on. I think it's more likely than not he would also have realised he wasn't receiving the services he expected at that stage. I consider this would have been sufficient to enable Mr C to bring his claims and I'm not persuaded it's unreasonable to expect him to have done so within the relevant time limits.

I've also considered (in this context) the submissions from Mr C's representatives about the payment of commission. They say any commission paid by BPF to the supplier for arranging the loan should have been disclosed and this gives rise to an unfair relationship under section 140.

BPF told us it has no record of how much – if any – commission was paid. But, my understanding of the levels of commission that were normally paid in this sort of situation (at the relevant time) is that this wasn't high enough to mean that BPF should have realised not telling Mr C risked the debtor-creditor relationship being unfair (under section 140A). If, and it's by no means certain, any commission was paid, I think it's unlikely to have exceeded 10%. I can't see that BPF would have breached any duty in making such a payment. I'm not persuaded that BPF was obliged to disclose it. And I don't think the supplier was under a duty to disclose it either. I can't see that the supplier was acting as agent for Mr C. I don't think it owed him a fiduciary duty and I'm satisfied it wasn't obliged to provide an impartial or dis-interested recommendation, in these particular circumstances.

It follows I'm not persuaded that section 32 assists Mr C here. However, even if Mr C was able to rely on section 32, I'm satisfied if any commission was paid it probably wasn't more than 10%. And I think it's unlikely a court would conclude that this created an unfair debtor/creditor relationship, in any event.

#### *Section 14A LA*

I'm not persuaded that section 14A of the LA (which provides for a second period in which a claim for negligence can be made) applies here. Looking at what happened, when Mr C purchased the product and took out the finance (and having considered the relevant documentation) I think there was an obligation to give Mr C sufficient appropriate and timely information to enable him to make an informed choice about whether to take out the loan. But, I'm not persuaded a duty of care arose - or advice was provided - that could give rise to a claim to which this section could apply.

#### *Section 19 Financial Services and Markets Act 2000*

Mr C's representatives say the supplier here didn't have appropriate authorisation to arrange this finance - in breach of the above. I can't see that this issue was ever raised with BPF so I'm conscious that BPF hasn't had a chance to consider and respond. But I'm satisfied, in any event, that the supplier did hold the appropriate registration at the relevant time and I can't reasonably uphold Mr C's complaint on those grounds.

#### *Unaffordable lending*

Mr C says proper credit checks were not carried out and it was irresponsible of BPF to provide this loan. Our investigator didn't think there was sufficient evidence to reasonably conclude that the lending was unaffordable for Mr C. And I can't see that Mr C has provided much by way of further evidence about this after the investigator sent her view. But, even if I were to accept that BPF didn't do all that it should have when it agreed to lend, I would need to be satisfied that the lending was *actually* unaffordable for Mr C (and he lost out as a result) in order to uphold this part of his complaint.

In considering this, I can only take into account the standards that applied at the relevant time. I haven't got much information about Mr C's circumstances then. From the evidence I have seen, I'm not persuaded there are enough fair and reasonable grounds to conclude that the loan was unaffordable for Mr C. And I'm unable to uphold this aspect of his complaint.

### *Conclusions*

As the investigator explained, it's for the courts to decide whether or not any claim that Mr C may have against the supplier or BPF has expired under the LA. But, as far as I can see from the information available, any relevant claim has most likely exceeded the time limits set out in the LA. I think it is reasonable to take this into account and (for the reasons set out) I'm not persuaded there are sufficient fair and reasonable grounds to uphold Mr C's complaint. I don't think BPF has treated Mr C unfairly or acted unreasonably and I can't properly require BPF to compensate him or do anything else.

### **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 both parties to consider my provisional findings and let me have any further comments and information by 4 February 2022 (which was subsequently extended to 10 February 2022). I said I'd consider all the evidence available after that and make my final decision.

The time set for responses has now passed. I'm satisfied that both parties have received my provisional decision. Neither party has provided any new information or raised any objections to my provisional findings. I see no reasonable grounds to depart from my provisional conclusions in the circumstances. For the reasons I've set out above, I remain of the view that this service is able to consider Mr C's complaint and, having done so, I am unable to uphold it.

### **My final decision**

My decision is that the Financial Ombudsman Service can consider this complaint and, having done so, I do not uphold it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 17 March 2022.

Claire Jackson

**Ombudsman**