

The complaint

Mr W complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, won't refund to him the money that he paid for some holiday club membership point rights. His partner is also involved in his complaint and he's being represented by a legal adviser.

What happened

Mr W and his partner entered into an agreement with a holiday company for a trial membership of a holiday club in March 2011. They then entered into an acquisition agreement in June 2011 to buy 1,000 holiday club membership point rights from the holiday company. The purchase price was £17,894, they traded in their trial membership which was given a value of £5,995 and the outstanding balance of a loan that had been used to pay for the trial membership was consolidated. Mr W entered into a fixed sum loan agreement with Barclays Partner Finance for a loan of £15,888 and he agreed to make 180 monthly payments of £237.87 to Barclays Partner Finance.

Mr W's representative says that Mr W and his partner traded in those points rights towards the purchase of another holiday product from the holiday company in September 2013 and that they paid the balance of that purchase price using a loan from another lender. Mr W's representative made claims to Barclays Partner Finance under sections 75 and 140A of the Consumer Credit Act 1974 in September 2021 about the trial membership agreement and the acquisition agreement. Its letter to Barclays Partner Finance said that: Mr W had a claim for misrepresentation and that Barclays Partner Finance was jointly and severally liable with the holiday company for those misrepresentations; and the misrepresentations and practices in the sales presentation made the loan agreement unfair.

Barclays Partner Finance didn't respond to those claims so a complaint was made to this service about the acquisition agreement that Mr W and his partner had entered into in June 2011.

Our investigator didn't recommend that Mr W's complaint should be upheld. She said that Mr W's claims about the trial membership agreement were made too late. She thought that Barclays Partner Finance was entitled to rely on the timing of Mr W's section 75 claim about the June 2021 purchase to turn it down and she wasn't persuaded that there was a misrepresentation at that time. She said that she hadn't seen enough to suggest that the relationship between Mr W and Barclays Partner Finance was unfair and she wasn't persuaded that a court would reach the conclusion that the relationship was unfair. She also said that she hadn't seen anything persuasive to suggest that the lending was unaffordable for Mr W.

Mr W's representative, on behalf of Mr W, says that it doesn't accept our investigator's recommendation and it has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it used.

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.

Having done so, I agree with our investigator that Mr W's complaint shouldn't be upheld for these reasons:

- Mr W's complaint form says that the transaction that he's complaining about took place in June 2021 (and that's when he and his partner entered into the acquisition agreement) but our investigator said that his claims about the trial membership agreement were made too late;
- I don't consider that Mr W has made a complaint about Barclays Partner Finance's response to the claims that had been made to it about the trial membership agreement – but if such a complaint had been made, I would agree with our investigator that the claims were brought outside of the time limits set out in the Limitation Act 1980 so Barclays Partner Finance would have a defence to the claims and that it wouldn't be unreasonable for it to have rejected them;
- we don't have a free hand to consider every complaint that's referred to us and our rules, which we're required by law to follow, say – amongst other things – that we can't normally deal with a complaint if it's referred to us more than six years after the event complained of; or (if later) more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;
- Mr W's complaint is that Barclays Partner Finance didn't uphold the claims that he'd made to it about the acquisition agreement and I accept that he referred his complaint to this service within six years of his claims being made to Barclays Partner Finance by his representative in September 2021 - but I need to consider whether the Limitation Act applies to his claims;
- Mr W's claims were made under sections 75 and 140A but I'm not determining the outcome of those claims in this decision as only a court would be able to do that - I'm considering whether or not Barclays Partner Finance's response to those claims was fair and reasonable in the circumstances;
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met);
- Mr W's claim under section 75 is that the membership point rights were misrepresented to him and his partner and that they wouldn't have bought them if they hadn't been misrepresented to them - if the criteria for a claim under section 75 were met, Barclays Partner Finance would be expected to consider that claim unless the claim was brought outside of the time limits set out in the Limitation Act in which case it would be entitled to rely on the Limitation Act and to not consider the claim;
- the time limit for a misrepresentation claim (whether under section 2 or 9 of the Limitation Act) is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);
- I consider that Mr W could have made a claim to the holiday company or Barclays Partner Finance about the misrepresentations that he says induced him and his partner into buying the membership point rights in June 2011 as that was the latest time that any misrepresentations would have been made and any loss would have been incurred as that was when he also entered into the loan agreement with

Barclays Partner Finance;

- I consider that his cause of action accrued at that time, so he would have had six years from then to bring a section 75 misrepresentation claim against either the holiday company or Barclays Partner Finance – but a claim wasn't made under section 75 until September 2021, more than ten years later, which was outside of the time limits set out in the Limitation Act so I consider that Barclays Partner Finance has a defence to that claim and I find that it wouldn't have been unreasonable for it to have rejected it;
- Mr W's representative says that the misrepresentations and practices in the sales presentation made the loan agreement unfair and section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;
- the courts have said, when considering section 140A, that 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;
- Barclays Partner Finance has provided an account statement which show that Mr W's loan account is still open so I don't consider that Mr W's claim under section 140A is time-barred;
- Mr W's representative says that Mr W and his partner entered into the acquisition agreement in reliance on the following untrue statements that were made during the sales presentation: they could easily divest themselves of the points membership by the holiday company selling them on their behalf; and they would be able to holiday at any resort in the UK and worldwide, any time they wished, even in high season, with accommodation of the same standard as they had been shown;
- Mr W and his partner entered into the acquisition agreement and they also signed the terms and conditions, a separate standard form of the withdrawal notice that could be given to withdraw from the acquisition agreement, a member's declaration, a standard information form and an exchange contract;
- the member's declaration says: *"We understand that we will have permanent Membership of .. the Vacation Club"*; and: *"We understand that [the holiday company] does not and will not run any resale or rental programmes and will not repurchase our [point rights] other than as a trade in against future purchases"*;
- the standard information form says: *"On becoming a Member, you will be entitled to exercise occupancy rights (subject to availability) in any of the Vacation Club Scheme Accommodation"*;
- neither Mr W nor his representative has provided a detailed account of the circumstances in which the alleged misrepresentations were made, the conversations that took place or the information that was provided to Mr W and his partner before their June 2011 purchase;
- I'm not persuaded that there's enough evidence to show that the holiday company represented to Mr W and his partner that the holiday company would sell their membership point rights on their behalf or that they would be able to holiday at any resort in the UK and worldwide, any time that they wished;
- nor am I persuaded that there's enough evidence to show that the membership point rights were misrepresented to Mr W and his partner by the holiday company or that they were induced into entering into the acquisition agreement by any such misrepresentations;

- Mr W's representative's September 2021 letter to Barclays Partner Finance says that Mr W and his partner have encountered problems with their membership including lack of availability and the standard of accommodation but I'm not persuaded that the alleged problems would cause Mr W's relationship with Barclays Partner Finance to be unfair;
- that letter also says that the duration of the membership and the obligation to pay management charges are unfair terms and Mr W's representative has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it used - but it would be for a court to determine whether or not any of the terms in the acquisition agreement and the other documents that Mr W and his partner entered into with the holiday company are unfair;
- the member's declaration says: *"We understand that currently the annual Membership Fee is Euro 257 03 for 2011. In addition the annual Individual Management Charge is Euro 0 8617 per Point purchased for 2011 and that an invoice will be sent for these within 3 months of full payment of the Agreement and thereafter by 1st January each year. 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"*; so I consider that Mr W and his partner were made aware of the annual membership fee and the individual management charge that would be payable;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated in practice and whether the operation of that term caused the relationship to be unfair;
- I'm not persuaded that there's enough evidence to show that the terms of the documents have been applied or operated unfairly against Mr W and his partner and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mr W and Barclays Partner Finance;
- Mr W's representative's September 2021 letter says that the sales practices used by the holiday company included misleading commercial actions, aggressive commercial practices and prohibited practices;
- Mr W and his partner had signed the separate standard form of the withdrawal notice that could be given to withdraw from the acquisition agreement which said that they had the right to withdraw from it within fourteen days without giving any reason but I've seen no evidence to show that they contacted either the holiday company or Barclays Partner Finance within that period to withdraw from the acquisition agreement;
- the loan agreement clearly set out Mr W's right to cancel the loan agreement but I've seen no evidence to show that he contacted Barclays Partner Finance within the cancellation period to cancel the loan agreement;
- Mr W and his partner entered into the acquisition agreement in June 2011 but I've seen no evidence to show that they complained about the sales practices that were used by the holiday company until Mr W's representative's September 2021 letter to Barclays Partner Finance (more than ten years later) and if they'd been subjected to unacceptably aggressive commercial practices and didn't want to buy the membership point rights I consider that it would be reasonable to expect Mr W to have complained to Barclays Partner Finance about any such issues before then;

- Mr W's representative says that Mr W and his partner traded in the point rights towards the purchase of another holiday product from the holiday company in September 2013 - I don't consider it to be likely that they would have agreed to buy another holiday product from the holiday company at that time if the holiday company had used misleading commercial actions, aggressive commercial practices and prohibited sales practices in June 2011;
- I'm not persuaded that there's enough evidence to show that Mr W and his partner were unduly pressured into entering into the acquisition agreement or that Mr W was unduly pressured into entering into the loan agreement or that the holiday company used unacceptably aggressive commercial practices against them;
- the September 2021 letter also says that Mr W discovered that the loan was at a significantly higher rate of interest than that being provided by other lenders and that at no stage prior to entering into the loan agreement was any proper assessment done to assess Mr W's creditworthiness and an adequate or transparent explanation of the loan agreement wasn't given to Mr W;
- Mr W has provided a copy of the pre-contract credit information and the loan agreement both of which clearly set out the interest rate, the amount of interest payable, the total amount payable and the number and amount of the monthly payments – and the loan agreement said: *"This is a credit agreement. Sign it only if you want to be legally bound by its terms"*;
- Mr W entered into the loan agreement in June 2011 but I've seen no evidence to show that he complained to Barclays Partner Finance about the terms of the loan, the affordability checks that were conducted or the explanation of the loan that he was given until his representative's September 2021 letter to Barclays Partner Finance (more than ten years later) and I consider that it would be reasonable to expect Mr W to have complained to Barclays Partner Finance about any such issues before then;
- neither Mr W nor his representative has provided any detailed information about Mr W's financial situation in June 2011 when the loan was made to him but the loan account statement shows that he's made the monthly payment of £237.87 each month since then;
- Mr W's representative says that it considers that Mr W was targeted with deceitful, oppressive, unfair and improper conduct, in breach of the Office of Fair Trading's guidance on irresponsible lending but I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mr W in June 2011 when it was made to him, that Barclays Partner Finance lent to him irresponsibly or that it has acted incorrectly in connection with the loan;
- Barclays Partner Finance didn't issue a substantive response to Mr W's claims so I can't say that its response to his claims was fair and reasonable – but if it had properly responded to his claims I consider that it would have been fair and reasonable for it not to have upheld them; and
- I sympathise with Mr W for the issues that he and his partner have had with their membership point rights but I find that it wouldn't be fair or reasonable in these circumstances for me to require Barclays Partner Finance to refund to Mr W any of the money that he's paid under the loan agreement, to cancel the loan agreement, to pay him any compensation or to take any other action in response to his complaint.

My final decision

My decision is that I don't uphold Mr W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 11 March 2024.

Jarrold Hastings
Ombudsman