

The complaint

Mr L's complaint is, in essence that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, acted unfairly and unreasonably by: (1) participating in an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974; and (2) deciding against paying claims under Section 75 of that Act.

What happened

I issued a provisional decision on this complaint in April 2024 in which I described what had happened as follows:

“Mr L entered into a purchase agreement to buy three holiday club membership weeks from a holiday company in January 2009. The total purchase price was £33,000 and he paid a deposit of £9,000 so the balance due from him was £24,000. Mr L also entered into a credit card agreement (the ‘Credit Card Agreement’) with Barclays Partner Finance and he used that credit to pay the balance due to the holiday company. The Credit Card Agreement included a promotional interest free period and Barclays Partner Finance says that the credit was repaid in July 2009.

Mr L entered into another purchase agreement to buy five more holiday club membership weeks from the holiday company in September 2009. The total purchase price was £24,950 and Mr L used the Credit Card Agreement to pay the purchase price to the holiday company. Barclays Partner Finance says that the credit was repaid in March 2010 and that the credit card account was closed in January 2013.

Mr L entered into a third purchase agreement to buy another holiday club membership week from the holiday company in November 2011. The purchase price was £14,356 and Mr L paid £3,611 so the balance due from him was £11,745. He entered into a fixed sum loan agreement (the Loan Agreement’) with Barclays Partner Finance for a loan of £11,745 and agreed to make 120 monthly repayments of £145.80 to Barclays Partner Finance. The loan was repaid, and Barclays Partner Finance says that the loan account was closed, in May 2013.

Mr L, represented by a legal adviser, wrote to Barclays Partner Finance in October 2019 to complain about:

1. misrepresentations by the holiday company at the times of the sales and breaches of contract, giving him claims under Section 75; and
2. Barclays Partner Finance's participation in an unfair credit relationship under the Credit Card Agreement and the Loan Agreement and related purchase agreements for the purposes of Section 140A.

It said that the holiday company made misrepresentations to Mr L which he relied on when entering into the loans (by which I understand it to have meant the Credit Card Agreement and the Loan Agreement). It also said that the agreements created an unfair relationship between Mr L and Barclays Partner Finance because of: the

holiday company's misrepresentations, misleading acts, omissions, falsities and unfair commercial practices; the terms of the agreements; the holiday company's failure to make a reasonable assessment on affordability; and irresponsible lending.

Barclays Partner Finance said that the purchase price for Mr L's January 2009 purchase was £33,000 which exceeded the limit for liability under Section 75 so it was unable to investigate his claim regarding that issue. It also said that claims relating to Mr L's September 2009 purchase were time-barred under the Limitation Act 1980. Mr L wasn't satisfied with its response so a complaint was made to this service.

Our investigator didn't recommend that Mr L's complaint should be upheld. She said that Mr L's January 2009 purchase was for £33,000 which exceeded the limit for a claim under Section 75 so she thought that Barclays Partner Finance had handled that claim fairly by saying it wasn't able to investigate it further. She thought that Barclays Partner Finance was entitled to rely on the timing of the Section 75 claims relating to Mr L's September 2009 and November 2011 purchases to turn them down. She thought that Mr L's claims under Section 140A were late under the Limitation Act 1980 and she said that she hadn't seen any persuasive evidence to suggest that the lending was unaffordable for Mr L.

Mr L's representative, on his behalf, has asked for this complaint to be considered by an ombudsman. It has responded in detail and says, in summary and amongst other things, that:

- Mr L bought three holiday club membership weeks in September 2009 and it's confident that each of them would cost less than £30,000 so the statutory limit is unaffected; and
- the limitation period is extended under Section 32 of the Limitation Act because Mr L couldn't, within the bounds of reasonable diligence, have discovered the fraudulent misrepresentations made by the holiday company within six years of the Credit Card Agreement and the Loan Agreement ending”.

My provisional decision

I said in my provisional decision:

“I've read and considered all the available evidence and arguments to decide:

1. whether this service's jurisdiction permits me to consider the entire complaint and, if relevant;
2. what's fair and reasonable insofar as the merits of the complaint are concerned.

Having done so, subject to any further comments or evidence that I receive from any of Mr L, his representative and Barclays Partner Finance, my provisional decision is that I intend to conclude that:

1. Mr L's complaint about a credit relationship with Barclays Partner Finance that was unfair to him isn't within this service's jurisdiction because it wasn't referred to this service within the time limits set out in Rule 2.8.2 R(2) of the Dispute Resolution Rules ('DISP') in the Financial Conduct Authority's Handbook; and
2. Mr L's complaint about Barclays Partner Finance's decision to reject his

concerns about the holiday company's misrepresentations under Section 75 was made in time under DISP 2.8.2 R(2) but that it wouldn't be fair or reasonable for me to require it to take any action in response to his complaint.

Was Mr L's Section 140A complaint made in time?

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. An assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into and the courts have said that determining whether or not the relationship complained of was unfair has to be made "*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*" – which is the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

In alleging that he was subject to an unfair credit relationship under Section 140A, Mr L's complaint extends to Barclays Partner Finance's acts and omissions, in being party to such a relationship and perpetuating its unfairness, right up until the moment his credit relationship with it ended.

DISP 2.8.2 R covers whether Mr L's complaint was made in time for the purposes of allowing this service to consider it and says: "*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service ... 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; ... unless ... in the view of the Ombudsman, the failure to comply with the time limits ... was as a result of exceptional circumstances ...*".

(a) Six Years

The event complained about for the purposes of DISP 2.8.2 R(2)(a), is the allegation that Barclays Partner Finance was party to an unfair credit relationship with Mr L and, during the currency of that relationship, it perpetuated the unfairness, failing in its responsibilities to take the necessary steps to correct the situation.

Barclays Partner Finance has provided evidence to show that the credit that Mr L used to make his January 2009 purchase was repaid in July 2009, that the credit that he used to make his September 2009 purchase was repaid in March 2010 and that the credit card agreement ended in January 2013 and that the loan that it made to Mr L in November 2011 was repaid and the loan account was closed in May 2013. I consider that the Credit Card Agreement, the Loan Agreement and, in turn, Mr L's credit relationship with Barclays Partner Finance, ended in May 2013 when his loan account was closed. But his complaint about his credit relationship with Barclays Partner Finance wasn't made to it until October 2019 so I consider it to be clear that he complained more than six years after the event complained about.

(b) Three Years

DISP 2.8.2 R(2)(b) could provide Mr L with more time to complain about the events in question if he did so within three years of the date he became aware, or ought reasonably to have become aware, that he had cause to complain. This raises the question as to whether Mr L was aware, or ought reasonably to have been aware,

more than three years before he first complained to Barclays Partner Finance that he had cause to complain to it.

So, that's what I've considered here and to answer that question, I need to consider whether and when Mr L was aware, or ought reasonably to have been aware, that:

1. there was a problem with the lending or with the holiday club membership;
2. the problem(s) caused him a loss;
3. another party's actions (or its failure to act) may have caused the loss; and
4. the other party may have been Barclays Partner Finance.

Mr L's representative's October 2019 letter sets out the reasons why Mr L considers his credit relationship with Barclays Partner Finance to be unfair to him under the Credit Card Agreement, the Loan Agreement and the related purchase agreements. It says that the holiday company failed to make a reasonable assessment on affordability and the lending was irresponsible.

It's not unreasonable to suggest that most people would realise the importance to a lender of understanding a person's income before lending them money. And as Mr L says that Barclays Partner Finance didn't make an assessment on affordability, it seems to me that he ought reasonably to have known no later than November 2011 (when he entered into the Loan Agreement) that Barclays Partner Finance had agreed to lend to him when there were serious questions left unanswered as to whether he could afford the loan – which is one of the arguments he's now making for why the credit relationship with Barclays Partner Finance was unfair to him.

This alone means that Mr L ought reasonably to have realised that he had cause to complain that his credit relationship with Barclays Partner Finance might have been unfair to him long before he did so.

The letter also describes the alleged misrepresentations that were made by the holiday company and gives particular of what it calls *"the falsities"*. But the purchases were made in January and September 2009 and November 2011 and it seems likely to me that it wouldn't have been long after November 2011 (at the latest) that Mr L would have known that there were significant problems with the purchases causing him financial losses.

The letter says: *"By November 2013 our client was getting increasingly worried. The yacht week had not been chartered since 2009 and the remaining apartment weeks remained unsold. The client was paying increasing maintenance fees and loan repayments with no money coming in for over a year"*. So by November 2013, I consider that Mr L would have known, or ought reasonably to have known, that another party was responsible for the losses that followed. One of those parties was, quite obviously, the holiday company, but Mr L also knew that Barclays Partner Finance had financed the purchases and that the holiday company had brokered the finance.

The letter also says: *"Those attending [the sales presentation] who could not afford to invest on the day were encouraged to fund them with loan agreements, which were provided by Barclays Partner Finance"*. Given the size of the financial commitments that Mr L found himself with because of the purchases and the associated credit and loan, and the long-term financial consequences of those commitments for him, I think that it's reasonable to have expected Mr L to carry out enquiries when concerns

about the credit, the loan and the membership first arose in order to establish what his rights were.

What's more, Mr L signed complex contracts, and with that being the case, if he wasn't already aware of the implications of his concerns and the possible complaints that he might make in light of them, the obvious course for him to take was to make further enquiries and seek advice. Such enquiries seem to me to have been a step he ought reasonably to have taken no later than shortly after November 2013 when he was "*getting increasingly worried*". And had Mr L carried out such enquiries, I think they would have led him to discover that Barclays Partner Finance, as a connected lender that provided finance for his purchases, may well have borne responsibility for the holiday company's alleged failings.

With all of that being the case, I think that Mr L ought reasonably to have been aware that he had cause to complain about Barclays Partner Finance holding him in an unfair credit relationship more than three years before he first complained. So, I'm not persuaded that the three-year part of the relevant time limit extends the six-year part of it for the purpose of Mr L's complaint about an unfair credit relationship under Section 140A. And that means he had to complain about Barclays Partner Finance's role in such a relationship by May 2019. But as he didn't do that until October 2019, his complaint was too late under the rules that I have to apply.

Exceptional Circumstances

I can consider the merits of a complaint referred to this service after the expiry of the relevant time limit if there are exceptional circumstances that justify why it was late. But I can't see that there are any such circumstances that apply to Mr L's complaint about an unfair credit relationship with Barclays Partner Finance.

I realise that this will be disappointing for Mr L but I hope he understands why I can't disregard the rules that apply.

Mr L's Section 75 complaint

Section 75 operates quite differently to Section 140A and, when it applies, it can give borrowers a very different ground for complaint against their lender. Whereas, as I've explained, Section 140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, Section 75 simply creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything that the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which Section 75 imposes on the lender a "*like claim*" to that which the borrower enjoys against the supplier. If the lender is notified of a valid Section 75 claim, it should pay its liability and if it fails or refuses to do so, that failure or refusal can give rise to a complaint to this service.

So, when a complaint is referred to this service because of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages this service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the 6 and 3 year time limit under DISP 2.8.2 R(2) to complain about an unsuccessful attempt to initiate a Section 75 claim doesn't usually start until the respondent firm answers and refuses the claim. It's clear that this complaint about

Barclays Partner Finance's handling of Mr L's Section 75 claim was referred to this service in time for the purpose of the rules on our jurisdiction.

Barclays Partner Finance said that the purchase price for Mr L's January 2009 purchase was £33,000 which exceeded the limit for liability under Section 75 so it was unable to investigate his claim regarding that issue. One of the criteria for a claim under Section 75 is that it doesn't apply to a claim so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000.

Under the purchase agreement that Mr L entered into in January 2009, he bought three holiday club membership weeks for a total price of £33,000. Although the price of each week wasn't specified, the price for each of those weeks couldn't have been more than £30,000 so I consider that Mr L's claim did relate to a single item to which the supplier was likely to have attached a cash price of less than £30,000. So I consider that Section 75 does apply to Mr L's January 2009 purchase. But as I've already said, I don't think that it would be fair or reasonable to uphold this complaint for reasons relating to Mr L's Section 75 claim.

As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr L's Section 75 claim was time-barred under the Limitation Act before he made it to Barclays Partner Finance.

A claim under Section 75 is a "*like claim*" against the creditor. It essentially mirrors the claim that the consumer could make against the supplier. A claim for misrepresentation against a supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967 and the limitation period to make such a claim expires six years from the date on which the cause of action accrued, under Section 2 of the Limitation Act.

But a claim, like the one in question here, under Section 75 is also "*an action to recover any sum by virtue of any enactment*" under Section 9 of the Limitation Act and the limitation period under that provision is also six years from the date on which the cause of action accrued. The date on which Mr L's cause of action accrued was in November 2011, the date of the latest of the sales that were made to him. I say this because Mr L entered into the latest of the purchase agreements at that time based on the alleged misrepresentations of the holiday company – on which he says he relied - and as he used a loan from Barclays Partner Finance to finance the purchase, it was when he entered into the Loan Agreement that he suffered a loss.

Mr L first notified Barclays Partner Finance of his Section 75 claim in October 2019 and as more than six years had passed between the time of the last sale and when he first made his claim to Barclays Partner Finance, I don't think that it was unfair or unreasonable of Barclays Partner Finance to reject Mr L's concerns about the holiday company's alleged misrepresentations.

Section 32 of the Limitation Act

Mr L's representative says that, in addition to the arguments raised in its October 2019 claim letter, it wishes to present to this service its substantive argument on Section 32 of the Limitation Act and that this supplemental argument is already with this service in respect of a submission that it has made on behalf of another client

and which goes into great detail on the legal arguments of deliberate concealment and Section 32 (and it provided a copy of that submission).

It says that it has provided around 30 witness statements which illustrate a contradiction between what was told to customers and that there cannot be honest belief in the truth when saying one thing to one customer and the opposite thing to another so the holiday company's actions must be seen in a context of serial conduct of fraud and wrongdoing.

Mr L's representative's October 2019 letter sets out the misrepresentations that were allegedly made by the holiday company as follows:

- *"It is impossible to dispose of the timeshares and there is no facility to relinquish ownership of them other than through the resale market; agreeing to the "upgrade" is the only way for our client to relinquish ownership of their existing timeshares at a profit;*
- *When the sales were not being made, our client was told that this was due to the apartments being the 'wrong type';*
- *Our client was told that the apartments were particularly outstanding in comparison to others the Supplier had already sold. Our client was shown various statistics of previously sold timeshare property that was bought for one price and sold on quickly for a profit;*
- *The sales team specifically stated that they could sell the timeshare for a profit that would definitely (at least) recoup any money invested. The Supplier promised that the apartments would be sold before maintenance became due;*
- *The Supplier was experienced in property and specifically experienced in selling property such as the new investment timeshare quickly and for a profit. The Supplier expressly boasted of its selling credentials in that it had both the resources and the necessary qualifications. The benchmark of the salesmen ought to be that of an "award winning" salesperson as that is what they passed themselves off as;*
- *Regarding the yacht weeks, our client was expressly told they would receive a yearly income and that this would cover the maintenance and realise them a profit; and*
- *The Second and Third Loans were alleged to be the best way to get out of the original debt of The First Loan and original purchases in 2001-2003".*

I need to consider whether Mr L, with reasonable diligence, could have discovered the alleged misrepresentations and I think the essential elements needed for him to bring a claim were knowledge that what he'd been told was wrong and that he'd suffered a loss because of it, not that the holiday company said different things to different customers.

For Section 32 to assist him, Mr L would need to show that he couldn't have discovered the alleged misrepresentations before November 2017 (at the latest). Even if I accept that the holiday company misrepresented the membership weeks to Mr L (and I make no such finding), I think that he ought reasonably to have been aware that what he'd been told was wrong and that he'd suffered a loss because of it within a few years of buying the membership weeks, and certainly long before November 2017. I therefore don't think that the limitation period for Mr L's claim

would be extended under Section 32 and I think that Barclays Partner Finance had a defence to those claims and acted fairly in turning them down”.

Subject to any further comments or evidence that I received from any of Mr L, his representative and Barclays Partner Finance, my provisional decision was: that this service's jurisdiction doesn't permit me to consider the merits of Mr L's complaint about an unfair credit relationship with Barclays Partner Finance because it wasn't made within the time limits set out in DISP 2.8.2 R (2); and that I don't consider that Barclays Partner Finance needs to do more in regard to the claim made under Section 75.

Mr L's representative says that it doesn't have any further evidence but doesn't understand why concealment isn't inferred from the significant body of evidence provided. Barclays Partner Finance says that it has nothing to add.

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 none of Mr L, his representative and Barclays Partner Finance has provided any comments or evidence that haven't already been made, I see no reason to change the findings that I set out in my provisional decision. For the reasons set out in my provisional decision, I don't consider that Barclays Partner Finance needs to do more in regard to the claim made under Section 75.

I'm issuing a separate decision about Mr L's complaint about an unfair credit relationship with Barclays Partner Finance.

My final decision

My decision is that Barclays Partner Finance needs to do no more in regard to the claim made under Section 75.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 8 July 2024.

Jarrold Hastings

Ombudsman