

The complaint

Mr M 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 timeshare membership ("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 M and Mrs M but the loan agreement is in Mr M's sole name. This means Mr M is the complainant who is eligible to bring a complaint to our service and that's why I've referred to him alone in this decision.

What happened

Mr M and Mrs M acquired rights under a vacation membership agreement from a third party (that I'll call A) in June 2007. They paid a deposit by credit card and put off paying the balance under a deferred payment agreement with A. In February 2008 Mr M took out a fixed sum loan with BPF for around £10,700 to pay the deferred amount. Under the loan terms he agreed to pay back over £14,000 (including interest) at almost £240 a month for 60 months. Mr M says misrepresentations were made and he was treated unfairly when the product was sold and no proper affordability checks were undertaken when he took out the loan. He wants BPF to provide a refund and compensation.

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

One of our investigators looked into the matter. In summary, he was satisfied that this service could look at Mr M's complaint but he thought Mr M had raised his section 75 claim too late - as he contacted BPF outside of the six year time limit under the LA. He thought it was most likely that Mr M's loan account was closed in 2008 so Mr M had raised his section 140A claim outside of the relevant time limits too. He wasn't persuaded that other provisions of the LA would extend time or otherwise assist Mr M.

The investigator thought Mr M's claims have more than likely exceeded the relevant time limits and, whilst that's for the courts to decide, it's not unreasonable for BPF to take this into account. He didn't think Mr M had provided enough evidence to reasonably conclude that it was irresponsible of BPF to provide this loan and the borrowing was unaffordable for him. And he wasn't persuaded that BPF's decision to decline Mr M's claims was unfair or unreasonable in the circumstances - so he didn't think the complaint should be upheld.

Mr M disagreed and asked for an ombudsman to review the matter making various submissions which I've summarised below:-

- affordability checks weren't undertaken and the lending was irresponsible and unaffordable;
- high pressure sales tactics (which amounted to undue influence) were used – amongst other things, Mr M attended a sales event which lasted the whole day, he wasn't allowed to leave and he was given complex contractual documentation to sign at the time, giving rise to an unfair relationship contrary to Section 140A;

- the product was sold as 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 M to enter into the agreements;
- Mr M relied on what was said and experienced loss as a result and he could not have known that misrepresentations were fraudulent - and what remedies might be available - until he sought advice and instructed representatives;
- the primary limitation period hasn't expired but, even if it had, Mr M relies on section 32 of the LA (specifically section 32(l)(b)) to extend the limitation period.

Having considered the available evidence, I wasn't minded to uphold this complaint. My reasons weren't quite the same as the investigator's however and I thought it was fair to give the parties the chance to see my provisional findings and respond if they wanted to before I made my final decision. I issued a provisional decision on 14 September 2022 and I've set out what I decided provisionally (and why) below (in italics). 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. 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 can see that Mr M and his family have experienced some very difficult personal circumstances and I'm sorry to hear of all that they've been through. I want to assure Mr M that I have considered everything that's been said and sent to us. If I don't address every single point that's been raised, it's not because I haven't thought about it. I have, but I'm going to concentrate in this decision on what I think is relevant and material to reaching a fair and reasonable outcome. I realise this is likely to come as a disappointment to Mr M but, based on the evidence I've seen so far, I'm not minded to require BPF to do anything else to resolve this matter - and I've explained why below.

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 the events Mr M is complaining about took place more than six years before he brought his complaint to us and that's too late, under our rules. 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 M 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 M'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 M is complaining here about is BPF's rejection of the claim he made under the CCA. So, the relevant date is when BPF declined his complaint in September 2018. I'm satisfied that Mr M had already brought his complaint to our service by that stage so he's not out of time to do so. I find this part of his complaint falls within the jurisdiction of this service and we can consider it.

Jurisdiction and section 140A

Mr M 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 took place in 2007. I can't reasonably conclude that this part of Mr M'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 M 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).

It's been said that Mr M 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 M 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. I accept this is not the same as Mr M knowing that he had cause for complaint against BPF. And, whilst Mr M 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 M 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 M 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 M's complaint. Mr M 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 M had to bring these claims against BPF is probably out of time under the LA. If that's correct, then I agree it's something that BPF could reasonably take into account when it decided to decline Mr M's claims. I should make it clear however that I am not deciding here if any right that Mr M 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 M 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 M purchased the product - in June 2007. Amongst other things, this was when he agreed to pay for the benefits which he says were misrepresented. As a consequence, I think Mr M would have needed to bring any claim under section 75 within six years of the date he entered into the transaction to buy the product. I'm satisfied that more than six years had passed since that date before Mr M contacted BPF in 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 say it was wrong of BPF to decline Mr M'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 but I haven't considered this as I'm not minded to uphold this complaint for other reasons.

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 so I've considered when (and whether) that happened. Mrs M supplied a statement that says, whilst the agreement with BPF was for five years, they made repayments for eight and they never had any contact or received statements. And when they asked BPF for account information, it had no record of them and said payments were going into a holding account. She also said Mr M stopped making payments and A got in touch to say £7,000 remained owing and sent bailiffs so Mr M paid £2,500 but didn't get a receipt. She states that he still doesn't know the account balance or who the debt is with – given A says it's their debt but Mr M got the loan from BPF.

We asked BPF for more information and it was unable to supply the original loan agreement. Financial businesses aren't required to keep information indefinitely and, given the passage of time here, I can't fairly criticise BPF for that. BPF has provided a statement of account. I'm satisfied this shows the relevant loan was taken out on 7 February 2008 and payments were made by direct debit and debit card from March until August the same year. I can see a direct debit for the monthly amount went unpaid in August 2008 and it looks as if the loan was cancelled a month or so later - with the balance (of £9,299) reduced to nil.

In light of the different loan histories provided by the parties we asked them both to provide additional information. BPF checked its systems and said it no longer has relevant contact notes but the loan was cancelled, funds were returned to BPF and there was no repayment plan put in place. Mr M hasn't supplied anything else. I'm satisfied that BPF supplied the account statement (referred to above) to Mr M in September 2018 and confirmed then that the loan was cancelled in 2008 and account balance was nil. I've seen no evidence to contradict this. And, on the information I have at the moment, I think it looks as if the credit facility ended in or about October 2008. As a consequence, I think Mr M would have needed to bring any claim under section 140A by October 2014.

I'm satisfied Mr M didn't contact BPF until 2018. That's more than six years after the date time started running. I consider any right he 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 his claim.

Section 32 LA

I appreciate Mr M 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've given some thought 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 M 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 M had concerns about the product soon after purchase. Mrs M hasn't included dates in her statement but it looks as if they were unhappy with the purchase very early on. On balance, I think Mr M was probably aware then that benefits he says he was told at the outset would be provided might have been misrepresented - and it's more likely than not he also realised the product wasn't what he expected, at that stage. I consider this would have been sufficient to enable Mr M 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) submissions made about the payment of commission. It's been said that 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 has no record of how much – if any – commission was paid. And 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 M 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 M. I don't think it owed him a fiduciary duty. And I'm satisfied it wasn't obliged to provide an impartial or disinterested recommendation, in these particular circumstances. It follows, I'm not persuaded that section 32 assists Mr M. However, even if Mr M 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 M purchased the product and when he took out the finance and having considered the available documentation, I'm not persuaded that 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

After the matter was referred to our service, it was suggested that the supplier didn't have appropriate authorisation to arrange this finance - in breach of section 19 above. I think this is a new claim - I can't see that it was raised with BPF previously – and I find it fair that BPF should have the opportunity to consider this and respond so it's not something I'm able to look at here. It remains open to Mr M to put this to BPF and, if he's unhappy with the response, he may be able to bring another complaint to our service.

Unaffordable lending

Mr M says proper credit checks were not carried out and it was irresponsible of BPF to provide this loan. BPF hasn't been able to provide details of any credit checks but, even if I were to accept that BPF didn't do all that it should have when it agreed to lend, I'd need to be satisfied that the lending was actually unaffordable for Mr M (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.

We asked for information about Mr M's finances at the time and Mrs M told us that Mr M earned about £14,000 a year and their joint annual income was about £26,000. She said the mortgage cost about £678 a month, they took out a secured loan to pay off other debts that cost £282 a month and they didn't think Mr M would be accepted for the BPF loan as he was not creditworthy at the time.

Our investigator didn't think there was enough evidence to reasonably conclude that the lending was unaffordable, based on the evidence available. After the investigator sent his view, Mrs M provided another statement containing somewhat different figures. She said their joint income was approximately £29,000 per annum with a monthly mortgage payment of over £1,000 and they paid £218 on the secured loan and essential outgoings for utilities and the like. Mrs M reiterated their surprise that Mr M was accepted for the BPF loan as they couldn't afford the monthly payments at that time and said they've been in a debt management plan (DMP) since 2015.

I'm sorry to hear that Mr M and Mrs M have a difficult time and they had to enter a DMP in 2015. I have sympathy for the situation they found themselves in. I realise the differing figures provided probably resulted from memories fading over time but I can't fairly rely on such inconsistent information. We asked Mr M if he was able to send us more evidence about his finances at the relevant time – which could include details of income and outgoings as well as documentary evidence such as bank statements, bills and/or his credit file – but we haven't received anything else.

On the evidence I've got, I can't fairly conclude that the credit provided by BPF in 2008 was unaffordable for Mr M solely on the grounds he entered a DMP some years later, in 2015. Taking everything I've seen so far into account, I'm not persuaded that there are sufficient fair and reasonable grounds to conclude that this loan was unaffordable for him when he took it out so I'm unable to uphold this aspect of his complaint.

As the investigator explained, it's for the courts to decide if any claim that Mr M 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 M's complaint. I don't think BPF has treated Mr M 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 the parties to consider my provisional findings and let me have any further comments and information by 28 September 2022. I said I'd consider all the evidence available after that and make my final decision. BPF told us it had nothing further to add.

An issue arose regarding the appointment of a firm of solicitors to represent Mr M. The investigator explained the problem to Mr M and the relevant firm and I extended the time allowed for responses to my provisional decision - to give them the opportunity to sort things out. The time set for responses has now passed and we haven't received anything further.

Neither party has raised any objections to my provisional findings and I see no reasonable grounds to depart from my provisional conclusions in the circumstances. For the reasons set out above, I remain of the view that there aren't sufficient fair and reasonable grounds to uphold Mr M's complaint. I don't think BPF has treated him unfairly or acted unreasonably and I can't properly require BPF to compensate him or do anything else.

My final decision

For the reasons I've given, my decision is this service is able to consider Mr M's complaint and, having done so, I'm unable to uphold it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 8 February 2023.

Claire Jackson
Ombudsman