

The complaint

Mrs F complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance (BPF) didn't address her complaint about the authorisation of the credit intermediary used when her BPF credit card agreement was set up to finance the acquisition of a holiday product.

Further complaint points were then raised in regard to claims under Sections 75 and 140A of the Consumer Credit Act 1974 (CCA) in relation to a holiday product she acquired with Mr F, in 2007.

This complaint is Mrs F's, because it relates to a credit agreement in her sole name. But as the holiday product was in Mr and Mrs F's name, I'll refer to Mr and Mrs F throughout much of this decision.

What happened

Mr and Mrs F entered into a purchase agreement for a holiday product with a third-party supplier (the 'Supplier') in November 2007 ('the 'Time of Sale'). Mrs F financed the acquisition through a credit card agreement with BPF. It appears that the credit card agreement was settled in May 2008. Mrs F complained to BPF in July 2020 saying that the credit agreement was arranged by an unauthorised credit broker.

BPF issued a final response letter in October 2020. It said that the Limitation Act 1980 (LA) needed to be considered and that any claim under Section 75 of the CCA needed to be made within six years of the Time of Sale. As Mrs F contacted BPF more than six years after the Time of Sale it said the claim was out of time.

Mr and Mrs F - acting through a professional representative (PR) – referred their complaint to the Financial Ombudsman Service in March 2021, raising issues of misrepresentation and lawful authority. The PR raised a number of issues and while I haven't repeated these all in detail, a summary of the key concerns are noted below:

Unlawful authority

- The PR noted that BPF's comments about the credit broker but continued to raise concerns about its authority including noting it had breached its authorisation due to the misrepresentations made.

Misrepresentation

- Mr and Mrs F believed they would be able to stay in luxury accommodation in an exclusive members club whenever they wanted. But when they tried to book holidays, there wasn't availability.

Unfair Relationship

- Mrs F was provided with the credit agreement after a lengthy and pressurised sale

meeting.

- The high interest rate on the credit agreement was indicative of an unfair relationship.

Other issues raised

- Adequate affordability checks weren't undertaken.

Our investigator issued a view in June 2022. He concluded that:

- The Section 75 claim for misrepresentation was made out of time under the Limitation Act 1980 (LA).
- The Section 140A claim was made out of time under the Limitation Act 1980 (LA).
- He hadn't seen persuasive evidence that the lending was unaffordable.
- The credit broker had the required authorisation at the time the credit agreement was arranged.

Mr and Mrs F didn't agree with our investigator's view. PR responded to the view saying the following:

- Evidence hadn't been provided to show that the credit broker had the required authorisation at the time the credit agreement was arranged.
- The Section 75 and 140A claims weren't made out of time. Mrs F couldn't have known her cause for a claim at the Time of Sale. It also said that maintenance fees continued to be charged giving rise to new limitation periods.

My provisional conclusions

I issued a provisional decision on this complaint. My findings were as follows:

Authorisation of the credit intermediary

Mrs F financed the acquisition through a credit card agreement with BPF provided at the Time of Sale. The information provided by BPF lists a retailer for the agreement. However, as the Supplier named on the purchase agreement was already in the position to arrange the credit agreement because it held a Consumer Credit Licence at the Time of Sale, in the absence of any persuasive evidence to suggest otherwise, I find it more likely than not that the Supplier named on the purchase agreement arranged the credit agreement. As they had the required license at the time, I do not find I have evidence to uphold this part of Mrs F's complaint.

Section 75: Misrepresentation

When a consumer has a claim for misrepresentation against a supplier, they can, in certain circumstances, make a "like" claim against their lender under section 75 of the CCA. The claim against the lender effectively mirrors the claim the consumer could make against the supplier provided it's made inside the relevant limitation period.

But a section 75 claim is "an action to recover any sum by virtue of any enactment" under section 9 of the Limitation Act 1980. And the limitation period under that provision is six years from the date on which the cause of action accrued.

Only a court can decide whether Mrs F's claim was made out of time under the LA. But the Act's still relevant here, as I need to take it into account in deciding whether BPF's response to the claim was reasonable.

The date on which the 'cause of action' accrued is the point at which Mr and Mrs F entered into the purchase agreement. I say this because they entered into the agreement based on the alleged misrepresentation by the Supplier – which they relied on. The credit card agreement Mrs F used to pay for the purchase was entered into in November 2007 and so it is at this time when she suffered the loss.

It follows therefore that I think the cause of action accrued in 2007, and this means that this claim had to be made within six years of that date. As the claim under Section 75 of the CCA wasn't raised until 2021, this was more than six years after the credit card agreement was entered into and so I think it's likely to have fallen outside of the time limit set out in the LA – such that BPF had and has a complete defence to this claim.

Section 140A: Unfair Relationship

Only a court has the power to decide whether a relationship between the credit and debtor is unfair, but it is relevant law, so I have taken it into consideration.

A claim under Section 140A is a claim for a sum recoverable by statute – which is governed by section 9 of the LA. So, the time limit for making a claim is six years from the date when the cause of action accrued. But in this case the six years applied from when the relationship between BPF and Mrs F ended.

Based on the relevant case law, it can be argued that the limitation period started when the credit relating to the purchase in question was paid off, rather than when the relevant credit agreement is formally brought to an end and the entire debtor-credit relationship ends. That said, consideration also needs to be given to whether there are continuing financial detriments and/or ongoing contractual obligations that continue to render the debtor-creditor relationship unfair.

Having considered the evidence and noting that it appears that Mrs F settled her outstanding balance under the credit agreement in 2008, I think it's unlikely a court would likely find that the relationship between her and BPF was unfair after that date as a result of the 2007 purchase. Therefore, I find it reasonable to accept that the claim would likely be considered as out of time under the LA.

Irresponsible lending

The suggestion that BPF didn't carry out the right checks when it lent to Mrs F can be considered as giving rise to an unfair debtor-creditor relationship under Section 140A. And I've already explained why the claim under that provision was likely to have been made out of time under the LA.

Lending money under a regulated credit agreement of the kind in question by BPF was an activity covered by the Financial Ombudsman Service's jurisdiction at the Time of Sale. Noting when the activity took place, I have considered whether this is something we can consider.

The rules about the complaints we can consider are known as the DISP rules and these can be found in the FCA's Handbook. 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 she had cause for complaint.*

I'm satisfied the decision to lend here was made at the point of sale in 2007. I can't reasonably find that this part of Mrs F's complaint was brought to us within the six-year period set out in the first part of DISP 2.8.2 above so I've gone on to consider the second limb of DISP 2.8.2 - when Mrs F knew, or ought reasonably to have known, that she had cause for complaint - to see if this extended the time. If the loan was unaffordable, I'd expect Mrs F to have realised this much earlier - but I accept that's not the same as Mrs F knowing she had cause for complaint against BPF. On the current evidence, I can't be certain that Mrs F knew (or ought reasonably to have known) that she had cause for complaint against BPF regarding affordability before she took advice in 2021. I'm satisfied she brought this complaint to us within three years of that and I've gone on to consider this part of her complaint.

When considering a complaint about irresponsible lending, I need to be satisfied that adequate checks weren't undertaken before the credit was provided and that had these happened, BPF would have, or ought reasonably to have, realised the lending was unaffordable. In this case I do not find I have sufficient evidence to say this, therefore I cannot uphold this part of the complaint.

No new information was provided in response to my provisional decision.

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 consider each case based on its merits. When doing that, I'm required to take into account the relevant law and regulations; regulator's rules, guidance and standards; and codes of practice and what I consider to have been good industry practice at the time.

When evidence is incomplete, inconclusive or contradictory, I've made my decision on the balance of probabilities – that is, what I think is more likely than not to have happened given the available evidence and wider circumstances.

I set out my reasoning for my conclusions in my provisional decision. I concluded that Mrs F's claims under Sections 75 and 140A of the CCA were likely to be found out of time under the LA and so I didn't think BPF was required to do anything further in response to these. I thought the evidence showed that the credit broker did have the required licence at the time of the agreement being arranged and I didn't find evidence to support the case that adequate checks would have shown the lending to have been unaffordable. Based on this I didn't uphold the complaint.

As no new evidence was provided in response to my provisional decision, my conclusions haven't changed and I do not find that I can uphold this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or

reject my decision before 9 May 2023.

Jane Archer
Ombudsman