

The complaint

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

What happened

Mr W and his wife had bought a trial membership of a holiday club and they entered into an acquisition agreement in October 2009 to trade-in their trial membership and buy some holiday club membership points. The price of the membership points was £23,578 and the trial membership was given a trade-in value of £5,995 so the amount due from them was £17,583. Mr W entered into a fixed sum loan agreement with Barclays Partner Finance for a loan of that amount and he agreed to make 180 monthly repayments of £263.14 to Barclays Partner Finance.

Mr W and his wife entered into another acquisition agreement to buy some more holiday club membership points in February 2010. The price of those membership points was £13,023 and Mr W's wife entered into a fixed sum loan agreement with Barclays Partner Finance for a loan of that amount.

Mr W's representative made claims to Barclays Partner Finance in June 2022 under sections 75 and 140A of the Consumer Credit Act 1974 about the October 2009 agreements – and it said that Mr W also had a complaint about irresponsible lending. It attached draft particulars of complaint which said that the membership points had been misrepresented to Mr W and his wife, there was an unfair relationship between Mr W and Barclays Partner Finance and no meaningful affordability checks or assessments were made as to the affordability of the loan.

Barclays Partner Finance said that Mr W was out of time under the Limitation Act 1980 to bring any claim under section 75 and that the unfair relationship provisions don't entitle this service to give any remedy. Mr W wasn't satisfied with its response so a complaint was made to this service. Mr W's wife has also made claims to Barclays Partner Finance about the February 2010 agreements and a complaint about its response to those claims has been made to this service. That complaint is being dealt with separately and in this decision I'm only considering Mr W's complaint about Barclays Partner Finance's response to the claims that he's made about the October 2009 agreements.

Our investigator didn't recommend that Mr W's complaint should be upheld. She thought that Barclays Partner Finance was entitled to rely on the timing of Mr W's section 75 claim to turn it down. 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 his behalf, has asked for this complaint to be considered by an ombudsman. It has provided a detailed complaint submission in which it says, in summary and amongst other things, that:

- our investigator hasn't referred to any evidence provided by Barclays Partner Finance or the holiday company and hasn't meaningfully analysed the contractual documents or considered the statutory protections afforded to purchasers of products of this nature;
- similar fact evidence and complaints haven't been considered, it has referred to a decision issued by this service on another complaint and says that the approach taken should be adopted on this complaint and it has described the obligations on this service when considering complaints;
- the narrow and superficial focus on the contractual documentation disregards entirely the misleading and highly pressurised sales practices employed by the holiday company and the fact that the contractual documentation was complicated and not fully disclosed;
- the burden of proof is on Barclays Partner Finance to show that the relationship is not unfair and it has breached the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010;
- the omission of key information, the misleading statements made by the holiday company and the terms of the purchase agreement and the holiday company's articles haven't been considered – and it has included its analysis of the terms that it says give rise to an unfair relationship;
- our investigator hasn't properly considered the issue of affordability in respect of a product which involves the payment of a significant upfront capital sum and assumption of a liability for annual maintenance fees for a product which doesn't give cheaper holidays and has no resale value; and
- there has been deliberate, or at least reckless, concealment of at least some facts relevant to Mr W's right of action so the time limit for making a section 75 claim is suspended by section 32 of the Limitation Act.

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:

- 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 turned down the claims that he'd made to it and I accept that he referred his complaint to this service within six years of that happening - 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 points were misrepresented to him and his wife 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 wife into buying the membership points in October 2009 as that was the latest time that any misrepresentations would have been made to them by the holiday company 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 misrepresentation claim against either the holiday company or Barclays Partner Finance – but a misrepresentation claim wasn't made to the holiday company and to Barclays Partner Finance until June 2022, more than twelve years later, so I consider that Barclays Partner Finance has a defence to Mr W's claim and I find that it wasn't unreasonable for it to have rejected that claim;
- Mr W's representative says that information was deliberately or recklessly concealed from Mr W so the time limits are postponed under section 32 - section 32(1)(b) says that, if any fact relevant to the debtor's right of action has been deliberately concealed from them, the period of limitation doesn't begin until the debtor has discovered the concealment or it could with reasonable diligence have been discovered by them – and section 32(2) says that deliberate commission of a breach of duty which is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach;
- I'm not persuaded that there's enough evidence to show that there's been a deliberate or reckless concealment of any relevant information in these circumstances so I don't consider that section 32 is applicable to Mr W's claim;
- Mr W's representative says that, amongst other things, the holiday company's misrepresentations and selling practices created an unfair relationship between Mr W and Barclays Partner Finance - 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 shows that Mr W's loan account had a balance of £5,726.90 in September 2022 and I consider that Barclays Partner Finance should have properly responded to Mr W's section 140A claim;
- the particulars of complaint set out the representations that Mr W's representative says were relied on by Mr W and his wife and which were untrue, including that:
 - they would receive a number of points that could be used to book holidays each year at any resort within the holiday company's portfolio;
 - they would be investing in their holidays by securing future holidays that would be significantly cheaper than would be available on the open market and that purchasing the membership points would enable them to have access to cheaper holidays worldwide through exchanges;
 - there was a ready re-sale market for the membership points which meant that they would be able to sell them so they were purchasing an asset;
 - there would be good availability of 5-star accommodation in worldwide resorts at peak times of the year;
 - they would have access to an exclusive holiday club and the holidays weren't available to the general public;
 - the annual maintenance fees would be limited to the cost of maintenance and would only increase with the rate of inflation; and
 - the price of the points was only available, at a rate significantly below market value, for a very limited period (during the course of the sales presentation);
- Mr W and his wife signed documents in October 2009 including the acquisition agreement, the terms and conditions and a member's declaration and the acquisition agreement shows that they were purchasing 1,600 point rights that would be credited to them each year for their use;
- the member's declaration says: *"We understand that the purchase of our membership ... is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate, and that [the holiday company] makes no representation as to the future price or value of the ... product";*
- it also says: *"We understand that [the holiday company] does not and will not run any resale or rental programmes and will not repurchase ... Points other than as a trade in against future property purchases";*
- information about the maintenance charge was included in the member's declaration and it says: *"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";*
- Mr W and his wife had signed the member's declaration and confirmed that they had read and fully understood it and, if it was incorrect or didn't reflect what they'd been told by the holiday company, I consider that it would be reasonable to expect them not to have signed it;
- Mr W and his wife have completed his representative's questionnaire about the holiday company and they signed it in June 2022 – but that was more than twelve years after they entered into the acquisition agreement and I've seen no other evidence to show that the holiday company misrepresented the membership points to them – and if they had relied on representations that were made to them by the holiday company which they later found out to be untrue, I consider that it would be reasonable to expect them to have complained to the holiday company about those

issues – but I’ve seen no evidence to show that they complained to the holiday company about any such issues until Mr W’s representative’s letter to the holiday company in June 2022 – more than twelve years after any misrepresentations would have been made to them;

- Mr W’s representative says that it has been instructed by a large number of consumers making similar complaints against Barclays Partner Finance regarding the mis-selling of holiday products by the holiday company with each of its clients making very similar allegations – but this service considers each complaint on its individual merits and I’m not persuaded that allegations made by other of its clients shows that the membership points were misrepresented to Mr W and his wife in October 2009;
- I’m not persuaded that there’s enough evidence to show that Mr W and his wife were told that their holidays were exclusive and would be significantly cheaper than would be available on the open market or that there would be peak time availability, that there was a ready re-sale market for the membership points, that the maintenance charges would only increase with the rate of inflation or that the price of the points was only available at that time;
- I’m not persuaded that there’s enough evidence to show that Mr W and his wife were induced into entering into the acquisition agreement and buying the membership points by misrepresentations made by the holiday company;
- I’m not persuaded that there’s enough evidence to show that Mr W and his wife were unduly pressurised into buying the membership points in October 2009, that Mr W was unduly pressurised into entering into the loan agreement or that the holiday company used unacceptable selling practices against them – I’ve seen no evidence to show that Mr W complained about those issues until June 2022 and I consider that it would be reasonable to expect him to have complained about any such issues before then;
- immediately above Mr W’s and his wife’s signatures on the acquisition agreement, it says: *“You have the right to cancel this agreement. You have until [specified date later in October 2009] in which to do so”* – if Mr W and his wife were concerned about the selling practices that had been used by the holiday company and didn’t want to buy the points, I consider that it would be reasonable to expect them to have tried to cancel the agreement before the specified date – but I’ve seen no evidence to show that they tried to cancel the agreement until June 2022;
- Mr W’s representative says that the holiday company has breached the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 – but Mr W and his wife entered into the acquisition agreement in October 2009 and those regulations didn’t come into force until February 2011 – and I’m not persuaded that there’s enough evidence to show that there’s been a breach of any applicable law or regulation by the holiday company;
- Mr W’s representative has referred to a decision issued by this service on another complaint and says that the approach taken on that complaint should be adopted on this complaint – but this service considers each complaint on its individual merits and I’ve set out in this decision what I consider to be fair and reasonable in the circumstances of Mr W’s complaint;
- I’ve carefully considered what Mr W’s representative has said about the unfairness of the terms used by the holiday company but it would be for a court to determine whether or not any of those terms was unfair;
- 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 that Mr W and his wife agreed to in October 2009 have been applied or operated unfairly against them 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 says that Barclays Partner Finance lent to Mr W irresponsibly and that no meaningful affordability checks or assessments were made as to the affordability of the loan;
- Barclays Partner Finance says that, due to the age of the account, it no longer holds any credit assessment or records carried out at the time of underwriting the loan but the loan account statement shows that Mr W has made the monthly loan repayments of £263.14 since November 2009 and Barclays Partner Finance says that he's not missed any payments and hasn't contacted it to raise any affordability concerns throughout the life of the loan;
- the questionnaire that Mr W and his wife have completed shows that Mr W now has an annual income of £79,000 and that his wife has an annual income of £56,000 – they describe their financial status in October 2009 as "*bad*" but no further information about their financial position at that time has been provided;
- the loan was made to Mr W in October 2009 and I've seen no evidence to show that he asked Barclays Partner Finance for any information about the affordability assessment that it conducted or complained to it about the affordability of the loan until his representative's letter to it in June 2022 – more than twelve years later – and, if Mr W was concerned about those issues, I consider that it would be reasonable to expect him to have contacted it about them sooner than he did;
- I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mr W in October 2009 when it was made to him or that it was irresponsible for Barclays Partner Finance to have lent to him at that time;
- Mr W and his wife have referred in the questionnaire to some health issues and Barclays Partner Finance says that, if Mr W would like assistance from it, it can arrange for its support team to contact him to see if it can offer any assistance;
- I'm not persuaded that there's enough evidence to show that Mr W's relationship with Barclays Partner Finance was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mr W and Barclays Partner Finance in these circumstances;
- Barclays Partner Finance didn't issue a substantive response to Mr W's section 140A claim or his complaint about irresponsible lending that were made to it in June 2022, so I can't say that its response was fair and reasonable – but if it had properly responded to him 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 wife have had with their membership points and the other difficulties that they've described, 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 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 13 June 2023.

Jarrold Hastings
Ombudsman