

The complaint

Mrs L complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, has rejected the claims that she's made under the Consumer Credit Act 1974. She's being represented in her complaint by a claims management company.

What happened

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

"Mrs L and her husband entered into an agreement to buy a holiday product in June 2010. The total amount to be paid to the holiday company was £10,112, they paid £500 using a credit card and Mrs L entered into a credit card agreement with Barclays Partner Finance and she used £9,612 of that credit to pay the remaining amount to the holiday company. The credit was on "buy now - pay later" terms so the £9,612 wasn't applied to Mrs L's account until six months later. Mrs L repaid the credit in February 2011.

Mrs L's representative made claims to Barclays Partner Finance in July 2016 under section 140A of the Consumer Credit Act 1974. It said that the membership had been misrepresented to Mrs L and her husband and that the holiday company didn't conduct a proper assessment of Mrs L's financial position and ability to repay "the loan" (but it should have referred to "the credit"), applied considerable pressure to procure her agreement to "the loan" and breached EU law.

Barclays Partner Finance said that Mrs L's claims were time-barred under the Limitation Act 1980 so it had no obligation to investigate the points that had been raised. Mrs L wasn't satisfied with its response so a complaint was made to this service.

Our investigator didn't recommend that Mrs L's complaint should be upheld. She thought that Barclays Partner Finance was entitled to rely on the timing of the misrepresentation claim to turn it down. She said that she hadn't seen enough to suggest that the relationship between Mrs L 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 wasn't satisfied that Mrs L had brought her complaint about unaffordable lending in time.

Mrs L's representative, on her behalf, has asked for this complaint to be considered by an ombudsman. It says that it had also complained to Barclays Partner Finance that it had utilised the services of an unauthorised broker so the credit agreement was unenforceable. It has also raised its serious concerns about the way in which the finance was sold to Mrs L".

I said in my provisional decision: *"I consider that Mrs L's complaint about Barclays Partner Finance should 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 (unless the business consents) 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;

- *Mrs L's representative's letter included a claim under section 140A that the holiday company didn't conduct a proper assessment of Mrs L's financial position and ability to repay "the loan" but our investigator considered the complaint about the affordability of the credit as a separate complaint outside of section 140A – and she said that she wasn't satisfied that Mrs L had brought her complaint about unaffordable lending in time;*
- *Barclays Partner Finance says that Mrs L's complaint falls outside of the Limitation Act and it believes that it has handled the complaint correctly and that it's out of time – and it hasn't consented to this service considering this complaint;*
- *Mrs L entered into the credit card agreement in June 2010 and her complaint that the holiday company didn't conduct a proper assessment of her financial position and ability to repay the credit wasn't made to Barclays Partner Finance until July 2016, more than six years later;*
- *Mrs L would have had three years from when she became aware, or ought reasonably to have become aware, that she had cause for complaint to make a complaint about unaffordable lending;*
- *for me to be able to conclude that Mrs L was aware, or ought reasonably to have been aware, that she had cause for complaint, I'd have to find that she was aware, or ought reasonably to have been aware, that: there was a problem with the credit because it was unaffordable for her; the credit provided by Barclays Partner Finance caused her to lose out; and Barclays Partner Finance's actions (or its failure to act) may have caused her loss;*
- *the credit provided to Mrs L in June 2010 was on "buy now - pay later" terms so the payment of £9,612 wasn't applied to her account until six months later – and the interest rate under the agreement was 19.8%;*
- *Mrs L made two payments of £480.60 each to the account in January 2011 and then made a payment of £8,650.80 to repay the outstanding amount of the credit in February 2011 – she paid no interest under the credit card agreement to Barclays Partner Finance;*
- *Mrs L says that she repaid the credit by taking out a loan to consolidate her debts and I consider that she ought reasonably to have been aware that the credit may not have been affordable for her and that it might have caused her to lose out at that time – but that doesn't mean that she should have been aware that it was Barclays Partner Finance's actions (or failure to act) in June 2010 that might have been responsible, at least in part, for the situation in which she found herself with credit that was unaffordable for her;*
- *Mrs L says that she didn't raise her concerns about the affordability of the credit at that time as she wasn't aware of her rights and I consider that it's reasonable to conclude that Mrs L wouldn't have been aware that Barclays Partner Finance might have some responsibility for the situation in which she found herself until she took advice from her representative;*
- *I consider it to be more likely than not that Mrs L did make her complaint within three years of becoming aware that she had cause for complaint so I don't agree that she brought her complaint about unaffordable lending too late and I find that*

this service does have jurisdiction to consider her complaint about the unaffordability of the credit that was provided to her;

- I consider that Barclays Partner Finance should have carried out reasonable and proportionate checks to satisfy itself that Mrs L was likely to have been able to repay the credit in a sustainable way and that: if it carried out those checks, it should only have provided the credit to her responsibly using the information it had gathered; or, if it didn't carry out such checks, that the required checks would have shown that she was likely to have been able to repay the credit in a sustainable way;*
- Barclays Partner Finance says that it no longer has access to the underwriting information for Mrs L's account but it provided the account statement showing that the credit was settled in February 2011;*
- Mrs L says that her husband wasn't given credit and that the credit was unaffordable for her – her representative has provided a copy of Mrs L's 2009/10 P60, her bank statements for April, May and June 2010 and an income and expenditure form;*
- the P60 shows that in 2009/10 Mrs L received pay of £14,621.20, paid income tax of £1,628 and made national insurance contributions of £991.17;*
- her bank statements show that she was paid £1,297.70 in April 2010, £1,022.30 in May 2010 and £1,117.69 in June 2010 and that her month-end balances were £202.66, £276.45 and £336.54;*
- the income and expenditure form shows that Mrs L had a net weekly income of £230;*
- the credit limit of the credit card agreement was £20,000, the amount of credit provided to Mrs L in June 2010 was £9,612 and the minimum monthly repayment under the agreement was 5% of the interest bearing balance outstanding on the account;*
- I've seen no evidence to show that Barclays Partner Finance carried out reasonable and proportionate checks to satisfy itself that Mrs L was likely to have been able to repay the credit sustainably and, if it had carried out those checks, I consider it to be more likely than not that it would have identified that Mrs L couldn't afford a credit card agreement with a credit limit of £20,000 or the credit of £9,612 that was provided to her;*
- I consider that Mrs L has lost out as a result of Barclays Partner Finance's decision to lend to her because she and her husband were able to buy a holiday product that they couldn't sustainably afford and Mrs L had the continuing obligation to repay the £9,612, together with interest, that she couldn't sustainably afford;*
- I consider that Mrs L's complaint about unaffordable lending should be upheld and that Barclays Partner Finance should take the actions described below;*
- I consider that Mrs L was unlikely to have entered into the credit card agreement and that she and her husband wouldn't have bought the holiday product but for Barclays Partner Finance's failings and that it would be fair and reasonable for Mrs L to be put back into the position in which she would have been had she not entered into the credit card agreement and they hadn't bought the holiday product;*
- I find that Barclays Partner Finance should:*
 - refund the payments that Mrs L made to it under the credit card*

agreement and any annual membership fees paid by her or her husband under the purchase agreement and deduct from those payments the market value of any holidays that Mrs L and her husband took using the holiday product (the “net repayments”); and

- pay interest on the net repayments at an annual rate of 8% simple from the date they were paid to the date this complaint is settled;*
- when responding to my provisional decision, I ask Mrs L, her representative and Barclays Partner Finance to provide their submissions on what they think the market value of any use that Mrs L and her husband have had from the holiday product should be, along with supporting evidence;*
- Mrs L’s representative’s letter included a claim under section 140A and our investigator considered Mrs L’s misrepresentation claim under section 75;*
- I don’t consider that Mrs L had made a claim to Barclays Partner Finance under section 75 about any misrepresentations that had been made to her and her husband by the holiday but 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);*
- 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 Mrs L could have made a claim to the holiday company or Barclays Partner Finance about the misrepresentations that she says induced her and her husband into buying the holiday product in June 2010 as that was the latest time that any misrepresentations would have been made and any loss would have been incurred as that was when Mrs L also entered into the credit card agreement with Barclays Partner Finance;*
- I consider that her cause of action would have accrued at that time, so she 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 Barclays Partner Finance until July 2016, more than six years later, so I consider that Barclays Partner Finance would have had a defence to any claim under section 75 and that it wouldn’t have been unreasonable for it to have rejected any such claim;*
- Mrs L’s complaint was made about Barclays Partner Finance’s response to the claims that had been made to it under section 140A and her representative says that there was an unfair relationship between Mrs L and Barclays Partner Finance because the holiday product had been misrepresented to Mrs L and her husband, and the holiday company didn’t conduct a proper assessment of Mrs L’s financial position and ability to repay “the loan”, applied considerable pressure to procure her agreement to “the loan” and breached EU law;*
- 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*

Mrs L repaid the credit in February 2011 and I consider that the credit card agreement ended at that time so she would have had six years from then to bring a section 140A claim against Barclays Partner Finance – Mrs L's representative's claim letter to Barclays Partner Finance was sent in July 2016, less than six years after the credit card agreement ended so I don't consider that a court would conclude that Mrs L's claim under section 140A was made too late;

- but as I consider that Mrs L's complaint about unaffordable lending should be upheld and that Barclays Partner Finance should take the actions described above, I don't consider that there's any need for me to make any finding as to whether there was an unfair relationship between Mrs L and Barclays Partner Finance in these circumstances; and*
- Mrs L's representative says that Barclays Partner Finance utilised the services of an unauthorised broker so the credit card agreement was unenforceable but this service's records show that the holiday company was covered under our consumer credit jurisdiction in June 2010 – which it wouldn't have been had it not been granted a consumer credit licence by the Office of Fair Trading – and, in the absence of any persuasive evidence to suggest otherwise, I don't consider that it's unreasonable to conclude that it's more likely that not that the holiday company held the requisite licence when Mrs L entered into the credit card agreement and that it's more likely than not that the credit card agreement would be enforceable”.*

Subject to any further comments or evidence that I received from any of Mrs L, her representative and Barclays Partner Finance, my provisional decision was that I intended to uphold this complaint. Both Mrs L and Barclays Partner Finance have accepted my provisional decision but Barclays Partner Finance says that for it to refund maintenance fees it will need evidence of them being paid.

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 both Mrs L and Barclays Partner Finance have accepted my provisional decision, I see no reason to change the findings that I set out in my provisional decision. In my provisional decision I asked Mrs L, her representative and Barclays Partner Finance to provide their submissions on what they think the market value of any use that Mrs L and her husband have had from the holiday product should be, along with supporting evidence. I've not received any such evidence from Mrs L or her representative and Barclays Partner Finance says that for it to refund maintenance fees it will need evidence of them being paid.

Mrs L has until 28 September 2023 to accept or reject my decision. If she accepts my decision but doesn't provide evidence about the annual membership fees paid by her or her husband under the purchase agreement and the market value of any holidays that they've taken using the holiday product by that date, then I find that it would be fair and reasonable for Barclays Partner Finance to refund to Mrs L the payments that she made to it under the credit card agreement.

Putting things right

I find that it would be fair and reasonable for Barclays Partner Finance to take the actions described in my provisional decision and as set out below.

My final decision

My decision is that I uphold Mrs L's complaint and I order Clydesdale Financial Services Limited, trading as Barclays Partner Finance, to:

1. Refund the payments that Mrs L made to it under the credit card agreement and any annual membership fees paid by her or her husband under the purchase agreement and deduct from those payments the market value of any holidays that Mrs L and her husband took using the holiday product (the "*net repayments*").
2. Pay interest on the net repayments at an annual rate of 8% simple from the date that they were paid to the date that this complaint is settled.

HM Revenue & Customs requires Barclays Partner Finance to deduct tax from the interest payments to be made to Mrs L and Barclays Partner Finance must give her a certificate showing how much tax it's deducted if she asks it for one.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 28 September 2023.

Jarrold Hastings
Ombudsman