DRN-4468855

The complaint

Mr S complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") acted unfairly and unreasonably by (1) participating in an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (the "CCA") and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

In or around April 2009, September 2009 and July 2011, Mr S (together with his wife) attended meetings with a timeshare supplier who I'll refer to as "C". At each meeting, Mr S agreed to purchase a timeshare product from C as follows.

- Purchase 1 (April 2009) - A timeshare Trial Membership at an agreed price of £3,795. £3,495 of this was funded under a fixed sum loan agreement with BPF over 36 months (Loan 1);
- Purchase 2 (September 2009) - Trade in of the trial membership to acquire a full timeshare points-based membership including 1,800 points rights at an agreed price of £25,094. £17,550 was funded under a fixed sum loan agreement with BPF over 180 months (Loan 2). The loan amount included consolidation of the remaining balance owed of £3,251 under the first loan; and
- Purchase 3 (July 2011) - Purchase of a further 701 points rights at an agreed price of £10,795. This amount was funded under a fixed sum loan agreement with BPF over 180 months (Loan 3).

Although each product purchase was completed in the joint names of Mr S and his wife, the loans with BPF were in Mr S's sole name. As such, Mr S is the only eligible claimant under the CCA and hence, the only eligible complainant here.

In August 2021, using a claims management company (the "CMC"), Mr S wrote to BPF to complain about:

1. Misrepresentations by C at the Time of each Sale giving him a claim under Section 75 of the CCA ("S75").
2. Breaches of contract by C under the agreements giving him a claim under S75
3. BPF's participation in an unfair credit relationship under the Credit Agreements and related timeshare agreements for the purposes of Section 140A of the CCA ("S140A").

Mr S's S75 Complaint

The CMC allege that C had misrepresented the products purchased by telling Mr S the products were of some substance albeit *"it's now clear it is worthless"*. The CMC also said the products were sold as an investment contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. Further, the CMC said the contract between Mr S and C was breached. They believe that both the misrepresentations and the breach satisfy the criteria for a claim under section 75 of the CCA ("S75").

Mr S's S140A complaint

The CMC said that the relationship between Mr S and BPF, arising out of the loan agreements, taken with the related purchase agreements with C, is unfair pursuant to section 140A of the CCA ("S140A"). In particular, they said that in addition to the misrepresentations:

- Mr S was subjected to high-pressure sales presentations;
- there'd been a breach of fiduciary duty
- BPF had deliberately chosen not to disclose the fact that commission was paid to C, or the amount paid;
- Mr S wasn't presented with a choice of finance options; and
- BPF failed to carry out a sound and proper credit assessment and the finance agreement was unaffordable.

Having not received a substantive response from BPF, the CMC referred Mr S's complaint to this service. One of this service's investigators considered all the evidence and information available. Having done so, our investigator thought the claims for misrepresentation had been brought too late pursuant to the Limitation Act 1980 ("The LA"). And because Loan 1 had been repaid in October 2009, they thought any claim under S140A in respect of that loan had also been brought too late under the LA.

However, our investigator did think the claims for misrepresentation in respect of purchases 2 and 3 could be considered as part of a claim under S140A as loans 2 and 3 remained live and active. But having considered everything available, our investigator didn't think there was sufficient evidence to support the allegations made. Or that a court was likely to find unfairness in the relationship pursuant to S140A. So, they didn't think BPF needed to do anything more.

The CMC didn't accept our investigator's findings. In support, they provided this service with a 45-page document containing *"Generic submissions on behalf of complainants"* which relates specifically to situations where consumer credit has been provided to purchase products sold by C – as in Mr S's case.

Further, the CMC raised specific concerns about the way finance had been sold to purchasers of timeshare products generally. In doing so, they wanted this service to obtain information and provide responses to various questions about the procedures and policies that applied to the sale of loans with BPF by C. They also raised questions about the regulatory status of C and their resultant ability to introduce loans to consumers. Finally, the CMC raised concerns about this service's approach to similar claims and complaints referencing previous decisions and outcomes.

As an informal resolution couldn't be achieved, Mr S's complaint was passed to me to consider and reach a final decision. Between our investigator issuing their findings and Mr S's complaint being referred to me, BPF issued final responses in relation to Mr S's claims relating to the first two purchases. BPF thought that Mr S's claims had been brought too late under the LA so didn't uphold them.

On 25 October 2010, I issued a Provisional Decision ("PD") in which I said that I didn't think BPF needed to do anything more. In doing so, I offered the parties to this complaint the opportunity to provide their responses to my findings, together with any additional evidence for me to consider before I reached a final decision.

BPF acknowledged receipt of my PD but offered no further comment or evidence for me to consider. Despite follow up by this service, neither Mr S nor the CMC provided any response to my PD.

Since then, I thought further about Mr S's complaint in light of two Supreme Court rulings handed down in October 2023. Whilst my provisional decision remained unchanged, some

of the reasons for it were different. So, I issued a further PD (the "second PD") on 8 May 2024 in which I provisionally found that:

1. Mr S's complaint about BPF's participation in a credit relationship that was unfair to him in relation to Loan 1 wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the "FCA") Dispute Resolution Rules ("DISP").
2. Mr S's complaint about BPF's participation in a credit relationship that was unfair to him in relation to Loans 2 and 3 was within the Financial Ombudsman Service's jurisdiction because it was made in time under the limits set out in Rule 2.8.2 R (2) of the FCA DISP Rules. But BPF didn't act unfairly or unreasonably by coming to the decision they did.
3. Mr S's complaint about BPF's decision to reject his concerns about C's alleged misrepresentations and a breach of contract under S75 was made in time under DISP 2.8.2 R (2). But BPF didn't act unfairly or unreasonably by coming to the decision they did.

Neither BPF nor the CMC responded to my second PD. So, Mr S's complaint has been passed back to me to issue my final decision on the aspects I believe this service has jurisdiction to consider.

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 that, I still don't think Mr S's complaint should be upheld insofar as it relates to his concerns about BPF's responsibility under S75 or their participation in a credit relationship that was unfair to him in relation to Loans 2 and 3. And in the absence of anything new to consider, the findings in my PD remain unchanged.

In my second PD, I said:

> **Mr S's S75 complaint**
>
> S75 operates quite differently to S140A and, when it applies, it can give borrowers a very different ground for complaint against a lender. Whereas S140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, S75 simply creates a financial liability that the creditor is bound to pay. Liability under S75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the supplier (here that's C). S75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid S75 claim, it should pay its liability. And if it fails or refuses to do so, that can give rise to a complaint to this service.
>
> So, when a complaint is referred to this service on the back of an unsuccessful S75 claim, the act or omission that engages this service's jurisdiction is the creditor's refusal to accept or pay the debtor's claim. This is distinct from anything that occurred before the claim was made such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.
>
> However, I don't think it would be fair or reasonable to uphold Mr S's complaint for reasons relating to his S75 claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr S's S75 claim was time-barred under the LA before it's put to BPF.

As I've explained, a claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Mr S could make against C. A claim for misrepresentation against C 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 (see Section 2 of the LA).

But a claim under S75, like this one, is also *"an action to recover any sum by virtue of any enactment"* under Section 9 of the LA. 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 the cause of action accrued here was the Time of each Sale. I say this because Mr S entered into the purchase of each timeshare products at those times based upon the alleged misrepresentations of C – which Mr S says he relied upon. And as the loans from BPF were used to help finance those purchases, it was when he entered into the Credit Agreements that he allegedly suffered the loss.

Mr S first notified BPF of his S75 claim in August 2021. And as more than six year had passed between the Time of each Sale and when he first put his claim to BPF, I don't think it was unfair or unreasonable of BPF to reject Mr S's concerns about C's alleged misrepresentations.

The claims under S140A in relation to loans 2 and 3

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (BPF) and the debtor (Mr S) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

I think the alleged misrepresentations in relation to purchases 2 and 3 are, therefore, relevant here. Even though I think BPF's defence under the LA wasn't unfair or unreasonable as far as S75 is concerned.

- <u>The claim for misrepresentation under S140A</u>

For me to conclude there was a misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare products. In other words, that they told Mr S something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr S to enter into the contract. This means I would need to be persuaded that he reasonably relied on those false statements when deciding to buy the timeshare products.

From the information available, I can't be certain about what Mr S was specifically told (or not told) about the benefits of the products he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr S's claim, such as marketing material or documentation from the time of the sales that echoes what the CMC says he was told. In particular that the products purchased were represented as financial investments.

I also don't think the contracts can have been marketed and sold as investments contrary to The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") simply because there might have been some inherent value to his membership. And in any event, I've found nothing within the evidence provided to suggest C gave any assurances or guarantees about the future value of the products Mr S purchased. C would had to have presented the membership in such a way that used any investment element to persuade Mr S to contract. Only then might they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Given my findings above, I don't think BPF's response to the allegation was ultimately unreasonable.

On a separate (but related) point, the complaint submitted by the CMC appears to suggest that Mr S purchased a Fractional points product. A Fractional timeshare is generally accepted as one where the purchaser acquires a defined interest in real property under the purchase agreement. In Mr S's case, he purchased points rights to be used against holiday accommodation and experiences from within a portfolio – not an interest in a defined and identifiable property. There's no evidence Mr S purchased a Fractional timeshare product as part of these purchases.

- <u>The pressured sale and process</u>

The claim makes an allegation that Mr S was subjected to a high-pressure sales presentation albeit there's no detail as to how this came about or manifested itself. Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr S agreed to the purchases in 2009 and 2011 (purchases 2 and 3) when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to C, after the purchases, to suggest he'd agreed to them when he didn't want to. And Mr S hasn't provided a credible explanation for why he didn't subsequently seek to cancel the purchases within the 14-day cooling off period permitted in each case here.

If Mr S only agreed to the purchases because he felt he was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest he was obviously harassed or coerced into the purchases. And because of that, I'm not persuaded there's sufficient evidence to demonstrate he made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired.

In deciding whether to make a determination under S140A, *"the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor* [C] *and matters relating to the debtor* [Mr S]*)"*.

Mr S already held an existing trial membership timeshare product he'd purchased from C in April 2009. Importantly, the purchases in September 2009 and July 2011 appear to relate to an upgrade of his existing timeshare product holding. It doesn't appear either was his first product purchase from C and Mr S wasn't a new customer. So, it's likely he would've benefitted from his previous experience and what might be expected from the meetings and sales presentations in September 2009 and July 2011.

Whilst there could be potential for a court to decide that some allegations might have led to an unfair debtor-creditor relationship here, I think any decision is likely to be taken within the context of Mr S's overall experience. And even if I was to find that some of the information could've been clearer during the sale – and I make no such finding – I think it's unlikely this would lead to a court finding this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- C's responsibilities and disclosure of commission paid

Part of Mr S's S140A claim is based upon the status of C (as the introducer of the loans) and their (and BPF's) resultant responsibilities towards him. In particular, it's argued that the payment of commission by BPF to C was kept from him.

I don't think the fact that BPF might have paid C commission was incompatible with their role in the transaction. C weren't acting as an agent of Mr S but as the supplier of contractual rights he obtained under the Purchase Agreement. And, in relation to the loan, based on what I've seen so far, it doesn't look like it was C's role to make an impartial or disinterested recommendation or to give Mr S advice or information on that basis. What's more, as I understand it, the typical amounts of commission paid by BPF to suppliers (like C) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that the non-disclosure and payment of commission rendered Mr S's credit relationship with BPF unfair for the purposes of Section 140A given the circumstances of this complaint.

BPF provided this Service with information on its commission rates – which I accept in confidence under DISP 3.5.9 [R]. But, in keeping with that rule, one of BPF's Managing Directors (who is a FCA Approved Person) confirmed, in summary, the information I included in the paragraph above.

Were the required lending checks undertaken?

There are certain aspects of Mr S's claim that could be considered outside of S75 and S140A. In particular, in relation to whether BPF undertook a proper credit assessment. The CMC allege a proper affordability check wasn't completed.

It's relevant that the CMC haven't provided any evidence to show that the loans were unaffordable or unsuitable for Mr S. And I've not seen anything that supports any suggestion of financial difficulty from that time.

BPF haven't explained what (if any) affordability assessment was undertaken when Mr S first applied for the loans with them. And given the passage of time, it's possible that information is no longer available. If I were to find that the checks and tests completed by BPF didn't comply with the regulatory guidelines and requirements that applied – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr S in order to uphold his complaint here. And I don't believe any proven compliance failure would automatically mean that Mr S's loan agreements were null and void in any event. It would need to be proven that any such failures resulted in a loss to Mr S as a consequence.

I've seen no specific information about Mr S's actual position at the time and no supporting evidence that he struggled to maintain repayments. Based upon these findings, I can't reasonably conclude the loans were unaffordable for him or that he suffered any loss as a consequence.

Other considerations

Following our investigator's view, the CMC asked that this service consider the contents of a document headed *"Generic submissions on behalf of complainants".* However, given the generic nature of its contents, I don't think it's helpful in establishing the facts of what actually happened in Mr S's specific case.

The CMC have also referenced other complaint decisions issued by this service in relation to timeshare products funded under regulated agreements. However, my role is to consider Mr S's complaint on its own merits given its own particular set of circumstances.

Furthermore, the CMC also requested that this service obtain extensive details of BPF's processes and procedures together with evidence that C (and in turn BPF) complied with the relevant rules, regulations and codes of practice that applied in the circumstances of the loans that was provided to Mr S.

This service's role as an Alternative Dispute Resolution Service does not extend to regulating financial businesses or questioning their policies and procedures – that's the role of the FCA. Our powers are confined to deciding whether, on balance, their processes and procedures were applied in a fair and reasonable way in Mr S's individual circumstances. And in doing so, whether BPF's handling of Mr S's claims appears fair and reasonable. That's what I've done here.

As regards the regulatory status of C (or otherwise), I can't see that this formed any part of the claim presented to BPF. So, I don't believe this is an aspect that I can consider as part of this complaint.

In my first PD I said:

The claim for breach of contract under S75

A breach of contract occurs when one or more parties to a contract or agreement fails to perform their duties or fulfil their obligations under that contract resulting in a loss for the other party. The CMC haven't explained how the purchase agreements have been breached. Or how Mr S suffered loss as a consequence. So, I don't think it unreasonable not to uphold such a claim in these circumstances.

My final decision

For the reasons set out above, I don't uphold Mr S's complaint insofar as it relates to concerns about BPF's responsibility under S75 of the CCA and their participation in a credit relationship that was unfair in relation to Loans 2 and 3.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 20 June 2024.

Dave Morgan
Ombudsman