

The complaint

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

What happened

In or around March 2010, Mr S (together with his wife) attended a meeting with a timeshare supplier who I'll refer to as "D". During that meeting, they agreed to purchase 2,000 timeshare product points (Purchase 1) in a scheme operated by D to add to their existing timeshare points holding (purchased previously from D). The agreed purchase price of £2,840 was funded under a revolving loan facility provided by BPF in Mr S's sole name (Loan 1). The amount borrowed was repaid in September 2010.

In or around March 2011, Mr S (again with his wife) attended a further meeting with D. During that meeting, they agreed to purchase a further 2,000 timeshare points in the scheme operated by D (Purchase 2). The agreed purchase price of £3,340 was funded under a Fixed Sum Loan Agreement with BPF in Mr S's sole name over 120 months (Loan 2). This loan was repaid and closed in August 2012.

In or around June 2012, Mr S (and his wife) again attended a further meeting with D in which they agreed to purchase a further 4,000 points in the timeshare scheme operated by D. However, on this occasion, the purchase price wasn't funded by Mr S in any form.

In or around early 2017, using a claims management company ("the CMC"), Mr S wrote to BPF to complain about their participation in an unfair credit relationship under the Credit Agreement and the related timeshare agreement for the purposes of Section 140A of the CCA

CMC said:

- D didn't conduct a proper assessment of Mr S's financial position and ability to repay the loans;
- D applied considerable pressure to procure agreement to the loans; and
- D breached EU Law.

Further, in relation to purchase 1, the CMC allege:

- An informal update meeting turned out to be a sales meeting lasting five hours;
- D said the purchase would give Mr S access to additional benefits including dog friendly accommodation in the UK. But it was later discovered they already had access to this; and
- despite advising D they couldn't afford the purchase, Mr S was persuaded to take finance with BPF.

In relation to purchase 2, the CMC allege:

- an informal update meeting again turned out to be a sales meeting lasting five hours;
- D said they would rent out the points purchased for a profit which would cover annual

management fees;

- D guaranteed they could rent out the points if they were used to book UK resorts in peak season. But Mr S was later told he wasn't allowed to book peak season or that rental could be guaranteed;
- despite advising D they couldn't afford the purchase, Mr S was persuaded to take finance with BPF.

The CMC also submitted a similar complaint in relation to a loan taken out for the purchase in June 2012. However, as Mr S wasn't party to any associated finance, I'm unable to consider that aspect as part of his complaint here. That's because Mr S isn't an eligible claimant (or complainant) under the CCA for that particular transaction.

BPF responded to the claim submitted by the CMC in March 2017. They didn't think the CMC had provided any details of the alleged breaches of EU Law, so couldn't consider this aspect further. They confirmed they'd completed an assessment of affordability for the loans which were approved against their lending criteria at the time and didn't agree the loans were unaffordable. BPF also didn't agree there was any evidence the products purchased had been misrepresented as alleged. Or that there was any evidence Mr S was pressured into entering into the loan agreements. BPF didn't agree they had a regulatory obligation to disclose any commission paid by them to D. Finally, BPF didn't think there was any specific evidence to suggest the relationship was unfair under S140A.

The CMC didn't agree with BPF's response. So referred Mr S's claim to this service as a complaint. In doing so, they commented at length about the commission paid by BPF to D providing reference to various regulations and legislation together with examples of case law they believe applies.

One of this service's investigators considered everything that was said and provided. Having done so, they didn't think BPF's response to Mr S's claim was unfair or unreasonable having not found anything they felt was likely to lead a court to find that the debtor-creditor relationship was unfair.

The CMC asked that Mr S's complaint be referred to an ombudsman. In doing so, they asked that I consider the contents of a 51-page document prepared by Counsel headed, "Generic submissions on behalf of complainants".

I considered all the relevant information. Having done so, whilst I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed. So, I issued a Provisional Decision (PD) on 8 November 2023, 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 didn't provide any 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 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 Loan 2 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's DISP Rules. 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 participation in a credit relationship that was unfair to him in relation to Loan 2. And in the absence of anything new to consider, the findings in my PD remain unchanged.

In my second PD, I said:

The claims under S140A in relation to loan 2

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).

So, I think the alleged misrepresentations in relation to purchase 2 are, therefore, relevant here.

- The claim for misrepresentation under S140A for purchase 2

For me to conclude there was a misrepresentation by D in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that D made false statements of fact when selling the timeshare product. 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 points.

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 relating to Mr S's ability to rent out his points holding, any guarantees that a rental return could be achieved or the nature and timings of bookings available to him.

In their final response, BPF reference various clauses within the documentation that Mr S received and signed at the time of purchase 2. In particular, it's suggested that the "Customer Compliance Statement/Declaration to Treating Customers Fairly" specifically stated that there was no guarantee that points (or any weeks acquired with points) could be successfully rented out. Although I haven't been provided with a copy of this document in Mr S's specific case, I'm familiar with its contents.

I think it's also relevant that it appears Mr S's only request to use D's "Wish to Rent" programme wasn't made until 2015. But Mr S insists he only purchased the points to use them to derive a rental return to cover annual management charges. If that were the case, I'd expect to see evidence that Mr S had attempted to access this programme before, and on a regular basis thereafter. But there is no evidence of that here. And if he then wasn't able to do so, I'd also expect him to have raised this with D sooner. But again, there's no evidence he did that either.

On balance, I'm not persuaded that D did misrepresent the points purchased in the manner alleged. Or that Mr S's decision to purchase them was influenced by any alleged representation.

- The pressured sale and process

The claim makes an allegation that D applied considerable pressure to procure agreement to the loan albeit there's no real 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 purchase and loan in 2011 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to D or BPF, after the purchase, to suggest he'd agreed to it and the loan 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 purchase or the loan agreement within the 14-day cooling off period permitted in each case here. Particularly as it appears he'd exercised this right previously with BPF.

If Mr S only agreed to take the loan 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 taking the loan. 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 [BPF] and matters relating to the debtor [Mr S])"*.

Mr S already held existing timeshare product points he'd purchased from C on multiple occasions prior to the purchase in 2011. So, the purchase appears to relate to an upgrade of his existing timeshare product holding. It doesn't appear it was his first product purchase from D 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 meeting and sales presentation in 2011.

Even if there was 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.

- Responsibilities and disclosure of commission paid

Part of Mr S's S140A claim is based upon the status of D (as the introducer of the loan) and their (and BPF's) resultant responsibilities towards him. In particular, it's argued that the payment of commission by BPF to D was kept from him. But I don't think the fact that BPF might have paid D commission was incompatible with its role in the transaction. D wasn'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 the Supplier's role to make an impartial or disinterested recommendation or to give Mr S advice or information on that basis. As far as I'm aware, he was always at

liberty to choose how he wanted to fund the transaction. I think Mr S was aware of that given he'd previously cancelled a loan application and agreement with BPF for a previous purchase.

What's more, as I understand it, the typical amounts of commission paid by BPF to suppliers (like D) 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've 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 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 loan was unaffordable or unsuitable for Mr S. And I've not seen anything that supports any suggestion of financial difficulty from that time.

BPF have provided an overview of the assessment they undertook at the time which, they say, demonstrated that the loan was sustainably affordable for Mr S. 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.

I don't believe any proven compliance failure should 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. And the evidence provided shows that the loan was repaid in full in 2012. Based upon these findings, I can't reasonably conclude the loan was unaffordable for him or that he suffered any loss as a consequence.

Other considerations

Following our investigator's view, the CMC asked that I 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.

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 participation in and/or continuation of an unfair credit relationship in relation to Loan 2.

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