

The complaint

Mr C's complaint is, in essence, that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, acted unfairly and unreasonably by: (1) participating in an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974; and (2) deciding against paying claims under Section 75 of that Act.

What happened

I issued a provisional decision on this complaint in April 2024 in which I described what had happened as follows:

"Mr C and his then wife had bought a trial membership of a holiday club from a holiday company in August 2010 and they bought some holiday club membership point rights from the same holiday company in January 2011. Mr C also entered into a fixed sum loan agreement with Barclays Partner Finance for a loan of £16,157 to pay for the point rights (the 'Credit Agreement'). He agreed to make 180 monthly repayments of £241.88 to Barclays Partner Finance but the loan was settled in May 2011.

Mr C, using a legal adviser, wrote to Barclays Partner Finance in October 2019 to complain about:

1. misrepresentations by the holiday company at the time of sale and a breach of contract, giving him claims under Section 75; and
2. Barclays Partner Finance's participation in an unfair credit relationship under the Credit Agreement and the related purchase agreement for the purposes of Section 140A.

The representative's letter to Barclays Partner Finance said that Mr C had a claim for misrepresentation against the holiday company for which Barclays Partner Finance was jointly and severally liable under Section 75 and the misrepresentations and practices in the sales presentation made the Credit Agreement unfair under Section 140A. It also said that the lending was irresponsible and there was no prospect that the lending could have been repaid in a sustainable manner.

Barclays Partner Finance said that Mr C was out of time to bring any Section 75 claim in respect of the issues that he claimed to have happened at the point of sale and Mr C had settled the loan in May 2011, and as the time limit applicable is six years from the date of the end of the debtor-creditor relationship, he needed to raise his Section 140 claim no later than May 2017. Mr C wasn't satisfied with its response so he complained to this service.

Our investigator didn't recommend that Mr C's complaint should be upheld. She thought that Mr C had six years from the time of sale to make a misrepresentation claim under Section 75 but he didn't do that until October 2019, so Barclays Partner Finance was entitled to rely on the timing of that claim to turn it down. She couldn't see that there had been a breach of contract by the holiday company. She also

thought that Barclays Partner Finance was entitled to rely on the timing of his Section 140A claim to turn it down and she said that she hadn't seen anything persuasive to suggest that the lending was unaffordable for Mr C.

Mr C's representative says that it needs this service to carry out a full investigation into this complaint in order to come to a fair and reasonable outcome given the facts and circumstances. As Mr C didn't accept our investigator's recommendation, this complaint has been passed to me for a decision".

My provisional decision

I said in my provisional decision:

"I've read and considered all the available evidence and arguments to decide:

1. whether this service's jurisdiction permits me to consider the entire complaint and, if relevant;
2. what's fair and reasonable insofar as the merits of the complaint are concerned.

Having done so, subject to any further comments or evidence that I receive from any of Mr C, his representative and Barclays Partner Finance, my provisional decision is that I intend to conclude that:

1. Mr C's complaint about a credit relationship with Barclays Partner Finance that was unfair to him isn't within this service's jurisdiction because it wasn't referred to this service within the time limits set out in Rule 2.8.2 R(2) of the Dispute Resolution Rules ('DISP') in the Financial Conduct Authority's Handbook; and
2. Mr C's complaint about Barclays Partner Finance's decision to reject his concerns about the holiday company's misrepresentations under Section 75 was made in time under DISP 2.8.2 R(2) but that it wouldn't be fair or reasonable for me to require it to take any action in response to his complaint.

Was Mr C's Section 140A complaint made in time?

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. An assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into and the courts have said that determining whether or not the relationship complained of was unfair has to be made "*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*" – which is the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

In alleging that he was subject to an unfair credit relationship under Section 140A, Mr C's complaint extends to Barclays Partner Finance's acts and omissions, in being party to such a relationship and perpetuating its unfairness, right up until the moment that his credit relationship with it ended.

DISP 2.8.2 R covers whether Mr C's complaint was made in time for the purposes of allowing this service to consider it and says: "*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service ... 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 he had cause for complaint; ... unless ... in the view of the Ombudsman, the failure to comply with the time limits ... was as a result of exceptional circumstances ...".

(a) Six Years

The event complained about for the purposes of DISP 2.8.2 R (2)(a), is the allegation that Barclays Partner Finance was party to an unfair credit relationship with Mr C and, during the currency of that relationship, it perpetuated the unfairness, failing in its responsibilities to take the necessary steps to correct the situation.

Barclays Partner Finance has provided evidence to show that Mr C repaid the loan in full in May 2011 so I consider that the Credit Agreement and, in turn, Mr C's credit relationship with Barclays Partner Finance, ended in May 2011. But his complaint about that credit relationship was first made to Barclays Partner Finance in October 2019 so it's clear that he complained more than six years after the event complained about.

(b) Three Years

DISP 2.8.2 R (2)(b) could provide Mr C with more time to complain about the event in question if he did so within three years of the date that he became aware, or ought reasonably to have become aware, that he had cause to complain. This raises the question as to whether Mr C was aware, or ought reasonably to have been aware, more than three years before he first complained to Barclays Partner Finance that he had cause to complain to it.

So, that's what I've considered here and to answer that question, I need to consider whether and when Mr C was aware, or ought reasonably to have been aware, that:

1. there was a problem with the lending or with the holiday club membership;
2. the problem(s) caused him a loss;
3. another party's actions (or its failure to act) may have caused the loss; and
4. the other party may have been Barclays Partner Finance.

Mr C's representative's October 2019 letter sets out the reasons why Mr C considers his credit relationship with Barclays Partner Finance to be unfair to him under the Credit Agreement and the related purchase agreement.

It says that the lending was irresponsible, there was no prospect that it could have been repaid in a sustainable manner and at no stage prior to entering into the Credit Agreement was any proper assessment done to assess Mr C's creditworthiness. But it also says: *"Our clients were also told that [the holiday company] could arrange finance for the purchase. It was admitted that the finance had a high APR, but our clients were told that they could re-finance 'back home'"; and: "Our client initially made payments to you under the [Credit] Agreement. They discovered that this was at a significantly higher rate of interest than that being provided by other lenders and refinanced their borrowing ... and paid off the loan from you".*

It's not unreasonable to suggest that most people would realise the importance to a lender of understanding a person's income before lending them money. And as Mr C says that Barclays Partner Finance didn't make an assessment of his financial

position, it seems to me that he ought reasonably to have known in January 2011 that Barclays Partner Finance had agreed to lend to him when there were serious questions left unanswered as to whether he could afford the loan – which is one of the arguments he’s now making for why the credit relationship with Barclays Partner Finance was unfair to him.

This alone means that Mr C ought reasonably to have realised that he had cause to complain that his credit relationship with Barclays Partner Finance might have been unfair to him long before he did so.

The letter also says that Mr C and his wife encountered problems with: lack of availability; the standard of accommodation and the lack of exclusivity. It says: *“Our clients were booked into [specified accommodation] in November 2011. They were disappointed to see that, contrary to what they had been promised, it was “very tired and very dirty”. Our clients went to the main office to complain and were moved to better accommodation”.*

It seems likely to me that by November 2011 Mr C and his wife would have known that there were significant problems with the purchase causing Mr C financial losses because of the lack of availability of holidays, the standard of accommodation and the lack of exclusivity. So, when it looked like it was more difficult to holiday in the way that Mr C and his wife wanted to, Mr C knew, or ought reasonably to have known, that another party was responsible for the losses that followed. One of those parties was, quite obviously, the holiday company, but Mr C also knew that Barclays Partner Finance had financed the purchase of the membership and that the holiday company had brokered the finance.

Given the size of the financial commitment that Mr C found himself with because of the purchase and the associated loan, and the long-term financial consequences of both of those commitments for him, I think it’s reasonable to have expected Mr C to carry out enquiries when concerns about the loan and the holiday club membership first arose in order to establish what his rights were.

What’s more, the contracts for the purchase were complex, and with that being the case, if he wasn’t already aware of the implications of his concerns and the possible complaints that he might make in light of them, the obvious course for him to take was to make further enquiries and seek advice. Such enquiries seem to me to have been a step he ought reasonably to have taken shortly after November 2011 when he began to have concerns about how the membership had been sold to him and how it was working in practice. And had Mr C carried out such enquiries, I think that they would have led him to discover that Barclays Partner Finance, as a connected lender that financed his purchase, may well have borne responsibility for the holiday company’s alleged failings.

With all of that being the case, I think that Mr C ought reasonably to have been aware that he had cause to complain about Barclays Partner Finance holding him in an unfair credit relationship within the first few years of taking out the membership and certainly more than three years before he first complained. So, I’m not persuaded that the three-year part of the relevant time limit extends the six-year part of it for the purpose of Mr C’s complaint about an unfair credit relationship under Section 140A. And that means he had to complain about Barclays Partner Finance’s role in such a relationship by May 2017. But as he didn’t do that until October 2019, his complaint was too late under the rules that I have to apply.

Exceptional Circumstances

I can consider the merits of a complaint referred to this service after the expiry of the relevant time limit if there are exceptional circumstances that justify why it was late. But I can't see that there are any such circumstances that apply to Mr C's complaint about an unfair credit relationship with Barclays Partner Finance.

I realise that this will be disappointing for Mr C but I hope he understands why I can't disregard the rules that apply.

Mr C's Section 75 complaint

Section 75 operates quite differently to Section 140A and, when it applies, it can give borrowers a very different ground for complaint against their lender. Whereas, as I've explained, Section 140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, Section 75 simply creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything that the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which Section 75 imposes on the lender a "*like claim*" to that which the borrower enjoys against the supplier. If the lender is notified of a valid Section 75 claim, it should pay its liability and if it fails or refuses to do so, that failure or refusal can give rise to a complaint to this service.

So, when a complaint is referred to this service because of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages this service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the 6 and 3 year time limit under DISP 2.8.2 (2) R to complain about an unsuccessful attempt to initiate a Section 75 claim doesn't usually start until the respondent firm answers and refuses the claim. It's clear that this complaint about Barclays Partner Finance's handling of Mr C's Section 75 claim was referred to this service in time for the purpose of the rules on our jurisdiction.

However, as I've already said, I don't think that it would be fair or reasonable to uphold this complaint for reasons relating to Mr C's Section 75 claim. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr C's Section 75 claim was time-barred under the Limitation Act before he made it to Barclays Partner Finance.

A claim under Section 75 is a "*like claim*" against the creditor. It essentially mirrors the claim that the consumer could make against the supplier. A claim for misrepresentation against a supplier 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, under Section 2 of the Limitation Act.

But a claim, like the one in question here, under Section 75 is also "*an action to recover any sum by virtue of any enactment*" under Section 9 of the Limitation Act 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 Mr C's cause of action accrued was the time of the sale in January 2011. I say this because Mr C entered into an

agreement to purchase the point rights at that time based on the alleged misrepresentations of the holiday company – on which he says he relied - and as the loan from Barclays Partner Finance was used to finance the purchase, it was when he entered into the Credit Agreement that he suffered a loss.

Mr C first notified Barclays Partner Finance of his Section 75 claim in October 2019 and as more than six years had passed between the time of sale and when he first made his claim to Barclays Partner Finance, I don't think it was unfair or unreasonable of Barclays Partner Finance to reject Mr C's concerns about the holiday company's alleged misrepresentations".

Subject to any further comments or evidence that I received from any of Mr C, his representative and Barclays Partner Finance, my provisional decision was that: this service's jurisdiction doesn't permit me to consider the merits of Mr C's complaint about an unfair credit relationship with Barclays Partner Finance because it wasn't made within the time limits set out in DISP 2.8.2 R (2); and I don't consider that Barclays Partner Finance needs to do more in regard to the claim made under Section 75.

None of Mr C, his representative and Barclays Partner Finance has responded 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.

As none of Mr C, his representative and Barclays Partner Finance has responded to my provisional decision, I see no reason to change the findings that I set out in my provisional decision. For the reasons set out in my provisional decision, I don't consider that Barclays Partner Finance needs to do more in regard to the claim made under Section 75.

I'm issuing a separate decision about Mr C's complaint about an unfair credit relationship with Barclays Partner Finance.

My final decision

My decision is that Barclays Partner Finance needs to do no more in regard to the claim made under Section 75.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 8 July 2024.

Jarrold Hastings
Ombudsman