

The complaint

Mr J complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") didn't provide a fair and reasonable response to his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a timeshare product financed by a loan he provided.

What happened

In or around November 2014, whilst on holiday utilising his existing timeshare product, Mr J met with a representative of his timeshare supplier - who I'll refer to as "L". During that meeting, Mr J agreed to upgrade his existing timeshare arrangement with L by purchasing more timeshare points. The purchase price agreed was £15,060 which was funded under a fixed sum loan agreement with BPF.

In August 2021, using a professional representative ("the PR"), Mr J submitted a claim to BPF under sections 75 and 140A of the CCA. The PR alleged that Mr J purchased the timeshare product having relied upon representations made by L which turned out not to be true. And under section 75 of the CCA ("S75"), BPF are jointly liable for those misrepresentations.

In particular, the PR allege L told Mr J that they couldn't buy back his existing timeshare. But purchasing more points would allow him to leave his membership after five years.

The PR also allege that the misrepresentation, together with other things done (or not done) by L and alleged breaches of the regulations that applied, render the relationship with BPF, under the agreements, unfair pursuant to section 140A of the CCA ("S140A"). In particular, the PR allege that L:

- pressured Mr J into entering the purchase and loan agreements using aggressive commercial practices;
- said the offer was only available on the day, after which the price would significantly increase;
- allowed him no time to read or consider the information provided;
- failed to advise Mr J of any commission they may have received in relation to the loan;
- made no comparisons to other loan companies;
- didn't inform Mr J that he was free to arrange his own finance; and
- failed to undertake appropriate affordability checks for the loan.

The PR thought it unfair that annual maintenance charges continued to rise sharply and challenged the basis of their calculation. They also thought L had breached:

- the Timeshare, Holiday Products, Resale and Exchange Regulations 2010 ("TRs"); and
- the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

This service hasn't seen any evidence that BPF provided a substantive response to the claims. But they have told us they believe the claim under section 75 is out of time. BPF also say they hadn't been provided with any evidence to support the claim under S140A and don't uphold Mr J's complaint.

The PR referred Mr J's complaint to this service. One of our investigators considered all the information and evidence provided. Having done so, they also thought Mr J's claim under S75 had been brought too late. And they couldn't find any evidence to support the allegations under S140A. Our investigator didn't think there was any evidence to demonstrate the loan was unaffordable for Mr J. So, didn't think his complaint should be upheld.

The PR disagreed with our investigator's findings. In doing so, they asked that this service consider the experiences of other consumers whom they represent and raised various further allegations that it doesn't appear were included within the original claim.

As an informal resolution couldn't be reached, Mr J's complaint was passed to me to consider further. Having done that, while 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 or explained. So, I issued a provisional decision on 14 December 2023, giving both sides the chance to respond before I reach a final decision.

In my provisional decision I said:

Relevant considerations

When considering what's fair and reasonable, DISP¹ 3.6.4R of the FCA² Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

S75 provides consumers with protection for goods or services bought using credit. Mr J paid for the timeshare product under a restricted use fixed sum loan agreement with BPF. So, it isn't in dispute that S75 applies – subject to any restrictions or limitation. This means Mr J is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr J and BPF arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Given the facts of Mr J's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded by a regulated loan with BPF - took place in 2014. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered the effect this might also have.

It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe BPF's failure to uphold Mr J's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.

It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision

¹ Dispute Resolution: The Complaints sourcebook (DISP)

² Financial Conduct Authority

of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And as I've said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Was the claim of misrepresentation under S75 made in time?

The PR says L misrepresented the nature of the purchase agreement and benefits to Mr J when he agreed to purchase the product. And they believe this brings cause for a claim under S75.

But a section 75 claim is “*an action [that is, court action] to recover any sum by virtue of any enactment*” under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. So here, Mr J had to make a claim within six years of when he entered into the purchase contract and credit agreement. The PR confirm this took place in November 2014. That's because this is when they say Mr J lost out having relied upon the alleged false statements of fact at that time.

Details of the alleged misrepresentations were submitted by the PR to BPF in August 2021. But as this was more than 6 years after the purchase was completed and Mr J first says he lost out; I believe a court is likely to find that his claim falls outside of the time limit permitted under the LA. But it is possible that any alleged misrepresentation could be considered under S140A if it was found to have resulted in an unfair debtor-creditor-supplier relationship.

Was the unfair relationship claim under S140A made in time?

A claim under Section 140A is a claim for a sum recoverable by statute – which is also governed by Section 9 of the LA. As a result, the time limit for making such a claim is also six years from the date on which the cause for action accrued.

However, in determining whether or not the relationship complained of was unfair, the High Court's decision in *Patel v Patel (2009)* decided this could only be determined by “*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*”. In that case, that was the date of the trial or otherwise the date the relationship ended.

So, having thought about this, I believe the trigger point here is slightly different. Any relationship between Mr J and BPF continued while the finance agreement remained live. So, that relationship only ended once the agreement ended and any borrowing under it was repaid.

BPF have confirmed that Mr J settled his loan in September 2019. And as this was less than six years before his claim was submitted to BPF, I believe it's likely a court would find that his S140A claim was submitted within the time limit permitted in the LA

The unfair relationship claim under S140A

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 J) 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).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

- Misrepresentation

In determining if the relationship is unfair, the courts must have regard for “*any other thing done (or not done) by or on behalf of, the creditor*”³. I think the alleged misrepresentations are, therefore, relevant here. Further, even though I think it likely they couldn’t be considered under S75 due to the effects of the LA, I think they could still be considered under S140A⁴. So, in trying to establish whether I think a court would likely find that an unfair relationship existed, I’ve considered the alleged misrepresentations further in addition to the various other points raised by the PR.

For me to conclude there was a misrepresentation by L in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that L made false statements of fact when selling the holiday product in 2014. In other words, that they told Mr J something that wasn’t true in relation to the allegation made. I would also need to be satisfied that the misrepresentation was material in inducing Mr J to enter the contract. This means I would need to be persuaded that Mr J reasonably relied on these false statements when deciding to buy the timeshare product.

The difficulty I have is establishing what Mr J was told (or not told) at the time of the sale in 2014. The PR have provided very limited details or evidence to support the misrepresentation they say L made, although I acknowledge that Mr J does say he was told these things. So, I’ve thought about this and whether there’s any evidence available from the time of the purchase in 2014.

Although not determinative of the matter, I haven’t seen any documentation which supports the assertions in Mr J’s claim, such as marketing material or documentation from the time of the sale that echoes what the PR says he was told. In particular relating to the product allowing him to leave his membership after five years. There’s simply no reference to this within any of the documentation provided.

Having considered everything available, I haven’t seen anything to support the allegations here. And because of that, I can’t reasonably say, with any certainty, that L did misrepresent the product Mr J purchased in the way alleged.

³ Under S140A(1)(c) of the CCA

⁴ See *Scotland & Reast v. British Credit Trust Limited* [2014] EWCA Civ 790

- The pressured sale and process

The claim suggests Mr J was pressured into purchasing the product and entering into the finance agreement with BPF. I acknowledge what the PR have said about this. So, I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Mr J approached the closing stages, he was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr J agreed to the purchase and the finance agreement in 2014 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to L, after the purchase, suggesting he'd agreed to it when he didn't want to. And neither the PR, nor Mr J have provided a credible explanation for why he didn't subsequently seek to cancel the transaction within the 14-day cooling off period permitted here – both under the purchase and loan agreements.

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

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mr J as required under the TRs. I've seen very little from the time of the sale here, although there's no suggestion that L didn't provide all the required documentation.

It's possible Mr J wasn't given sufficient time to read and consider the contents of the documentation at the time of the sale. Even if I were to find that was the case – and I make no such finding – It's clear he still had 14 days to consider his purchase and raise any questions or concerns he might've had. And ultimately, if he was unhappy or uncertain, he could've cancelled the agreement without incurring any costs.

Furthermore, I understand the finance agreement also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr J did raise any questions or concerns about either agreement.

- L's responsibilities and disclosure of commission paid

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

It's unclear whether any commission was paid. That said, I don't think any payment of commission by BPF to L would've been incompatible with their role in the transaction. L weren't acting as an agent of Mr J, but as the supplier of contractual rights he obtained under the timeshare product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was L's role to make an impartial or disinterested recommendation, or to give Mr J 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.

What's more, I haven't found anything to suggest BPF was under any regulatory duty to disclose any amount of commission paid in these circumstances. Nor is there any suggestion or evidence that Mr J requested those details from BPF (or L) at any point. As I understand it, the typical amounts of commission paid by BPF to suppliers (like L in this case) was unlikely to be much more than 10%. And on that basis, I'm

not persuaded it's likely that a court would find that any non-disclosure or payment of commission would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

- The annual management charges

Various allegations have been raised in relation to the calculation and basis of the annual management charges payable under the timeshare product agreement Mr J entered into. But I've not been provided with any of the purchase agreement documentation relating to Mr J's timeshare purchase. Further, the PR haven't demonstrated what management charges have actually been invoiced and paid and how and if they differ from what was contractually included within the purchase agreement.

It's not unusual for such agreements to include provisions for recalculation of the annual charges payable each year. So, I wouldn't consider increases to be out of the ordinary in themselves. Further, given Mr J was already an existing member of L's timeshare scheme, I think it's reasonable to conclude that he already had some awareness of the charges associated with his timeshare at the time of the purchase in November 2014. And in any event, in the absence of any supporting evidence, it's not possible to reasonably assess the fairness (or otherwise) of their calculation and application here.

Were the required lending checks undertaken?

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

Ordinarily, responsibility falls with the lender (BPF in this case) to conduct affordability checks as set out within the Consumer Credit Sourcebook ("CONC"), part of the FCA handbook. BPF haven't provided any details of the assessment they undertook. And given the passage of time, it's possible that information is no longer available.

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

If I were to find that BPF hadn't complied with the regulatory guidelines and requirements that applied here – 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 J in order to uphold their complaint here. Furthermore, I don't believe any regulatory failure would automatically mean that the loan agreement is null and void. It would need to be proven that any such failure resulted in a loss to Mr J as a consequence.

As I've seen no specific information about Mr J's actual position at the time and no supporting evidence that he struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for him. And given the loan was successfully repaid in September 2019, I can't see that he's suffered any loss either.

Summary

I want to reassure Mr J that I've carefully considered everything that's been said and provided. Having done so, I think a court is likely to find that BPF have a valid defence under the LA in respect of his claim under S75. And I haven't found any evidence from the time of the sale to support the allegations of unfairness included within his claim. So, I can't say that BPF's failure to uphold it was ultimately unfair or

unreasonable. Because of that, I don't currently intend to ask them to do anything more.

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.

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BPF, having received my provisional decision, confirm they have nothing further to add. However, despite follow up by this service, the PR haven't provided any further comment, information or evidence for me to consider.

In the circumstances. I've no reason to vary from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Mr J's complaint.

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

Dave Morgan
Ombudsman