

The complaint

Mr D's complaint is that Clydesdale Financial Services Limited trading as Barclays Partner Finance ('BPF') acted unfairly and unreasonably when dealing with a complaint about a loan taken out in 2011.

The complaint is only in Mr D's name as he alone was named on the Credit Agreement. But I will refer to both Mr and Mrs D throughout this decision as the timeshare contract in question was in both of their names.

What happened

Mr and Mrs D purchased a trial membership from a timeshare provider (the 'Supplier') on 19 September 2010. This allowed them to take 5 weeks of holiday within a 34-month period. Mr and Mrs D then purchased full membership from the Supplier on 31 March 2011 (the 'Time of Sale'). They bought 1,000 points at a pre-trade in cost of £15,434. Trading in their trial membership reduced the purchase price to £11,439.

Mr and Mrs D paid for their membership by taking finance from BPF in Mr D's name. He entered into a consolidated 15-year restricted use Fixed Sum Credit Agreement for £11,439 and the total amount repayable if the loan ran to term (after interest and charges) was £30,875.40 (the 'Credit Agreement').

Under the terms of the membership, Mr and Mrs D could exchange their points for holidays.

Mr D wrote to BPF on 16 October 2020 to complain and raised the following points:

- There has been a Spanish supreme court ruling which has made clear that this type of product is illegal.
- The salesperson used aggressive techniques.
- There was no assessment of affordability.
- The product was sold to them as an investment.
- They were not expressly informed of the 14-day cooling off period.
- They were not advised regarding the annual, rising maintenance fees and were told the annual charge would be 1.9% when it in fact was 4.3%.
- They were shown accommodation and were told this is the standard they could expect to receive for their points, but they've never been able to book accommodation of that standard.
- They were never able to book any accommodation, despite trying to do so months in advance. They were advised to book up to a year in advance, but this isn't feasible for them as they are both self-employed and so can't plan that far ahead.
- It was implied by the salesperson that they could sell their points back to the Supplier.
- The level of interest applied to the loan is too high.
- They believe an unfair relationship exists for the above reasons and referred to

Section 140 of the Consumer Credit Act 1974 (the 'CCA').

BPF did not provide a final response to this complaint, and to date have not done so.

Mr and Mrs D therefore referred their complaint to the Financial Ombudsman Service on 23 December 2020. At this stage, they added the following points to their complaint:

- They were never offered the opportunity of financing elsewhere.

They also provided a copy of a witness statement they had completed. This was unsigned but dated as 14 December 2016. As well as the other points listed above, it also mentioned Mr and Mrs D's concern that the contract runs in perpetuity.

The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits on 12 December 2023.

Mr and Mrs D disagreed with these findings and asked for the matter to be referred to an Ombudsman for a final decision to be made, largely repeating the points already made (as above), albeit with more detail.

They also provided further submissions, which they said had been written with the assistance of a barrister, along with supporting documents. These submissions largely repeated the points already made (as above), as well as making the following points:

- They accept that any claim made under Section 75 of the CCA claim is time-barred under the Limitation Act 1980 and confirmed their complaint is solely based on the unfair relationship they feel exists between Mr D and BPF and the associated provisions of Section 140 of the CCA.
- They feel the terms allowing the Supplier to charge the annual charges and to vary those charges are unfair under the Unfair Terms in Consumer Contracts regulations 1999 (the 'UTCCR').
- They confirmed their complaint under Section 140 is based on the misrepresentation of the quality of the accommodation, the failure to draw their attention to the effect of the annual management charges and the aggressive sales pitch.

As agreement on the outcome could not be reached, the complaint has been referred to me to make a final 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.

When making my decision, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulator's rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

Where evidence is incomplete, inconclusive, or contradictory, I make my decision on the balance of probabilities i.e., what I think is more likely than not to have happened based on the evidence available and the wider circumstances of the complaint.

My role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

Before addressing the crux of Mr D's complaint, I'd like to briefly explain that since Mr D isn't making, nor has made, a Section 75 claim and has confirmed his complaint isn't based on this, I won't consider that provision further in relation to it.

Mr D's complaint that BPF hadn't treated him fairly

The crux of Mr D's complaint is that he feels, for various reasons, the credit relationship between him and BPF was unfair. Some of these matters, such as the question of whether the loan was affordable, can be considered as complaint points in their own right. But some of these concerns could give rise to an unfair debtor-creditor relationship as set out in Section 140A of the CCA. I've addressed each of these aspects of Mr and Mrs D's dissatisfaction in turn.

Spanish court ruling

Mr D said there is a Spanish supreme court ruling which has made clear that selling timeshares "*dressed up as points ownership in properties evades timeshare law*".

He also said that because they have an 'in perpetuity' contract and their timeshare is a points-based timeshare, the contract is illegal under Spanish law.

However, in this case, the timeshare agreement is governed by English law, not Spanish law, so I don't think any Spanish court judgement can be directly applied to the question of whether the product is illegal under English law. And having read all of the relevant legislation, rules and regulations, I can't see anything which would have the effect Mr D seeks.

I note that Mr and Mrs D haven't explained the reasons why they feel a timeshare that provides for the ability to use points to book holidays, is illegal under English law or provided any evidence to support this assertion. Having taken everything into account, including all relevant legislation, rules and regulations, I can't see anything that would mean the agreement was illegal. Points based timeshares were common models that haven't been prohibited in English law and I've seen nothing to suggest that all timeshare agreements had to refer to a specific apartment or set week.

Affordability of the loan

Mr and Mrs D say they don't think there were any affordability checks carried out at the Time of Sale.

I haven't been provided with evidence by BPF of any checks it did or what they showed. However, Mr and Mrs D haven't provided any evidence that shows that the loan was unaffordable for Mr D at the Time of Sale.

So, on the basis of the evidence and information I do have from both parties, I've not seen sufficient evidence to suggest the loan wasn't affordable for Mr D at the Time of Sale. It follows, I can't say Mr and Mrs D lost out, even if BPF didn't do all of the checks it should have done, or that this caused an unfairness that requires a remedy in this case.

The Supplier's sales and marketing practices at the Time of Sale

Mr and Mrs D have told our Service that the sales process took most of a day and was followed up on a subsequent day when Mr D's father was present and that this altered the dynamic and increased the pressure to buy, with a deal offered at a discount.

From what I know of the Supplier's general sales practices at this time, I don't doubt that the sales process Mr and Mrs D attended was lengthy. But I don't think the testimony provided is sufficient for me to safely say that any undue pressure was applied to them during the sale, such as to cause them to buy something they otherwise wouldn't have done.

Regarding the discount offered, I'm aware that prospective members were often offered cheaper deals on the day than if they'd approached the Supplier at another time. But I don't think there is anything wrong with offering customers a discount or limited time offers. I also don't think there is anything wrong in sales representatives visiting customers.

Mr and Mrs D don't say more about exactly how they were pressured. From the limited evidence provided, I'm not sufficiently persuaded the sale was pressured in a way that caused them to buy something they otherwise wouldn't have done, nor do I think this created an unfair relationship that requires a remedy.

I note that Mr and Mrs D declined to purchase membership after the first, longest conversation they had. And there were other conversations where they declined to purchase too. I think this shows not only that they were aware they could decline to purchase, but that the general sales process and techniques used were not so pressured that they purchased something they otherwise wouldn't have done. In their witness statement, Mr and Mrs D say they found the whole concept attractive, so I think it's more likely they made their purchase for this reason, as opposed to because they were unduly pressured into it.

It is also important to note that Mr and Mrs D were also given a 14-day 'cooling off' period following the sale, during which time they could cancel the purchase and the associated Credit Agreement without penalty.

In their original complaint, Mr and Mrs D also said the product was sold to them as an investment.

At the Time of Sale, Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') prohibited the Supplier from marketing or selling the membership as an investment. At the Time of Sale, the provision said:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

However, apart from making the bare allegation when they first made their complaint, Mr and Mrs D haven't described in any detail what was said to them, by whom and in what circumstances to support the suggestion in question. Nor have they mentioned it again when they've developed their submissions or clarified their complaint points with our Service.

So, in the circumstances, I don't think it's likely the Supplier breached the prohibition on selling timeshares as investments. Even if I'm wrong about that, based on what's been provided, along with the fact that Mr D hasn't mentioned this point in any of the further submissions made, I'm not persuaded it was important enough to Mr and Mrs D's purchasing decision to render his relationship with BPF unfair to him if the membership had, in fact, been sold as an investment.

The provision of information at the Time of Sale

Mr and Mrs D say that they weren't expressly informed of their 14-day cooling off period.

However, I can see the cooling off period was clearly explained to Mr and Mrs D in the documentation provided to them at the Time of Sale. And there's been nothing to suggest Mr and Mrs D couldn't have used their right of withdrawal had they wished to.

Mr and Mrs D also say there was no discussion about the annual charges, and it was only afterwards that they realised such fees would apply. But they also say that they were told the indexation of the charges was 1.9% and it has subsequently turned out to be 4.3%. What's more, Mr D has also said in later submissions that he accepts that the fees are described in the sale documentation and also that these were highlighted to them at the end of the sales process, albeit he said these were stated in a way that "*made them appear of no consequence*".

In my view, the testimony provided is inconsistent regarding what Mr and Mrs D say they were told, and what they now think they should have been told. And they haven't provided a full breakdown of all the annual charges they have actually had to pay, so I cannot see that the fees have risen unfairly.

So, while it's possible the Supplier didn't give Mr and Mrs D sufficient information, in good time, on the various charges they could have been subject to as members in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't seen enough to persuade me that was the case, nor that the lack of information provided rendered Mr D's credit relationship with BPF unfair to him. I also haven't seen sufficient evidence to persuade me that the Supplier's cost disclosure played such a significant part in Mr and Mrs D's decision to purchase membership that they would have made a different purchasing decision had the Supplier's cost disclosure complied with their regulatory responsibilities.

Mr and Mrs D have also complained that the term(s) which allowed the Supplier to charge such fees and to vary the level of those fees were unfair under the UTCCR.

But I don't think charging such fees or varying them in order to (as per the scheme rules) 'balance the budget' i.e., basing them on the estimated costs of the association for the upcoming year is unusual or unreasonable. I note that Mr D has said that due to these fees, owning the timeshare gave him no advantage over simply purchasing a holiday on the open market. But I can't see that the membership was sold with the view of providing such an advantage or designed for that purpose. So, I'm not currently persuaded that these term(s) are unfair for the purposes of the UTCCR, such that it would play a part in rendering the credit relationship between BPF and Mr D unfair to him under Section 140A.

Section 140A(2) says that a court shall have regard to "*all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)*" – so it is wide enough to include the consumer's ongoing exposure to unfairness in the future under the terms in question and how a supplier has enforced any terms that are or might be unfair.

So, given the particular circumstances of this complaint, even if some of the terms in question had the potential to be unfair under the UTCCR, it seems unlikely to me they led to any unfairness in the credit relationship between Mr D and BPF for the purposes of Section 140A. The reason being is that I can't see that the relevant terms were actually operated unfairly against Mr and Mrs D during the time that Mr D has been party to the Credit Agreement. I also can't see that there were any ongoing effects of unfairness because of the terms in question that would warrant a remedy.

Level of interest on the loan and alternative finance

Mr and Mrs D also said there was a high level of interest applied to the loan and they felt this was unfair.

It seems likely to me that Mr and Mrs D were told this information at the Time of Sale. For example, I can see that their signed Credit Agreement clearly states the applicable interest rate. It also explained the total amount they'd be repaying after interest and charges.

Being charged interest when borrowing money is normal, and I do not see that charging interest would have led to an unfairness in this case. I acknowledge that Mr and Mrs D have said they feel the interest rate was high but again, the interest rate was set out on the face of the loan agreement, so it would have been clear to Mr and Mrs D. Further, I've not been provided with any reason why such a rate was unfair given Mr and Mrs D's circumstances, so I can't say the level of interest led to an unfairness that requires a remedy in this case.

Mr and Mrs D have also said they weren't offered the possibility of financing the agreement through another provider or through alternative means by the Supplier. But the Supplier wasn't acting as an agent of Mr and Mrs D but as the supplier of contractual rights they obtained under the relevant purchase agreement. And, in relation to the loan, it doesn't look like it was the Supplier's role to make impartial or disinterested recommendations, or to give Mr and Mrs D advice or information about how to finance their purchase on that basis.

So, I'm not persuaded that Mr D's credit relationship with BPF was rendered unfair for these reasons given the facts and circumstances of this complaint.

Other points

Mr and Mrs D also say that there were a number of pre-contractual misrepresentations by the Supplier in the lead up to the sale of their membership. Misrepresentations could also be something that led to an unfair debtor-creditor relationship, so I've considered what Mr and Mrs D have said with that in mind and whether I think there is enough to conclude that they were told something untrue by the Supplier that caused them to enter into the purchase agreement.

Mr and Mrs D haven't explained what exactly they were told or promised regarding the standard of accommodation at the Time of Sale or how the accommodation they did book was different to this. They've said the reality of what they received in this regard was totally at odds with what was promised, but they haven't explained how or why.

They've said they were never able to book any accommodation, but from the information provided, they have made use of their holiday rights. It would seem from what they've said that their difficulties stem from being self-employed and therefore not being able to plan far enough in advance. I can't see this was something they specifically told the Supplier at the Time of Sale, nor that the Supplier made any guarantees or promises in relation to how far in advance (or not) Mr and Mrs D would have to book. From what they've said, the Supplier simply told them there was availability at the resorts they were interested in, which isn't an untrue statement.

In relation to being able to sell the points back to the Supplier, Mr and Mrs D have said this was mentioned in the context of being offered a lower price, with the Supplier saying they were able to offer such a price due to a previous owner returning their points. Mr and Mrs D say they accept the Supplier did not directly say they themselves could sell their points back, but they felt this was implied. This description also does not suggest to me that a false statement of fact was made to them by the Supplier.

Lastly, Mr and Mrs D have said they were told they could pass on the rights to their points to

their children for their enjoyment. But, it has subsequently turned out that the contract runs in perpetuity and that their children have an obligation to continue paying annual charges to the Supplier. No further detail has been provided as to what exactly Mr and Mrs D were told in this regard, by whom and in what context, so it is not clear to me what the alleged untrue statement made by the Supplier was.

As there's nothing else on file that persuades me that there were any false statements of fact made to them by the Supplier at the Time of Sale, I do not think there was a misrepresentation by the Supplier for the reasons they allege. And it follows that I don't think any of these points raised caused an unfairness in the credit relationship between Mr D and BPF.

Mr D has said he doesn't need to prove an actionable misrepresentation in order to make an unfair relationship 'claim', in the same way he would for a Section 75 claim, only that he would need to prove the Supplier misled him by giving a false impression. While it's true that the two sections operate very differently, and give a very different ground of complaint, we consider complaints on the balance of probabilities, based on the evidence provided. Here, I must decide whether I think there was an unfair relationship between Mr D and BPF for the reasons he alleges. And, ultimately, I'm not persuaded by the evidence provided in this case that the Supplier misled Mr D in the way he claims, such as to cause the credit relationship to be unfair, for the reasons I've set out above.

So, overall, I haven't seen enough to persuade me that any of these points rendered Mr D's credit relationship with BPF unfair to him.

Conclusion

Overall, taking into account all the facts and circumstances of this complaint, I'm not persuaded that BPF was party to a credit relationship with Mr D under the Credit Agreement that was unfair to him. And, having taken everything into account, I see no other reason why it would be fair or reasonable to direct BPF to compensate Mr D.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 9 July 2024.

Fiona Mallinson
Ombudsman