DRN-4620964

The complaint

Mr F 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 they financed.

What happened

In or around September 2014, whilst on holiday utilising his existing timeshare product, Mr F agreed to meet with a representative of his timeshare supplier (who I'll refer to as "L") for an update. During that meeting, Mr F agreed to upgrade his existing timeshare arrangement with L by purchasing a points-based product from them. The price agreed for the points purchased was £6,650 which was funded under a Fixed Sum loan with BPF.

In March 2022, using a professional representative ("the PR"), Mr F submitted a claim to BPF under sections 75 and 140A of the CCA. The PR allege that Mr F 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 that L told Mr F the points would allow him access to exclusive luxury resorts where he could holiday at his time of choosing. But the resorts weren't exclusive as non-members could holiday there by booking on-line. Further, the PR allege it was impossible for Mr F to holiday at his preferred time.

The PR also allege that the misrepresentations, 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:

- the payment of any commission by BPF to L was hidden from view;
- what was positioned as an update meeting turned into a sales presentation;
- Mr F felt pressured to enter into the purchase and loan agreements and was made to feel he couldn't leave the meeting;
- Mr F wasn't told the timeshare was in perpetuity;
- Mr F was given no opportunity to consider other lenders and wasn't permitted to arrange his own finance; and
- Mr F wasn't given the opportunity to consider the paperwork.

Further, the PR allege L's actions led to breaches of:

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

Finally, the PR allege that no proper affordability checks were undertaken before the credit facility was agreed and provided to Mr F by BPF.

BPF didn't uphold Mr F's claim(s). They thought the claim under S75 had been brought too late under the provisions of the Limitation Act 1980 ("the LA"). And they didn't think it would be fair or reasonable to uphold Mr F's claim under S140A.

The PR didn't accept BPF's response, so referred Mr F's claim to this service as a complaint. In doing so, they explained why they didn't agree Mr F's S75 claim was time barred. One of our investigators considered all the information and evidence provided. Having done so, our investigator thought BPF were entitled to rely upon a defence under the LA in rejecting Mr F's S75 claim. Our investigator also didn't think a court was likely to find unfairness in the relationship under S140A based upon the evidence available. Or that there was anything persuasive to suggest the lending was unaffordable for Mr F.

The PR responded at length suggesting the investigator's findings were incorrect. In a detailed 12-page submission, the PR raise concerns about increasing annual maintenance fees charged by L. They allege that from 2009, Mr F was being approached by L to purchase a new point-based product which would provide a guaranteed exit from his existing timeshare via a release clause of five or ten years. And further, that the new points could be redeemed ensuring Mr F got his money back *"at the very least or more likely a profit".* They go on to include further alegations of misrepresentation which it doesn't appear were included within the original claim in March 2022. In particular, that the timeshare points were sold as an investment contrary to the TRs. In doing so, the PR also reference other timeshare points purchases made by Mr F in 2009, 2010, 2012, 2015, 2016 and 2017, together with their observations in relation to those purchases.

As an informal resolution couldn't be reached, Mr F's complaint was passed to me to consider further. Having done that, I was inclined to reach the same outcome as our investigator. But I considered a number of issues which may not have been fully addressed or explained previously. So, I issued a provisional decision on 16 January 2024, giving both sides the chance to respond before I reach my final decision.

In my provisional decision I said:

> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] 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.
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> S75 provides consumers with protection for goods or services bought using credit. Mr F paid for the timeshare points under a fixed sum loan agreement with BPF. So, it isn't in dispute that S75 applies. This means Mr F 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.
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> S140A looks at the fairness of the relationship between Mr F and BPF arising out of the finance agreement (taken together with any related agreements). And because the product purchased was funded under the loan 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 F's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded by a fixed sum loan agreement with BPF - took place in September 2014. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered any effect this might also have.

[1] Dispute Resolution: The Complaints sourcebook (DISP)

[2] Financial Conduct Authority

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 F'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 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 say L misrepresented the nature of the purchase agreement and benefits to Mr F when he agreed to purchase the timeshare points in September 2014. 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 F had to make a claim within six years of when he entered into the purchase contract and credit agreement. The PR confirm these took place in September 2014. That's because this is when they say Mr F 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 March 2022. But as this was more than six years after the purchase was completed and Mr F first says he lost out; I believe a court is likely to find that his claim falls outside of the time limit permitted in the LA.

Could the limitation period be postponed?

The PR argue that the limitation period should be extended under Section 32 of the LA because the timeshare points were sold as an investment in breach of regulation 14(3) of the TRs. The PR allege L deliberately concealed that it was illegal to sell timeshare products this way.

Section 32(1)(b) applies when *"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant"* [my emphasis]. But the PR haven't provided me with anything persuasive to suggest that L sold the timeshare points as an investment contrary to regulation 14(3) of the TRs. And in any event, I can't see that this specific allegation formed part of the claim submitted to BPF in March 2022 or that BPF have been asked to consider and respond to it. So, my view is that this particular argument by the PR doesn't help Mr F's cause within the context of the actual claim submitted.

The PR also suggest that Mr F only became aware he had cause for complaint on 15 April 2021, albeit they haven't elaborated upon the significance of that date. They suggest Mr F's complaint was referred to this service within three years of when he first became aware he had cause for complaint as required under DISP rule

2.8.2R(2)(b). To reiterate, the complaint being considered here relates to Mr F's dissatisfaction with BPF's response to his claim – I'm not deciding the legal claim itself. The DISP rules relate to complaints about financial services and products, not legal claims. So, I agree that Mr F's complaint was referred to this service in time. But I don't see how that argument has any bearing upon the effects of the LA upon Mr F's legal claim under S75.

The unfair relationship claim under S140A

A claim under Section 140A is a claim for a sum recoverable by statute – which is normally also governed by Section 9 of the LA. As a result, the time limit for making such a claim would also be 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.

As far as I'm aware, Mr F's loan with BPF remained open and active at the point the claim was raised with BPF. So, on that basis, I believe any claim under S140A was made in time.

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 F) 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). And I think it's relevant to acknowledge Mr F's existing membership and relationship with L.

The PR confirm Mr F had previously purchased products from L. So, I think it's reasonable to conclude that at the time of the purchase September 2014, he had a fairly strong awareness about any products he'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude Mr F was familiar with L (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as that purchase doesn't appear to have been his first.

- Misrepresentation

In determining if the relationship is unfair under S140A (under the points detailed above), I think the alleged misrepresentations are 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 S140A[3]. 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.

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

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 F something that wasn't true in relation to the allegations made. I would also need to be satisfied that the misrepresentation was material in inducing Mr F to enter the contract. This means I would need to be persuaded that he reasonably relied on these false statements when deciding to buy the timeshare product.

The difficulty I have is establishing what Mr F 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 misrepresentations they say L made, although I acknowledge they do say Mr F 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 F'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 exclusivity and/or booking availability. There's simply no reference to this within any of the documentation I've seen.

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 F purchased in the way alleged.

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

The claim suggests Mr F was pressured into purchasing the timeshare points and entering into the loan 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 F 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 F 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 F have provided a credible explanation for why he didn't subsequently seek to cancel the transaction within the 14-day cooling off period usually 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 F 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.

- <u>Time to read and consider the information provided</u>

I've thought about the information that I believe should have been provided to Mr F 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. And in the claim, the PR refers to the written paperwork running to over 100 pages. So, it seems Mr F was likely to have received that.

It's possible Mr F wasn't given sufficient time to read and consider the contents of the documentation at the time of the sale. But even if I were to find that was the case –

and I make no such finding – it's clear he would still have had 14 days to consider his purchase and raise any questions or concerns he might've had – as required under the TRs. And ultimately, if he was unhappy or uncertain, he could've cancelled the agreement without incurring any costs.

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

- L's responsibilities and disclosure of commission paid

Part of Mr F'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 F, 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 F 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 they may have paid in these circumstances. Nor is there any suggestion or evidence that Mr F 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.

- Is the purchase contract voidable

The PR argue that the timeshare product Mr F purchased is in perpetuity – that is to say, it has no defined end date. However, I've not seen anything that supports that assertion within the limited documentation provided from the time of the sale. It would certainly be unusual if that were the case.

It's possible that such a term may be considered unfair under the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR"). One of the main aims of both the TRs and UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a bargain didn't recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may amount to unfairness under Section 140A.

However, as the Supreme Court decision in Plevin[4] makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of Section 140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. And as Section 140A(2) says that courts shall have regard to "all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)", it is wide enough to include the consumer's ongoing exposure to unfairness in the future under the

[4] *Plevin vs Paragon Personal Finance Ltd [2014] ('Plevin')*

terms in question and how a supplier has enforced any terms that are or might be unfair.

It's possible L didn't give Mr F sufficient information as regards the length of the timeshare agreement he entered into in September 2014 in order to satisfy their responsibilities under Regulation 12 of the TRs. But even if that was the case, as I've said above, Mr F was an existing member and had been for several years by the time the sale in question happened. So, I think his experience as a member is likely to have given him enough insight into the terms of the contracts he'd entered into. And as he'd made the decision to enter into a further purchase agreement with that experience in mind, in the absence of a credible explanation from him as to why, at the time of sale, L's disclosures could be said to have played a significant part in that decision, I'm not persuaded they did. And because of that, I'm also not persuaded such a contractual term – if evidenced – would mean that the contract was voidable.

Were the required lending checks undertaken?

There are certain aspects of Mr F'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 fell 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 - which applied at the time. 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.

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 any finance repayment wasn't sustainably affordable for Mr F in order to uphold his complaint here. Furthermore, I don't believe any regulatory failure would automatically mean that the loan agreement was null and void. It would need to be proven that any such failure resulted in a loss to Mr F as a consequence.

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

Other considerations

In their detailed response to our investigator's findings, the PR reference other purchases made by Mr F from L. However, I'm only able to consider Mr F's complaint within the context of his specific claim in March 2022 and BPF's response to that – i.e., this complaint specifically relates to his purchase in September 2014 and not to any other purchases or associated agreements. So, I don't see how much of what the PR has said assists me when considering Mr F's complaint here.

Furthermore, the PR made subsequent allegations that the timeshare points were sold as an investment. But as this doesn't appear to have formed part of the original claim submitted in March 2022 and considered by BPF, I'm unable to consider this aspect further as part of the complaint referred to this service.

Summary

I want to reassure Mr F 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. Further, I haven't found any

evidence from the time of the sale to support the allegations of unfairness included within his claim. Or that there's anything to suggest the loan was unaffordable for him to such an extent that it caused him loss. So, I can't say that BPF's failure to uphold his claim 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.

BPF have acknowledged receiving my provisional decision and confirm they have nothing further to add at this stage. Despite follow up by this service, neither the PR, nor Mr F have responded to my provisional findings. So, in the circumstances, I've no reason to vary from them.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 13 March 2024.

Dave Morgan
Ombudsman