

The complaint

Mr R complains that Clydesdale Financial Services Limited, trading as Barclays Partner Finance, won't refund to him the money that he paid to upgrade a holiday club membership. He's being represented in his complaint by a claims management company.

What happened

Mr R and his wife had bought a holiday club membership from a holiday company and they then entered into a 26th share purchase agreement to upgrade their membership in June 2010. The purchase price of the upgrade was £21,950, from which a part-exchange value of £5,000 was deducted, so the balance due from them was £16,950. Mr R entered into a finance agreement with Barclays Partner Finance to pay that amount to the holiday company but neither Mr R nor Barclays Partner Finance has been able to provide a copy of that agreement and I also understand that it's been repaid.

Mr R and his wife entered into another purchase agreement with the holiday company in September 2014 to increase their membership of the holiday club. Mr R's representative made claims, on behalf of Mr R, to Barclays Partner Finance under section 140A of the Consumer Credit Act 1974 in January 2017. The representative's letter to Barclays Partner Finance said that: the holiday company didn't conduct a proper assessment of Mr R's financial position and ability to repay the finance; applied considerable pressure to him and his wife to procure their agreement to the finance; breached the contract and EU Law; and accepted a commission from Barclays Partner Finance; which rendered the finance agreement unfair.

Barclays Partner Finance said that the claims were time-barred under the Limitation Act 1980. Mr R wasn't satisfied with its response so complained to this service in April 2017. His complaint form says that: the holiday company and Barclays Partner Finance failed to conduct a proper assessment of his ability to afford the finance; Barclays Partner Finance paid a commission to the holiday company which wasn't declared to him; and the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the finance agreement; all rendering the finance agreement unfair pursuant to section 140A.

Our investigator didn't recommend that Mr R's complaint should be upheld. He said that Mr R's complaint only related to the 2010 agreement which was financed by Barclays Partner Finance but he thought that Barclays Partner Finance should have considered the claim under section 140A. He didn't think that there was any evidence to suggest that the finance was unaffordable and he said that he hadn't seen enough evidence to conclude that Mr R felt that he had no option but to upgrade the membership. He wasn't persuaded that there was any commission paid, and if there was a commission paid, he didn't think that it was of such a level that would give rise to an unfair relationship.

Mr R's representative says that it doesn't agree with our investigator's recommendation and wishes for the matter to be referred to an ombudsman. It says that there are a number of grounds listed under section 140A which don't appear to have been considered and it has referred to two decisions issued by this service which involved the inclusion of further issues

under the scope of section 140A which weren't included in the original letter of claim. It says that the section 140A aspect of the claim is wide in scope and it doesn't believe that all issues have been considered - for example, the insertion of clauses for non-payment and the loss of use are well within the scope of section 140A, and those decisions find that the inclusion of such terms is manifestly unfair and gives rise to the acceptance of a claim under section 140A.

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 so, I agree with our investigator that Mr R's complaint shouldn't be upheld for these reasons:

- Mr R and his wife upgraded their holiday club membership in June 2010 and they increased their membership in September 2014 – Mr R entered into a finance agreement with Barclays Partner Finance in June 2010 to pay for the upgrade and Barclays Partner Finance has provided evidence to show that the finance has been repaid;
- Mr R's representative made claims to Barclays Partner Finance under section 140A in January 2017 and Mr R complained to this service in April 2017 – his complaint form says that the transaction about which he's complaining took place in June 2010 and that the finance agreement that he entered into with Barclays Partner Finance at that time was rendered unfair pursuant to section 140A;
- 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;
- I'm not determining the outcome of Mr R's claim under section 140A in this decision as only a court would be able to do that but I'm considering whether or not Barclays Partner Finance's response to the claim that had been made to it about Mr R and his wife's June 2010 purchase was fair and reasonable in the circumstances – I'm not considering any complaint relating to their September 2014 purchase in this decision;
- Mr R's representative's January 2017 letter to Barclays Partner Finance says that Mr R's relationship with Barclays Partner Finance was unfair and that the holiday company didn't conduct a proper assessment of his financial position and ability to repay the finance, applied considerable pressure to him and his wife to procure their agreement to the finance, breached the contract and EU Law and accepted a commission from Barclays Partner Finance;
- Mr R's complaint form says that the holiday company and Barclays Partner Finance failed to conduct a proper assessment of his ability to afford the finance, Barclays Partner Finance paid a commission to the holiday company which wasn't declared to him and the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the finance agreement, all rendering the finance agreement unfair pursuant to section 140A;
- Barclays Partner Finance said that the claims were time-barred under the Limitation Act but the courts have said, when considering section 140A, that the time for limitation purposes runs from the date that the credit agreement ended (if it was not still running at the time the claim was made) and the limitation period for a claim under section 140A is six years;
- the finance was provided to Mr R in June 2010 and Mr R's representative made claims to Barclays Partner Finance in January 2017 – I've seen no evidence to show

that the finance agreement ended before January 2011 so I consider that Barclays Partner Finance should have considered Mr R's claim under section 140A;

- neither Mr R nor his representative has provided any detailed information about Mr R's financial situation in June 2010 or to show that the finance wasn't affordable for him at that time – and Barclays Partner Finance has provided evidence to show that the finance has been repaid;
- the finance was made available to Mr R in June 2010 and has been fully repaid but I've seen no evidence to show that he complained to Barclays Partner Finance about the affordability assessment that it had conducted until his representative's January 2017 letter – if the finance was unaffordable for him, I consider that it would be reasonable to expect him to have contacted Barclays Partner Finance about that issue sooner than he did;
- I'm not persuaded that there's enough evidence to show that the finance wasn't affordable for Mr R in June 2010 when it was made available to him or that Barclays Partner Finance has acted incorrectly in connection with the finance;
- I've not been provided with any evidence to show that Barclays Partner Finance paid a commission to the holiday company in connection with the finance that it made available to Mr R but, from what this service has seen across the industry, if commission was ever paid it tended to be low and of less than 15% and I'm satisfied that Barclays Partner Finance wouldn't have breached any duty in making any such payment – nor was it under any regulatory duty to disclose the amount of any commission paid in these circumstances - and I don't consider that the level of any commission that was normally paid in this type of situation would have been sufficiently high to mean that Barclays Partner Finance should have appreciated that not disclosing the amount of any commission to Mr R risked the relationship being unfair under section 140A;
- the purchase agreement says that Mr R and his wife had the right to cancel the agreement for fourteen days after they'd entered into it and Mr R would have had the right to withdraw from the finance agreement within fourteen days - but I've seen no evidence to show that Mr R contacted either the holiday company or Barclays Partner Finance to withdraw from either the purchase agreement or the finance agreement within the applicable withdrawal periods;
- those agreements were signed in June 2010 but I've seen no evidence to show that Mr R complained to either the holiday company or Barclays Partner Finance about the undue pressure that he claims was applied to him and his wife until his representative's January 2017 letter – if they'd been unduly pressured into signing the purchase agreement and didn't want to upgrade their membership, I consider that it would be reasonable to expect him to have contacted either the holiday company or Barclays Partner Finance about that issue sooner than he did;
- if Mr R and his wife had been unduly pressured into signing the purchase agreement and didn't want to upgrade their membership in June 2010, I don't consider it to be likely that they would have entered into another purchase agreement with the holiday company in September 2014 to increase their membership;
- I'm not persuaded that there's enough evidence to show that Mr R and his wife were unduly pressured into entering into the purchase agreement in June 2010 or that Mr R was unduly pressured into entering into the finance agreement at that time;
- the January 2017 letter says that the holiday company has breached the contract and EU Law – but neither Mr R nor his representative has provided any further information about the alleged breaches and I'm not persuaded that there's any

evidence to show that the holiday company has breached the purchase agreement or EU law;

- Mr R's representative has referred, in response to our investigator's recommendation, to two decisions issued by this service which involved the inclusion of further issues under the scope of section 140A which weren't included in the original letter of claim and it says that the section 140A aspect of the claim is wide in scope and it doesn't believe that all issues have been considered - for example, the insertion of clauses for non-payment and the loss of use are well within the scope of section 140A, and those decisions find that the inclusion of such terms is manifestly unfair and gives rise to the acceptance of a claim under section 140A;
- Mr R and his wife also entered into a leaseback agreement and an option agreement with the holiday company in June 2010 and I've seen no clause in those agreements or the purchase agreement about termination of the membership in the event of non-payment of any annual charges or fees relating to Mr R and his wife's membership of the holiday club;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated in practice and whether the operation of that term caused the relationship to be unfair;
- I'm not persuaded that there's any evidence to show that the terms of the agreements that Mr R and his wife signed in June 2010 have been applied or operated unfairly against them and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mr R and Barclays Partner Finance;
- this service considers each complaint on its individual merits and the decisions to which Mr R's representative has referred relate to a different type of holiday ownership product than was bought by Mr R and his wife in June 2010 and I'm satisfied that I've considered all of the issues that have been raised by Mr R and his representative and I'm not persuaded that it would be fair or reasonable in these circumstances for me to consider any other issues;
- the courts have said that the protection afforded to debtors by section 140A isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty so, even if the holiday company did make some mistakes when the upgrade was sold to Mr R and his wife in June 2010, it doesn't automatically follow that those mistakes led to an unfair relationship for the purpose of section 140A - any such mistakes (and any consequences) must be looked at in the round, rather than in a narrow or technical way;
- having carefully considered all of the information and evidence that Mr R and his representative have provided, I'm not persuaded that there's enough evidence to show that Mr R's relationship with Barclays Partner Finance was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mr R and Barclays Partner Finance in these circumstances;
- Barclays Partner Finance said that Mr R's section 140A claim was time-barred under the Limitation Act but I consider that it should have considered the claim under section 140A so I can't say that its response to the claim that had been made to it was fair or reasonable – but if it had properly considered that claim, I consider that it would have been fair and reasonable for it not to have upheld it; and
- I find that it wouldn't be fair or reasonable in these circumstances for me to require Barclays Partner Finance to refund to Mr R any of the money that he's paid under the

finance agreement, to pay him any compensation or to take any other action in response to his complaint.

My final decision

My decision is that I don't uphold Mr R's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 24 April 2024.

Jarrold Hastings
Ombudsman