

The Complaint

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

Background to the Complaint

Mr M (and his wife, Mrs M¹) purchased membership of an asset-backed timeshare (the 'Fractional Club') on 29 August 2014 (the 'Time of Sale') from a third party (the 'Supplier'). They appear to have entered into two purchase agreements with the Supplier – albeit under the same membership number. They used a restricted-use loan from BPF (the 'Credit Agreement') in Mr M's name to help pay for membership. And Mr M went on to repay that Agreement in full on 8 December that year.

Mr M – using a professional representative ('PR') – wrote to BPF on 18 February 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim under Section 75 of the CCA.
2. BPF's participation in an unfair credit relationship under the Credit Agreement and related timeshare agreements for the purposes of Section 140A of the CCA.

Mr M's Section 75 Complaint

The Letter of Complaint says that the Supplier made a number of misrepresentations at the Time of Sale – namely that:

1. The membership term of the Fractional Club had a guaranteed end date when that wasn't true.
2. Membership of the Fractional Club was an "investment" when that wasn't true.
3. Membership of the Fractional Club offered Mr and Mrs M access to an exclusive club and a higher standard of accommodation when that wasn't true. They weren't always able to book their first choice of holiday. And the Supplier's resorts aren't exclusive as non-members holidayed at them.
4. Membership of the Fractional Club was a desirable product that would sell quickly when that wasn't true.

Mr M's Section 140A Complaint

The Letter of Complaint set out a number of reasons for why Mr M says the credit relationship between him and BPF was unfair to him. It isn't practical or necessary to set out those reasons in detail here. But in summary, they include the following:

¹ As Mr M was the only person named on the Credit Agreement, only he's eligible to make this complaint for the purposes of the Financial Ombudsman Service's jurisdiction. But as both Mr and Mrs M were named on the timeshare agreements, I'll refer to both of them at times in my Provisional Decision.

1. Mr M wasn't told how much commission was paid by BPF to the Supplier.
2. Mr and Mrs M's Fractional Club membership was marketed and sold to them by the Supplier as an investment contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
3. The Supplier failed to give Mr and Mrs M the information they needed under Regulation 12 of the Timeshare Regulations to make an informed purchasing decision.
4. The annual management charges increased significantly each year – which was a possibility that wasn't made clear to Mr and Mrs M by the Supplier at the Time of Sale.
5. Mr and Mrs M were pressured at the Time of Sale.
6. All of the documentation relating to the finance was already printed out along with the paperwork relating to Fractional Club membership – which gave Mr and Mrs M the impression that a BPF loan was “part and parcel of the timeshare agreement”. No comparisons with other loan companies were made available to them. And Mr and Mrs M weren't told that they were free to arrange their own finance.
7. *“No affordability checks were carried out on [Mr M's] ability to afford the loan being offered. No income and expenditure information [was] required let alone proof of income. To [Mr M's] knowledge no credit checks were carried out.”*

BPF dealt with Mr M's concerns as a complaint and issued its final response letter on 8 March 2022 rejecting it on the basis that there was a defence to the complaint under the Limitation Act 1980 (the 'LA').

As a result, the complaint was referred to the Financial Ombudsman Service on 28 March 2022. Mr M was still represented by PR, and while much of the complaint at that time mirrored the concerns in the Letter of Complaint, PR sought to introduce a new complaint about the Supplier's alleged liquidation and its subsequent breach of contract.

The complaint was then looked at by an investigator who, having only dealt with the concerns in the Letter of Complaint, rejected it. But as PR disagreed with the investigator's assessment and asked for an ombudsman's decision, it was passed to me.

I issued a Provisional Decision ('PD') on 1 March 2024 in which I provisionally found that:

1. Mr M's complaint about BPF's alleged participation in a credit relationship that was unfair to him wasn't in the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the time limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the 'FCA') Dispute Resolution Rules ('DISP').
2. Mr M's complaint about BPF's decision to reject his concerns about the Supplier's alleged misrepresentations under Section 75 of the CCA was made in time under DISP 2.8.2 R (2). But BPF didn't act unfairly or unreasonably by coming to the decision it did.
3. The concern Mr M has about BPF and the Supplier's alleged breach of contract, while in time under DISP 2.8.2 R (2), loses on its merits.

BPF had nothing to add in response to my PD. And neither Mr M nor PR responded. So, the complaint was passed back to me.

My PD dealt with both the Financial Ombudsman Service's jurisdiction to deal with Mr M's complaint and the merits of those parts of his complaint that I thought were in jurisdiction. But as decisions on jurisdiction aren't usually published, this is the second of two decisions that I'll issue setting out my final thoughts. Having already issued a decision on why Mr M's complaint about his allegedly unfair credit relationship with BPF doesn't fall within the Service's jurisdiction, I'll now deal with the merits of Mr M's concerns about BPF's responsibility under Section 75 of the CCA for alleged misrepresentations and a breach of contract by the Supplier.

My Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done that, I still don't think Mr M's complaint should be upheld insofar as it relates to concerns about BPF's responsibility under Section 75 of the CCA for alleged misrepresentations and a breach of contract by the Supplier.

When Mr M first complained to BPF, he was only concerned with its handling of his misrepresentation claim under Section 75 of the CCA and its participation in a credit relationship that was allegedly unfair to him. But as I've already said, PR then sought to expand the scope of this complaint by making an entirely new and separate complaint about an alleged breach of contract by the Supplier.

Generally speaking, a respondent firm (like BPF) ought to be given the chance to consider a new and separate complaint before it is then referred to the Financial Ombudsman Service.

However, as I understand it, the Complaint Form was shared with BPF not long after this complaint was referred to the Financial Ombudsman Service. Given its age, it also seems to me to be in everyone's interest to draw a line under it and consider it with all of the allegations in mind. And for reasons I'll come on to, I don't think it would be unfair on BPF to do that.

Mr M's Section 75 Complaint Involving Alleged Misrepresentations

As I said in my PD, Section 75 of the CCA 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 before, 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 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 the Financial Ombudsman Service.

So, when a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the 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.

However, I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr M's Section 75 claim for alleged misrepresentations by the Supplier. 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 LA 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 is relevant to consider whether the claim in question was time-barred under the LA before Mr M put it to BPF.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against the Supplier.

A claim for misrepresentation against the 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 (see Section 2 of the LA).

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 LA. 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 the cause of action accrued was the Time of Sale. I say this because Mr and Mrs M entered into Fractional Club membership at that time based on the alleged misrepresentations of the Supplier – which Mr M says they relied on. And as the loan from BPF was used to help finance membership, it was when Mr M entered into the Credit Agreement that he suffered a loss.

Mr M first notified BPF of his Section 75 claim on 18 February 2022. And as more than six years had passed between the Time of Sale and when he first put his claim to BPF, I don't think it was unfair or unreasonable of BPF to reject Mr M's concerns about the Supplier's alleged misrepresentations.

Mr M's Section 75 Complaint involving an Alleged Breach of Contract

Mr M's Complaint Form states that the Supplier went into liquidation and breached the contract with him and Mrs M as a result. But as I said in my PD, it includes little to no detail to substantiate either aspect of the allegation. And as neither Mr M nor PR still haven't said and/or provided anything to demonstrate what specific rights he lost as a result of the Supplier's apparent liquidation, I'm not persuaded that there's been a breach of contract that BPF is jointly responsible for on this occasion.

My Final Decision

For the reasons set out above, I don't uphold Mr M's complaint insofar as it relates to concerns about BPF's responsibility under Section 75 of the CCA for alleged misrepresentations and a breach of contract by the Supplier.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 25 April 2024.

Morgan Rees
Ombudsman