

The complaint

Ms V complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") acted unfairly and unreasonably by (1) participating in an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (the "CCA") and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

In or around April 2011, Ms V was on holiday with another party on a complementary holiday provided by a timeshare supplier who I'll refer to as "C". During that holiday, Ms V (and the other party) met with a representative of C to discuss the trial timeshare membership they'd purchased previously from C. During that meeting, Ms V (and the other party) agreed to upgrade their trial membership to full membership with C and purchase 1,501 points to be used against holidays and accommodation offered from C portfolio.

The purchase price agreed for the membership and points was £22,245. After a trade in allowance of £3,995 for the trial membership, a balance of £18,250 was funded under a Fixed Sum Loan Agreement with BPF in Ms V's sole name repayable over 180 months.

In April 2021, using a professional representative ("the PR"), Ms V wrote to BPF to complain about:

1. Misrepresentations by C at the Time of the Sale giving her a claim under Section 75 of the CCA ("S75").
2. BPF's participation in an unfair credit relationship under the Credit Agreement and related timeshare agreement for the purposes of Section 140A of the CCA ("S140A").

Ms V's S75 Complaint

The PR allege that C told Ms V the points would allow her to book holidays at any resort in the UK and worldwide, at any time she wished, even in high season with accommodation of the same standard as she'd been shown and promised. Further, that she could easily divest herself of the points membership by selling them. But Ms V was unable to book holidays where and when she wanted and the accommodation available wasn't of the standard she'd been shown.

Ms V's S140A complaint

The PR allege that the misrepresentations, together with other things done (or not done) by C 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:

- Ms V didn't receive a copy of the Information Statement prior to entering into the Purchase Agreement or, if she did, she didn't have adequate time to review it before signing the agreement;
- a compliance officer was represented as impartial, but was an employee of C and merely checked and told Ms V what documents she was signing;
- Ms V was told the product was only available for a limited time; and

- the impression was created that Ms V couldn't leave the premises until a contract was formed.

In addition, the PR suggest:

- no proper credit assessment was done to assess Ms V's creditworthiness;
- the interest rate was significantly higher than that being provided by other lenders; and
- no adequate or transparent explanation was given to Ms V as to the features of the loan agreement.

The PR believe the omissions and actions of C amount to breaches of the various regulations that applied to the sale of timeshares and arranging of the associated finance.

I haven't had sight of BPF's response to the complaints albeit the PR suggest BPF refused to accept any responsibility for C's actions and denied liability under S75 and S140A without having carried out a full and independent investigation. So, the PR referred Ms V's complaint to this service.

One of this service's investigators considered all the information and evidence available. Having done so, they thought Ms V's complaint had been brought too late. Because of that, our investigator didn't think BPF needed to do anything more.

The PR disagreed with our investigator's findings. They said that the relationship with BPF continues. And as such, Ms V's complaint under S140A wasn't out of time. In particular, they pointed out that another loan continued in the other party's name relating to a purchase Ms V and that party had subsequently made from C - also funded by BPF.

As an informal resolution couldn't be achieved, Ms V's complaint has been passed to me to consider further.

On 31 January 2024, I issued a Provisional Decision ("PD") in which I said that I didn't think BPF needed to do anything more. In doing so, I offered the parties to this complaint the opportunity to provide their responses to my findings, together with any additional evidence for me to consider before I reached a final decision.

BPF acknowledged receipt of my PD and confirmed they have nothing further to add. Despite follow up from this service, neither the CMC nor Ms V responded or provided anything new for me to consider.

Since then, I thought further about Ms V's complaint in light of two Supreme Court rulings handed down in October 2023. Whilst my provisional decision remained unchanged, some of the reasons for it were different. So, I issued a further PD on 8 May 2024 in which I provisionally found that:

1. Ms V's complaint about BPF's participation in a credit relationship that was unfair to her wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the "FCA") Dispute Resolution Rules ("DISP").
2. Ms V's complaint about BPF's decision to reject her concerns about C's alleged misrepresentations under S75 was made in time under DISP 2.8.2 R (2). But BPF didn't act unfairly or unreasonably by coming to the decision they did.

BPF have confirmed they've nothing further to add. The PR responded confirming they didn't accept my provisional findings but didn't provide any reasons or anything new for me to consider. So, Ms V's complaint has been passed back to me to issue my final decision on the aspects I believe this service has jurisdiction to consider.

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 that, I still don't think Ms V's complaint should be upheld insofar as it relates to her concerns about BPF's responsibility under S75 for the alleged misrepresentations.

As I said in my second PD, S75 operates quite differently to S140A and, when it applies, it can give borrowers a very different ground for complaint against a lender. Whereas S140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, S75 simply creates a financial liability that the creditor is bound to pay. Liability under S75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the supplier (here that's C). S75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid S75 claim, it should pay its liability. And if it fails or refuses to do so, that can give rise to a complaint to this service.

So, when a complaint is referred to this service on the back of an unsuccessful S75 claim, the act or omission that engages this service's jurisdiction is the creditor's refusal to accept or pay the debtor's claim. This is distinct from anything that occurred before the claim was made 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 Ms V's complaint for reasons relating to her S75 claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Ms V's S75 claim was time-barred under the LA before it's put to BPF.

As I've explained, a claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Ms V could make against C. A claim for misrepresentation against C 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 under S75, like this one, 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 here was the Time of the Sale. I say this because Ms V entered into the purchase of her timeshare product at that time based upon the alleged misrepresentations of C – which Ms V says she relied upon. And as the loan from BPF was used to help finance that purchase, it was when she entered into the Credit Agreement that she allegedly suffered the loss.

Ms V first notified BPF of her S75 claim in April 2021. And as more than six years had passed between the Time of the Sale and when she first put her claim to BPF, I don't think it was unfair or unreasonable of BPF to reject Ms V's concerns about C's alleged misrepresentations.

My final decision

For the reasons set out above, I don't uphold Ms V's complaint insofar as it relates to concerns about BPF's responsibility under section 75 of the CCA for alleged misrepresentation by the supplier.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms V to accept or reject my decision before 20 June 2024.

Dave Morgan
Ombudsman