

## **The complaint**

Mr C complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a timeshare. The purchase was made by Mr C and his wife but the loan was taken out in his name so he is the eligible complainant. For simplicity, in this decision I will refer to him as the sole purchaser.

## **What happened**

In August 2009 Mr C purchased a timeshare from a company I will call S. This cost £13,162 and was funded by a loan from BPF. This loan was repaid in October 2010. In 2023 contacted Mr C and asked if he wished his purchase to be reviewed. Having carried out a review, after seeking further information from Mr C, BPF concluded that he had suffered no detriment. Mr C complained to BPF in April 2024 and after not receiving a substantive reply he brought a complaint to this service in July 2024.

The details of the claims are known to both parties so I will give a brief summary of the main points.

- Mr C had been pressurised into making the purchase..
- He had been told that the timeshare he was buying into would be "moved on within a matter of months at worst", and this was untrue.
- He was told that this was an investment and one which would bring a financial return but this was untrue.
- S had gone into liquidation and so the contract had been breached.

In responding to a request from this service BPF said that the claims under s.75 CCA for misrepresentation and that under s.140A had been brought out of time.

Our investigator didn't think the claims had been made in time and so he didn't recommend that the complaint be upheld. Mr C didn't agree and asked that the matter be considered by an ombudsman.

I issued a provisional decision as follows:

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

*I've read and considered all the available evidence and arguments to decide whether the Financial Ombudsman Service's jurisdiction permits me to consider the entire subject matter of this complaint.*

*I have every sympathy with Mr C but I do not consider I can uphold his complaint. I will explain why.*

*In short, I don't think that his complaint about an unfair credit relationship with BPF falls within the Financial Ombudsman Service's jurisdiction because it wasn't made within the time limits set out in DISP 2.8.2 R (2).*

#### *The Financial Ombudsman Service's Substantive Jurisdiction*

*The subject matter of Mr C's complaint must fall within the definition of a "complaint", if I'm to consider it; and the Financial Ombudsman Service only has the jurisdiction to consider "complaints" (as defined in the Glossary of the FCA's Handbook of rules and guidance) about the provision of, or failure to provide, a financial service, claims management service or redress determination. Expressions of dissatisfaction about other matters fall outside the Service's jurisdiction.*

*What's more, the Financial Ombudsman Service can only consider complaints under its Compulsory Jurisdiction that concern an "activity" as set out in Rule 2.3.1 in DISP – which, insofar as it's relevant here, means that this complaint must relate to an act or omission of a respondent firm (or a person for whom the respondent firm is responsible in lending money or carrying out a regulated activity or any ancillary activity carried out by the respondent firm in connection with those activities.*

*Mr C's complaint about BPF's participation in and/or perpetuation of an unfair relationship as the creditor to the Credit Agreement are expressions of dissatisfaction about the provision of a financial service. And as the Credit Agreement was a "regulated credit agreement" for the purposes of Article 60(B)(1) in Part 2 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the 'Regulated Activities Order'), those concerns are also clearly about a regulated activity.*

*So, the Financial Ombudsman Service does have the jurisdiction to consider Mr C's complaint about a credit relationship with BPF that was unfair to him if it was made in time.*

*Under s. 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of the terms of the credit agreement itself and how the creditor exercised or enforced its rights under the agreement. Such a finding may also be based on the terms of any related agreement and, when combined with s. 56 CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.*

*In complaints such as this one, when restricted credit was granted, s. 56 CCA created a statutory agency relationship between S and BPF because it states that any negotiations between a debtor and the supplier before a transaction financed by a debtor-creditor-supplier agreement are deemed to have been conducted by the supplier as an agent of the creditor. This means that S was acting 'on behalf of' BPF when it sold Mr C the timeshare at the Time of Sale, such that S' pre-contractual acts and/or omissions are relevant to the complaint that BPF was party to an unfair relationship under s.140A CCA.*

*However, an assessment of unfairness under s.140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel v Patel* [2009] EWHC 3264 (QB) (which was recently approved by the Supreme Court in the case of *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.*

*So, for as long as the Credit Agreement remained outstanding, BPF was responsible for the*

*matters that might have made its relationship with Mr C unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair.*

*Accordingly, in alleging that he was subject to an unfair credit relationship under s. 140A, Mr C's complaint extends to BPF's acts and omissions, in being party to such a relationship and perpetuating its unfairness, right up until the moment his credit relationship with it ended.*

*S. 2 of DISP covers whether Mr C's complaint was made in time for the purposes of allowing the Financial Ombudsman Service to consider it.*

*This is what DISP 2.8.2 R says (insofar as its relevant to this complaint):*

*"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*

*[...]*

*(2) more than:*

*(a) six years after the event complained of; or (if later)*

*(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

*unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received; [...]*

*unless:*

*[...]*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R [...] was as a result of exceptional circumstances; or [...]"*

#### *Part 1 – Six Years*

*The event complained about for the purposes of DISP 2.8.2 R (2)(a), is the allegation that BPF was party to an unfair credit relationship with Mr C and, during the currency of that relationship, it perpetuated the unfairness, failing in its responsibilities to take the necessary steps to correct the situation.*

*The Credit Agreement and, in turn, Mr C's credit relationship with BPF ended in October 2010. But his complaint about that credit relationship was first made to BPF in April 2024. So, it's clear that he complained more than six years after the event complained about. Even if one takes the date of the complaint as being in 2023 when BPF raised the issue of a review the claim falls outside the six year limit.*

#### *Part 2 – Three Years*

*However, that isn't the end of the matter. DISP 2.8.2 R (2)(b) could provide Mr C with more time to complain about the event in question if he did so within three years of the date he became aware, or ought reasonably to have become aware, that he had cause to complain.*

*This raises the question as to whether Mr C was aware, or ought reasonably to have been*

aware, more than three years before he first complained to BPF that he had cause to complain to it.

So, that's what I've considered here.

To answer this question, I need to consider whether and when Mr C was aware or ought reasonably to have been aware that:

1. There was a problem with the lending or with the timeshare membership.
2. The problem(s) caused him a loss.
3. Another party's actions (or its failure to act) may have caused the loss.
4. The other party may have been BPF.

Mr C's complaint form set out many reasons which I have summarised above why he considers his credit relationship with BPF unfair to him under the Credit Agreement and related timeshare agreements. I consider there were a number of reasons why Mr C ought reasonably to have been aware he had cause to complain.

- He has explained that he struggled with the increasing cost of maintenance which had doubled and this had not been explained at the time of purchase.
- As he explained: "The portfolio we were sold was obviously never going to be turned around and resold to fund the initial purchase (due in clear hindsight to what was a failing resales business)."
- He ended up with a portfolio of timeshare weeks he couldn't use.
- The booking process became more difficult and holidays were costly.

I consider that any or all of these matters gave Mr C the opportunity to bring a claim long before he did. Furthermore, given the size of the financial commitment that Mr C found himself with because of the purchase and the associated loan, and the long-term financial consequences of both of those commitments for him, I think it's reasonable to have expected Mr C to carry out enquiries when concerns about the loan and the timeshare first arose in order to establish what his rights were.

What's more, Mr C signed a complex contract. And with that being the case, if Mr C wasn't already aware of the implications of his concerns and the possible complaints that he might make in light of them, the obvious course for him to take was to make further enquiries and seek advice. Such enquiries seem to me to have been a step he ought reasonably to have taken shortly after he acquired the timeshare when he began to have concerns about how it had been sold to him and how it was working in practice. And had Mr C carried out such enquiries, I think they would have led him to discover that BPF, as the connected lender that financed his membership, may well have borne responsibility for S' alleged failings.

With all of that being the case, I think that Mr C ought reasonably to have been aware that he had cause to complain about BPF holding him in an unfair credit relationship within the first few years of taking out the timeshare and certainly more than three years before he first complained. So, I'm not persuaded that the three-year part of the relevant time limit extends the six-year part of it for the purpose of Mr C's complaint about an unfair credit relationship under s.140A of the CCA. And that means he had to complain about BPF's role in such a relationship by August 2015. But as he didn't do that until April 2024 his complaint was too

*late under the rules I have to apply.*

### *Exceptional Circumstances*

*I can consider the merits of a complaint referred to the Financial Ombudsman Service after the expiry of the relevant time limit if there are exceptional circumstances that justify why it was late. But I can't see that there are any such circumstances that apply to Mr C's complaint about an unfair credit relationship with BPF.*

*I realise that this will be disappointing for Mr C but I hope he understands why I can't disregard the rules that apply.*

### *Mr C's S. 75 Complaint for Misrepresentation*

*S. 75 of the CCA operates quite differently to s.140A and, when it applies, it can give borrowers a very different ground for complaint against their lender. Whereas, as I've explained, s.140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, s. 75 simply creates a financial liability that the creditor is bound to pay.*

*Liability under s. 75 isn't based on anything the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which s. 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 s. 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 s. 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.*

*As a result, the 6 and 3 year time limit (under DISP 2.8.2 (2) R) to complain about an unsuccessful attempt to initiate a s. 75 claim doesn't usually start until the respondent firm answers and refuses the claim.*

*In this case, as BPF refused to accept and pay Mr C's claim in April 2024, their primary time limit (of 6 years) only started at that time. And as this complaint about BPF's handling of that claim was referred to the Financial Ombudsman Service in April 2024, it was made in time for the purpose of the rules on our jurisdiction.*

*However, as I've already indicated, I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr C's s. 75 claim. As a general rule, creditors can reasonably reject s. 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 Mr C's s. 75 claim was time-barred under the LA before they put it to BPF.*

*A claim under s. 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against S. A claim for misrepresentation against S would ordinarily be made under s. 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 s. 2 of the LA).*

*But a claim, like the one in question here, under s. 75 is also "an action to recover any sum*

*by virtue of any enactment” under s. 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 C entered into the purchase of the timeshare at that time based on the alleged misrepresentations of S – which he says he relied on. And as the loan from BPF was used to help finance the purchase, it was when he entered into the Credit Agreement that he suffered a loss.*

*Mr C first notified BPF of his s. 75 claim in 2023 or 2024. And as more than six years had passed between 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 C's concerns about S' alleged misrepresentations.*

#### **Mr C's S. 75 Complaint for Breach of Contract**

*On the matter of the alleged breach of contract, I have seen no evidence that to show that the contract was breached. I am aware that while S may have gone into liquidation the services it provided have been continued by another operator. I believe various options were made available to members and I have seen no documentation concerning Mr C's contract. I have noted the various online articles from action groups and claims management companies, but they do not tell me what happened to Mr C's contract. If he considers he lost use of the accommodation then I would invite him to provide me with the supporting evidence specific to him and his contract including the date of the alleged breach so that it may be established that any claim falls within the time limits explained above.”*

#### **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.

Mr C did not agree with my provisional decision. He set out the timeline of events from the date of purchase in 2009. He explained that between 2011 and the end of 2014 he became aware he had cause for complaint, but not a sensible affordable path to do so. This was because he had ended the loan with BPF in 2010 and the original seller had been taken over by a new company. He also pointed out that S had sold his portfolio units and exchanged them for others which he did not consider similar. He complained to S in 2015 and thought this had been a breach of contract.

Mr C explained that there had been history of a complex regime of underhand sales and finance behaviour. He pointed out he had complained to S in 2015. Overall, he felt that he had faced an exceptional set of circumstances which proved to be impossible to navigate. He considered the ongoing provision of services after the liquidation did not cover the sales of units and none had taken place.

He said the liquidation was a breach of contract and this was supported by online articles etc. He said that the swapping of units was also a breach of contract. He had submitted his complaint to S in 2015 which was within six years of the breaches.

I have noted Mr C's arguments, but they do not persuade me that my provisional decision was wrong. I will explain why.

The two routes by which Mr C could seek redress were set out in my provisional decision. The first is via s.140A and the second is via s.75. I will address these individually.

Under s.140A relief is applied where there is an unfairness between the lender and the borrower, in other words between BPF and Mr C. The rules on time limits are set out above. The loan was repaid in October 2010 and the relationship with BPF ended. Our rules permit us to consider those complaints which fall within the time limits set out in DISP. It is clear that the event complained of occurred more than six years before the complaint was made to this service. I do not believe Mr C disputes this.

The second leg of the rule allows for complaints to be made to this service within three years from the date the complainant became aware he had cause to complain. Mr C has said that he was aware he had cause to complain in 2015 but his complaint to this service was not made until 2024. I appreciate he has said that he did not consider the link with BPF remained intact and so he was not aware that he could complain to it and then to this service. However, the basis of s.140A is unfairness between the lender and the borrower and does not rely on the services etc. provided by S. I think it reasonable to believe that Mr C ought to have been aware he had cause for complaint about the actions of BPF regardless of the ending of the loan. He complained to S in 2015 and so it was reasonable to have expected him to explore his options which would have included contacting BPF if he considered there had been an unfair relationship with it.

I would also reiterate the point I made in my provisional decision that he entered into a complex contract and so it would be reasonable to expect him to be satisfied that it was satisfactory and suitable for his needs.

Turning to s.75 and misrepresentation I have explained that the cause of any action accrued at the Time of Sale. As such, given he did not submit a claim to BPF until more than six years had passed it was made out of time.

On the issue of breach of contract Mr C now says that the changes in 2015 were a breach. However he did not make a claim to BPF until 2023/2024 which is more than six years after the alleged breach. A claim under s.75 is made against the lender and not the supplier, in this case S. The fact he complained to S about the changes does not constitute a claim to BPF and so his later claim was made out of time.

More broadly Mr C had other grounds on which to make a claim of breach of contract as set out above and he didn't take the opportunity to do so. Quite simply his claim fell outside the required time limits and I cannot direct BPF to consider them.

I appreciate Mr C will be disappointed with my decision, but I do not consider I can uphold his complaint.

### **My final decision**

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 26 March 2025.

Ivor Graham  
**Ombudsman**