DRN-5466439

The complaint

Mr S complains that Barclays Bank UK PLC (the 'Lender') acted unfairly and unreasonably in respect of a complaint he raised about how parts of the Consumer Credit Act 1974 ('CCA') related to a timeshare product he bought using finance it provided.

What happened

In or around May 2013 (the 'Time of Sale'), Mr S - jointly with another - agreed to upgrade their existing 'Trial Membership' of a timeshare product by purchasing membership of another timeshare product (the 'Timeshare') from the same provider (the 'Supplier').

The Timeshare purchased included 60,000 points to be used to book holidays and experiences from a range of destinations within the Supplier's portfolio for an agreed purchase price - after trade in of their existing Trial Membership - of £4,850 (the 'Purchase Agreement').

Mr S paid for the Timeshare using a credit card (the 'Credit Agreement') provided by the Lender. Payment was made in three instalments:

- £1,850 on 18 June 2013;
- £1,500 on 2 July 2013; and
- £1,500 on 2 August 2013.

Whilst the Timeshare was purchased in joint names, the credit card used was in Mr S's sole name. This means that only Mr S is an eligible complainant. So, for simplicity, I will refer to Mr S only throughout this decision.

In February 2024, using a professional representative (the 'PR'), Mr S submitted a claim/complaint (the 'Letter of Complaint') to the Lender to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under section 75 of the CCA ('s.75'), which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA ('s.140A').
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated to carry out such an activity.

For clarity, details of the allegations include:

(1) S.75 CCA – the Supplier's misrepresentation at the Time of Sale

Mr S says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that:

- The Timeshare was described as an upgrade (to the previous Trial Membership);
- Mr S *"would have exclusive and unlimited access to all of the Supplier's holiday resorts, within a variety of exotic locations, as part of their membership for the accommodation of their choice;*

- *That a membership fee would be paid annually, though the sum would gradually increase, inline with inflation (if at all) and not at extortionate onerous unjustified rate;* [and]
- [Mr S] *would not be liable for any other annual fees, other than the membership fee* […].

Despite this, Mr S says the Timeshare provided the same service as the previous Trial Membership other than it included a surrender clause. He also says he experienced significant difficulty booking holidays of the standard shown to him at the Time of Sale.

(2) Section 140A CCA: the Lender's participation in an unfair credit relationship.

In addition to the above, the Letter of Complaint sets out several reasons why Mr S says that the credit relationship between him and the Lender was unfair to him under s.140A CCA. In summary, they include:

- he was subjected to a lengthy and pressurised sales presentation which placed him under duress to enter into the Purchase Agreement;
- the Supplier failed to disclose the existence of maintenance fees;
- the Purchase Agreement was unlawful as it was sold as a strategy through which to exit his Trial Membership which itself, operated in perpetuity in breach of the applicable regulations;
- the high interest rate associated with the Credit Agreement is clear indication of an unfair relationship.

In addition, Mr S suggested that the Supplier, acting as a broker of finance, wasn't authorised to do so under the various provisions of the Financial Services and Markets Act 2000 ('FSMA').

The Lender dealt with Mr S's concerns as a complaint and issued its final response letter on 13 March 2024. The response explained that it would require more information in order to fully investigate Mr S's claim and went on to set out the information and evidence required. However, the Lender was unable to progress Mr S's claim further having not received the requested information and evidence.

The PR then referred Mr S's complaint to the Financial Ombudsman Service. It was assessed by an investigator who, having considered the information provided, rejected the complaint on its merits. In particular, the investigator:

- thought Mr S's complaint under s.75 CCA had been brought too late pursuant to the Limitation Act 1980 (the 'LA');
- couldn't find anything to suggest that the credit relationship was unfair pursuant to s.140A;
- couldn't find anything to show that the Credit Agreement was unaffordable for Mr S;
- the Credit Agreement predated the Financial Conduct Authority's ('FCA') regulation of consumer credit activities meaning that there was no right to recovery money under s.27 of the Financial Services and Markets Act 2000 ('FSMA')

The PR rejected the investigator's assessment on Mr S's behalf and asked for an ombudsman's decision – which is why it has been passed to me.

In doing so, the PR explained why it didn't think the investigator's interpretation of the provisions of the LA was correct. In doing so, the PR argues that s.32 LA makes provision for the limitation period to be postponed and explained why it should be applied in Mr S's case. Further, the PR explained in further detail why it disagreed with the investigator's assessment of unfairness by making reference to various case law it thought relevant.

Having considered all the information provided. I was inclined to reach the same conclusion as our investigator. But, in some parts for different reasons, and in other's I took the opportunity to expand upon the reasoning. In the circumstances, I issued a provisional decision ('PD') on 19 March 2025 giving Mr S and Barclays Bank UK PLC the opportunity to respond to my findings below before I reach a final decision.

In my PD, I said:

> I do not currently think this complaint should be upheld.
>
> But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.
>
> What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.
>
> When considering what's fair and reasonable, DISP 3.6.4R of the FCA 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.
>
> Section 75 CCA provides consumers with protection for goods or services bought using credit. Mr S paid for the Timeshare under a pre-existing regulated Credit Agreement with the Lender. So, it isn't in dispute that s.75 applies (subject to any restrictions or limitation). This means Mr S may be 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.
>
> Section 140A CCA looks at the fairness of the relationship between Mr S and the Lender arising out of the Credit Agreement (taken together with any related agreements). And because the product purchased was funded under that Credit Agreement, they're deemed to be related agreements.
>
> Given the facts of Mr S's complaint, relevant law also includes the LA. This is because the original transaction - the purchase funded by the Credit Agreement with the Lender - took place in May 2013. 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.
>
> At this point I think it's relevant to highlight some inaccuracies that appear to have arisen as part of Mr S's complaint. The original complaint appears to have been addressed to another business with the suggestion that the Purchase Agreement was funded under a new point of sale Credit Agreement brokered by the Supplier to Mr S at the Time of Sale specifically for that purpose. However, based upon the evidence I've seen, it seems that the Purchase Agreement was funded using Mr S's existing credit card with the Lender.
>
> So, the Credit Agreement I've referred to relates to that credit card and not to any alleged new credit agreement entered into at the Time of Sale. I say that because the statements for Mr S's credit card with the Lender not only show the purchase transactions referred to, but also transactions and purchases predating the Time of Sale. And those transactions also didn't necessarily relate specifically to purchases from the Supplier. In fact, the statements show that Mr S used his credit card for other personal expenditure including supermarket and petrol purchases.
>
> <u>Mr S's complaint under s.75 CCA</u>

Having considered everything, I don't think it would be fair or reasonable to uphold Mr S's complaint for reasons relating to the s.75 claim. As a general rule, creditors can reasonably reject s.75 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 Mr S's s.75 claim was likely to be time-barred under the LA before it was put to the Lender.

A claim under s.75 is essentially a "like" claim against the creditor. It mirrors the claim Mr S 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 under s.75, 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 Sale. I say this because Mr S entered into the Purchase Agreement at that time based upon the alleged misrepresentations of the Supplier – which Mr S says he relied upon. And as the Credit Agreement with the Lender provided funding to help finance that purchase, it was when he used his credit card to make those payments that he allegedly suffered the loss.

It seems Mr S first notified the Lender of the s.75 complaint in February 2024. And as more than six years had passed between the Time of Sale and when he first put the complaint to the Lender, I don't think it was ultimately unfair or unreasonable of the Lender to reject Mr S's concerns about the Supplier's alleged misrepresentations.

Could the limitation period be postponed?

The PR argue that the limitation period should be extended pursuant to s.32 LA because facts relevant to Mr S's complaint were concealed at the Time of Sale and only revealed when he sought advice having seen material online about the mis-selling of timeshares and having seen coverage of high-profile financial service claims.

The PR go on to reference what it believes to be relevant case law with the suggestion that the Supplier is guilty of fraud. It also suggests that the question of the Supplier's authorisation (to broker the Credit Agreement) should have been known to the Lender. And the Lender's failure to highlight that to Mr S constitutes concealment pursuant to s.32 LA.

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". But the PR haven't provided me with anything persuasive to suggest that either the Supplier or the Lender deliberately concealed anything about the Timeshare Mr S purchased or the Credit Agreement used to fund that purchase. Further, as I've already explained, the evidence suggests that the Credit Agreement wasn't brokered by the Supplier here. So, the question of broker authorisation doesn't appear relevant. And as I still can't see why, given the allegations fuelling each claim, this particular issue prevented Mr S from making a claim or raising a complaint with the Lender earlier, my view is that this particular argument by the PR doesn't help his cause.

The PR also suggests the purchase agreement is inherently unlawful, "on the basis it was sold […] as a form of exit strategy of [Mr S's] Trial Membership that was originally sold [to him] in 'perpetuity' which, pursuant to Directive 93/13/EEC on Unfair Contract Terms, is in itself an unenforceable term".

My understanding of Trial Memberships sold by the Supplier here is that they were usually for a shorter 'trial' duration – essentially a sample or taster membership. I should point out that it is not the sale of the Trial Membership that is in question here. And in any event, Mr S hasn't provided any details or documentation relating to that particular product. So, I can't reasonably say that the subsequent upgrade to full membership under the Purchase Agreement was "inherently unlawful" in the way the PR alleges.

Further, these types of agreements appear to fall within the definition of a timeshare contained within the Timeshare, Holiday Products and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). So, I'm satisfied that these types of timeshares have never been prohibited to be sold under English law, either at the time of Mr S's purchase or afterwards.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide time could be extended under the provisions of the s.32 LA.

Mr S's unfair relationship complaint under s.140A CCA

The court may make an order under s.140B CCA in connection with a credit agreement if it determines that the relationship between the creditor (the Lender) and the debtor (Mr S) is unfair to the debtor because of one or more of the following (from s.140A):

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).

Only a court has the power to make a determination under s.140A. But as it's relevant law, I've considered it when looking at the various allegations.

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

So, having considered this, I believe the trigger point here is slightly different. Any relationship between Mr S and the Lender continues while the Credit Agreement remains live. So, that relationship only ends once the Credit Agreement ends and any borrowing under it has been repaid. Mr S says that he still uses the credit card provided by the Lender here. And the Lender hasn't suggested any different. So, with that being the case, I believe Mr S's complaint under s.140A was made in time given the relationship appears to remain live. So, it is those concerns that I will explore here.

- Misrepresentation

In determining if the relationship is unfair under s.140A (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 s.75 due to the effects of the LA, I think they could still be considered under s.140A[1]. 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 in this complaint.

For me to conclude there was misrepresentation by the Supplier in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Timeshare to Mr S. In other words, that the Supplier told Mr S something that wasn't true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mr S to enter into the Purchase Agreement. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the Timeshare.

From the information available, I can't be certain about what Mr S was specifically told (or not told) about the benefits of the Timeshare he purchased at the Time of Sale. The PR has provided limited details or evidence to support the misrepresentations Mr S says the Supplier made. It was, however, indicated that he was told those things, So, I've thought about that alongside the evidence that is available from the Time of Sale.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr S's complaint, such as marketing material or any wider purchase documentation from the Time of Sale that echoes what the PR says Mr S was told. In particular relating to exclusivity and/or booking availability. There's simply no reference to this within any of the documentation that I've seen. Furthermore, I haven't seen anything within the documentation from the Time of Sale that clearly defines the standard of accommodation or what that may include.

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 the Supplier did misrepresent the Timeshare Mr S purchased in the ways alleged.

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

Upon referring his complaint to this service, Mr S relies upon a number of clauses within the Consumer Protection from Unfair Trading Regulations 2008 ('CPUT') that the PR suggests created an unfair relationship between him and the Supplier. We know that these sales presentations often lasted for a number of hours, and it is suggested that Mr S was pressured into entering into the Purchase Agreement.

I acknowledge what the PR has said about this and understand that Mr S may have felt weary after a sales process that may have continued for a long time. But he doesn't say anything about what was said and / or done by the Supplier during the sales presentation that made him feel as if he had no choice but to purchase the Timeshare when he simply did not want to.

He was also given a 14-day cooling off period – clearly detailed in the Purchase Agreement under the heading 'RIGHT OF WITHDRAWAL' – which he initialled. And he has not provided a credible explanation for why he did not cancel his membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr S made the decision to purchase the Timeshare because his ability to exercise that choice was – or was likely to have been - significantly impaired by pressure from the Supplier, contrary to Regulation 7 of CPUT..

- <u>The annual maintenance/management charges</u>

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

Several allegations have been made about the annual charges that Mr S was contractually obliged to pay under the Purchase Agreement he entered into. Some of those allegations appear contradictory. In particular, the complaint says:

> *"In discussing the fees that would be incurred by [Mr S] under the Timeshare Agreement, they were explicitly informed by the Retailer's representatives that it would only include an annual maintenance fee. They failed, however, to inform [Mr S] about the maintenance fees that would be required to bear under the Timeshare Agreement and which would increase in amount every year".*
>
> *"…the Retailer's misrepresentations made to [Mr S] also concerned the annual maintenance fees levied, including the rate at which the same increased, under the Timeshare Agreements. As well as failing to explain the basis and purpose of the maintenance fees levied, at the time of sale of the Timeshare Agreements, [Mr S] was assured by the Retailer that the fees would not increase each year or, if they did increase, would do so a reasonable scale".*
>
> *"That a membership fee would be paid annually, though the sum would gradually increase, inline with inflation (if at all) and not at extortionate onerous unjustified rate…"*
>
> *"…at no point during the repeated sales meetings did the Retailer clearly explain to [Mr S] the nature of membership fees which continuously increase such that the same have become vastly unaffordable. Also it is grossly unclear what these fees were used for as the representatives failed to explain such. Moreover, the Retailer failed to disclose the existence of maintenance fees which, similarly to the membership fees, exponentially increased each year".*

In summary, the complaint appears to reference both 'maintenance' and 'membership' fees being paid annually. And on the one hand suggests Mr S wasn't told that the annual fees would increase but then goes on to suggest such increases would be 'reasonable'. The complaint then suggests they would increase in line with inflation. So, Mr S's recollections of what he was allegedly told at the Time of Sale appear to me to be inconsistent.

Within the evidence provided by the PR, there are documents that refer to 'Annual Fees' payable together with an email from the supplier summarising the 'annual maintenance fees amounts' for each year between 2014 and 2018. However, I haven't seen any evidence to suggest that Mr S was required to pay both 'maintenance' and 'membership' fees each year.

I also can't see that I've been provided with any of the wider Purchase Agreement documentation which supports any of Mr S's allegations. So, whilst the PR has provided some limited detail of the annual fees that were charged, it hasn't demonstrated how and if they differ from what was contractually included within the wider Purchase Agreement.

One of the main aims of the Timeshare Regulations and CPUT 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 contract did not 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 lead to a breach of both the Timeshare Regulations and CPUT, resulting in the credit agreement potentially being found to be unfair under Section 140A of the CCA.

However, the Supreme Court made it clear in Plevin[2] that it does not automatically follow that regulatory breaches create unfairness for the purposes of s.140A CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

It appears Mr S was aware that he would need to pay some form of annual charge, and it's not unusual for such agreements to include provisions for recalculation of those each year. So, I wouldn't consider increases to be out of the ordinary in themselves. Furthermore, and in the absence of any further supporting evidence, I don't think it's possible to reasonably assess the fairness (or otherwise) of their calculation and application here. Further, as I have seen any evidence to suggest that the requirement to pay those charges operated in such a way as to cause unfairness in Mr S's case, I can't reasonably conclude that they did.

On a final note, it's suggested that the high interest rate associated with the Credit Agreement is a clear indication of an unfair relationship. However, I don't think that's relevant here. As I've already explained, I'm not persuaded that the Credit Agreement was specifically entered into in order to fund the Purchase Agreement. And in any event, the credit card statements I've seen show that Mr S promptly repaid any borrowing under the Credit Agreement each month. And because of that, I can't see that he paid any interest.

Credit Assessment

There are certain aspects of Mr S's complaint that could be considered outside of s.140A CCA. In particular, in relation to whether the Lender undertook a proper credit assessment when the Credit Agreement was first entered into by Mr S. That said, and as I've already explained above, I can't see that the Credit Agreement was entered into at the Time of Sale. From the evidence available, it seems that the Credit Agreement that Mr S had with the Lender pre-existed the Timeshare purchase in May 2013.

Of course, it maybe that Mr S believes the Lender didn't undertake the necessary checks when he first entered into that Credit Agreement. In which case, if I were to find that the Lender hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that repayments under the Credit Agreement weren't sustainably affordable for Mr S in order to uphold any complaint here.

I haven't seen any information about Mr S's actual financial situation at the time the Credit Agreement was entered into. And there's no obvious suggestion or evidence that he struggled to maintain repayments. In fact, the credit card statements provided show that he repaid all amounts owed under the Credit Agreement each month, without any obvious signs of difficulty. So, I can't reasonably conclude the Credit Agreement was unaffordable for him. And because of that, there doesn't appear to be any evidence of loss here either.

Summary

Having carefully considered everything that's been said and provided, I can't reasonably conclude that the Lender's response to Mr S's complaint was either unfair or unreasonable. And whilst I do understand Mr S will be disappointed, I don't currently intend to ask the Lender to do anything more here.

As the time given for responses has now expired, Mr S's complaint has been passed back to me in order to reach a final decision.

[2] Plevin v. Paragon Personal Finance Limited UKSC/2014/0037

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.

The PR has confirmed that it received my PD and was consulting with Mr S before providing a response.. However, despite follow up from this service, no further comments or information have been provided. The Lender has not provided any acknowledgment to my PD.

With the time for responses having now expired, I see no reason for me to vary from the findings in my PD. Because of that, my final decision remains unchanged from that documented above.

My final decision

For the reasons set out above, I don't uphold Mr S's complaint about Barclays Bank UK PLC.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 8 May 2025.

Dave Morgan
Ombudsman