DRN-5544817

The complaint

Mr M complains that Clydesdale Financial Service 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"); (2) deciding against paying a claim under Section 75 of the CCA; (3) lending irresponsibly having failed to conduct the required affordability checks and (4) enforcing a credit agreement arranged by an unauthorised credit broker.

What happened

Mr M (together with another) purchased a timeshare product (the "Timeshare") from a timeshare provider (the "Supplier") on 22 March 2010 (the "Time of Sale"). The purchase price agreed of £3,988 (the "Purchase Agreement") was funded under a new Fixed Sum Loan agreement with BPF (the "Credit Agreement") in Mr M's sole name. Because of that, only Mr M is an eligible complainant here. So, I'll refer to him only throughout this decision. All borrowing under the Credit Agreement was repaid in full in May 2017.

In or around May 2023, BPF wrote to Mr M inviting him to submit a 'Review Request Form' so that it could complete a review in respect of his timeshare purchase and the related Credit Agreement. Mr M responded on 20 June 2023 and included a letter setting out the events and his recollections of what happened at the Time of Sale.

BPF responded on 30 August 2023 to confirm that it had completed the review and, having done so, did not believe he *"would have suffered any detriment in relation to the timeshare".*

On 27 October 2023, using a professional representative (the "PR"), Mr M submitted a claim to BPF which included:

1. Misrepresentations by the Supplier at the Time of Sale giving Mr M a claim against BPF under Section 75 of the CCA ("S75").
2. A breach of contract by the Supplier giving him a claim against BPF under S75.
3. BPF being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA ("S140A").
4. The decision to lend being irresponsible because the Supplier did not carry out the right creditworthiness assessment.
5. The Supplier wasn't authorised to carry on regulated activities rendering the Credit Agreement unenforceable under section 27 of the Financial Services and Markets Act 2000 ("FSMA").

The specifics of the claim submitted included the following:

(1) S75: the Supplier's misrepresentations at the Time of Sale

The PR says that the Supplier made a number of pre-contractual misrepresentations to Mr M at the Time of Sale – namely that the Supplier:

1. told him that the Timeshare was an investment that would considerably appreciate in value;
2. promised a considerable return on investment;

3. told him its resale department would sell the Timeshare quickly at a profit when he listed it for sale in a couple of years; and
4. told him the duration of the loan would only last for a short period of time until the Timeshare was sold.

(2) S75: the Supplier's breach of contract

Although no specific breach of contract was specified by the PR, it alleges that the Supplier started insolvency proceedings in January 2020 meaning that Mr M wouldn't be able to recover any amounts awarded against the Supplier by English or Spanish courts.

(3) S140A: BPF's participation in an unfair credit relationship

The PR set out several reasons why the credit relationship between Mr M and BPF was unfair to him under S140A. In summary, they include the following:

1. Mr M wasn't given enough time to properly read and consider the implications of the Purchase Agreement.
2. Terms within the Purchase Agreement, in particular relating to the payment of annual maintenance fees and a default clause were unfair.
3. The maintenance fees payable had risen exponentially with no reasonable explanation.
4. The Timeshare was sold as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations")

Neither the PR nor Mr M received a response from BPF. So, the PR referred Mr B's claim to the Financial Ombudsman Service as a complaint.

This service referred Mr M's complaint back to BPF for comment. In response, BPF rejected Mr M's complaint on all ground explaining in detail its reasons.

One of this service's investigators considered all the evidence and information available. Having done so, our investigator thought:

1. The complaints suggesting BPF's participation in a credit relationship that was unfair to Mr M and the decision to lend being irresponsible were not within the Financial Ombudsman Service's jurisdiction because they weren'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. The complaint about BPF's decision not to accept Mr M's claim about the supplier's alleged misrepresentations was made in time under DISP 2.8.2 R (2). But BPF didn't act unfairly or unreasonably by not upholding them.
3. There was no evidence to support the allegation that the Supplier didn't hold the necessary regulatory authorisation to introduce the Credit Agreement with BPF; and
4. There was no evidence that the Supplier had breached the purchase contract such that BPF could be held liable under S75.

The PR didn't agree with the investigator's findings. In response, it provided copy correspondence received from the FCA which confirmed it could find no record of the Supplier being authorised. It suggested that the Supplier had deliberately concealed information about Mr M's ability to sell his Timeshare in the future. It also made reference to the findings of a judicial review[1] relating to the sale of a different kind of timeshare which

[1] R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ("Shawbrook & BPF v FOS");

found that the timeshares in that case had been sold in breach of R14(3) of the Timeshare Regulations. The PR also pointed to the court's findings in that judicial review suggesting that a *"Purchaser Default"* clause included within the Purchase Agreement contained unfair terms.

As an informal agreement couldn't be achieved, Mr M's complaint was passed to me to consider further.

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.

Relevant considerations

When considering what's fair and reasonable, DISP[2] 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.

The CCA introduced certain protections that afforded consumers (like Mr M) a right of recourse against lenders that provide the finance for the acquisition of goods or services (like the Timeshare purchased) from suppliers.

The concerns Mr M has about the sale of the product he purchased only constitute a complaint that the Financial Ombudsman Service has the authority to consider if those concerns are considered with at least one of those provisions of the CCA in mind.

S75 provides protection to consumers for goods or services bought using credit. Mr M paid for the Timeshare under the Credit Agreement with BPF specifically for that purpose. So, it isn't in dispute that S75 applies here – subject to any restrictions and limitations. So, where the requirements of the CCA are met, it means Mr M is afforded the protection offered to borrowers like him under those provisions. As a result, I've taken this section into account - together with any related provisions within the CCA - when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr M and BPF arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under the Credit Agreement, they're deemed to be related agreements.

Given the facts of Mr M's complaint, relevant law also includes the Limitation Act 1980 (the 'LA'). This is because the original transaction - the purchase funded by the Credit Agreements with BPF - took place in March 2010. 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.

I want to make it clear that I've based my decision on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. When doing that, my role isn't to address every single point that's been made. So, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided by both sides.

Having considered everything, I decided that the Financial Ombudsman Service's jurisdiction doesn't permit me to consider the merits of Mr M's complaint about BPF's participation in an unfair credit relationship because it wasn't made within the time limits set out in DISP 2.8.2 R (2). I came to the same conclusion for similar reasons when considering Mr M's complaint that BPF hadn't undertaken the necessary credit checks and, as a consequence, had lent to

[2] Dispute Resolution: Complaints Sourcebook ("DISP")

him irresponsibly. I've explained my reasons for this to the parties to this complaint in a separate decision.

However, 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 (BPF) 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. 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.

Was Mr M's S75 complaint made in time?

As far as Mr M's S75 complaint is concerned, the six- and three-year time limits (under DISP 2.8.2 (2) R) don't usually start until the respondent firm answers and refuses the claim. Here, BPF refused to accept and reimburse Mr M under the claim initiated in October 2023. So, the primary time limit of six years only started once BPF responded. Here, BPF didn't initially respond to Mr M's claim albeit they did provide a response in writing on 22 January 2025 – after Mr M's complaint had been referred to it by this service. And as this complaint about BPF's handling of Mr M's complaint was referred to this service in February 2024, it was made in time for the purpose of the rules on this service's jurisdiction.

So, having decided this service is able to consider this aspect of Mr M's complaint, I've considered the allegations and circumstances further.

Mr M's misrepresentation complaint under S75

Having considered everything, I don't think it would be fair or reasonable to uphold Mr M's complaint for reasons relating to the S75 misrepresentation 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 Mr M's S75 claim was time-barred under the LA before it was put to BPF.

As I've explained, a claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Mr M 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 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 Sale. I say this because Mr M entered into the Purchase Agreement at that time based upon the alleged misrepresentations of the Supplier – which Mr M says he relied upon. And as the Credit Agreement with BPF provided funding to help finance that purchase, it was when he entered into the Credit Agreement that he allegedly suffered the loss.

Mr M first notified BPF of his S75 complaint in October 2023. And as considerably more than six years had passed between the Time of Sale and when the complaint was first put to

BPF, I don't think it was ultimately unfair or unreasonable of the Lender to reject his concerns about the Supplier's alleged misrepresentations.

Could the limitation period be postponed?

There are provisions for the limitation period to be postponed under Section 32 of the LA ("S32") where facts relevant to Mr M's claim were deliberately concealed.

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"* [my emphasis].

The PR argues that the Supplier had assured Mr M that the timeshare ownership was a valuable asset which would be a good investment. And further, that the Supplier could sell the Timeshare later for a profit or rent it and earn revenue. The PR also alleges that the Supplier later assured Mr M that once its resale department opened, his timeshare could be sold at a profit. However, it was only when Mr M's Purchase Agreement was reviewed by a lawyer in January 2023 that the deception was uncovered.

However, the PR hasn't provided me with any persuasive evidence to demonstrate that the Supplier told Mr M any of this. Or that Mr M had even wanted his Timeshare to be sold and / or rented out at any point. The Timeshare Mr M purchased afforded him points to be used to secure bookings from within the Supplier's portfolio of resorts and accommodation, rather than a specific apartment or property. Furthermore, I haven't seen and persuasive evidence that the Supplier deliberately concealed anything else in relation to the various allegations that Mr M wouldn't have realised well before the he submitted the claim.

The PR have referred to the Court's findings in Shawbrook & BPF v FOS; in particular because in that case, the Court found that the Timeshare's concerned had been sold as an investment in breach of Regulation 14(3) of the Timeshare Regulations. But I don't see how the findings in that case have relevance to Mr M's complaint. Shawbrook & BPF v FOS related to the sale of a different type of timeshare to that purchased by Mr M, the facts and features of which were very different.

I've certainly seen nothing to support the allegations suggested by the PR. And as I still can't see why, given the allegations fuelling the claim, these particular issues prevented Mr M from making a claim or - at the very least - raising a complaint earlier, my view is that this particular argument by the PR doesn't help his cause.

Mr M's breach of contract complaint under S75

The PR suggests that as a consequence of the Supplier entering into an insolvency process in 2020, Mr M is unable to recover any award made by English or Spanish courts. But I haven't seen any evidence to suggest that such an award has been made in Mr M's case. And as a consequence, I can't see that there's been any loss such that BPF could be held liable for it.

Furthermore, I haven't been provided with anything to suggest that Mr M is unable to continue using his Timeshare because of any contractual breach of the Purchase Agreement by the Supplier. BPF have confirmed – and I'm also aware - that the Supplier's resorts remains open and available for use.

The credit broker's authorisation

The PR believes that the Supplier wasn't authorised to broker the Credit Agreement with BPF. And because of that, it believes Mr M's loan is unenforceable.

The Credit Agreement Mr M entered into was dated 22 March 2010. The FCA took on the regulation of consumer credit on 1 April 2014. Prior to that, consumer credit was regulated by the Office of Fair Trading (the "OFT") under the CCA. And the Supplier would need to have held a license from the OFT. I acknowledge that the PR has received confirmation from the FCA that it has never provided any license or authorisation to the Supplier. However, given what I've said above, I don't see that this is relevant given regulation at the time was by the OFT.

Section 27 of the Financial Services and Market Act 2000 ("FSMA") (*"Agreements made through unauthorised persons"*) only applies to (FCA) regulated activities, which in this case doesn't cover consumer credit lending prior to 1 April 2014.

In October 2019, the FCA issued explanation and guidance relating to Validation Orders to allow an otherwise unenforceable credit agreement. This was updated in February 2023. Insofar as it's relevant to Mr M's complaint, the FCA explanation says,

"For agreements entered into before 1 April 2014, a modified regime applies. […] *For agreements that were entered into before this date and which are unenforceable against the borrower, the borrower has no right to recover any money paid or other property transferred under the agreement or compensation for loss".*

That aside, if Mr M's Credit Agreement was found to be unenforceable – and I make no such finding – it would normally mean that whilst the obligations under the agreement remain in existence, one or both parties to the agreement can't enforce compliance in the courts. So, if BPF took steps against Mr M to enforce the agreement, there might be a defence. However, I don't think this is relevant in Mr M's case. He repaid all amounts due under the Credit Agreement in full in May 2017.

In reality, Mr M took the finance from BPF and later repaid it. He knew he had the finance, the amount borrowed and what it was for (the Timeshare purchase). So, even if it was found to be improperly brokered, I haven't seen anything that persuades me that it would've resulted in something that would require the payment of compensation.

Summary

I want to reassure Mr M that I've considered everything that has been said and provided here. And whilst I have addressed the various points and allegations included within the Letter of Complaint, it does concern me that many of those allegations don't appear to be reflected within the letter and submissions Mr M sent to BPF with his completed 'Review Request Form' in June 2023. Having completed my review, whilst I appreciate that Mr M will be disappointed, I won't be asking BPF to do anything more.

My final decision

For the reasons set out above, I don't uphold Mr M's complaint about Clydesdale Financial Service Limited trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 5 June 2025.

Dave Morgan
Ombudsman