

## The complaint

Mr F has complained that Clydesdale Financial Services Limited, trading as Barclays Partner Finance (“BPF”), has not properly dealt with a complaint that arose out of the sale of a timeshare membership bought using finance provided by BPF.

## What happened

On 9 March 2009 (“the Time of Sale”), Mr and Mrs F purchased a points-based membership (“the Membership”) from a timeshare supplier (“the Supplier”). This gave Mr and Mrs F the opportunity to exchange the points for holidays at the Supplier’s resorts. The Membership cost £5,608, which was funded entering into a fixed sum loan agreement in Mr F’s name.<sup>1</sup> The loan was repaid in December 2014.

In September 2019, using a professional representative (“PR”), Mr F made a complaint to BPF. The initial letter runs to twelve pages. It’s not necessary to repeat everything said in full here, so I’ve summarised the concerns raised.

PR said that, at the Time of Sale, Mr F was using a ‘trial membership’<sup>2</sup> he held with the Supplier to take a holiday. Whilst there he was told he needed to attend a presentation to discuss the membership, which actually turned out to be a lengthy, high-pressured sales presentation. During the presentation the following matters were misrepresented, which BPF was jointly liable to answer due to the operation of s.75 of the Consumer Credit Act 1974 (“CCA”):

- Mr F would have to take out a full membership to return to the resort and doing so would mean he joined an ‘exclusive club’. This was important as Mr F wished to return to this specific resort, but almost all of the Supplier’s properties can be accessed and booked by non-members. In support of this, PR provided evidence that one of the Supplier’s properties was available to book by non-members in April 2019.
- Mr F was told that the accommodation he had used was a ‘minimum standard’ and so he expected to get ‘luxury accommodation’ in future stays. But Mr F has had issues with the quality of accommodation.
- Mr F was told there was guaranteed availability and so he wouldn’t need to worry about searching for holidays every year. But Mr F has had issues with the availability of accommodation.
- The sale was pressured and Mr F was told there was no guarantee that this particular deal would be available for the same price on another day.
- The Membership was presented to Mr F as a benefit, but it’s actually a burden with no end date, meaning that the liability to pay maintenance fees will be perpetual.

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<sup>1</sup> As the loan was in Mr F’s sole name, I’ll only refer to him throughout this decision as he is the only person eligible to make this complaint. Further, the amount borrowed was significantly more than the cost of the Membership, so I’ve assumed this loan was for more than just the purchase of the Membership, possibly for consolidating an earlier loan. But as this issue hasn’t been raised by PR, I’ve not commented on it further.

<sup>2</sup> This was a type of membership whereby Mr F could use the Supplier’s resorts without having to take out a full membership.

PR also said there had been actionable breaches of contract that again BPF needed to answer under s.75 CCA. Those were:

- It was an implied term that the contract was legal, but the Membership was illegal pursuant to Spanish law. Spanish law applied to the Membership as Mr F bought it in Spain and intended to use Spanish properties.
- The Supplier accepted a deposit payment on the date Mr F signed the contract. This was a breach of a European Directive that banned the taking of deposits on the day the timeshares were sold. There was also a breach of this Directive as the Supplier didn't make it clear that the meeting Mr F attended was going to be a sales meeting.

PR also argued that there was a breach of a fiduciary duty as the Supplier received a commission from BPF when it arranged Mr F's loan. Further it was said that neither BPF nor the Supplier carried out any proper assessment of Mr F's circumstances to work out if the loan was right for him.<sup>3</sup>

Finally, PR said that BPF was a party to an unfair debtor-creditor relationship as set out in s.140A CCA. Some of the reasons given were the same as those already raised, such as the payment of a commission, but in addition it was said:<sup>4</sup>

- The Membership was not worth the amount paid for it.
- No choice of finance provider was given by the Supplier.
- Under Reg.26 of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"), the purchase price should have been divided into equal instalments for each year of the agreement. But the price was paid upfront by taking a loan with BPF.

BPF acknowledged the complaint, but wasn't able to give its position and explained it needed more time. In January 2020, PR referred Mr F's complaint to our service as BPF hadn't responded to the complaint within the eight weeks it was normally given to do so.

One of our investigators considered everything, but didn't think BPF needed to do anything further to answer the complaint. In summary, he said:

- Mr F had raised a number of different complaints about different memberships he'd bought from the Supplier, using loans provided by lenders other than BPF. This showed that the Membership bought in 2009 was the fourth purchase he'd made and our investigator thought it was likely Mr F knew by this stage how the Supplier's point-based memberships worked. So he thought Mr F would have known non-members could stay at the resorts and would have been familiar with the standard of accommodation.
- The Membership was purchased before the Timeshare Regulations came into force, so they didn't apply to this sale.
- There was no evidence that actionable misrepresentations were made by the Supplier during the sale.
- There was no evidence that Spanish law applied to Mr F's agreement, nor was there evidence that a deposit was taken on the day of the sale. Further, if there had been a breach of terms implied into the agreement, that would have taken place on the date of sale, which meant any claim was made too late under the relevant provisions of the Limitation Act 1980 ("LA").

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<sup>3</sup> I've taken this to mean that the loan wasn't affordable for him.

<sup>4</sup> Some of the allegations related to a different type of membership, fractional membership, which wasn't what Mr F had bought. So I've not repeated those allegations here as I don't see how they could relate to Mr F's complaint.

- There wasn't sufficient evidence to show BPF had been party to an unfair debtor-creditor relationship.
- There was no evidence that the lending was unaffordable for Mr F.

PR, on behalf of Mr F, disagreed with the investigator's view. In doing so, it relied on a forty-five page document produced by a barrister titled "*Various consumer complainants and Providers of Consumer Credit for Purchase of [the Supplier]'s Vacation Club Points – Generic submissions on behalf of complainants*" ("Counsel's Submissions"). Again, due to the length of this document it's not practical to repeat the contents in full, but I'll provide a summary of the key points below which apply to this complaint:<sup>5</sup>

- The volume of complaints made about timeshare sales suggests there was a significant problem with the way they were sold and financed.
- The combination of high pressure of marketing and bundling memberships with loans meant that the complexities of the product or the financial consequences for the borrower weren't explained or considered properly.
- The sales process was skewed towards the positives, with little consideration of the complexities of memberships or the borrower's long-term liability and objective value of memberships.
- A proper assessment of circumstances was not completed before lending. The Financial Ombudsman Service must consider the impact of the failure to carry out affordability assessments over the period of the product (not just the term of the loan) beyond retirement and the sustainability of the lending criteria adopted.
- the Supplier's options for relinquishment introduced after the Time of Sale is an acknowledgement that the Membership operated unfairly, but doesn't address the unfairness and breaches of guidance that took place at the Time of Sale.

PR also raised a further concern, which was that the lending should not have been granted as it breached the Office of Fair Trading's ("OFT") and Financial Conduct Authority's ("FCA") guidance and rules on how loans were granted. PR didn't provide anything further from Mr F setting out his recollections of the sale or details of his concerns.

As the parties didn't agree with our investigator, the complaint was passed to me for a decision.

I issued a provisional decision, explaining that I agreed with our investigator that the complaint shouldn't be upheld, but I did so for different reasons. So I set out my reasoning and invited both parties to provide me with anything else they wished me to consider before I issued a final decision.

I explained that I'd considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I didn't think BPF needed to do anything further to answer this complaint.

I also said that when deciding complaints, under the DISP rules, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice.

I also focused on what I thought was material and relevant to reach a fair and reasonable

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<sup>5</sup> As noted in the title, these submissions were generic and are designed to apply to a number of different complaints. Many of these submissions don't, and can't, apply to Mr F's complaint, for example submissions that the sale breached the Timeshare Regulations 2010 can't apply as those regulations post-dated Mr F's sale. So, I've relied on this document in so far as it provides additional submissions on the claims Mr F actually made.

outcome. So although I read everything that had been supplied to me, I didn't address every point that has been raised.

When it came to the merits of the complaint, I said the following:

*"Is BPF jointly liable for the Supplier's alleged misrepresentations?"*

*Mr F said that the timeshare supplier misrepresented the nature of the membership to him when he bought it and that he has a claim for misrepresentation against the Supplier. Under s.75 CCA, BPF could be jointly liable for the alleged misrepresentations made by the Supplier and Mr F has complained that BPF hasn't properly considered whether it's liable, nor paid what it should have.*

*Having considered everything, I think Mr F was too late in bringing his concerns about that to BPF. For the avoidance of doubt, I've not decided whether the appropriate limitation period has expired as that would be a matter for the courts should a legal claim be litigated. Rather, I've considered whether BPF should have fairly accepted it was liable for the alleged misrepresentations.*

*It was held in Green v Eadie & Ors [2011] EWHC B24 (Ch) [2012] Ch 363 that a claim under s 2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s 2 LA).*

*Here Mr F made a like claim against BPF. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which would be open to the supplier, including that of limitation:*

*"There is no difficulty in treating the debtor's rights under sub-s (1) as a "like claim" against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited his liability, the creditor may shelter behind that exclusion or limitation. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in diminution or extinguishment of his liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])"*

*Therefore, the limitation period for the s.75 claim expires six years from the date on which the cause of action accrued.*

*The date on which a 'cause of action' accrued is the point at which Mr F entered into the agreement to buy the timeshare. It was at that time that he entered into an agreement based, he says, on the misrepresentations of the Supplier and suffered a loss. He says, had the misrepresentations not been made, he would not have bought the timeshare. And it was on that day that he suffered a loss, as he took out the loan agreement with BPF that he was bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in March 2009, so Mr F had six years from then to bring a claim. But he didn't make a claim against BPF until September 2019, which was outside of the time limits set out in the LA. So I think BPF had a defence to this misrepresentation claim*

Is BPF jointly liable for the Supplier's alleged breach of contract?

PR has said that the Supplier breached its contract with Mr F by breaching terms implied at the Time of Sale. But it alleges that these were breached as soon as Mr F entered into the agreement.<sup>6</sup> Again, that is something that BPF might be liable for due to the operation of s.75 CCA.

The LA applies to breach of contract claims too and there the limitation period expires six years from the date of the alleged breach, which PR says was at the Time of Sale (s.5 LA). Again, I think Mr F made his claims to BPF outside of that time period and so it had a defence to his claim.

Was BPF a party to an unfair debtor-creditor relationship?

PR has argued that for a number of reasons, the debtor-creditor relationship between BPF and Mr F was unfair as defined by s.140A CCA. I've considered what PR has said, but I've also looked at the allegation that there was a breach of fiduciary duty by the payment of commission and that the lending was unaffordable in this section. That is because, although those matters could constitute separate complaints in their own right, they can also be considered as things that could make the relevant relationship unfair.

Under s.140A CCA a court may make an order under s.140B CCA in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but this is relevant law and I've taken it into account.

The alleged misrepresentations made by the Supplier that might have happened outside of the limitation period to make a misrepresentation claim are things that can be considered when assessing the fairness of the debtor-creditor relationship (see Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790). Further, the terms of the Membership agreement, and how they operated in practice, are matters that can be considered too as it was a related agreement under the CCA.

Our investigator set out why he didn't think the alleged misrepresentations were made out on the evidence available and in response PR hasn't provided any new evidence to consider, so I'm not sure whether this is still in dispute. However, for completeness, I also don't think there is enough evidence to say the Supplier made the representations as alleged or that they would have been untrue if made.

Misrepresentations

PR alleged that Mr F was told that he had to take out a full membership to return to the resort and doing so would mean he joined an 'exclusive club'. But I think Mr F was already a full member at the time he took out the Membership and he was only increasing the number of points he held. So I don't think it was likely that he was told he needed to upgrade a trial membership as, at the Time of Sale, I don't think he held such a membership and I think he would have been able to use the Supplier's resorts already as he was a member. PR has also shown that one of the Supplier's properties was available to book by non-members in April 2019, but I don't think this means that any non-member was necessarily able to stay at all the Supplier's

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<sup>6</sup> It's not clear to me that these allegations would have amounts to breaches of contract. But I've not needed to make a finding on that as I don't think BPF needs to consider the claim as it was made too late.

*properties at any time of the year. So even if Mr F was told the Membership was 'exclusive', I've not seen enough evidence to say that the Membership wasn't 'exclusive' as suggested.*

*Mr F hasn't provided any information as to the quality of the accommodation he actually stayed in with the Supplier, so I can't say that, even if he was promised accommodation of a certain quality, that it wasn't actually provided to him.*

*Mr F says that he was told there was guaranteed availability and so he wouldn't need to worry about searching for holidays every year. But again, I've not seen any evidence that he wasn't able to book holidays suitable for him or that he wasn't able to use the Membership as expected.*

*Finally, it was said that the Membership was presented to Mr F as a benefit, but actually it was a burden with no end date, meaning that the liability to pay maintenance fees will be perpetual. I'm not sure what the alleged representation was here, but again, Mr F was already a member, so I think he was already aware how the Membership worked and how maintenance fees were charged.*

#### *The breaches of contract*

*I'm not sure that a breach of contract by the Supplier, after it was taken out, could make the debtor-creditor relationship unfair as I don't think such a breach would have been done with the Supplier acting on behalf of BPF. But the alleged contract problems could be looked at in assessing the fairness of the relationship. But I can't see that Spanish law applied to Mr F's agreement or that any payment was taken at the Time of Sale. So I don't think the issues raised could lead to an unfairness.*

*In addition, in Counsel's Submissions, there are terms of the Supplier's agreements that are highlighted as being unfair. But PR hasn't pointed to any specific term of Mr F's Membership agreement that operated unfairly in practice.*

#### *Other reasons Mr F said there was an unfair debtor-creditor relationship*

*PR has said that there were breaches of the OFT's guide to irresponsible lending (it also pointed to the FCA Handbook, but that did not cover this type of lending at the Time of Sale).*

*It argues that BPF didn't complete proper checks before agreeing to lend. I've not got any information about what checks were completed when Mr F's loan was agreed. So, I accept that proper checks may not have been completed.*

*However, to uphold this aspect of Mr F's complaint I'd still need to be satisfied that the loan was unaffordable for him and that, had proper checks been completed, they would have uncovered this. Mr F and PR have not provided any evidence to support the allegations that the loan was unaffordable for him. So I can't conclude the loan was granted irresponsibly to Mr F.*

*Mr F said he was pressured to sit through a presentation for the Membership. If the levels of pressure were so extreme as to cause him to buy something that he otherwise would not have done, that is something that could lead to an unfair debtor-creditor relationship. However, Mr F has only said that the sale was pressured and that he was told there was no guarantee that this particular deal would be available for the same price on another day. Given the evidence available, although I think it was likely the sale was somewhat 'pressured', I do not think it went so far as to cause*

*an unfairness. After all Mr F was already a member, so I think he already had some interest in the product. Further, I can't say that it wasn't true that any offer made at the Time of Sale was only available on that day (or that it would be improper to say that).*

*I've also considered the information available about how the Supplier sold its timeshare products, as set out more fully in PR's claims and Counsel's Submissions. I think it is fair to say that the benefits of the products are highlighted, any negatives not discussed at length and the sales representatives are encouraged to secure a sale on the day. From what I know about how these sales took place, I think it likely that sales staff are also trained on overcoming the key objections a customer might make. But I think there is a difference between a 'hard sell' and a 'pressured sale'.*

*I have noted the comments in Counsel's Submissions relating to loans and memberships being bundling into one sale. But I do not agree that taking the Membership and a loan at the same time would have taken away Mr F's free choice to take out either the Membership or the loan. I accept that some customers were unlikely to have a full understanding of the Membership terms as they were set across several documents. But I think Mr F had enough basic information about the Membership to decide if he wanted it and, again, I don't see how this forced Mr F into taking a membership he didn't want.*

*Mr F said that he thinks BPF paid a commission to the Supplier when the loan was granted and that could have created an unfair debtor-creditor relationship. From what I understand, if BPF paid any commission, it tended to be low and of less than 10%. I'm satisfied BPF didn't breach any duty in making such a payment, nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances. Further, I don't think the levels of commission that were sometimes paid in this situation were sufficiently high to mean that the relationship was unfair under s.140A CCA. I also don't think there was the right relationship between Mr F and BPF to give rise to a fiduciary relationship as alleged.*

*PR has said that the membership wasn't worth the amount paid for it. I don't think I can take this allegation further as I don't know why it says this or, if true, why that would make the debtor-creditor relationship unfair.*

*PR has said that no choice of finance provider was given. I know that Mr F took out loans with other providers to pay for the Supplier products prior to the Time of Sale, so he must have known other lenders could have been available. But I can't see that Mr F questioned this at the Time of Sale or why PR say an unfairness would have been caused if he hadn't been offered loans from other lenders.*

*Finally, PR has pointed to potential breaches of the Timeshare Regulations, but as these weren't in force at the Time of Sale, I fail to see how they could cause an unfairness in Mr F's case.*

*It follows, I can't see any reason to tell BPF to pay anything to Mr F arising out the sale of the Membership."*

Neither BPF nor PR responded to my provisional decision.

### **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.

As neither party has given me anything further to consider, I see no reason to depart from my provisional findings.

**My final decision**

I don't uphold Mr F's complaint against Clydesdale Financial Services Limited, trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 8 April 2024.

Mark Hutchings  
**Ombudsman**