DRN-4773248

The complaint

Miss P complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") acted unfairly and unreasonably by (1) not paying a claim under Section 75 of the Consumer Credit Act 1974 (the "CCA") and (2) participating in an unfair credit relationship with her under Section 140A of the CCA.

What happened

In August 2010 ("the Time of the First Sale"), Miss P (together with another) agreed to purchase Trial Membership of a timeshare product from a supplier ("the Supplier"). The purchase price agreed was £3,995 which, after payment of a deposit, was funded under a Fixed Sum Loan Agreement for £3,000 with BPF over 24 months in Miss P's sole name ("The First Finance Agreement).

In October 2010 ("The Time of the Second Sale"), Miss P (together with another) agreed to upgrade their Trial Membership to a full Points Membership with the Supplier. The purchase price agreed was £11,775 less a trade in allowance for their Trial Membership of £3,995. The balance of £7,780 was funded under a new Fixed Sum Loan Agreement with BPF over 180 months in Miss P's sole name ("The Second Finance Agreement"). The new loan also consolidated the first loan resulting in a new total loan of £10,639.

In September 2017, using a professional representative (the "PR"), Miss P wrote to BPF to complain about:

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

Miss P's S75 complaint

In relation to the Points Membership, the PR allege Miss P was told:

- this was an exclusive private members club, but non-members could book and stay at (the Supplier's) resorts;
- the membership would be cheaper than using a travel agent which was not true;
- they could divest themselves of the Points Membership by selling it back to the Supplier, but this wasn't true;
- they could holiday at any resort they wished in high season with accommodation of the same standard they'd been shown, but this wasn't true; and
- that annual management charges would only increase in line with inflation, but they rose by significantly more.

Miss P's S140A complaint

In relation to the Points Membership, the PR allege the misrepresentations, together with other things done (or not done) by the Supplier, together with alleged breaches of the

regulations that applied, render the relationship with BPF under the agreements, unfair pursuant to S140A. In particular, the PR allege:

- a Compliance Officer was presented as impartial but wasn't as he was an employee of the Supplier and didn't take steps to free Miss P from the influence of the misrepresentations;
- Miss P didn't receive the Disclosure Statement prior to entering into the purchase agreement, or if she did, she didn't have time to review the Information Statement before signing the Purchase Agreement;
- the Points Membership contract and/or the obligation to pay management charges was and is unfair under regulation 5 of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR");
- the Supplier made untrue statements in breach of regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT");
- the Supplier used aggressive commercial practices in breach of regulation 7 of CPUT;
- the sales presentation included prohibited practices under schedule 1 of CPUT; and
- the interest rate for the loan was significantly higher than that provided by other lenders.

BPF said they were under no obligation to investigate Miss P's complaint as any complaint regarding the product purchased and the associated finance was time barred under the Limitation Act 1980 (the "LA"), given more than six years had elapsed.

The PR didn't accept BPF's response and wrote to BPF again. They said that as Miss P was seeking to reopen a credit bargain on grounds of the relationship between the lender and the creditor being unfair, the action is a speciality for the purposes of section 8 of the LA. And under that provision, the limitation period is twelve years. They suggested the relationship (between Miss P and BPF) was ongoing, so the twelve-year limitation hadn't yet begun. Included in their response to BPF, the PR referenced a third "Fractional" (timeshare) Product".

In the absence of a further response from BPF, the PR referred Miss P's complaint to this service. Having considered everything that had been said and provided, our investigator didn't think Miss P's complaint should be upheld.

The PR didn't agree with our investigator's findings. In response, they made observations and allegations relating to a fractional timeshare product purchased by Miss P. In particular referencing the outcome of a recent Judicial Review[1] relating to the sale of fractional timeshare products.

As an informal resolution couldn't be reached, Miss P's complaint was passed to me to reach a final decision.

I issued a Provisional Decision ("PD") on 10 July 2024 in which I provisionally found that:

1. Miss P's complaint about BPF's participation in a credit relationship that was unfair to her wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the "FCA") Dispute Resolution Rules ("DISP").
2. Miss P's complaint about BPF's decision to reject her concerns about the Supplier's

[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').

alleged misrepresentations under Section 75 of the CCA ("S75") was made in time under DISP 2.8.2 R (2). But BPF didn't act unfairly or unreasonably by coming to the decision they did.

In acknowledging receipt of my PD, BPF confirmed they had nothing further to add. Despite follow up by this service, neither the PR nor Miss P responded or provided anything new for me to consider. So, Miss P's complaint was passed back to me.

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 I've said above, neither the PR nor Miss P have provided anything further for me to consider. So, I still don't think Miss P's complaint should be upheld insofar as it relates to her concerns about BPF's responsibilities under S75.

For completeness, I said the following in my PD:

Relevant consideration

When considering what's fair and reasonable, DISP[2] 3.6.4R of the Financial Conduct Authority ("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.

S75 provides consumers with protection for goods or services bought using credit. Miss P paid for the timeshare products under restricted use regulated finance agreements with BPF. So, it isn't in dispute that S75 applies (subject to any restriction or limitation). This means Miss P may be afforded the protection offered to borrowers like her 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.

Given the facts of Miss P's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transactions - the purchases funded by finance agreements with BPF - took place in August and October 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.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it 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. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

While the products were purchased in joint names of Miss P and another, both finance agreements were in Miss P's sole name. This means that only Miss P is eligible to bring a complaint to this service about them.

As far as I can establish, Whilst Miss P's letter (submitted by the PR) to BPF references the circumstances of the Trial Membership purchase, it doesn't appear that any specific allegations or complaints were made in relation to it. The letter refers to *"miss-sold finance […] in respect of the purchase of a timeshare product"* and *"our clients purchased that timeshare product" (*emphasis added). The allegations included within the complaint letter appear to specifically relate to *"The Points Membership".* So, in considering this complaint, I've only considered the allegations as they relate to the Points Membership purchase and the associated finance agreement (The Second Finance Agreement).

[2] Dispute Resolution: The Complaints sourcebook (DISP)

I've also noticed that the PR often refers to the purchase of a fractional timeshare product at times within their submissions. I've seen no evidence that BPF were involved in the financing of such a timeshare product for Miss P. So, it appears any such reference isn't relevant to the circumstances of this complaint.

Miss P's S75 complaint

S75 operates quite differently to S140A and, when it applies, it can give borrowers a very different ground for complaint against a lender. Whereas S140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, S75 simply creates a financial liability that the creditor is bound to pay. Liability under S75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the supplier. 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.

However, I don't think it would be fair or reasonable to uphold Miss P's complaint for reasons relating to her S75 claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Miss P's S75 claim was time-barred under the LA before it's put to BPF.

As I've explained, a claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Miss P 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 the Second Sale. I say this because Miss P entered into the purchase of her timeshare product at that time based upon the alleged misrepresentations of the Supplier – which Miss P says she relied upon. And as the Second Finance Agreement from BPF was used to help finance that purchase, it was when she entered into the Second Finance Agreement that she allegedly suffered the loss.

Miss P first notified BPF of her S75 claim in September 2017. And as more than six year had passed between the Time of the Second Sale and when she first put her claim to BPF, I don't think it's unfair or unreasonable for BPF to reject Miss P's concerns about the Supplier's alleged misrepresentations.

The PR suggest that the relationship is still ongoing. However, based upon the evidence I've seen, I don't agree. I've seen an account statement which clearly shows that the Second Finance Agreement was repaid in full in March 2011. Further, the PR suggests that the action is a speciality for the purposes of section 8 of the LA, thus providing a longer limitation of twelve years. A specialty is a contract or covenant executed as a deed. I can't see that was the case here, so I don't think section 8 of the LA helps Miss P's case here.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 11 September 2024.

Dave Morgan
Ombudsman