

## The complaint

Mrs K's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") acted unfairly and unreasonably by (1) participating in an unfair credit relationship with her 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

In November 2009, Mrs K (together with another party) purchased a timeshare interest from a supplier (the "Supplier") for an agreed purchase price of £6,350. This purchase was funded under a regulated credit agreement with BPF (the "Credit Agreement") in Mrs K's sole name. All borrowing under the Credit Agreement was repaid in full in June 2010.

In May 2023, BPF wrote to Mrs K to advise that they'd identified some concerns about the circumstances of her timeshare sale. BPF invited Mrs K to complete a questionnaire relating to her timeshare purchase experience so it could be reviewed.

In October 2023, using a professional representative (the "PR"), Mrs K submitted a claim to BPF under the CCA. In particular, the PR included allegations:

1. of misrepresentation by the Supplier at the Time of the Sale including that the timeshare product had been represented as an investment that could be sold for a profit within a couple of years of the purchase;
2. unfair terms within the timeshare purchase agreement;
3. unfairness resulting from the Supplier's sales practices;
4. breaches of the regulations that applied;
5. the credit intermediary wasn't authorised to carry on a regulated activity under the Financial Services and Markets Act 2000 ("FSMA") rendering the credit agreement unenforceable;
6. of irresponsible lending having failed to complete that required affordability checks;
7. that due to the Supplier entering into an insolvency process, Mrs K would be unable to recover any amounts awarded by the courts.

Having not received a response from BPF, the PR referred Mrs K's claim to this service as a complaint. BPF subsequently responded to Mrs K's complaint confirming they were unable to uphold it. In particular because despite numerous attempts to contact Mrs K and the PR, they'd not been provided with the information required to help them investigate Mrs K complaint. BPF did agree to revisit the complaint should the requested information be subsequently received.

Having considered all the information and evidence available, one of this service's investigators thought:

1. Mrs K's complaint suggesting 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. Mrs K's complaint suggesting BPF's decision to lend to her was irresponsible also wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in DISP 2.8.2 R (2);
3. Mrs K's complaint about BPF's decision to reject her concerns 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 coming to the decision they did; and
4. 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.

The PR didn't agree with our investigator's findings. In particular the PR said:

- Mrs K's inability to sell her timeshare investment only became apparent once the Supplier entered into an insolvency process in 2020 and, as a consequence, their timeshare resale service ended thus bringing about Mrs K's cause of action;
- The supplier, whilst likely to have held the required license from the Office of Fair Trading (the "OFT"), was a company registered in the British Virgin Islands ("BVI") with no employees. And the contracts were entered into in a Spanish territory. The PR believes the circumstances mirror issues raised in the case of *Plaxedes Chickombe and Other vs The Financial Conduct Authority* [2018] UKUT 0258 (TCC). The PR believes the findings in that case set a precedent which should be applied to Mrs K's complaint.

As an informal resolution couldn't be achieved, Mrs K's complaint was passed to me to consider.

### **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.

When considering what's fair and reasonable, DISP 3.6.4R of the FCA<sup>1</sup> 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 of the CCA ("S75") provides consumers with protection for goods or services bought using credit. Mrs K paid for the timeshare product under a regulated Credit Agreement with BPF. So, it isn't in dispute that S75 applies (subject to any restriction or limitation). This means Mrs K 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.

Section 140A of the CCA ("S140A") looks at the fairness of the relationship between Mrs K and BPF arising out of the finance 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 Mrs K's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transaction - the purchase funded by a finance agreement with BPF - took place in November 2009. 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

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<sup>1</sup> Financial Conduct Authority

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.

Mrs K's complaint was referred to this service by the PR as a joint complaint with another party to the timeshare purchase agreement. However, as the Credit Agreement was in the sole name of Mrs K, only she is an eligible claimant under the CCA and, consequently, the only eligible complainant under DISP 2.7 within the dispute rules of the FCA's Handbook.

Having considered everything, I decided that the Financial Ombudsman Service's jurisdiction doesn't permit me to consider the merits of Mrs K's complaint about BPF's participation in an unfair credit relationship and the alleged failure to undertake a credit assessment because they weren't made within the time limits set out in DISP 2.8.2 R (2). 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 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.

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 Mrs K under her claim initiated in October 2023. So, the primary time limit of six years only started once BPF responded. And as this complaint about BPF's handling of Mrs K'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.

#### Mrs K's complaint under S75

Having decided this service is able to consider this aspect of Mrs K's complaint, I've considered the various allegations and circumstances further.

Having done so, I don't think it would be fair or reasonable to uphold Mrs K's complaint for reasons relating to his 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 Mrs K'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 Mrs K 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 Sale. I say this because Mrs K entered into the purchase of the timeshare product at that time based upon the alleged misrepresentations of the Supplier – which Mrs K says she relied upon. And as the Credit Agreement with BPF provided funding to help finance that purchase, it was when she entered into the Credit Agreement that she allegedly suffered the loss.

Mrs K first notified BPF of her S75 complaint in October 2023, And as more than six year had passed between the Time of the Sale and when she first put her complaint to BPF, I don't think it was ultimately unfair or unreasonable of BPF to reject Mrs K's concerns about the Supplier's alleged misrepresentations.

#### The credit broker's authorisation

The PR believes that the Supplier wasn't licensed and authorised to broker the loan. And because of that, Mrs K's loan is unenforceable.

The Credit Agreement Mrs K entered into was dated 9 November 2009. The FCA took on the regulation of consumer credit on 1 April 2014. Prior to that, consumer credit was regulated by the OFT under the CCA. And the Supplier would need to have held a license from the OFT.

This service's records show that the "seller" of the timeshare product (as detailed within the purchase agreement) came under this service's Consumer Credit Jurisdiction at the Time of the Sale. In order to do so, they would've needed to hold the requisite OFT license. So, I'm persuaded that license was held.

In response to our investigator's findings, the PR says that whilst the Supplier may have held an OFT license, it was a company registered in the BVI with no employees. And Mrs K signed the timeshare purchase documents whilst holidaying in a Spanish territory. The PR believes these circumstances mirror issues raised in the case of *Plaxedes Chickombe and Others v The Financial Conduct Authority [2018] UKUT 0258 (TCC)*. And because of that, the precedent set in that case should apply to Mrs K's own complaint.

Section 27 of FSMA (*"Agreements made through unauthorised persons"*) only applies to 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 last updated in February 2023. Insofar as it's relevant to Mrs K'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 Mrs K'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 Mrs K to enforce the agreement, there might be a defence. However, I don't think this is relevant in Mrs K's case. Mrs K repaid all amounts due under the Credit Agreement in full in June 2010. So, no such steps to enforce the agreement appear to have arisen.

In reality, Mrs K took the finance from BPF and subsequently repaid it. She knew she 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 resulted in something that would require the payment of compensation.

#### Other matters

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

### Summary

Whilst Mrs K's complaint about BPF's failure to uphold her claim under S75 was made in time under DISP 2.8.2 R (2), I'm not persuaded that BPF's response to her complaint was ultimately unfair or unreasonable. Furthermore, in respect of the allegations as they relate to the authorisation (or otherwise) of the Supplier (acting as the broker of the Credit Agreement), I've not found any reasons to support the payment of compensation to Mrs K.

I do appreciate that Mrs K will be disappointed by my findings, but I won't be asking BPF to do anything more here.

### **My final decision**

For the reasons set out above, I don't uphold Mrs K'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 Mrs K to accept or reject my decision before 12 September 2024.

Dave Morgan  
**Ombudsman**