DRN-5056209

## The complaint

Mr F'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 him under Section 140A of the Consumer Credit Act 1974 (the "CCA") and (2) deciding against paying a claim under Section 75 of the CCA.

## What happened

Since 2003 Mr F (together with his wife) have purchased various timeshare products and upgrades from a timeshare provider (the "Supplier"). Those purchases included:

- October 2003 – Trial membership;
- February 2004 – Full membership with 870 membership points;
- August 2005 – An additional 1,000 membership points; and
- November 2006 – Trade in of existing points for 4,400 membership points.

In June 2009 (the Time of Sale), Mr F agreed to purchase an additional 300 membership points (the "Upgrade") from the Supplier. The agreed price of £3,864 was funded using a regulated loan (the "Credit Agreement") provided by BPF in Mr F's sole name. All amounts due under that loan were repaid in full in May 2010.

In April 2020, using a professional representative (the "PR"), Mr F submitted a claim/complaint to BPF which included:

- Misrepresentations by the Supplier at the Time of Sale giving Mr F a claim against BPF under Section 75 of the CCA ("S75"), which BPF failed to accept and pay.
- 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").

I don't propose to list all of the various allegations included within the claim at this point as the parties are familiar with them. However, I may refer to them below where I believe it's helpful and/or relevant.

Mr F's claim also includes allegations of misrepresentation and unfairness in respect of a later purchase that he agreed to in November 2012. While this was purchased from the same Supplier, it was for a different type of timeshare product to the ones previously purchased. The claim alleges that this was also funded under a loan agreement with BPF.

In response, BPF rejected Mr F's complaint on every ground on the basis that the deadline for bringing his complaint had passed under the provisions of the Limitation Act 1980 (the "LA").

Mr F didn't accept BPF's response and findings. So, the PR referred matters to this service as a complaint. One of this service's investigators considered all the information and evidence provided. Having done so, our investigator thought:

1. the complaint suggesting BPF's participation in a credit relationship that was unfair to Mr F 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"); and

2. the complaint about BPF's decision to reject their 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 not upholding them.

The PR (on Mr F's behalf) didn't accept our investigator's findings and asked for the complaint to be referred to an ombudsman. To support this, the PR submitted arguments which relate specifically to the type of timeshare product that was allegedly purchased by Mr F in November 2012. In particular making reference to the findings of the court in *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').*

Mr F'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.

Relevant considerations

While the purchase(s) in question were in the joint names of Mr and Mrs F, the Credit Agreement in 2009 was in Mr F's sole name. This means that only Mr F is an eligible claimant here. And as a consequence, the only eligible complainant.

As mentioned above, the claim includes allegations in respect of a further purchase that Mr F agreed to in November 2012. However, BPF haven't been able to find any record of the associated loan referred to by the PR. Our investigator asked the PR to provide full details of this purchase together with the loan. But no further information or acknowledgment was provided by them.

For the purpose of this decision, and in the absence of any further information or evidence, I'm unable to consider the circumstances of the alleged purchase in November 2012. So, this decision only serves to consider the circumstances and allegations as they relate to the Upgrade Mr F agreed to in June 2009.

When considering what's fair and reasonable, DISP 3.6.4R of the FCA[1] 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. Mr F paid for the Timeshare under a regulated Credit Agreement with BPF. So, it isn't in dispute that S75 applies (subject to any restrictions or limitation). This means Mr F 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.

S140A looks at the fairness of the relationship between Mr F and BPF 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 F's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transaction - the purchase funded by the Credit Agreement with BPF - took place in June 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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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.

Having considered everything. I decided that the Financial Ombudsman Service's jurisdiction doesn't permit me to consider the merits of Mr F's complaint about BPF's participation in an unfair credit relationship. I've explained my reasons for this to the parties to this complaint in a separate decision.

Was Mr F's S75 complaint made in time?

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 S75 claim which is found to be valid, 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 failure to respond to, or refusal to accept and/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.

Section 2 of the Rules set out in DISP covers whether Mr F's complaint was made in time for the purposes of allowing this service to consider it.

This is what DISP 2.8.2 R says (insofar as its relevant to this complaint.

*"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*

*[…]*

*(2) more than:*

*(a) six years after the event complained of; or (if later)*

*(b)three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

*Unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgment or some other record of the complaint having been received; […]*

*unless:*

*[…]*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R […] was as a result of exceptional circumstances; or […]*

As far as Mr F'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 didn't accept and reimburse Mr F under the claim initiated in 2020. So, the primary time limit of six years only started once BPF responded – here that was 30 April 2024. And as this complaint about BPF's handling of Mr F's claim was referred to this service in May 2024, it was made in time for the purpose of the rules on this service's jurisdiction.

Mr F's complaint under S75

Having decided this service is able to consider this aspect of Mr F'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 Mr F's complaint for reasons relating to the 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 Mr H's S75 claim was likely to be 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 F 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 F entered into Upgrade agreement at that time based upon the alleged misrepresentations of the Supplier – which Mr F 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.

It seems Mr F first notified BPF of the S75 complaint in April 2020. And as more than six year had passed between the Time of Sale and when he first put the complaint to BPF, I don't think it was ultimately unfair or unreasonable of BPF to reject Mr F's concerns about the Supplier's alleged misrepresentations.

Other matters

In response to our investigator's findings, the PR points to the findings of the court in *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').*

That particular case related to the provision and sale of a different type of timeshare product to that which Mr F held and upgraded in 2009. And despite this service's requests, the PR haven't provided any evidence in relation to the 2012 transaction. So, I don't think the findings in that case are relevant to Mr F's complaint here.

Summary

Whilst Mr H's complaint about Novuna's failure to uphold his claim under S75 was made in time under DISP 2.8.2 R (2), I'm not persuaded that Novuna's response to the complaint was ultimately unfair or unreasonable. Furthermore, in respect of any allegation relating 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 Mr H.

I do appreciate that Mr H will be disappointed by my findings, but I won't be asking Novuna to do anything more here.

**My final decision**

For the reasons set out above, I don't uphold Mr F's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 30 October 2024.

Dave Morgan
**Ombudsman**