

The complaint

Mr F complains that Diamond Resorts Financial Services Limited has rejected the claims that he's made under the Consumer Credit Act 1974. His wife is also involved in his complaint and he's being represented by a claims management company.

What happened

Mr F and his wife entered into a purchase agreement in November 2013 to buy 7,000 holiday club membership points rights from a holiday company. The total price payable for the points rights was £8,750, Mr F entered into a fixed sum loan agreement with Diamond Resorts Financial Services for an interest free loan of £7,000 and the balance of £1,750 was paid by other means. Mr F agreed to make 36 monthly repayments of £194.44 to Diamond Resorts Financial Services and the loan was repaid in January 2017.

Mr F's representative, on behalf of Mr F, made claims to Diamond Resorts Financial Services in December 2021 under sections 75 and 140A of the Consumer Credit Act 1974. It said that the holiday company was in breach of contract, Diamond Resorts Financial Services was liable for procuring a breach of fiduciary duty and the purchase agreement and the loan agreement are unfair. It also said that the points rights were misrepresented to Mr F and his wife, the holiday company was in breach of the EU timeshare directive and Diamond Resorts Financial Services failed to carry out a sound and proper credit assessment.

Diamond Resorts Financial Services said that Mr F was statute barred from bringing a claim for misrepresentation in respect of the purchase and the limitation period for a complaint to this service was six years from the date of entering into the contract. Mr F wasn't satisfied with its response so a complaint was made to this service.

Mr F's complaint form says that: the holiday company and Diamond Resorts Financial Services failed to conduct a proper assessment of his ability to afford the loan; Diamond Resorts Financial Services paid a commission to the holiday company which wasn't declared to him; and the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A.

Our investigator didn't recommend that Mr F's complaint should be upheld. He thought that Mr F was outside of the time limits in the Limitation Act 1980 for a misrepresentation claim and he didn't think that his breach of contract claim was raised in time. He said that he hadn't seen enough to suggest that the relationship between Mr F and Diamond Resorts Financial Services was unfair and he wasn't persuaded that a court would reach the conclusion that the relationship was unfair. He also said that he hadn't seen anything persuasive to suggest that the lending was unaffordable for Mr F.

Mr F's representative, on behalf of Mr F, has asked for this complaint to be considered by an ombudsman. It has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses, it has raised concerns about the way that the finance was sold to Mr F and says that the holiday company didn't broker proper credit and

failed to meet the standard of a regulated firm. It has also provided the reasons that it considers that there's been a fundamental breach of contract.

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.

Having done so, I agree with our investigator that Mr F's complaint shouldn't be upheld for these reasons:

- we don't have a free hand to consider every complaint that's referred to us and our rules, which we are required by law to follow, say – amongst other things – that we can't normally deal with a complaint if it's referred to us more than six years after the event complained of; or (if later) more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;
- Mr F's complaint is that Diamond Resorts Financial Services turned down the claims that he'd made to it and I accept that he referred his complaint to this service within six years of that happening - but I need to consider whether the Limitation Act applies to his claims;
- Mr F's claims were made under sections 75 and 140A but I'm not determining the outcome of those claims in this decision as only a court would be able to do that - I'm considering whether or not Diamond Resorts Financial Services' response to those claims was fair and reasonable in the circumstances;
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met);
- Mr F's claim under section 75 is that there's been a breach of contract by the holiday company and that the points rights were misrepresented to him and his wife and that they wouldn't have bought them if they hadn't been misrepresented to them;
- if the criteria for a claim under section 75 were met, Diamond Resorts Financial Services would be expected to consider that claim unless the claim was brought outside of the time limits set out in the Limitation Act in which case it would be entitled to rely on the Limitation Act and to not consider the claim;
- the time limit for a misrepresentation claim (whether under section 2 or 9 of the Limitation Act) is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);
- I consider that Mr F could have made a claim to the holiday company or Diamond Resorts Financial Services about the misrepresentations that he says induced him and his wife into buying the points rights in November 2013 as that was the latest time that any misrepresentations would have been made and any loss would have been incurred as that was when he also entered into the loan agreement with Diamond Resorts Financial Services;
- I consider that his cause of action accrued at that time, so he would have had six years from then to bring a misrepresentation claim against either the holiday company or Diamond Resorts Financial Services – but a misrepresentation claim wasn't made to Diamond Resorts Financial Services until December 2021, more than eight years later so was outside of the time limits set out in the Limitation Act and I consider that Diamond Resorts Financial Services has a defence to Mr F's

misrepresentation claim and I find that it wasn't unreasonable for it to have rejected that claim;

- Mr F's representative has also referred to breaches of contract by the holiday company and the time limit for a breach of contract claim in these circumstances is also six years from the date on which the cause of action accrued;
- I consider that the alleged breaches of contract occurred when Mr F and his wife entered into the purchase agreement and other documents in November 2013 so Mr F would have had six years from then to bring a breach of contract claim against either the holiday company or Diamond Resorts Financial Services – but a breach of contract claim wasn't made to Diamond Resorts Financial Services until December 2021, more than eight years later so was outside of the time limits set out in the Limitation Act - and I consider that Diamond Resorts Financial Services has a defence to Mr F's breach of contract claim and I find that it wouldn't have been unreasonable for it to have rejected that claim;
- I'm not persuaded that there's enough evidence to show that there's been any other breach of contract by the holiday company for which Diamond Resorts Financial Services would now be liable under section 75;
- Mr F's complaint form says the holiday company and Diamond Resorts Financial Services failed to conduct a proper assessment of his ability to afford the loan, Diamond Resorts Financial Services paid a commission to the holiday company which wasn't declared to him and the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the loan agreement, all of which rendered the loan agreement unfair pursuant to section 140A;
- section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;
- the courts have said, when considering section 140A, that the time for limitation purposes runs from the date that the credit agreement ended (if it was not still running at the time the claim was made) and the limitation period for a claim under section 140A is six years;
- Diamond Resorts Financial Services has provided evidence to show that the loan was settled in January 2017 and Mr F's claim under section 140A was made to Diamond Resorts Financial Services by his representative in December 2021, less than four years after the credit agreement ended, so I don't consider that Mr F's claim under section 140A is time-barred;
- Diamond Resorts Financial Services has provided a copy of the loan application that was made by Mr F before the loan was made to him in November 2013 which shows that he was an employed home-owner with a net monthly income of £5,000 and he also provided it with a copy of his invoice for his services in October 2013 for £4,954.40 – and it also obtained a credit report on Mr F;
- it says that income and outgoings were input into an affordability calculator which assesses monthly net disposable income and there was nothing in the information that it obtained at the time which would have suggested that the loan was unsuitable for Mr F;
- Mr F was able to make the loan repayments and the loan was repaid on schedule but I've seen no evidence to show that he complained to the holiday company or Diamond Resorts Financial Services that a proper assessment of his ability to afford the loan hadn't been conducted until his representative's letter to Diamond Resorts

Financial Services in December 2021 – more than eight years after the loan was made to him and nearly five years after it had been repaid;

- I'm not persuaded that there's enough evidence to show that a loan of £7,000 with a monthly repayment of £194.44 wasn't affordable for Mr F in November 2013 when it was made to him, that Diamond Resorts Financial Services failed to carry out a sound and proper credit assessment or that it should have done more to assess the affordability of the loan for him, that the loan was mis-sold to him or that it has acted incorrectly in connection with the loan;
- Mr F's complaint form says that Diamond Resorts Financial Services paid a commission to the holiday company which wasn't declared to him but Diamond Resorts Financial Services says that both it and the holiday company are part of the same group of companies and that no commission was ever paid by it to the holiday company;
- neither Mr F nor his representative has provided any evidence to show that Diamond Resorts Financial Services paid a commission to the holiday company and I've seen no evidence to show that Mr F complained to Diamond Resorts Financial Services about any commission until his representative's letter to it in December 2021 – more than eight years after the loan was made to him - so I'm not persuaded that there's been a breach of any fiduciary duty;
- Mr F's complaint form says that the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the loan agreement but Mr F and his wife had signed in November 2013 the separate standard form of the withdrawal notice that could be given to withdraw from the purchase agreement with 14 days without giving any reason;
- I've seen no evidence to show that Mr F and his wife contacted either the holiday company or Diamond Resorts Financial Services to withdraw from the purchase agreement within the withdrawal period and, if they'd been unreasonably pressured into entering into that agreement and didn't want to buy the points rights, I consider that it would be reasonable to expect them to have exercised their right to withdraw from the agreement;
- the loan agreement said that Mr F had the right to withdraw from the loan agreement within 14 days without having to give any reason but it's clear that Mr F didn't withdraw from the loan agreement;
- I've seen no evidence to show that Mr F complained to Diamond Resorts Financial Services that he and his wife were unduly pressured into entering into the purchase agreement or that he was unduly pressured into entering into the loan agreement until his representative's letter to it in December 2021 – more than eight years after the loan was made to him;
- I'm not persuaded that there's enough evidence to show that Mr F and his wife were unduly pressured into buying the points rights in November 2013, that Mr F was unduly pressured into entering into the loan agreement or that the holiday company used unacceptable sales practices against them;
- Mr F's representative has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses but it would be for a court to determine whether or not any of the terms in the agreements were unfair;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated

in practice and whether the operation of that term caused the relationship to be unfair;

- I'm not persuaded that there's enough evidence to show that the terms of the documents have been applied or operated unfairly against Mr F and his wife and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mr F and Diamond Resorts Financial Services – and nor am I persuaded that there's enough evidence to show that there's been a breach of the EU timeshare directive;
- I'm not persuaded that there's enough evidence to show that Mr F's relationship with Diamond Resorts Financial Services was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mr F and Diamond Resorts Financial Services in these circumstances;
- Diamond Resorts Financial Services said that Mr F was statute barred from bringing a claim for misrepresentation in respect of the purchase and the limitation period for a claim to this service was six years from the date of entering into the contract - I consider that it would have been fair and reasonable for it to have said that his claims under section 75 were statute barred but I consider that it should have considered his claim under section 140A - so I can't say that its response to his claims was fair and reasonable but, if it had properly responded to his claim under section 140A, I consider that it would have been fair and reasonable for it not to have upheld it; and
- I sympathise with Mr F for the issues that he and his wife have had with their points rights, but I find that it wouldn't be fair or reasonable in these circumstances for me to require Diamond Resorts Financial Services to refund to Mr F any of the money that he paid under the loan agreement, to pay him any compensation or to take any other action in response to his complaint.

My final decision

My decision is that 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 4 December 2023.

Jarrold Hastings
Ombudsman