

The complaint

Mr C complains that he and his wife were mis-sold timeshare products and the credit facility used to pay for them. The credit facility was provided to Mr C by Clydesdale Financial Services Limited, which trades as Barclays Partner Finance and which I'll refer to as "BPF".

Mr C is represented by a claims management business, which I'll call "F". Where I refer to Mr C's submissions, I include those made on his behalf.

What happened

In July 2009 Mr and Mrs C bought from Resort Properties Limited seven timeshare weeks in different units at the Beverley Hills Club and the Hollywood Mirage Club. To finance the purchase, Mr C took out a running credit facility of £25,000 with BPF. I understand that the facility was used in full for the purchase.

Mr C's credit facility was repaid in full in January 2010 – that is, about six months after he took it out.

In June 2012 Mr and Mrs C traded in their timeshare units for different products. It appears that they may have made further changes in June 2013, when Mrs C took out a credit facility with BPF.

Resort Properties Limited was subsequently taken over by Silverpoint Properties SL. Silverpoint was placed into liquidation in 2020, in part as a result of a Spanish court case where it was found to have been in breach of Spanish timeshare legislation in the sale of points-based timeshare products.

In July 2020 Mr and Mrs C, through F, brought a claim against BPF. They said, in summary:

- Resort Properties had used pressured sales techniques and had misrepresented the timeshares.
- The services which Mr and Mrs C had bought could no longer be provided, so they had a claim for breach of contract against Silverpoint.
- The timeshares had been sold as an investment.
- In breach of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"), Resort Properties had not provided proper information about the timeshares.
- No proper assessment had been carried out to establish whether the credit facility was affordable.
- As a result of these matters, Mr C had a claim against BPF under section 75(1) of the Consumer Credit Act 1974; in addition, the credit facility created an unfair relationship under section 140A of the same Act.

To the extent that the claims were made in respect of the 2009 credit facility in Mr C's name, BPF did not accept them. It said that any claim that the seller had misrepresented the

timeshare products would be out of time under the Limitation Act 1980. It said too that there was no breach of contract, because the liquidation of Silverpoint had not affected the operation of the Beverley Hills Club or the Hollywood Mirage Club.

Mr C did not accept BPF's response and referred the matter to this service, where one of our investigators considered what had happened. He was not minded to uphold the complaint and issued a preliminary assessment explaining why that was. Mr C did not accept that assessment and asked that an ombudsman review the case.

I did that and issued a provisional decision in which I said:

The scope of my decision

As I have noted above, Mr and Mrs C have entered into more than one timeshare contract over the years. The contracts appear to have been connected, in the sense that they have involved trading one product (or group of products) for another. My powers are however limited to considering individual complaints about financial businesses. I cannot therefore consider as a single complaint claims made by both Mr and Mrs C about credit facilities taken out by each of them as individuals.

Mrs C raised a complaint about the 2013 credit facility in her name (and in respect of which BPF made a settlement offer), but my decision here concerns only Mr C's complaint, which is made in respect of the 2009 facility granted to him.

I will therefore address the points made in respect of the 2009 sale and credit facility.

The complaint about suitability and the credit assessment

Mr C says that BPF did not properly assess the affordability or suitability of his credit facility. Our own rules say that we cannot generally consider a complaint unless it is referred to us within six years of the event complained of or, if later, within three years of the date on which the complainant knew, or ought reasonably to have known, that he had cause for complaint.

The event complained of in this case is the credit assessment that BPF carried out (or did not carry out) in July 2009. No complaint was made until around 11 years later – and more than ten years after the facility had been repaid in full. It is at least arguable therefore that this part of the complaint should have been referred to this service by no later than 4 July 2015 – six years from the date Mr C took out the facility – and that, because it was not, we have no power to consider it.

I have nevertheless considered the position on the basis that Mr C was not aware that he had cause for complaint – because he might not have known that BPF should have carried out checks.

I note that the facility was repaid after about six months. Mr C has not suggested he had any difficulty making repayments. Indeed, the credit agreement included a reference to a "buy now pay later" option, so it may be that no payments were needed in that time in any event. It does not necessarily follow that the facility was affordable, or that BPF carried out proper checks, but I would have expected Mr C, in making such a claim, to produce some evidence to support his assertion that the facility was unaffordable for him. I would also expect him to have raised the issue at the time. Since he didn't, I think it more likely than not that the facility was affordable and that BPF did carry out appropriate checks.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75 of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and*
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

It is clear in this case that the credit facility financed the timeshare purchases in 2009. Resort Properties is named as the seller in both the timeshare contract and in the credit agreement. I am satisfied therefore that section 56 and 75 can apply and have therefore considered the effect of what Mr and Mrs C have said about the sale itself.

Misrepresentation and breach of contract

As a matter of English law, a misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

A breach of contract occurs when one party to a contract does not fulfil its obligations to the other. That is, it does not do what it has agreed to do or does not provide what it has agreed to provide.

However, under the Limitation Act 1980 an action (that is, court action) based on contract (which includes claims for misrepresentation) cannot generally be brought after six years from the date on which the cause of action accrued.

In this case, I note that the sale contract was governed by Spanish law. Spanish law may have different provisions in respect of breach of contract claims, claims for misrepresentation, and time limits. If either party wants to refer me to any material differences from English law, it is open to them to do so. I have however approached this provisional decision on the basis that Spanish law and English law are similar in all material respects.

Any statements which might have induced Mr and Mrs C into the contract for the purchase of the timeshare interests in July 2009 were made on or before 4 July 2009. They did not however raise any complaint with BPF until July 2020, 11 years later. I think it very likely therefore that a court would conclude that any claim for misrepresentation against the seller was made outside the time limit in the Limitation Act. It follows that BPF's response to this part of the complaint is not unreasonable, since it can rely on any defence which would be open to the seller – including a limitation defence.

For clarity, Mr C's complaint about BPF in respect of the alleged misrepresentation is that it did not uphold his claim. That happened in 2020, so this part of his complaint is not out of time under our own rules. But I can consider the effect of the Limitation Act in deciding whether BPF's response to the claim was reasonable.

Mr C says that the liquidation of Silverpoint amounts to a breach of contract. Any such breach occurred in 2020, so Mr C's claim is not out of time under the Limitation Act. BPF says that the services he bought under the 2009 contract are still available, since the clubs are still operating.

Whether or not the Beverley Hills Club and the Hollywood Mirage Club are still in operation is however of no consequence to Mr C's claim in this case. That's because he relinquished the timeshares he bought in 2009 when he traded them for a different product in 2012. The 2009 contract had already ended by the time of the alleged breach in 2020. In saying that, I stress that I make no comment on any possible breach of any subsequent or replacement contract – save of course that it was not financed by the 2009 credit facility.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties, refunding payments and re-opening an agreement which has come to an end. In considering whether a credit agreement creates an unfair relationship, a court can have regard to any connected agreement, which in this case could include the 2009 sale contract.

Only a court can make orders under sections 140A and 140B. I must however take into account any relevant law in deciding what's fair and reasonable, and I have done so here. Also, I have wide powers in the making of awards. I can, for example, require that a lender make refunds of loan payments. I do not believe however that it would be fair to do so here.

There is little to no evidence about the sale process itself, other than F's assertion that it was high-pressured. In line with EU laws designed to protect timeshare buyers, and which applied in Spain in 2009, Mr and Mrs C had 14 days in which to cancel the purchase agreement. Mr C also had 14 days in which to cancel the credit agreement with BPF. If Mr and Mrs C felt they had been unduly pressured into the purchase, I think it likely that they would have cancelled.

Under section 56 of the Consumer Credit Act, Resort Properties acted as agent for BPF, not as Mr C's agent. I am not persuaded therefore that it owed any fiduciary duty towards him, or that BPF procured, or could have procured, a breach of any such duty. Resort Properties sold the timeshare and introduced Mr C to BPF. It was not his financial adviser and was not recommending any particular financial product from a range of products.

Mr C says that the timeshare units were sold as investments, in breach of relevant regulations. He has not explained when or in what circumstances he came to realise they were not investments. I do note however that the sale documents included two identical Completion Statements (one covering one timeshare property, the second covering the remaining six properties). Mr and Mrs C signed the statements. Each included:

"We understand that the purchase of Timeshare weeks/Club Memberships is not a financial investment and any subsequent resale of Timeshare weeks/Club Memberships at a profit is a speculative venture."

If in fact the units were sold as investments and if Mr and Mrs C had bought them on that basis, I think it unlikely they would have signed statements saying the opposite. In the circumstances, I am not persuaded that the timeshares were either sold as or bought as investments.

Mr C says that he was not given the information required under EU law, primarily because he did not receive full information about place of incorporation of the seller. He did however have its full name and a correspondence address in Tenerife. Mr C does not appear to have suggested that he needed more information than that, and nor is it clear what difference it would have made. I have no reason to think it would not have been provided upon request, had Mr C asked for it. Even if there were a technical breach of the relevant EU Directive,

therefore, I do not believe it would be fair to make an award against BPF as a result – especially after so many years.

Conclusion

For the reasons I have indicated, I am not persuaded that Mr C could bring a successful claim for breach of contract or in misrepresentation against the seller of the timeshares. I think it unlikely too that a court would make an order under section 140B of the Consumer Credit Act.

In the circumstances, I do not believe it would be fair to uphold Mr C's complaint.

I gave the parties until 16 January 2024 to provide me with any further information or submissions before I issued a final decision. I have not received any additional material, however.

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 have not been sent anything more to consider, I see no reason to reach a different conclusion from that set out in my provisional decision. In saying that, I stress however that I have considered the complaint afresh before reaching this decision.

My final decision

For these reasons, my final decision is that I do not uphold Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 22 February 2024.

Mike Ingram
Ombudsman