

The complaint

Mr and Mrs D complain that they were mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Clydesdale Financial Services Limited, which trades as Barclays Partner Finance and which I'll refer to as "BPF". Mr and Mrs D are represented by a claims management business, which I'll call "M". Where I refer to Mr and Mrs D's submissions, I include those made on their behalf.

What happened

Mr and Mrs D were existing timeshare owners with Club La Costa Vacation Club ("the Club"). I have not been provided with details of that timeshare, save that it was financed by a different lender – not BPF.

Mr and Mrs D say that, when they staying at the Club in November 2008, they explained they were having problems using their timeshare and were persuaded that buying Points Rights in the Club would help.

On 13 November 2008 Mr and Mrs D bought 300 Points Rights from Club La Costa (UK) Plc ("CLC") at a cost of £3,799. The purchase price was provided through a BPF loan to Mrs D for £22,052. That sum included consolidation of the loan which had been used to pay for the existing timeshare.

In October 2018 Mr and Mrs D contacted BPF. They said they had been misled into buying the Points Rights. Because BPF had financed the purchase, it was liable to them along with CLC, under section 75(1) of the Consumer Credit Act 1974. In addition, they have said, either in their initial complaint or subsequently:

- BPF was guilty of procuring a breach of fiduciary duty, since CLC was acting as agent for Mr and Mrs D.
- CLC had used pressured sales techniques to persuade them to buy.
- They were told that members would have exclusive use of the Club, but that was not true.
- The contract was in perpetuity.
- CLC was in breach of regulation 26 of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").
- Parts of the contract were "unfair" within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR").
- No proper assessment had been carried out to establish whether the loan was affordable.
- The effect of these matters was that the loan agreement created an unfair relationship under section 140A of the Consumer Credit Act.

BPF did not accept the arguments made on behalf of Mr and Mrs D. It pointed out that, as the sole borrower, only Mrs D could make a complaint about the loan agreement. It also

noted that some parts of the complaint were likely to be out of time, since they concerned events which had happened more than six years previously.

The complaint was referred to this service, where one of our investigators considered what had happened. The investigator did not recommend that the complaint be upheld – primarily because of the time that had elapsed since the sale.

Mr and Mrs D did not accept the investigator's assessment and asked that an ombudsman review the case.

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

The complaint about suitability and the credit assessment

M says that BPF did not properly assess the affordability or suitability of the loan, and that it was consolidated with Mr and Mrs D's mortgage, which they have had some difficulty paying. I have not been provided with any further information or evidence about that.

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 November 2008. No complaint was made until nearly ten years later. It is at least arguable therefore that this part of the complaint should have been referred to this service by no later than 13 November 2014 – six years from the date Mrs D out the loan – and that, because it was not, we have no power to consider it.

I have nevertheless considered the position on the basis that Mrs D was not aware that she had cause for complaint – because she might not have known that BPF should have carried out checks. She has said that she had difficulty repaying the loan, but has not said when that came to light.

I note that the loan was repaid in April 2017. I note too that Mrs D says it was consolidated into her and Mr D's mortgage. The account statements however show that no payments were missed in the time the account was open, and there is no suggestion that Mrs D ever contacted BPF to say she was having difficulty making payments. So, even if BPF should have carried out further checks, it does not appear that Mrs D's position would have been materially different.

It is significant too that more than 80% of the loan was to consolidate existing borrowing for the timeshare. Mrs D already owed that money, whatever BPF's lending decision in November 2008.

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 loan financed the purchase of the Points Rights. CLC is named as the seller in both the timeshare contract and in the loan agreement. I am satisfied therefore that section 56 and 75 can apply and have therefore considered the effect of what Mr and Mrs D have said about the sale itself.

Misrepresentation and breach of contract

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.

Any statements which might have induced Mr and Mrs D into the contract for the November 2008 purchase of Points Rights were made on or before 13 November 2008; since they were already Club members, it's possible that Mr and Mrs D relied on what they were told or their own experiences even before that. They did not however raise any complaint with BPF until October 2018, nearly ten years later. I think it very likely therefore that a court would conclude that any claim for misrepresentation was made outside the time limit in the Limitation Act.

Mrs D has not alleged any specific breach of contract here. M has said that some contract terms were unfair and that CLC breached the Timeshare Regulations. I will discuss those allegations later, but neither constitutes a breach of contract. Even if I were to take a different view on that, a court is likely to take the view that any claim for breach of contract based on them would now be out of time.

...

I would however note that, in its response to the claim, BPF said that any claim under section 75 is limited to £3,799, the purchase price of the Points Rights. That is not correct. A claim for breach of contract or misrepresentation could exceed both the amount of any loan used to finance the transaction and the purchase price. And the debtor could bring that claim against a creditor in the same way as against a seller.

I stress that it is not for me to decide whether any underlying claim is now out of time under the Limitation Act. Rather, I must decide whether the response of BPF to the claim under section 75 was reasonable. I think there is a real possibility that a court would say that the claims against CLC are time-barred in this case. That is an argument that would also be available to BPF if it had to respond to a section 75 claim. In the circumstances, I think BPF's response was reasonable.

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 contract with CLC.

The usual time limit for these types of claims under the Limitation Act is six years from the time the relationship between the parties ended. The relationship between Mrs D and BPF in this case ended when the loan was refinanced, in April 2017. I have therefore considered the points she has made.

There is little to no evidence about the sale process itself, other than M's assertion that it was high-pressured. In line with laws designed to protect timeshare buyers, however, Mr and Mrs D had 14 days in which to cancel both the purchase agreement and the loan agreement. If they felt they had been unduly pressured into the purchase, I think it likely that they would have availed themselves of that right.

Under section 56 of the Consumer Credit Act, CLC acted as agent for BPF, not as Mrs D's agent. I am not persuaded therefore that it owed any fiduciary duty towards her, or that BPF procured, or could have procured, a breach of any such duty. CLC sold the Points Rights and introduced Mrs D to BPF. It was not her financial adviser and was not recommending any particular financial product from a range of products.

The contract was not in perpetuity. The Club is to be dissolved in 2054. That was set out in the contract itself. In some circumstances, members may be able to relinquish their membership early. Mrs D has not said whether she has tried to do so.

There was no breach of regulation 26 (or of any other part) of the Timeshare Regulations. The contract pre-dates their coming into force in February 2011. And regulation 26 concerns payments for long-term holiday product contracts defined in regulation 8. Mr and Mrs D's contract was for a timeshare, defined in regulation 7.

Even if there were a breach of the Timeshare Act 1992 or of the Timeshare Regulations 1997 (which applied at the time), that would not necessarily give rise to a claim which an individual Club member could bring against CLC. Nor would it necessarily mean that the loan agreement created an unfair relationship between Mrs D and BPF.

M says that some terms of the contract are "unfair" within the definition in UTCCR. That is not for me to say, although I must have regard to relevant law, including UTCCR. The remedy if a contractual provision is "unfair" is however that the provision is unenforceable against the consumer – not that the whole contract falls. Mrs D has not said whether any of the provisions which she says is unfair has been relied on by CLC or what the effect has been on her.

In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mrs D and BPF. It follows that BPF's response to this part of the complaint was reasonable.

I did not uphold the complaint.

BPF acknowledged receipt of my provisional decision and said that it had nothing further to add. M did not respond to it within the time I allowed for further submissions.

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 neither party has raised any new arguments or provided any further evidence, I see no reason to change the view I set out in my provisional decision.

My final decision

For these reasons, my final decision is that I do not uphold Mrs D's complaint and I do not require Clydesdale Financial Services Limited to do anything more to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 3 August 2023.

Mike Ingram

Ombudsman