

## **The complaint**

Mr L complains that he was mis-sold a timeshare product and the credit facility used to pay for it. The credit facility was provided by Clydesdale Financial Services Limited, which trades as Barclays Partner Finance and which I'll refer to as "BPF". Mr L is represented by a claims management business, which I'll call "P". Where I refer to Mr L's submissions, I include those made on his behalf.

## **What happened**

Mr and Mrs L were existing timeshare owners and members of Club Infiniti, a timeshare and holiday club.

In August 2007 they "upgraded" their membership and converted it into a points-based product. They bought 8,000 points and traded in their timeshare for a further 32,500 points. This left a balance due of £4,950, which was paid with a £20,000 running credit facility provided to Mr L by BPF. BPF says its records show that the credit facility was settled in November 2007.

In or about October 2019 Mr L made a data subject access request to BPF. Following receipt of information received as a result of that request, he contacted BPF again in December 2020. In that letter he asked what checks had been made to ensure he could afford the payments due under the credit facility. He said too that it appeared that the broker which arranged the facility had not been properly authorised at the time, with the result that the credit facility was not enforceable.

In December 2021 P referred the matter to this service on Mr L's behalf. It said, in summary, that the timeshare had been misrepresented to him, that the broker did not have the necessary authorisation to arrange credit and that the credit facility created an unfair relationship between Mr L and BPF. P said as well that BPF had not properly assessed whether the credit facility was affordable.

BPF said that, given the time that had elapsed since the events complained of, this service had no power to consider the complaint.

One of our investigators considered what had happened and issued a provisional assessment. That assessment did not recommend that the complaint be upheld. The investigator concluded that parts of it would be out of time under the Limitation Act 1980; credit brokers did not require authorisation from the regulator in August 2007; and there was no evidence that the facility was not affordable.

Mr L did not accept the investigator's conclusions 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***

*P says that BPF did not properly assess the affordability of the credit facility, but 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 August 2007. The facility was repaid within months, but no complaint was made until more than 13 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 9 August 2013 – six years from the date the credit facility was opened and that, because it was not, we have no power to consider it.*

*I have nevertheless considered the position on the basis that Mr L was not aware that he had cause for complaint – because he might not have known that BPF should have carried out checks. Even if that is the case, however, there is no evidence that Mr L had any difficulty making payments in the short period he used the facility. He has not explained either how or why he repaid it so quickly. I do note however that the facility included reference to an “Interest Free Period” (which applied to some facilities granted by BPF), so it is possible that it was repaid before any interest became payable.*

*I note as well that P has referred extensively to the part of the Financial Conduct Authority’s Handbook which deals with consumer credit (known as “CONC”) in support of Mr L’s position. However, FCA did not become responsible for the regulation of consumer lending until some years after the events complained of here.*

### **Section 75 of the Consumer Credit Act 1974**

*One effect of section 75 of the Consumer Credit 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 and club membership. The seller is named in the timeshare contract as Albatros Ventas SL and in the credit facility as Royal Park Albatros. I assume that the latter is simply a trading style of the former and that section 75 of the Consumer Credit Act can therefore apply. I have therefore considered the effect of what Mr L has 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 L into the contract for the August 2007 purchase of points were made on or before 9 August 2007; since he and Mrs L were already Club members, it's possible that they relied on what they had been told or their own experiences even before that. They did not however raise any complaint with BPF until the end of 2020, more than 13 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.*

*Mr L has not alleged any specific breach of contract here.*

*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. Given the real possibility that a court would say that the claims are time-barred, I think it was.*

### **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 Albatros Ventas SL.*

*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 Mr L and BPF in this case ended when the credit facility was repaid in November 2007.*

*Again, it is not for me to say whether a claim is time-barred under the Limitation Act but, given the delay in making the allegation that the facility created an unfair relationship, I think that BPF's response to it was reasonable.*

### **Authorisation of Albatros Ventas SL / Royal Park Albatros**

*P says that the seller and/or broker was not authorised to arrange credit in August 2007, contrary to section 19 of the Financial Services and Markets Act 2000 ("FSMA"), and that the loan is therefore not enforceable.*

*At the relevant time, section 19 of FSMA said:*

#### **19 The general prohibition.**

*(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—*

*(a) an authorised person; or*

*(b) an exempt person.*

*(2) The prohibition is referred to in this Act as the general prohibition.*

*Section 27 of FSMA provided:*

#### **27 Agreements made through unauthorised persons.**

*(1) An agreement made by an authorised person ("the provider") —*

*(a) in the course of carrying on a regulated activity (not in contravention of the general prohibition), but*

*(b) in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition,*

*is unenforceable against the other party.*

*A "regulated activity" was an activity specified in The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. It did not in August 2007 include consumer credit broking or consumer credit lending (although it now does).*

*It follows that neither BPF nor Albatros Ventas SL / Royal Park Albatros was carrying out a regulated activity at the time. Neither therefore needed FCA (or FSA, as it then was) authorisation in August 2007. They would have needed a licence issued by the Office of Fair Trading, the body responsible for consumer credit at the time.*

*Our records indicate that BPF had the necessary licence, since it was covered by our consumer credit jurisdiction at the time and remains subject to our compulsory jurisdiction. But whether the seller / broker had the necessary licence does not in my view make any difference to the outcome here. It would not affect the enforceability of the credit facility.*

I invited both parties to make further submissions, if they wanted to do so. Neither has however provided any more evidence or arguments.

### **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 Mr L nor BPF has provided any more information for me to consider, I see no reason to reach a final decision which differs from that set out in my provisional decision.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 8 November 2023.

Mike Ingram

**Ombudsman**