

The complaint

Mr F complains that he and his wife were 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 F is represented by a claims management business, which I'll call "M". Where I refer to his submissions and arguments, I include those made on his behalf.

What happened

On 16 February 2009 Mr and Mrs F signed an agreement with Leisure Resorts Limited, a company registered in the British Virgin Islands, for the purchase of 2,000 points and membership of the Club La Costa Vacation Club Limited ("CLC"), a timeshare and holiday business. Club points could be exchanged for holiday accommodation.

The sale agreement recorded that the price of the points was £27,745. Of that, £5,795 was paid by way of a trade-in, and the balance was financed by a BPF loan to Mr F.

The loan was repaid early, in November 2014.

In January 2020 M complained to BPF. It said that the timeshare product had been misrepresented to Mr and Mrs F and that, because BPF had financed its purchase, Mr F had a claim against it in the same way as she had a claim against the seller. M also said that the actions of the seller and BPF had meant that the loan created an unfair relationship.

Other than sending a number of holding responses, BPF did not respond to the claims, and M referred the matter to this service. Our investigator did not recommend that the complaint be upheld. She thought there was insufficient evidence to support Mr F's case that the timeshare product and the loan had been mis-sold.

M did not accept the investigator's assessment and said (for the first time) that the timeshare had been sold as an investment.

The investigator reviewed the case. On reflection, she concluded that the complaint had been brought outside the relevant time limits in the Limitation Act 1980 and that this service could not therefore consider the claims for misrepresentation.

M did not address that issue, but made lengthy generic submissions about CLC and connected businesses. It also raised concerns about the sale of the finance and the relationship between the credit intermediary and BPF. It suggested the intermediary had not complied with FCA regulations.

M asked that an ombudsman review the case.

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.

Sale of the finance

Our rules say, at DISP 2.8.1R:

The Ombudsman can only consider a complaint if:

- (1) the respondent has already sent the complainant its final response or summary resolution communication; or*
- (2) in relation to a complaint that is not an EMD complaint or a PSD complaint, eight weeks have elapsed since the respondent received the complaint...*

The definition of a “*complaint*” in the FCA Handbook says that it must include an allegation that the complainant has suffered, or may suffer, financial loss, material distress or material inconvenience.

As I have indicated, M did not make any arguments about the sale of the loan itself or the position of the credit intermediary until after the investigator had issued two assessments of Mr F’s complaint. Those arguments were presented to this service, not to BPF. They do not allege that Mr F suffered any financial loss or material distress or inconvenience as a result of any alleged regulatory failing.

In the circumstances, I am not persuaded that these new allegations constitute a “*complaint*”, as defined by the FCA Handbook. But, even if I were to take a different view on that, I do not believe this service has any power to consider that complaint, because the respondent, BPF, has not received it.

If Mr F wants to refer these matters to the Financial Ombudsman Service, he must first refer them to BPF and await its final response or wait until eight weeks have passed – whichever is earlier. We may then be able to consider them as a new complaint.

Sections 56 and 75 of the Consumer Credit Act 1974

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 club membership, at least in part. The seller and supplier was Leisure Resorts Limited, but BPF’s correspondence refers to Leading Resorts Limited, a different company. It is not therefore clear whether section 75 applies at all – that depends on the link between the two companies. I have nevertheless approached this case on the basis that they were sufficiently closely linked that section 75 could apply.

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.

However, under the Limitation Act 1980 an action (that is, court action) for breach of contract or based on 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 F into the timeshare contract were made on or before 16 February 2009. Mr F did not however raise any complaint with BPF until January 2020, nearly eleven 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 F's complaint included a claim for breach of contract, but no details have been provided.

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 it would be reasonable to make BPF responsible for any misrepresentation claim against the seller. In the circumstances, I don't believe it would be.

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 and refunding payments. In deciding whether to make an order, a court can have regard to any connected agreement; in this case, that could include the agreement for the sale of the timeshare product.

Mr F has not suggested that there was any inherent unfairness in the loan agreement itself. Rather, he says that the actions of the seller created an unfair relationship. But, as I have explained, many of the matters which have been raised on his behalf are not "*complaints*" or, if they are, they have not been raised with BPF.

M has said that BPF facilitated a breach of fiduciary duty on the part of the seller. But the seller was not acting as Mr F's financial adviser; it was selling him a timeshare product and introducing a finance option. It does not appear to me therefore that the seller owed Mr F a fiduciary duty or that BPF could have procured a breach as alleged. It follows too that BPF was under no obligation to disclose any commission it might have paid to the seller or the intermediary.

I have no power to make an order under section 140B, and it is not for me to say whether a court would make an order if invited to do so. I can however make an award requiring a lender, for example, to make loan refunds if I think it would be fair and reasonable to do so.

I am not persuaded however that there are any reasons why I should do so in this case.

My final decision

For these reasons, my final decision is that I do not uphold Mr F's complaint and I do not require Clydesdale Financial Services Limited to take any further steps to resolve it.

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

Mike Ingram
Ombudsman