

The complaint

Mr W 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 W 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

Mr and Mrs W were existing timeshare owners and members of the Diamond Resorts European Collection, a timeshare and holiday club.

On 26 October 2009 Mr W says that he and Mrs W attended a presentation while they were on holiday. Following the presentation, and as a result of it, they agreed to buy from Diamond Resorts Tenerife Sales SL ("DRT") additional membership points at a cost of £6,190. Mr W says they did so because they were told that having additional points would help resolve issues they had experienced with availability of holiday accommodation.

In order to fund the purchase, Mr W was offered and agreed to take out a ten-year loan with BPF for the full purchase price of £6,190.

In August 2018 Mr W complained to BPF. He said that the timeshare product had been misrepresented to him and his wife and that, because BPF had financed its purchase, he had a claim against it in the same way as he had a claim against DRT. He also said that no proper checks had been made to ensure that he could afford to repay what he had borrowed, and that the actions of DRT and BPF had created an unfair relationship.

BPF did not agree to meet Mr W's claims and did not uphold his complaint. Its main reason was the length of time that had passed since the timeshare sale and the provision of the loan.

Mrs S referred the matter to this service. Our investigator, however, took broadly the same view as BPF had done and did not recommend that the complaint be upheld. Mr W 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 the credit assessment

M says that BPF did not properly assess whether the credit facility was affordable for Mr W. At the time, lenders were obliged to assess the affordability of loans and other credit facilities in line with guidance issued by, for example, the Office of Fair Trading (OFT), the Lending Standards Board and the Finance and Leasing Association.

Our 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 they 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 October 2009. I think it possible that Mr W could have known fairly soon after that date if he was having difficulty making repayments. It's possible, therefore, that this part of the complaint was brought outside our own time limits.

Be that as it may, I have seen nothing to indicate that Mr W is having difficulty making payments, that he has had difficulty making payments, or that he has sought assistance from BPF. So, even if BPF should have carried out more detailed checks, it is not apparent that its lending decision would have been materially different or that Mr W has suffered any loss as a result of any failure to do so.

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. DRT was a party to the timeshare contract, although a different Diamond Resorts company was named in the credit agreement. It is open to the parties to provide further information about the relationship between the two, should they wish to do so, but I shall proceed on the basis that it is sufficiently close that section 75 could apply.

I have therefore considered what the position might be if Mr W were to bring a claim against DRT.

Misrepresentation

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) 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 and Mrs W into the timeshare contract were made on or before 26 October 2009; since they were already club members, it's possible that they relied on what they were told or their own experiences even before that. Mr W did not however raise any complaint with BPF until August 2018, nearly nine 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.

Any defence available to DRT in respect of a misrepresentation claim would also be available to BPF. That includes a defence based on time limits. 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 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.

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. As far as I am aware, the loan agreement was not repaid early, but the parties can tell me in their response if it was.

On the basis of what I have seen so far, however, I think it unlikely that a court would make an order under section 140B. The allegations made about the sales process are not detailed and are not supported by contemporaneous evidence. They include an allegation that BPF induced a breach of fiduciary duty on the part of DRT. That would however require DRT to have been acting as agent for Mr W. But the effect of section 56 of the Consumer Credit Act is that DRT was BPF's agent.

I am not persuaded that DRT had to disclose what commission, if any, it was receiving from BPF – unless Mr W asked. I note as well that M has suggested DRT was in breach of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, even though they only came into force in February 2011, more than a year after the timeshare sale.

I have no power to make an order under section 140B of the Consumer Credit Act; only a court can do that. I must however have regard to any relevant law in deciding what's fair and reasonable; that includes relevant parts of the Consumer Credit Act.

In the circumstances, I think that BPF's response to the complaint made by reference to section 140A of the Consumer Credit Act was reasonable.

I concluded that I was not minded to uphold the complaint, but indicated that I would consider any further evidence or arguments the parties might send.

Neither BPF nor Mr W has provided anything further for me to consider.

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 submitted any further evidence or arguments, I do not believe there is any reason for me to reach a different conclusion from that set out in my provisional decision. I have nevertheless reviewed Mr W's complaint in full before reaching that conclusion.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 14 September 2023.

Mike Ingram
Ombudsman