DRN-4308737

## The complaint

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

Mr S is represented by a firm of solicitors which I'll call "W". Where I refer to his submissions and arguments, I include those made on his behalf.

## What happened

In or around May 2004, Mr and Mrs S bought trial membership of Club La Costa Vacation Club Limited ("the Club"), a timeshare and holiday club business. They paid using a credit card.

In April 2005 they upgraded to full membership, buying 1,501 points, which could be exchanged for holiday accommodation. The purchase price was funded in part with a loan from BPF. That loan was repaid early (W's notes suggest within about a year).

In October 2009 Mr and Mrs S bought a further 500 points at a cost of £5,599, financed with a 10-year loan from BPF in Mr S's name. They exchanged their Club points for a fractional ownership arrangement (by which they hold a share in property which will be sold and the proceeds split amongst all the fractional owners) in 2013. BPF did not finance that arrangement.

In November 2019 Mr S complained to BPF. He said that the timeshare products had been misrepresented to him and that, because BPF had financed the purchases in 2005 and 2009, he had a claim against it in the same way as he had a claim against the seller. 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 the seller and BPF had created an unfair relationship.

BPF did not respond an any substantive way to Mr S's claims, and W referred the matter to this service. Our investigator, however, did not recommend that the complaint be upheld, primarily because of the length of time that had passed since the timeshare sales and the provision of the loans.

Mr S 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 irresponsible lending*

*W says that BPF did not properly assess whether the loans were affordable for Mr S.*

*When Mr S took out the first loan, in 2005, the Financial Ombudsman Service had no general power to consider complaints about consumer credit activities. It could only do so if such activities were ancillary to activities which we could consider – such as general banking – or if the respondent business was subject to our voluntary jurisdiction.*

*Whilst BPF was subject to our compulsory jurisdiction from 14 January 2005, it does not seem to me that the loan in April 2005 could be said to be ancillary to activity of BPF that this service could have considered then. Granting the loan to Mr S was a stand-alone activity. It follows that I have no power to consider the assessment of the 2005 loan by BPF, and I therefore make no further comment on it.*

*By the time of the 2009 loan, however, the Financial Ombudsman Service did have power, under its consumer credit jurisdiction, to consider complaints about regulated consumer credit activities. It acquired that power on 6 April 2007.*

*W says that BPF did not properly assess whether the 2009 loan was affordable for Mr S. 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 own rules say however 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. Arguably, therefore Mr S only had until October 2015 to refer this part of the complaint to us and that, because he didn't, we have no power to consider it.*

*Even if I were to take a different view on that, however (perhaps because Mr S would not have known the extent of BPF's obligations in assessing affordability and suitability), I have seen nothing to suggest that the facility wasn't affordable. It was repaid in late 2019, on the face of it in line with the payment schedule in the loan agreement. So, even if BPF should have carried out more detailed checks before agreeing the 2009 loan, it does not appear to me that the outcome would have been any different.*

***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(1) 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 loans financed the purchase of the Club membership and points. The seller was Club La Costa (UK) plc ("CLC") and was named as such in the 2009 loan agreement. The timeshare contracts were therefore financed under pre-existing arrangements between CLC and BPF.*

*I have therefore considered what the position might be if Mr S were to bring a claim against CLC.*

***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 S into the timeshare contracts were made on or before 24 April 2005 and 28 October 2009. Mr S did not however raise any complaint with BPF until November 2019, more than ten years after the second sale. I think it very likely therefore that a court would conclude that any claim for misrepresentation against CLC would be outside the time limit in the Limitation Act.*

*A credit provider defending a claim under section 75(1) of the Consumer Credit Act can rely on any defence which would be available to the seller, including limitation defences.*

*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(1) 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. The relationship created by the 2005 loan ended many years ago, very possibly before sections 140A and 140B of the Consumer Credit Act came into force. The 2009 loan was not repaid until 2019, however.*

*In deciding whether a loan creates an unfair relationship, a court can have regard to any connected agreement, which in this case could include the agreements with CLC.*

*W has not identified anything in the 2009 loan agreement which makes it inherently unfair. Rather, it has referred to the actions of CLC and to terms in the timeshare contract which it says are unfair.*

*Although I have concluded that any claim for misrepresentation against CLC is likely to be out of time, I note that the allegations made are not supported by any corroborating evidence.*

*W has also said that the sale was in breach of the Timeshare Regulations 1997 (which applied at the time), but again there is little evidence of that or explanation of the effect on Mr S of any breach.*

*Finally, [Mr] S says that some terms of the timeshare contract (specifically, those relating to possible increases in management fees) were unfair withing the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 and that the "whole agreement" clause was not reasonable and therefore in breach of the Unfair Contract Terms Act 1977. I note however that there is no evidence about the application of those terms in Mr S's case and that, even if there were any breach, the effect would be to make the terms unenforceable. A breach does not make the contract void – still less any linked credit agreement. As I have indicated, Mr and Mrs S converted their timeshare points into a fractional ownership*

*arrangement many years ago, so there is no risk of any … unfairness arising from them in the future.*

*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. In the circumstances, however, it is reasonable to think that a court would not do so.*

In response to my provisional decision BPF said it had nothing to add. W did not reply to it.

**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 had anything to add, I see no reason to reach a different conclusion from that which I reached in my provisional decision. In saying that, however, I stress that I have reviewed the complaint in full.

**My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 19 September 2023.
Mike Ingram
**Ombudsman**