DRN-4721592

The complaint

Mr M complains that he was mis-sold a timeshare product when he was on holiday in Malta. Because he used his credit card, issued by MBNA Limited, to pay part of the purchase price, he says that he has a claim against it in the same way as he has a claim against the seller.

Mr M is represented by a firm of solicitors, which I'll refer to as "L". Where I refer to Mr M's submissions, I include those made on his behalf.

What happened

In June 2013 Mr M was on holiday with his partner in Malta. They attended a presentation, at the end of which they bought a timeshare unit for some £9,000 from a company within the Azure Group. Mr M paid part of the purchase price using his MBNA credit card and the balance with a loan from a company linked to the seller.

Mr M and his partner (later his wife) used the timeshare regularly. However, they soon found out that the silver level of membership they had bought gave them relatively limited access to accommodation at the times they were able to take holidays. In November 2016 they traded in their silver membership for a gold membership, which enabled them in particular to use their timeshare during school holidays. Mr M has said that they bought a total of 13 timeshare products between 2005 and 2020; this complaint concerns only that bought in June 2013.

In June 2022 Mr M contacted MBNA. He said that the timeshare had been misrepresented to him and that he therefore had a claim against the seller. Because the purchase had been funded in part by the credit card, he could bring that claim against MBNA as well.

MBNA did not accept the claim. It said, in summary, that there was no evidence to support a claim for misrepresentation and that in any event a claim would by then be outside the relevant time limits.

Mr M referred the matter to this service. He said that the time limits to which MBNA had referred did not apply in this case. That was because he had not become aware of the seller's wrongdoing until some years after the sale; the reason for that was that the seller had acted fraudulently and had concealed its actions from him.

One of our investigators considered what had happened but did not recommend that the complaint be upheld, largely for the same reasons as MBNA had given. Mr M did not accept the investigator's recommendations and asked that an ombudsman review the case.

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

Evidential issues

As a general observation, I would comment first of all that very little documentation is available from the time of sale. That is perhaps unsurprising, since Mr M traded in the timeshare he bought using his credit card in 2016, at which point that timeshare agreement was replaced by a new agreement concerning a different timeshare unit and a different level of holiday club membership.

The fact that sale documents are not available means that neither I nor the parties to the complaint can compare what Mr M says he was told about the timeshare in 2013 with what was in the written terms. When considering claims in misrepresentation, it is often crucial that such a comparison can be made.

This service has however seen a number of complaints arsing from timeshare sales with the Azure Group of companies. As is to be expected, many were subject to the same terms and conditions, and identical or very similar documents were used.

Section 75(1) Consumer Credit Act 1974

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 creditor. Those conditions include:

- *that the credit financed the contract giving rise to the claim; and*
- *that the credit was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

In this case, the credit card payment financed (albeit only in part) the purchase of the timeshare. A payment will be made under or in contemplation of future arrangements if it falls within section 12(b) of the Consumer Credit Act. It will generally do so if payment is taken by the supplier or an associate of the supplier (rather than, say, by a trustee or agent), as defined in section 184.

L said in its claim that the credit card payee in this case was not the supplier, but was an associate of the supplier. It invited MBNA to say if that was disputed. MBNA has not challenged that part of Mr M's case, so I have proceeded on the basis that the two companies were indeed linked and that the card payment was therefore made under existing arrangements between the seller and MBNA.

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.

Mr M's primary case here is that he was told the timeshare would be an investment and that it could be sold easily.

As I have said, the contractual documentation is not available in this case. Because of that, neither party is in a position to show conclusively what, if anything, the contract said about timeshare sales. That is a key point when considering whether Mr M was misled.

Be that as it may, 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 M into the contract for the purchase of the timeshare were made on or before 16 June 2013. He did not however raise any complaint with MBNA until June 2022, nine years later. I think it very likely therefore that a court would conclude that any claim against the seller was made outside the time limit in the Limitation Act.

L says that the six year time limit does not apply here, because the relevant time limit is extended where the claimant did not know they had a cause of action or where fraud is involved.

I do not accept that the general time limit is extended where a claimant does not know they have cause for complaint. That can be the case in negligence claims – for example, where the consequences of medical negligence do not become apparent for many years – but the claim here is that the seller misrepresented a contract, not that it was negligent.

Knowledge of a cause for complaint is relevant to our own time limits. 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.

Mr M's complaint to this service is that MBNA would not meet his section 75 claim; its refusal to do so only dates back to 2022, so that complaint was clearly referred to us in time. The issue here is really whether the seller would be able to rely on a Limitation Act defence if Mr M were to bring an action against it. If so, it's likely that a similar defence would be available to MBNA.

In my view, Mr M's own evidence indicates that he was concerned about what he had been told by as early as 2014. In the statement submitted with his complaint, he said:

"On 29 June 2014 we emailed the company stating that we had been misled and wished to terminate our agreement… Once we enquired if we could sell it, we were told that it was the wrong time to sell as nobody wanted to buy Silver apartments, and we would lose money. We decided to keep the apartment and sell it later on."

His statement continued:

"Whilst on holiday in November 2016 … we had a meeting with another Azure salesman [name] to check if we were happy with our timeshare etc. This meeting lasted over a few hours. During this meeting we were persuaded/pressured to "upgrade". The reasons being that we would get more use from a Gold week as it was available up to June and from the beginning of October. We would also be able to sell it at a profit as Gold apartment were very sought after. They reinforced the point of nobody wanting Silver apartments, but Gold ones being snapped up. They had only one available on the day, at a discounted price."

In my view, this illustrates that the sale options had been a live issue for many years before Mr M made a claim to MBNA. It was not therefore an issue which was concealed from him; nor does Mr M's account of events from 2014 and 2016 suggest fraud. It was also an issue which – to some extent at least – Mr M had resolved when he traded in his timeshare in 2016 and applied the proceeds to the "upgrade".

Be that as it may, it is not for me to decide whether any particular claim against the seller of the timeshare is now out of time under the Limitation Act or whether it would succeed in any event. Rather, I must decide whether the response of MBNA to the claim under section 75 of the Consumer Credit Act was reasonable. Given the lack of evidence to support Mr M's case and real possibility that a court would say that the claim is time-barred, I think it was.

My provisional decision was not to uphold Mr M's complaint, but I invited both him and MBNA to provide me with any further evidence and arguments they wanted me to consider before I issued a final decision. Neither has sent me anything further 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 I have been provided with no further evidence or arguments, I see no reason to reach a different conclusion from that set out in my provisional decision. I stress however that I have considered everything afresh before issuing this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 14 May 2024.
Mike Ingram
Ombudsman