David Partington discusses:
Time Share Mis Selling – An Introduction to Alternative Strategies

The standard, if unimaginative, attack on a timeshare contract is an action in breach of contract and claiming or claiming and damages under section 2(1) of the Misrepresentation Act 1967. This is a perfectly logical and valid start, but as I have written before, and will write again, the classic action in misrepresentation is a very cumbersome and formalistic cause of action. It is a construction rooted in Victorian values, and the axiom *caveat emptor* (buyer beware) is part of its legal DNA. No doubt it worked very well where gentlemen in stove pipe hats were buying and selling new parts for their latest foundry; it also works well when you have purchased a company after a comprehensive due diligence process and there are written representation and accounts to pore over. It is much more difficult to deploy in the modern world where "consumers" (not a concept with which the Victorians would have been comfortable) are being subject to what may loosely but accurately be called "high pressure selling techniques" which employ a mixture of half-truths and psychological exploitation.

To move from the abstract to the more specific, there are a number of practical problems in presenting a claim in misrepresentation. Here are some examples.

The first is the difficulty of pinning down an exact statement of fact made orally. Timeshare documentation is carefully drafted to avoid any action in misrepresentation. The statements which must be relied on will be oral, made by the sales personnel in the course of long sales presentations. This gives rise to evidential problems; not only will the statement have been made often several years before, pinning down "exact" words can be difficult, and then one runs into further problems; where is the line between a statement of fact and advice (albeit possibly negligent advice)? Where does one draw the line between a "half-truth" and a statement of fact? What if the problem is not necessarily what the client has been told, but what has been omitted, or the way in which the clients' fears and concerns are exploited?

For a specific example of that last point, one very common pattern of sale is that clients purchase a so called "points based" timeshare product way back when, without realizing the very long duration of the contracts they have been signed up to, and the implications of a seemingly endlessly rising annual management charge in the nature of a service charge (which is a topic in itself, but don't get me started, we'll be here all week). After a few years clients become terrified of the prospect of the charge continuing until the mid-21st century, and what is sold as a wonderful gift they can pass on to their children is now presented as a burden which could bind their children into servitude and the Poor House. This is a not so subtle form of guilt manipulation. Clients are then sold a so called "fractional" product as a replacement with the lure of a supposedly shorter contract with a "guaranteed" end date. For reasons which deserve an article in themselves, they in fact appear to offer no such guarantee at all.

Another common situation is that the client may have purchased a product with a long term some years ago; say 2009. Over time the ability to use the scheme becomes less and less, and the availability of satisfactory holidays seems to mysteriously diminish; clients are commonly invited to buy more "points" in order to increase their entitlement under the scheme; another way in which clients are milked of cash.

In both these situations the clients, or rather their legal representatives, face difficulties in running a traditional "misrep" action; I am not saying that such actions are impossible or always inappropriate; indeed I am pretty sure that often statements which are commonly made overstep the *caveat emptor* line, but the area is complex, and there are practical evidential problems with claims based on oral statements which are contradictory to dense, heavily "loaded" documentation designed to defeat such claims with all the skill of a Medieval castle designed to prevent invaders from breaching its walls and gaining access to the keep. By the way, I am an expert in Medieval castle design. History, as Lord Denning understood and preached, is a very good teacher for the lawyer.

Anyway, back to the second point. Another practical issue is that misrepresentation actions have a six-year limitation period, now barring out claims under that head in respect of events before 2011. What is more, the timeshare companies have become somewhat emboldened after their victory in the case of Abbott v RCI Europe in October of last year. As I have written before, I regard that case as tactically unsound; it was the wrong argument on the wrong battleground, because it related the timeshare exchange system which members were free to leave, *not the underlying contract*. Both Napoleon and Wellington would have been appalled; I refer to my comments above.

What can a client in those circumstances do? There are alternative strategies, but they are essentially defensive in nature, with a view to striking down the contracts or, perhaps more subtly, striking down particularly onerous aspects of them, such as the obligation to pay the annual management charge under the pertinent "consumer" legislation. I am not going to tell you which or how; you have to pay me for that.

However, there is an alternative approach which is, or should be much more flexible and also which is much more capable of overcoming the problem of limitation of actions. Almost all timeshare contracts are purchased with the dubious "benefit" of Consumer Credit Act regulated loans (at extremely high rates of interest) usually from one of a small number of UK based lenders. This opens the door to a claim against the lender under the "relatively" new a section 140A of the Consumer Credit Act. In subsequent articles I will examine that jurisdiction in more detail, and even make reference to the delightful, mysterious and little known "CONC5". No, it's not a Marvel film. But maybe it should be.

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