DRN-3640127

The complaint

Mr M and Mrs T complain that they were mis-sold a timeshare product and the credit facility used to pay for it. The credit facility was provided by First Holiday Finance Ltd, which I'll refer to as "FHF".

Mr M and Mrs T have been represented by a claims management business, which I'll call "C". Where I refer to Mr M's and Mrs T's submissions and arguments, I include those made on their behalf.

What happened

In June 2011 Mr M and Mrs T entered into a timeshare contract with Club La Costa Leisure Ltd ("CLC"). Under the contract, they were to buy membership of Club La Costa Vacation Club Limited ("the Club") and 2,000 Points Rights. The Club was a timeshare and holiday club, and the Points Rights could be exchanged annually for holiday accommodation and other benefits.

Mr M and Mrs T funded the 2011 purchase in part by a credit card payment and in part by trading in a trial membership which it appears they had bought at the end of 2010. The bulk of the purchase price was however funded by a joint loan of £20,439 from FHF.

In January 2021 C complained to FHF on behalf of Mr M and Mrs T. C said, in summary:

- CLC had misrepresented the nature of the Club membership and the Points Rights; because FHF had financed the purchase, Mr M and Mrs T had a claim against FHF in the same way as against CLC.
- The timeshare product had been sold as an investment, contrary to applicable law and regulations.
- Proper checks had not been carried out to ensure the loan was affordable.
- The loan agreement created an unfair relationship between Mr M and Mrs T on the one hand and FHF on the other.

C's initial letter of complaint ran to some 12 pages (not including supporting documents), and this is a very brief summary of its contents.

FHF said in reply that it had passed the complaint to CLC World (a company linked to CLC), and enclosed a copy of CLC World's response. CLC World denied the allegations made about CLC. It also noted a number of discrepancies in C's account of events.

Mr M and Mrs T referred the matter to this service, where one of our investigators considered what had happened. In her initial assessment, the investigator did not recommend that the complaint be upheld, in part (but not exclusively) because of the time that had passed since the sale.

Mr M and Mrs T 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:

A large part of C's initial complaint to FHF dealt with fractional ownership. Fractional ownership is a form of timeshare product where timeshare owners buy an interest in one or more holiday properties on the understanding that the property will be sold after a set period of time. If and when the property is sold, each of the owners of the timeshare weeks in the property receives a share of the sale proceeds. There is therefore potential for fractional ownership products to be seen as investments, and not just as holiday products; there is also potential for them to be sold as such. Different regulatory regimes apply to timeshare products and investment products.

C says that Mr M and Mrs T bought a fractional ownership product, that it was sold to them as an investment, and that the correct regulations were not followed.

It does appear that Mr M and Mrs T bought a fractional ownership product as well as a property interest in Turkey. The paperwork which C has sent indicates however that they did not do so until 2017 – when they traded in the points-based timeshare they had bought in 2011. They did not buy a fractional ownership product in 2011. Crucially (for the purposes of this complaint), FHF did not fund the 2017 purchase. The only purchase it funded was the purchase of Club membership and the points-based timeshare in 2011.

CLC World noted this in its response to Mr M's and Mrs T's complaint and was critical of the way in which the claim had been presented. Given that FHF was not involved at all with the fractional ownership contract, I can understand why that was.

Not all of the claims here are linked to C's apparent misunderstanding that FHF had financed the purchase of a fractional ownership product. I will therefore discuss the allegations which could be linked to the 2011 purchase.

The complaint about the credit assessment

C says that FHF did not properly assess whether the loan was affordable for Mr M and Mrs T. Whilst the precise nature of the obligations has changed over the years, it has long been the case that lenders should take steps to ensure that borrowers can afford to meet contractual loan payments.

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 FHF carried out (or did not carry out) in June 2011. But no complaint was made under nearly ten years later. It's arguable therefore that we have no power to consider this part of the complaint.

If I were to take a different view on that (perhaps because Mr M and Mrs T cannot be expected to know what checks FHF should have carried out), I have not seen anything here to suggest that the lending was not affordable or that the loan was otherwise not appropriate for them. There is no suggestion that payments were missed or that Mr M and Mrs T said they could not afford them. I note too that the loan was repaid after some six years, even though it was due to run for 12 years in total. That does not necessarily mean it was affordable or that appropriate checks were carried out, of course, but I think it unlikely that Mr M and Mrs T would have repaid the loan without mentioning any difficulties if they could not meet the repayments. It's unlikely too that they would have bought another timeshare

product – the fractional ownership – if they had been unable to afford the points based timeshare.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 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 and of Points Rights. The documentation shows too that CLC acted as broker and that the loan was made under pre-existing arrangements between CLC and FHF.

I must therefore consider the claims against CLC. Mr M and Mrs T say that CLC misled them about the benefits of Club membership and the timeshare.

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. There is little detail in this case about what was said to Mr M and Mrs T at the time of the sale, beyond what I have summarised above.

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 M and Mrs T into the contract for the purchase of the points were made on or before 19 June 2011. They did not however raise any complaint with FHF until January 2021, nearly ten years later. I think it very likely therefore that a court would conclude that any claim against CLC was made outside the time limit in the Limitation Act.

A lender facing a claim under section 75 of the Consumer Credit Act can generally rely on any defence which is or would be available to a supplier. It's likely therefore that FHF would be able to rely on a Limitation Act defence in court. It follows that its response to this part of the claim was reasonable.

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.

I have no power to make orders under sections 140A and 140B; only a court can do that. I can however make awards which might have a similar effect – for example, requiring a lender to write off debt or make refunds of loan payments.

I don't believe however that there is any reason for me to do so in this case. As I have explained, much of Mr M's and Mrs T's case has been brought on the misunderstanding that FHF financed the purchase of a fractional ownership product.

The claim under sections 140A and 140B was referred to FHF within the time limit set out in the Limitation Act – which is six years from the end of the loan relationship. Nevertheless, I think it is relevant to the merits of allegations of unfairness that Mr M and Mrs T did not suggest at any time while they loan was "live" that they thought they had been or were being treated unfairly. They did not do so until nearly four years later, on the face of it at the suggestion of C.

C's submissions on this point appear too to rely on CLC being the agent of Mr M and Mrs T. Again, I believe that is a misunderstanding of the position. CLC was an agent of FHF – section 56 of the Consumer Credit Act. It was selling a timeshare product and introducing finance. It did not, and owed Mr M and Mrs T no duty to, provide independent financial advice or to disclose any commission it may have received – unless they had asked about it.

In the circumstances, I think that FHF's response to the claims made was reasonable.

I indicated that I would consider any further evidence and arguments before I issued a final decision. Neither Mr M and Mrs T nor FHF responded with anything further.

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.

I have received no further evidence or arguments following my provisional decision, but I have reviewed the case in full. Having done that, I see no reason to reach a different conclusion from that set out in my provisional decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs T to accept or reject my decision before 21 March 2024.
Mike Ingram
Ombudsman