DRN-5822935

Financial Ombudsman Service

The complaint

Mr and Mrs O's complaint is, in essence, that [full business name] ('the Lender'), acted unfairly and unreasonably by:

(1) Being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 ('CCA').

(2) Deciding against paying a claim made under Section 75 of the CCA.

(3) Providing the loan through an unauthorised credit intermediary.

(4) Providing lending to pay for a contract that is null and void.

(5) Lending to Mr and Mrs T irresponsibly.

What happened

Mr and Mrs O purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 8 August 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,030 fractional points at a cost of £14,834 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs O more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs O paid for their Fractional Club membership by taking finance of £14,834 from the Lender (the 'Credit Agreement'). Mr and Mrs O paid off the loan, and their credit relationship with the Lender ended, on 27 February 2015.

Mr and Mrs O – using a professional representative (the 'PR') – wrote to the Lender on 23 September 2021 (the 'Letter of Complaint') to raise several different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs O's concerns as a complaint and issued its final response on 25 November 2021, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, said that the complaint about an unfair credit relationship and irresponsible lending were outside of the jurisdiction of the Financial Ombudsman Service, and the remainder of the complaint should not be upheld.

Mr and Mrs O disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I previously issued a decision explaining which parts of this complaint I could and could not consider. This final decision deals with those parts of the complaint that I can consider, being points (2), (3) and (4) above.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context here.

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've decided not to uphold this complaint. Before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

<u>Complaint about the Lender's rejection of Mr and Mrs O's Section 75 misrepresentation claim</u>

I don't think it would be fair or reasonable to uphold this complaint. Generally, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act. This is because it wouldn't be fair to expect creditors to investigate such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mr and Mrs O's Section 75 claim was time-barred under the Limitation Act before they put it to the Lender.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against the Supplier. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2 (1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the Limitation Act).

But a claim under Section 75 is also 'an action to recover any sum by virtue of any enactment' under Section 9 of the Limitation Act. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Mr and Mrs O entered the purchase of their timeshare at that time based on the alleged misrepresentations of the Supplier – which they say they relied on. And as the loan from the Lender was used to help finance the purchase, it was when they entered into the Credit Agreement that they suffered a loss.

Mr and Mrs O first notified the Lender of their Section 75 claim on 25 November 2021. And as more than six years had passed between the Time of Sale and when they first put their claim to the Lender, I don't think it was unfair or unreasonable of the Lender to reject Mr and Mrs O's concerns about the Supplier's alleged misrepresentations.

Complaint about the credit being brokered by an unauthorised credit intermediary

The PR alleges that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement.

However, Mr and Mrs O knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for Mr and Mrs O, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that caused Mr and Mrs O a financial loss – such that it would be fair and reasonable to tell the Lender to compensate Mr and Mrs O, even if the loan wasn't arranged properly.

Complaint about the Purchase Agreement being null and void

The PR argues that, because the Purchase Agreement was unlawful under Spanish law considering certain information failings by the Supplier, I should treat that Agreement and the Credit Agreement as rescinded by Mr and Mrs O and award them compensation accordingly – in keeping with the judgment of the UK's Supreme Court in Durkin v DSG Retail [2014] UKSC 21 ('Durkin').

However, the Lender wasn't party to any court proceedings in Spain and the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in Diamond Resorts Europe and Others (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

What's more, as Mr and Mrs O have gone some way to taking advantage of the Purchase and Credit Agreements, an English court might hesitate to uphold a claim for rescission of either Agreement because there are equitable reasons to do so.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, I'm not persuaded that it would be fair or reasonable to uphold this complaint for this reason.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O and Mr O to accept or reject my decision before 29 October 2025.

Phillip Lai-Fang
Ombudsman