DRN-3622926

The complaint

Mr and Mrs P complain that they were mis-sold a timeshare product and the loan used to pay for it. The loan was provided by GE Money Consumer Lending Ltd, but was later transferred to Shawbrook Bank Limited.

Mr and Mrs P are represented by a claims management business, which I'll call M. Where I refer to Mr and Mrs P's submissions, I include those made on their behalf.

What happened

In October 2007 Mr and Mrs P bought from St Frances Marketing Ltd 80 Points Rights in the VIP Club, a timeshare and holiday club. Points Rights could be exchanged annually for holiday accommodation and other experiences. Mr and Mrs P paid £11,995 (including fees and the first year's management charge), which was funded by loan from GE Money.

In July 2016 GE Money transferred some of its loan book (including Mr and Mrs P's loan) to Shawbrook.

In September 2018 Mr and Mrs P repaid the loan, in line with the payment schedule.

In December 2018 M contacted GE Money to complain about the timeshare sale and the loan. GE Money referred M to Shawbrook. M contacted Shawbrook, saying, in summary, that:

- the timeshare had been misrepresented to Mr and Mrs P, who therefore had a claim against Shawbrook under section 75 of the Consumer Credit Act 1974;
- GE Money had been guilty of procuring a breach of fiduciary duty; and
- the loan agreement had created an unfair relationship under section 140A of the Consumer Credit Act.

As well as expanding on the allegations of misrepresentations on the part of the seller, M has now also said that GE Money did not properly assess whether the loan was affordable for Mr and Mrs P, that the seller did not disclose the commission it received from GE Money, and that the seller used undue pressure to achieve the timeshare sale.

Shawbrook did not uphold the complaint, and so one of our investigators considered what had happened. The investigator did not recommend that the complaint be upheld – primarily, but not exclusively, because of the time that had passed since the sale. M did not accept that assessment and asked that an ombudsman review the case. I did that and issued a provisional decision, in which I said:

Whilst the lender in this case was GE Money, I am satisfied that the loan was sold to Shawbrook in 2016, along with any liabilities that GE Money had in connection with it. That is, Shawbrook is responsible for the actions and omissions of GE Money arising from the loan.

The complaint about suitability and the credit assessment

M says that GE Money did not properly assess the affordability or suitability of the loan. Shawbrook says that it would have been assessed in line with the rules and guidance in CONC – the part of the regulator's Handbook which deals with consumer credit. Since the loan pre-dates the FCA's regulation of consumer credit activities, however, CONC did not apply at the time. I would nevertheless expect lenders to have assessed the affordability of loans 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 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.

The event complained of in this case is the credit assessment that GE Money carried out (or did not carry out) in October 2007. Mr and Mrs P did not make any complaint until December 2018, more than eleven years later. The affordability complaint was not made until some months after that.

I have therefore considered when Mr and Mrs might have known that the loan was not affordable and that they therefore had cause for complaint.

There is no evidence to suggest that Mr and Mrs P ever contacted either GE Money or Shawbrook to suggest they were having difficulty making payments. As I have said, the loan was repaid in line with payment schedule. The bank's records do show some late payments in 2010 and 2011, but they were generally made within a few days of the due date.

If payments were late because of affordability issues, then I believe that Mr and Mrs P knew by 2011 at the latest that they had cause to complain and that this service has no power to consider this part of their complaint.

If, on the other hand, payments were late for some other reason, there is in my view no evidence that the loan was not affordable. If that's the case, a more detailed assessment of affordability would have made no difference to Mr and Mrs P's overall position.

Sections 56 and 75 of the Consumer Credit Act

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 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. St Frances Marketing is named as the seller in both the purchase contract and the loan agreement. It follows that the loan was made under existing arrangements between it and GE Money. I have therefore considered what the position might be if Mr and Mrs P were to make a claim for misrepresentation against the seller.

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 and Mrs P into the contract for the purchase of their Points Rights were made on or before 14 October 2007. They did not however raise any complaint with GE Money or Shawbrook until December 2018, eleven years later. I think it very likely therefore that a court would conclude that any claim for misrepresentation was made outside the time limit in the Limitation Act.

A defence that is available to a seller, including a Limitation Act defence, is also available to a creditor facing a claim under section 75 of the Consumer Credit Act. For that reason, I think that Shawbrook's response to this part of the complaint 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.

In considering with a credit agreement creates an unfair relationship, a court can consider any connected agreement. In this case, that could include the agreement for the sale and purchase of the Points Rights.

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. It is unlikely therefore that a court would say that this part of the complaint is out of time.

I have no power to make an order under section 140B of the Consumer Credit Act; only a court can do that. I do however have power, for example, to require a lender to refund loan payments or, where a loan has not been repaid, to require a lender to accept reduced payments. In deciding what's fair and reasonable, I must have regard to any relevant law – which in this case includes relevant provisions of the Consumer Credit Act.

Mr and Mrs P have not provided me with a full copy of the sale agreement – only the first page. Nor have they provided much detail about the sales process or their experience as VIP Club members. There is no evidence to support what M has said on their behalf. There is very little therefore to persuade me that the terms of the underlying agreement or Mr and Mrs P's experiences meant that the loan agreement created an unfair relationship.

M has made two very general points, which I'll discuss briefly.

M says that GE Money's actions amounted to procuring a breach of the fiduciary duty which the seller owed to Mr and Mrs P. M has not expanded on that. However, I do not accept that the seller was in a fiduciary relationship with Mr and Mrs P in any event. It was not advising them or recommending any financial product. It was selling them a timeshare product and introducing GE Money as a lender. In doing that, it was bound by, for example, the Timeshare Regulations 1997 and the Consumer Credit Act, but there was no fiduciary duty.

I make similar comments in respect of the suggestion that any commission should have been disclosed. This was not a case where the seller was recommending a financial product from a range of products and where commission might have influenced that recommendation. The seller introduced a single financial product which Mr and Mrs P could

use if they wanted to. And there is no suggestion either that they asked about commission or that it influenced their decision to buy the Points Rights or take out the loan.

I concluded that I was unlikely to uphold the complaint.

Neither Shawbrook nor Mr and Mrs P made any further submissions in response to my provisional decision.

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.

Given that there are no further arguments or evidence for me to consider following my provisional decision, I see no reason to reach a different conclusion from that which I set out in it.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 4 August 2023.
Mike Ingram
Ombudsman