

The complaint

Mr and Mrs B complain that they were mis-sold a timeshare product in August 2001. Because the timeshare was financed with a loan from First Holiday Finance Ltd ("FHF"), they say that they have a claim against it in the same way as against the seller.

Mr and Mrs B have been represented by a firm of solicitors, which I'll refer to as "P". Where I refer to Mr and Mrs B's arguments, I include those made on their behalf.

What happened

On or about 13 August 2001 Mr and Mrs B bought a timeshare product from a timeshare company, which I'll call "T". The purchase was financed with a loan from FHF. According to FHF's records, the loan was settled in July 2005.

In April 2021 Mr and Mrs B complained to FHF about the timeshare sale and the loan. They said the timeshare had been misrepresented to them and that the loan created an unfair relationship. They also said that the credit intermediary ("C") had not had the appropriate authorisation to arrange it; the loan was therefore not enforceable.

FHF did not accept the allegations made, and so P referred the matter to this service.

Our investigator did not recommend that the complaint be upheld, largely because of the time that had passed since the sale and the loan had been agreed. Mr and Mrs B asked that an ombudsman review the case.

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

Authorisation of C

P says that C was not authorised to arrange credit in August 2001, contrary to section 19 of the Financial Services and Markets Act 2000 ("FSMA"), and that the loan is therefore not enforceable. That is, in my view, a surprising claim to make in view of the regulatory landscape at the time.

FSMA didn't come into force until 1 December 2001, after the loan was brokered and agreed.

Further, both the Financial Conduct Authority ("FCA") and the Financial Ombudsman Service acquired their powers under FSMA, with effect from 1 December 2001.

C did not therefore require FCA (or FSA, as it then was) authorisation in August 2001. It would have needed a licence issued by the Office of Fair Trading, and FHF says it had one. For reasons I shall explain, however, it makes no difference to the outcome here whether it did or not.

Complaints arising at the point of sale

Mr and Mrs B make two main complaints about what FHF did (or, more accurately, didn't do) at the point of sale. The first, which is linked to my comments above, is that it should have ensured C was properly authorised. The second is that FHF did not properly assess whether the loan was affordable. I do not believe however that I have the power to consider either.

The rules about what complaints the Financial Ombudsman Service can consider are set out in the part of the FCA Handbook which deals with dispute resolution, known as "DISP". DISP2.3.2 sets out the circumstances in which the service can deal with complaints about actions or omissions before 1 December 2001 ("commencement") and which were referred to it on or after that date. DISP2.3.2(1) says:

"The Ombudsman can also consider under the Compulsory Jurisdiction ... as a result of the Ombudsman Transitional Order, a relevant existing complaint or a relevant new complaint that relates to an act or omission by a firm or an unauthorised person which was subject to a former scheme immediately before commencement..."

The reference to the Ombudsman Transitional Order is a reference to the Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001. The "former schemes" were the eight ombudsman, dispute resolution or arbitration schemes which merged in December 2001 to form the Financial Ombudsman Service.

FHF was not subject to the jurisdiction of any of the former schemes. Indeed, consumer credit licensees only became subject to the Financial Ombudsman Service's consumer credit jurisdiction on 6 April 2007. Before that, the ombudsman's powers to look at complaints about consumer credit activities were much more limited than they are now.

This means that I have no power to consider any complaint about what FHF did or did not do in August 2001, and I make no further comment on that.

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.*

I have assumed the relevant conditions are met in this case – although that is largely because my current view is that it makes no difference to the outcome. I note however that P has said the supplier in this case was T, but the credit intermediary was C.

I should comment that I believe the Financial Ombudsman Service does have power to consider this part of Mr and Mrs B's complaint. That is because the complaint is not about what happened at the point of sale; rather, it is about FHF's response to the claims Mr and Mrs B say they have against T.

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 contract (which includes claims for 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 B into the timeshare contract were made on or before 13 August 2001. It was nearly 20 years before they made any claim. 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 lender facing a claim brought under section 75 can rely on any defence that would be available to a supplier, including limitation defences, and so I think that FHF's response to 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, refunding payments and re-opening an agreement which has come to an end. In considering whether a credit agreement creates an unfair relationship, a court can have regard to any connected agreement.

Sections 140A and 140B were however introduced by amendments to the Consumer Credit Act which came into effect in April 2007. And they do not cover loans which started before 6 April 2007 and ended before 6 April 2008. The loan in this case had come to an end even before the introduction of sections 140A and 140B. Again, therefore, I think that FHF's conclusion that a court would be unlikely to uphold a claim was reasonable.

I concluded that I was unlikely to recommend that the complaint be upheld.

FHF said that it had nothing to add. Mr and Mrs B did not respond 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.

Because neither party has provided any more evidence or arguments in response to my provisional decision, I see no reason to reach any different conclusion about the complaint. In saying that, however, I stress that I have considered all the evidence and arguments afresh.

My final decision

For these reasons, my final decision is that I do not uphold Mr and Mrs B's complaint and do not require First Holiday Finance Ltd to do anything more to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 1 November 2023.

Mike Ingram
Ombudsman