DRN-4172977

The complaint

Mr L complains that he was mis-sold a timeshare product in 2007. To finance the purchase, he took out a loan, responsibility for which has now been transferred to Shawbrook Bank Limited. He says that this arrangement means that Shawbrook is responsible for the actions of the seller, but it has not met his claims.

Mr L has had professional representation in bringing this complaint, so where I refer to his submissions and arguments I include those made on his behalf.

What happened

In January 2007 Mr L bought a points-based timeshare product and membership of a holiday club from a seller which I'll call "C". The price included a trade-in value, so it appears he was an existing member at the time.

The purchase was financed in part with a loan from a finance company, which I'll call "G". In 2020 G transferred some of its business – including Mr L's loan – to Shawbrook.

Mr L was not happy with the timeshare he had bought, and in 2016 he complained to C about representations that had been made at the time of sale. Specifically, he mentioned maintenance fees, availability of accommodation and potential resale values. C did not respond to Mr L's satisfaction, although he took matters no further at that point.

In January 2021 Mr L contacted G. He repeated that he thought the timeshare had been mis-sold and misrepresented and said that G was responsible for the actions of C at the time of sale. In addition, he said that this meant that the loan agreement created an unfair relationship. G referred the matter to Shawbrook.

Shawbrook responded to say that it would not be addressing the matter as it thought it had been brought outside the relevant time limits in our rules. Those rules generally require a complainant to refer a complaint to this service within six years of the complaint arising or, if later, within three years of a complainant knowing they have cause for complaint.

Mr L referred the matter to this service. Shawbrook continued to argue that it had been referred too late and that we therefore had no power to consider it. In February 2023 an ombudsman issued a decision concluding that we could in fact consider the complaint. He noted that the complaint about Shawbrook was in reality a complaint about its handling of Mr L's claims about the actions of C. Those claims had been made – and handled by Shawbrook – relatively recently.

The ombudsman noted however that any further outcome would need to give careful consideration to the operation of the Limitation Act 1980.

Our investigator therefore went on to consider the merits of Mr L's complaint about Shawbrook. She issued a preliminary assessment on the merits which said, in summary:

- It was likely that any claim against C for misrepresentation would now be out of time. Shawbrook was entitled to decline that claim.

- There was no evidence of any breach of contract.
- She was not persuaded that the loan agreement created an unfair relationship.
- There was no evidence that the lending decision was flawed.

Mr L did not accept the investigator's view and asked that an ombudsman review the case.

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.

The complaint about the credit assessment

Mr L says that G did not properly assess whether he could afford the loan in January 2007. Because Shawbrook has taken over the loan, it is now responsible for that omission.

The Financial Ombudsman Service's powers to consider complaints about consumer credit activities carried by what were then Office of Fair Trading licensees did not come into effect until 6 April 2007, when the service's consumer credit jurisdiction came into being. Before that, the service could consider complaints about consumer credit activities, but only if they were ancillary to another activity (for example, banks granting loans or issuing credit cards) or were carried out by a business which was subject to our voluntary jurisdiction. G was not covered by the Financial Ombudsman Service in January 2007. It follows that I have no power to consider a complaint about its actions or omissions in agreeing to provide the loan and no power to consider this part of the complaint about Shawbrook.

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. It is however not entirely clear that it was financed under pre-existing arrangements between G and C. The intermediary named on the finance agreement is not the same as the seller of the timeshare and club membership. This is not a point which Shawbrook as raised, however, and I have therefore approached the matter on the basis that the necessary links were in place.

Misrepresentation and breach of contract

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 L into the timeshare

contract were made on or before 25 January 2007; since it appears he was already a club member, it's possible that he relied on what he had been told or his own experiences even before that. Mr L did not however raise any complaint with Shawbrook until more than 14 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.

Mr L says that the time limit is extended where there is fraud or concealment. I do not accept that is generally the case or that it would apply here. And the matters which Mr L referred to Shawbrook were not concealed in any event; he was aware of them at the latest when he complained to C in 2016.

I stress that it is not for me to decide whether any underlying claim is now out of time under the Limitation Act. Rather, I must decide whether the response of Shawbrook to the claim under section 75 was reasonable. Given the real possibility that a court would say that the claims are time-barred, I think it was.

The usual time limit for bringing a claim for breach of contract is six years from the date of breach. Mr L has said that he has never been able to use the services, although he has provided little detail about why that is. But if it is correct that no services have been provided, that must have been the case for many years. So any claim based on those matters would now be outside the time limits in the Limitation Act.

It appears that one or more of the companies linked to the seller is no longer trading. That is not however a breach of contract if – as I believe to be the case – the services are still being provided.

In considering a claim brought under section 75, a lender can rely on any defence open to the supplier, including limitation defences. In the circumstances, I believe that Shawbrook's response to these parts 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. In deciding whether to make an order, a court can have regard to any connected agreement; that could include an agreement for the sale of goods or service financed by the credit agreement.

Sections 140A and 140B did not come into force until after the completion of the loan agreement, although they replaced similar provisions relating to "*extortionate credit bargains*".

Only a court can make an order under section 140B (or its predecessor, section 139). An ombudsman can however make an award which might require a lender, for example, to write off a loan or to refund payments – if they consider it would constitute a fair and reasonable resolution of a complaint. I am not persuaded however that I should make an award in those or similar terms in this case. I do not believe that Mr L has shown that the actions of C or G or Shawbrook are such as to warrant it.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 12 September 2023.
Mike Ingram
Ombudsman