

## **The complaint**

Mr C complains that First Holiday Finance Ltd has made an unfair claims decision under the Consumer Credit Act 1974 (CCA).

## **What happened**

Mr C and the late Mrs C purchased a timeshare product from Business X in September 2011. The timeshare was part funded with a loan provided by First Holiday Finance. The total amount of finance provided was £11,685.58 to be repaid over a period of 144 months. The loan was repaid early with this being confirmed in writing to Mr C and the late Mrs C in October 2014.

Mr C and the late Mrs C purchased a points-based timeshare. This gave them the option to exchange their points for holidays each year provided through Business X. They were also enrolled into an exchange scheme for one year as part of the membership fee, this gave access to other resorts and providers.

In September 2020, with the assistance of a professional representative, Mr C raised a claim under the CCA. He made the following accusations:

- He felt the benefits of the timeshare had been misrepresented at the point of sale.
- The loan which financed the timeshare was void because Business X didn't have the correct permissions at the time of the sale and wasn't authorised. So the lawfulness of the loan had been misrepresented.
- Mr C's representative expressed concerns about Business X and its operating structure.
- Mr C and his representative also claimed that First Holiday Finance failed to carry out the appropriate credit checks when the loan was taken out to confirm the loan was affordable.

Mr C's representative said Mr C was not aware that the loan should be voided until he instructed its services. And he wasn't aware of any misrepresentations until many years after the sale when he experienced problems when trying to book holidays with the points.

First Holiday Finance said Business X held all relevant authorities to sell the loan to Mr C and the late Mrs C. It also said all affordability checks were completed when the loan was taken out and it confirmed there was no commission paid by First Holiday Finance. It passed on the concerns about the sale of the timeshare to Business X to respond to directly as it felt it was best placed to address what happened during the sale. Business X didn't agree the timeshare had been misrepresented and it also confirmed it had the relevant authority to broker the loan.

Our investigator said that she felt the claim for misrepresentation under s.75 of the CCA had been made too late. She said this needed to have been made within six years of the

date of sale but as no claim was made until December 2019, she didn't think First Holiday Finance needed to consider this further.

Mr C and his representative disagreed. They argued that s.32 of the Limitation Act 1980 (LA) was applicable because Business X concealed the fact that it had no authority to broker or sell the loan. It felt this meant the claim for misrepresentation was brought in time. It also highlighted that its point about the authority of the broker had not been addressed.

In response our investigator said her response to s.75 CCA had not changed and she still felt the claim for misrepresentation had been brought too late. She said in response to the authority of the broker that Business X was not an agent of Mr C or the late Mrs C either as matter of fact or by law.

I issued a provisional decision on Mr C and the late Mrs C's complaint in August 2022. I said that I wasn't planning on upholding the complaint – but with additional considerations to that of our investigator. So to be fair to both sides ahead of issuing my final decision, I set out what I was planning on saying. My provisional findings are copied below:

*I'm not planning on upholding this complaint. I know this will be disappointing for Mr C, but I'll explain why I'm intending on reaching this outcome.*

*Mr C and his representative has provided a great deal of information in support of his claim. I want to assure Mr C that I've considered all the information provided. If I don't address every point that's been raised, it's not because I've not thought about them all. But I've focused on what I think is relevant and material to reaching a fair and reasonable outcome within my decision.*

*First Holiday Finance hasn't directly addressed the claims about misrepresentation made by Mr C. It has instead passed these concerns on to Business X to respond to. The CCA means First Holiday Finance is required to consider claims for misrepresentation and/or breach of contract under s.75 CCA. Allegations of misrepresentation will relate to the supplier and information provided by Business X, but this doesn't mean First Holiday Finance shouldn't consider this as part of its claim's decision. A CCA is relevant here as Mr C has alleged the relationship was unfair.*

*However, for the reasons I'll go on to explain in my decision, I don't think the lack of response on this makes a difference to the outcome of Mr C's complaint.*

#### *Was Business X authorised to arrange the loan?*

*At the heart of Mr C's argument is his belief that the loan was brokered without the correct authority and is voidable. I've considered this first, ahead of considering the claims made under CCA.*

*When Mr C's loan was sold, the regulation of consumer credit was handled by the Office of Fair Trading (OFT). First Holiday Finance has confirmed the OFT registration number in place for Business X at the time of the sale and I'm satisfied it had the correct authorisation relevant at the time of sale.*

*Mr C's representative has made reference to a number of parts of the Financial Conduct Authority (FCA) handbook which it says Business X didn't adhere to when the loan was arranged. But as the FCA didn't regulate the sale of this loan, I don't think these are relevant.*

*Mr C's representative has said the Business X breached its authorisation by mis-selling the timeshare to Mr C and late Mrs C. Because of this, the loan was granted in contrary to the Financial Services and Markets Act 2000 (FSMA). But I think this is dealt with in the claims made under CCA. I don't think it follows that, as Business X may have acted in a way that gives rise to a legal claim, they will have acted without authorisation when arranging the loan.*

#### The s.75 CCA claim

*Mr C said that Business X misrepresented the nature and benefits of the timeshare. Under s.75 CCA, First Holiday Finance would be jointly liable for a claim. But as our investigator said, these claims need to be raised by a certain point.*

*S.9 LA sets out that a claimant has six years to bring a claim from the date on which the cause of action occurred. The date the cause of action occurred is the point in time that everything needed to make a legal claim occurred.*

*Mr C and the late Mrs C purchased their timeshare in 2011 and it is from this point that they could have brought a claim under s.75 CCA. So it follows, they had six years from the date of the purchase to bring a claim. This is because this is the point in time Mr C and the late Mrs C would have lost out by relying on false statements of fact.*

*Mr C didn't bring a claim or raise any points of dissatisfaction with First Holiday Finance until December 2019. This is more than six years from the point when the cause for action occurs so I think s.9 LA would be applicable and First Holiday Limited would be entitled to rely on the time limit set out in the LA.*

#### Could the limitation be extended?

*Mr C's representative have argued that the limitation period should be extended. They feel s.32 LA is applicable and if applied, would extend the point in time from when the limitation period starts. S.32 states that when there has been fraud, deliberate concealment or mistake, the limitation period only starts to run from the point that the claimant discovers the fraud, concealment or mistake. Mr C's representative has argued that Business X concealed the fact it lacked the relevant authority to broker the loan.*

*As I've said above, I think Business X did have the relevant permissions to broker the loan when the timeshare was sold and there was no concealment of not having this permission. I've thought about everything else that Mr C and his representative have said about Business X. Having done so, I've not seen anything that persuades me that s.32 LA would be applicable, or that the limitation period for the s.75 CCA claim should be extended.*

#### The claim under s.140A

*Mr C has made reference to a number of things within his letter of claim that could give rise to a claim under s.140A. And his representative has quoted this within the letter of complaint. Under this section a court can make an order under s.140B in connection with a credit agreement if it decides that the relationship between the lender and creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but I think this is relevant law and I've taken it into account.*

*I've taken account of the actions taken by Business X when deciding whether Mr C and the late Mrs C have been treated fairly as the timeshare agreement is a related agreement to the credit agreement under s19 of the CCA.*

*I've also taken into account the relevant regulations applicable to Business X as a timeshare provider at the point of sale. It's not my role to decide Business X's legal liability in regard to these regulations. But they are relevant in determining a standard of commercial conduct expected of Business X. Any potential breach of the rules isn't determinative of the question posed by s.140A, but it may have a legitimate influence on whether an unfair relationship existed between Mr C and First Holiday Finance.*

*S.56 of the CCA is relevant and means Business X acted as First Holiday Finance's agent when conducting the negotiations with Mr C and the late Mrs C. And this can include all communication, advertisement and representations made by the negotiator. This can be considered when considering whether things have been done or not done when thinking about s.140A (1)(c)<sub>1</sub>.*

*S.140A is also subject to time limitations under the LA. But I'm satisfied Mr C and his representative brought their complaint/claim about an unfair relationship within the prescribed time. So I've considered whether First Holiday Financial should have done more when considering this.*

*As section 140A (2) sets out, a court will take account of all matters it considers relevant, both in relation to the creditor and debtor. This means I must also take into account Mr C and the late Mrs C's individual circumstances when the sale took place. Considerations which may be relevant to the fairness of the relationship include Mr C and late Mrs C's previous experience with timeshare products and the supplier's sales presentations, their sophistication or vulnerability, and their level of knowledge about the product they were buying.*

*I also have in mind the judgement of the Supreme Court in the case of Plevin v. Paragon Finance Ltd [2014] UKSC 61, where it was held (in summary) the question is whether the relationship between the creditor and debtor is unfair, not whether the creditor or anyone else has breached a duty. It was also held that relationships between businesses and consumers are often characterised by large differences of knowledge, which can make a relationship unfair if the imbalance is "sufficiently extreme".*

*Keeping all of the above in mind, I have considered all of the evidence and submissions in this case, to determine whether I think it's likely a court would find an unfair relationship existed between Mr C and the late Mrs C and First Holiday Finance under section 140A (1)(c), by virtue of anything Business X did or didn't do on First Holiday Finance's behalf.*

*Mr C has argued that Business X misrepresented the timeshare to such an extent that the agreement should be void as this gave rise to an unfair relationship. He said the following in relation to this:*

- A presentation given at the time of sale showed the quality of accommodation to be far superior to what he says he was able to obtain.*
- He was promised the timeshare would provide him with fractional ownership over the properties but no guidance was provided on how this could be obtained.*
- He was told he'd be able to sell the timeshare at any point but this hasn't been the case.*

- *The maintenance fees would not increase but these have increased year on year.*

*He's says this information provided at the point of sale together with the pressure applied led him to buy the timeshare. He also feels the high interest rate applied to the loan demonstrates that the relationship is unfair.*

*I appreciate that the nature of timeshare sales means it was likely that Business X made it difficult for Mr C and the late Mrs C to say 'no' to the timeshare. But I've not been provided with anything which persuades me that Business X didn't allow them to do this.*

*I've looked at the sales documentation provided at the point of sale. This give's information about the timeshare, including the ongoing fees, whether it can be sold (including whether Business X operates a resale programme) and information about how the timeshare works and whether it may have a trade in value against other schemes. I don't think this supports what Mr C says happened during the sale. He's mentioned products different to his own and it might be he didn't fully understand what he was buying but I don't think this indicates Business X did anything wrong at the point of sale.*

*Overall, thinking about their circumstances at the time of the sale and how the sales process took place, I think it is unlikely a court would determine this created an unfair relationship under s140A of the CCA.*

*Mr C has also said that he believes First Holiday Finance lent to him irresponsibly as it failed to complete adequate checks to ensure the loan was affordable. He has provided very little in support of this. First Holiday Finance has said it completed the correct checks at the time of the borrowing.*

*This service can consider complaints about unaffordable lending and in order to uphold a complaint of this nature, I'd need to be satisfied the lending was unaffordable to Mr C and the late Mrs C at the time and they've lost out as a result.*

*I've not been provided with evidence to persuade me that, at the time of sale, Mr C and the late Mrs C had any affordability issues and were unable to afford the loan repayment. So in the absence of this, I am unable to uphold the complaint for this reason.*

*Overall, I've not seen anything to persuade me that First Holiday Finance Ltd needs to take any action based on its claim's decision.*

First Holiday Finance had nothing further to add in response to the provisional decision. Mr C's representative reiterated a number of points made within the original submission.

It said that s.32 LA should be applied to extend the limitation period of s.9 LA meaning that Mr C's claim under s.75 CCA could be considered. And that the misrepresentations made were done to such an extent and relied on by Mr C, that it would be likely a court would agree that it gave rise to an unfair relationship under s.140A CCA. It felt more weight should be applied to Mr C's testimony in reference to this.

No response was provided in relationship to my answer on the complaint points brought about the affordability of the loan.

## **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 reconsidered everything on this complaint as well as the information provided by Mr C and his representative in response to my provisional decision. As I've mentioned above, most of what has been provided is a reiteration of the information submitted with the complaint originally.

But in answer to its point that more weight should be given to Mr C's testimony, weight has been given to this. But I also need to consider the other evidence provided, including what the contract says he was purchasing and how this would operate. Mr C has said he was given information which was directly contradictory to the information within the sales document. This information was provided at the point of sale and so I think it's unlikely that any representations were made by Business X that didn't follow what the product was or how it would operate.

Mr C hasn't provided anything new for me to consider on this point and because of this, I remain of the opinion that it is unlikely that, based on the information provided at the time of the sale, a court would determine this would create an unfair relationship.

Overall, I see no reason to depart from the decision set out in my provisional findings above.

## **My final decision**

For the reasons set out within the provisional decision included within the background of this complaint, I don't uphold Mr C and late Mrs C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and the estate of Mrs C to accept or reject my decision before 11 October 2022.

Thomas Brissenden  
**Ombudsman**