DRN-4710639

The complaint

Mr and Mrs F complain that First Holiday Finance Ltd ('FHF') is liable to pay them compensation following a complaint made about timeshares bought using credit provided by FHF.

What happened

In March 2011 Mr and Mrs F went on a promotional holiday provided by a timeshare company (the 'Supplier'). As part of this holiday, on 27 March 2011 they attended a sales presentation and as a result purchased a trial membership of 'Club Azure' ('the Trial Membership'). This trial membership, which cost them £3,995, allowed them to take five weeks of holidays over the following 34 months at the Supplier's resorts.

Mr and Mrs F paid £500 towards the cost of the trial membership with the remaining £3,495 being paid by taking finance from FHF. Mr and Mrs F entered into a joint Fixed Sum Loan Agreement ('Credit Agreement 1')[1] for £3,495 over 24 months, with the total amount payable after interest (APR 18.6%) being £4,153.67.

On 27 September 2011, whilst taking their first holiday as part of the trial, Mr and Mrs F attended a sales presentation by the Supplier. As a result of this they traded in their trial membership and purchased membership of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') from the Supplier. They bought 1050 Fractional Points at a cost of £18,932.

Under the terms of the FPOC, Mr and Mrs F could exchange their Fractional Points for holidays. And at the end of the projected 15-year membership term, they also had a share in the net sales proceeds of a property tied to their membership (the 'Allocated Property'). As their interest in the Allocated Property was limited to a share in its net proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

After trading-in their trial membership, they paid for the remaining balance of the FPOC membership by entering into a further joint Fixed Sum Loan Agreement ('Credit Agreement 2')[2] from FHF for £14,437, with the total amount payable after interest (APR 16.6%) being £30,127.84.

On 19 November 2018, using a professional representative, Mr and Mrs F sent two letters of complaint to FHF, the first concerning the sale of their Trial Membership and the second concerning the sale of their FPOC membership. Both letters made claims under Section 75 of the Consumer Credit Act 1974 (the 'CCA') due to alleged misrepresentations by the Supplier at the time of both sales. They also raised concerns about "unfair negotiations" under Section 140A CCA due to those misrepresentations and a number of other concerns.

Under the heading "Misrepresentation", Mr and Mrs F said the following in relation to their Trial Membership:

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[1] The 24-month term of Credit Agreement 1 meant it was cleared in April 2013
[2] Credit Agreement 2 was cleared in November 2023

- They were unable to book any of the apartments they had been shown as they weren't available to use.
- They were not told about a 'cooling off' period.
- They were promised worldwide travel and a high degree of flexibility in both dates and destinations that didn't transpire in practice.
- They were not given a choice of finance providers.
- They were not informed of a 'perpetuity clause' which would mean their next of kin would be obliged to take on the burden of the trial membership.

Under the same heading, Mr and Mrs F also said the following in relation to their FPOC membership:

- The Supplier told them the FPOC represented a viable and suitable investment which would only increase in value – which misled them into a purchase that they would not have made otherwise.
- They were told the re-selling process was quick, easy and profitable and would commence whenever Mr and Mrs F wanted when that was untrue.
- They were led to believe the FPOC would offer great flexibility in terms of locations and dates of travel, but they found that availability was virtually non-existent, no matter how much notice they gave the Supplier.
- They were not informed about the possibility of their maintenance fees increasing year-to-year.
- They were not told that FPOC membership was perpetual.

Under the heading "Unfair negotiations", Mr and Mrs F made the same points regarding both sales:

- Undue pressure was applied to them to make the purchases.
- The Supplier failed to deliver on its assurances.
- The Supplier failed to act in their best interests.
- The Supplier failed to ensure compliance and due diligence.
- The Supplier failed in its duty of care.

On 7 December 2018 FHF responded to Mr and Mrs F's complaint letters, a summary of which I've set out below.

In relation to the Trial Membership, FHF said

- Trial Membership was designed to give consumers some insight into the different locations offered by the Supplier, not to book specific apartments.
- Membership was for 34 months duration, so it could not be held in perpetuity.
- Mr and Mrs F were provided with a 14-day cooling off period.
- Mr and Mrs F didn't use their Trial Membership as they traded it in for FPOC membership on their first holiday.

In relation to Mr and Mrs F's FPOC membership, FHF also said:

- FPOC membership was sold on the basis that it provided many years of holidays.

The documentation clearly states the FPOC was not a monetary investment.

- Mr and Mrs F were able to sell their FPOC membership at any time, but they had never requested resale information.
- None of the Supplier's timeshares were perpetual.
- Mr and Mrs F enjoyed eight weeks of holidays as FPOC members. Restrictions on their ability to book were only put in place as they didn't adhere to the terms and conditions of the personal instalment plans that were in place.
- The sales meetings attended by Mr and Mrs F were voluntary and they were free to leave at any point.
- Mr and Mrs F attended a further three sales presentations after the one in question, which does not indicate that they were, or felt as if they were pressured into purchasing FPOC membership.
- The Supplier complied with all of its obligations.

Mr and Mrs F did not agree with FHF's response to their complaints, so they referred their complaints to our Service where, having been dealt with as a single complaint, it was assessed on two separate occasions by two different Investigators.

Both Investigators thought that FHF were fair and reasonable in declining Mr and Mrs F's claims under Section 75.

The Investigators came to those conclusions because the claims were made more than six years after they entered into the purchase agreements for the Trial and FPOC membership, giving FHF a defence to the claims under the Limitation Act 1980 (the 'LA').

As for Mr and Mrs F's concerns about "unfair negotiations", the Investigators treated those as complaints about FHF's participation in and perpetuation of unfair credit relationships under Credit Agreements 1 and 2 (and their related purchase agreements) for the purposes of Section 140A CCA. Neither investigator thought that the complaints should succeed.

As no agreement on the outcome of this complaint could be reached between the most recent Investigator and Mr and Mrs F, they asked for their complaints to be considered by an Ombudsman, and submitted evidence which they said showed that they had started the complaints process in June 2017.

So, the complaint came to me for a 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.

And when doing that, the Financial Conduct Authority's (FCA) Handbook of Rules and Guidance requires that I take into account the following under Rule 3.6.4 of the Dispute Resolution Rules ('DISP'): relevant law and regulations; the regulator's rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

And where there is conflicting information available, or indeed a lack of definitive evidence because of the passage of time, I need to decide what I think is most likely to have happened on the balance of probabilities.

Mr and Mrs F have made complaints about FHF's handling of claims for alleged misrepresentations by the Supplier under Section 75 CCA and, in essence, complaints about

credit relationships with FHF that were unfair to them under Section 140A CCA. Although the reasons for their complaint points overlap to a degree, I will deal with their Section 75 and 140A complaints separately.

Mr and Mrs F's Section 75 Complaints involving the Supplier's alleged Misrepresentations

Mr and Mrs F entered into contracts with the Supplier in March and September 2011 for services that were financed by debtor-creditor-supplier agreements. So, I am satisfied that Section 75 CCA applies here.

Section 75 says that, in certain circumstances, the borrower (Mr and Mrs F) under a credit agreement has an equal right to claim against the credit provider (FHF) if there's either a breach of contract or misrepresentation by the supplier of goods or services (the Trial and/or the FPOC memberships). And, once a claim is made, the creditor must properly consider it and pay compensation if needed. Mr and Mrs F's complaint is that FHF did not do that.

FHF considered Mr and Mrs F's claims under Section 75 but rejected them. Having considered everything, I do not think FHF was unfair or unreasonable in doing that, so I do not think that this part of their complaint ought to be upheld. I'll explain why.

As a general rule, creditors such as FHF can reasonably reject Section 75 claims that they are first informed about after the claim has been time-barred under the LA, as it wouldn't be fair to expect creditors to look into 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 F's claims were time-barred under the LA before they put them to FHF.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) 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. But a claim, like the ones in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

Mr and Mrs F have, in effect, made two claims under Section 75 as they entered into two loan agreements with FHF. So, the date on which the causes of action accrued was the date of the sales - 27 March 2011 and 27 September 2011. I say this because Mr and Mrs F entered into the purchases of both their Trial Membership and their FPOC membership at those times based on the alleged misrepresentations of the Supplier, which they say they relied on. And as the loans from FHF were used to help finance the purchases, it was when they entered into Credit Agreements 1 and 2 that they suffered a loss.

I understand that Mr and Mrs F engaged a professional representative in June 2017 to help them relinquish their FPOC membership and get their money back. And whilst I understand their frustration at the situation they find themselves in following the Investigators' assessments, it does not matter that they engaged a professional representative when they did. What matters is the timing of their Section 75 claims to FHF.

Mr and Mrs F first notified FHF of their Section 75 claims on 19 November 2018. And as more than six years had passed between the time of both sales and when they first put their claims to FHF, I don't think it was unfair or unreasonable of FHF to reject Mr and Mrs F's concerns about the Supplier's alleged misrepresentations.

Mr and Mrs F's complaints about Credit Relationships with FHF that were unfair to them

In both of Mr and Mrs F's complaint letters to FHF they made several points which they described as *misrepresentations,* and I have explained why I have decided that FHF were fair and reasonable in their rejection of Mr and Mrs F's Section 75 claims.

However, the complaint letters also made it clear that Mr and Mrs F thought they were the subject of unfair negotiations at both times of sale by the Supplier for the purposes of Section 140A CCA. So I have gone on to consider both sales with that provision in mind.

I have considered all of the points that Mr and Mrs F made in their complaints to FHF, and in their submissions to our Service. But as we're an informal dispute resolution service, set up as a free alternative to the courts, I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to Mr and Mrs F, rather it reflects the informal nature of our service, its remit, and my role in it.

When looking at the Supplier's sales process, I've considered (in the context of both sales):

1. The Supplier's sales and marketing practices; and
2. The provision of information by the Supplier.

And in considering these aspects of the sales, I've considered the impact that one or both had on Mr and Mrs F and their credit relationships with FHF.

The Supplier's sales and marketing practices

Mr and Mrs F say that they were put under pressure during the sales in question, were not told about a "cooling off" period, and were not given a choice of finance providers.

I'm required to take into account, when appropriate, what I consider was good industry practice at the time, which, in this complaint, is the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

The RDO Code sets out, amongst other things, the Sales and Marketing Principles. It states, under Principle 2.2.2, that selling Members will ensure "appropriate selling methods that treat the consumer with respect and allow the consumer choice between purchasing and reflection".

Other than what has been said in the letters of complaint and in their submission to our Service, the relevant sections of which have been summarised above, I've not seen sufficient evidence to persuade me that, on the balance of probabilities, Principle 2.2.2 of the RDO Code was not adhered to for reasons relating to pressure.

Mr and Mrs F have not explained what it was that was said or done that caused the alleged pressure from the Supplier. But having said they were pressured into the purchase of the Trial Membership, they made a further purchase (the FPOC) at their first opportunity to do so. And as it also appears that they attended other sales presentations without making a purchase, that doesn't suggest that they were likely to have been pressured at the times of sale. And in relation to them saying they weren't told about a "cooling off" period following the purchase of their Trial Membership, as I understand it, under the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations' - which were the regulations the Supplier had to comply with at the times of sale), they would have been given a one-page document to read and sign that set out their 14-day cooling off period. What's more, I can see from Credit Agreement 1 that Mr and Mrs F were told that they had 14 days during which time they could withdraw from the Credit Agreement without

penalty. So, on balance, I think it was more likely than not that they were informed of their "cooling off" period. So in light of the above, I don't think Mr and Mrs F were pressured into either of the purchases in question.

Mr and Mrs F say that they weren't offered a choice of credit providers by the Supplier. But it wasn't acting as an agent of Mr and Mrs F but as the supplier of contractual rights they obtained under the relevant purchase agreements. And, in relation to the loans, it doesn't look like it was the Supplier's role to make impartial or disinterested recommendations, or to give Mr and Mrs F advice or information on that basis. It's also clear to me that Mr and Mrs F knew they could fund their purchases by other means – having used a credit card on both occasions to put down deposits. So, I'm not persuaded that their credit relationships with FHF were rendered unfair for this reason given the facts and circumstances of this complaint.

Mr and Mrs F also say that there were a number of pre-contractual misrepresentations by the Supplier in the lead up to the sale of Trial Membership and FPOC membership.

A material and actionable misrepresentation, in this complaint, is an untrue statement of existing fact, made by the Supplier, that induced Mr and Mrs F into the purchase agreements.

I recognise that Mr and Mrs F have concerns about the way in which their Trial Membership and FPOC membership were sold. But they have not persuaded me that they remember much of what was said at the times of sale, by who and in what circumstances. And as there's nothing else on file that persuades me that there were any false statements of existing fact made to them by the Supplier at those times, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

Was the FPOC membership sold to Mr and Mrs F as an investment?

Mr and Mrs F, in their letter of complaint to FHF, said that the Supplier told them that the FPOC represented a viable and suitable investment which would only increase in value.

Regulation 14(3) of the Timeshare Regulations prohibit the Supplier from marketing or selling membership of the FPOC as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

So, given what was said in their letter of complaint, I have gone on to consider whether, on the balance of probabilities, the Supplier breached Regulation 14(3).

Having looked at how the FPOC membership worked, I can see there was an investment element to the purchase, given that there was the potential to realise a return from the eventual sale of the Allocated Property. But the fact that FPOC membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or the marketing and selling of such a product.

In other words, the Timeshare Regulations did not ban the sale of products such as the FPOC. They just regulated how such products were sold.

To conclude, therefore, that FPOC membership was likely to have been marketed and sold

to Mr and Mrs F as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier led them to believe that FPOC membership offered them the prospect of a financial gain and used that fact to induce them into the purchase given the facts and circumstances of *this* complaint.

I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned FPOC membership to Mr and Mrs F as an investment.

However, as Mr and Mrs F haven't described to any extent what was said to them, by whom and in what circumstances, to persuade me that the Supplier breached the prohibition of selling FPOC membership as an investment, I don't think it did.

But even if I'm wrong about that, Mr and Mrs F took the opportunity to disagree with and respond to the most recent Investigator's assessment. And as neither of them said anything about FPOC membership being sold to them as an investment, I'm not persuaded that the investment element of FPOC membership was important enough to Mr and Mrs F's purchasing decision to render their relationship with FHF unfair to them had the FPOC membership, in fact, been sold as an investment.

The provision of information by the Supplier

Mr and Mrs F say that they weren't told by the Supplier that the management fees under the FPOC membership would rise as they have done. But, other than making the bare allegation that the Supplier did not tell them the fees would rise, Mr and Mrs F did not and have not elaborated on the allegation to describe what they were told, and what they now think they should have been told. They also haven't provided a breakdown of the annual management charges they have actually had to pay, so I cannot see that the fees have risen unfairly.

So, while it's possible the Supplier didn't give Mr and Mrs F sufficient information, in good time, on the various charges they could have been subject to as FPOC members in order to satisfy its regulatory responsibilities at the relevant time of sale, I haven't seen enough to persuade me that this, alone, rendered Mr and Mrs F's credit relationship with FHF unfair to them.

In relation to the point made that they were not told there was a perpetuity clause in the terms and conditions of both the trial membership and the FPOC membership, Mr and Mrs F have adduced no evidence to support there is such a clause. And having considered the sales documents for both memberships, I am satisfied there is no such clause.

Overall, as I haven't seen anything else to suggest that there are any other reasons why the relevant credit relationships between Mr and Mrs F and FHF were unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Conclusion

Taking everything into account, I am satisfied that FHF did not act unfairly or unreasonably when it dealt with Mr and Mrs F's Section 75 claims, and I am not persuaded that FHF was party to credit relationships with Mr and Mrs F that were unfair to them.

My final decision

I do not uphold Mr and Mrs F's complaint about First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 24 May 2024.

Chris Riggs
Ombudsman