DRN-4717438

The complaint

Mr and Mrs R complain that they were mis-sold a timeshare product and the loan used to pay for it. The loan was provided by First Holiday Finance Ltd, which I'll refer to as FHFL. Mr and Mrs R have been represented in bringing this complaint by a claims management business, so any reference to their arguments and submissions include those made on their behalf.

What happened

In March 2020 Mr and Mrs R bought from Club La Costa (UK) Sucursal en Espaňa (a UK company with registration in Spain) a 15-year Topaz membership of Club La Costa Vacation Club ("the Club"), a holiday and timeshare club, and 1,100 holiday points. Mr and Mrs R could trade their holiday points each year for holiday accommodation and other benefits over the membership period. The full membership was an "upgrade" from a 3-year trial membership which Mr and Mrs R had bought the previous year; it was purchased while Mr and Mrs R were taking a free holiday as part of the trial membership.

To pay for the membership and points, Mr and Mrs R took out a loan with FHFL for £12,968; they also made an advance payment of £500 by credit card. The loan was brokered by the seller.

In January 2023 Mr and Mrs R complained to FHFL. They said that they had been misled about the sale of the holiday club membership and the holiday points they had bought. They had, they said, been led to believe that they were buying a share in a property, that it would be an investment, and that they would be able to access Club property at any time of the year.

Mr and Mrs R also said: they did not recall FHFL making any affordability assessment before agreeing the loan; the individuals working for the credit intermediary had not been properly authorised; they had tried to cancel the contract within the 14 days permitted; Club La Costa was going through liquidation proceedings in Spain and so was in breach of contract; and the loan created an unfair relationship.

Mr and Mrs R said that the effect of the Consumer Credit Act 1974 (and in particular sections 75 and 140A) was that FHFL was responsible for the actions of Club La Costa.

FHFL did not accept Mr and Mrs R's claims, and they referred the matter to this service. One of our investigators considered what had happened, but did not recommend that the complaint be upheld. Mr and Mrs R did not accept the investigator's recommendation and asked that an ombudsman review the case.

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

Affordability

Mr and Mrs R say they don't recall FHFL carrying out any checks to ensure the loan was affordable. FHFL on the other hand says that it asked Mr and Mrs R about their income and

other debts at the time, as well as carrying out credit reference checks. Having done that, it was satisfied that Mr and Mrs R's disposable income was sufficient to meet their commitments under the loan agreement.

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case. I am satisfied that FHFL did ask Mr and Mrs R about their income and outgoings in this case, even though they may not recall it in detail.

In assessing whether a loan is affordable, lenders should consider not just whether it is affordable when it is taken out, but whether it is likely to remain affordable. They should, for example, consider whether there are any future events which might have an impact on a borrower's ability to pay – such as retirement, for example.

At the time of the sale to Mr and Mrs R, Club La Costa required buyers to sign a declaration, as part of its standard sale sales process. That declaration included, at paragraph 9:

"We understand clearly what we have purchased and, having carefully considered this and our other financial commitments, are able to pay the amounts due on the dates agreed and in the case of purchases made with the assistance of finance agree that we are not aware of any future event that may prevent us from meeting the monthly repayments."

I think it likely that Mr and Mrs R signed a declaration in those, or in very similar, terms. FHFL did therefore address the possibility of future events affecting Mr and Mrs R's ability to repay the loan – albeit partly by seeking a reassurance from them through Club La Costa.

Mrs R has said that she was made redundant as a result of the Covid-19 pandemic, and that this made it difficult to meet the loan repayments. She says too that she contacted Club La Costa to explain the position – although she has not provided copies of any written communication about that. This suggests however that any difficulties Mr and Mrs R may now be having arose because of subsequent events, not that the loan was unaffordable from the outset.

If Mr and Mrs R are having difficulty making payments, I would expect FHFL to consider what steps it can take to assist them, but it is for Mr and Mrs R to approach FHFL in the first instance, to explain their situation. I am not persuaded however that FHFL failed properly to assess whether the loan was affordable.

Authorisation of the credit intermediary

Consumer credit broking is, and was in 2020, a regulated activity under the Financial Services and Markets Act 2000. That is, entities carrying out consumer credit broking must be properly authorised by the regulator, the Financial Conduct Authority ("FCA"). A consumer credit loan which is brokered by an unauthorised party is not enforceable (although the lender can apply to the FCA if it wishes to enforce it).

Mr and Mrs R's representative acknowledges that the broker, Club La Costa (UK) Plc (operating through its branch in Spain), was properly authorised at the time, but says that its sales force were self-employed. Club La Costa, on the other hand, says its staff were employed. I think it more likely that the regulated entity is aware of its staff's employment status than Mr and Mrs R's representative is, but in any event their representative has not explained why self-employed individuals representing a regulated business cannot carry out regulated activities on that business's behalf.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 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(1) 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 am satisfied that the necessary conditions were met in this case, and so will discuss what has been said about misrepresentation and breach of contract.

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.

A breach of contract occurs when one party to a contract does not fulfil its obligations to the other. That is, it does not do what it has agreed to do or does not provide what it has agreed to provide.

Mr and Mrs R say that the membership and points were sold to them as an investment. In support of that contention, their representative has provided a copy of some of the seller's presentation materials. They relate however to the sale of fractional timeshare interests (where timeshare properties are sold after a set number of years and the proceeds shared amongst those who have bought timeshare weeks in those properties). That is not however what Mr and Mrs R bought, and I find that material of very limited assistance; it was not used in the sales presentation which Mr and Mrs R attended.

In addition, the Acquisition Agreement included, at paragraph 5 on page 1:

"We understand that the purchase of our membership in vacation club is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as a real estate interest or an investment in real estate, and that CLC makes no representation as to the future price or value of the Vacation Club Holiday product…"

Further, the standard one-page declaration (referred to under the Affordability heading above) included a near-identical statement, which I believe Mr and Mrs R are likely to have signed and initialled.

In the circumstances, I think it most unlikely that the club membership was sold as an investment, or that Mr and Mrs R thought that was what they were was buying. I note as well that there is no evidence of any attempt on the part of Mr and Mrs R to sell the membership and points in order to realise any "investment".

Mr and Mrs R say they were told they could book holidays at any time of the year. But that was true – albeit subject to availability of accommodation and Mr and Mrs R having sufficient points. They have also provided some information about the holidays they have taken – and which I shall discuss further below.

In general, the allegations of misrepresentation are generic and unsupported by evidence. I do not find them particularly convincing. In parts, their submissions are inconsistent. I also note that Club La Costa's standard terms and conditions of sale (which formed part of the Acquisition Agreement which Mr and Mrs R signed) included, at paragraph N, a provision

saying that the agreement and its ancillary documents represented the entire agreement between the parties.

In my view, the inclusion of an "entire agreement" provision was an attempt to ensure that anything on which Mr and Mrs R sought to rely was included in the contract itself. Such provisions are not uncommon, even in consumer contracts, as they can help to provide clarity about the parties' rights and obligations. I am not persuaded in this case that Mr and Mrs R were misled, but, if I were to take a different view on that, I would need to consider the effect of that provision.

Mr and Mrs R say that Club La Costa is in liquidation and they therefore have a claim for breach of contract. It is correct that liquidation proceedings were started in Spain in or around December 2020. But those concerned sales companies. I understand however that the Club is still operating and that its facilities remain available. Indeed, Mr and Mrs R have used their holiday points after the start of the liquidation proceedings. The liquidation of the sales companies does not constitute a breach of Mr and Mrs R's contract with the seller; nor have they lost out as a result of the seller's liquidation.

In response to our investigator's recommendation, Mr and Mrs R submitted a signed statement dated 31 December 2022. Although that statement pre-dates their formal complaint, it does not appear to have formed part of it and it was not provided to FHFL when the complaint was made on 6 January 2023. It included statements that (i) Mr and Mrs R had tried to cancel the timeshare contract shortly after they had signed it, but had not received any response; and (ii) they had taken holidays in May and November 2021 and in October 2022, but had been unhappy with the standard of accommodation on offer. They did not however include any supporting evidence, such as a copy of the cancellation email or photographs of the accommodation. Given however that FHFL has not had the opportunity to address these issues, I will make no further comment on them at this stage.

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 and unfair relationship, a court can have regard to any connected agreement, which in this case could include the sale contract.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

Much of Mr and Mrs R's case that the loan agreement created an unfair relationship is based on fundamental misunderstandings – that the broker was unauthorised; that Mr and Mrs R were buying a fractional timeshare, which was sold as an investment; that there was a breach of contract when companies within the Club La Costa group were placed into liquidation.

Mr and Mrs R say that the timeshare sale was pressured. They say they thought they had little choice but to agree to buy after a lengthy – 9 hours in total – sales presentation. But they acknowledge too that they knew they could cancel both the sale and the loan agreement for 14 days after they signed them. They say that they did send a cancellation notice to Club La Costa, but they have not provided evidence of that. On the basis of what

I've seen to date, therefore, I do not believe I can safely conclude that a valid notice was sent, or that it was sent within the 14-day cancellation period.

Mr and Mrs R's representative has also referred to clause D of the Acquisition Agreement, by which the seller can rescind the Agreement if any sum due under it remains unpaid for 14 days. Their representative says that similar clauses have been found to be unfair and has referred to a case in which the court, as a result, made an order under section 140B. I note however that the only sum payable under the Acquisition Agreement was the sale price for the Club membership and holiday points. Mr and Mrs R's case appears to be, therefore, that, had they not paid the agreed contract price, it would have been unfair for their membership and points to have been withdrawn. That is a rather different position from the case law on which they seek to rely. Be that as it may, Mr and Mrs R did pay (through the card payment and loan) and the sale contract was not rescinded by Club La Costa.

It is not for me to decide whether Mr and Mrs R have a claim against Club La Costa, or whether they might therefore have a "like claim" under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140B of the same Act.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr and Mrs R's complaint. In the circumstances of this case, however, I do not believe that it would be fair to require FHFL to do any more to resolve things.

Mr and Mrs R did not accept my provisional decision and made further submissions – as I had invited both parties to do. They said that they remained of the view that FHFL should not have agreed the loan, They said that a different lender (from whom they had borrowed in the past) had already declined a loan application and that FHFL, as Club La Costa's in-house finance company, should have done the same. They were aware of many similar examples of FHFL accepting loan applications which other lenders had declined.

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.

As the only issue on which Mr and Mrs R have provided further comment is FHFL's agreement to the loan application, I shall limit my further comments to that point. For the avoidance of any doubt, however, I have not changed my view about the other issues here.

On the question of whether FHFL should have agreed the loan, I set out in my provisional decision why I was satisfied that it had properly assessed whether the loan was affordable for Mr and Mrs R. I also noted that Mr and Mrs R's own evidence suggested that any difficulties they were having appeared to be down to subsequent events (notably, Mrs R's redundancy), not because the loan was unaffordable from the outset.

I remain of that view. Whilst it may the case that a different lender was not prepared to lend, it does not automatically follow that FHFL should not have done so. Whilst consumer credit is regulated by the Financial Conduct Authority, which lays down rules and guidance about what checks a lender should make, lenders retain a degree of discretion in lending decisions – so not all lenders will reach the same conclusions about a prospective customer. And there is no requirement that they do so.

I also noted that Mr and Mrs R said they had contacted Club La Costa to explain the position, but had not provided any evidence of that. That remains the position.

If Mr and Mrs R are having difficulty making payments, they should discuss the position with FHFL, so that it can consider what steps it can take to assist. I do not however believe that I can fairly say that the loan should not have been agreed.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and Mr R to accept or reject my decision before 3 May 2024.

Mike Ingram
Ombudsman