DRN-4802267

The complaint

Mr and Mrs O's complaint is that First Holiday Finance Limited ('FHF') acted unfairly and unreasonably when deciding against paying their claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA') and turning down their complaint that it was party to an unfair debtor-creditor relationship as defined by Section 140A of the CCA.

What happened

Mr and Mrs O purchased membership of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') from a timeshare provider (the 'Supplier') on 25 June 2017 (the 'Time of Sale 1').They bought 2090 Fractional Points at a total cost of £10,558 (reduced from £17,708 due to Mr and Mrs O trading in an existing membership worth £7,150). They had previously made three other purchases and this was their fourth.

Mr and Mrs O paid for their FPOC membership by paying a £1,000 deposit and the rest was finance from FHF in both their names. They entered into a 12 year restricted use Fixed Sum Credit Agreement for £9,558 and the total amount repayable after interest and charges was £19,614.35 (the 'first Credit Agreement').

On 13 May 2018 (the 'Time of Sale 2'), Mr and Mrs O made a further, fifth purchase, purchasing 1,220 fractional points at a total cost of £11,549 (reduced from £25,849 due to Mr and Mrs O trading in one of their existing memberships worth £14,300). They paid for this membership by paying a £500 deposit and consolidated their existing loan (£9,376 outstanding) to pay the remainder (£11,049). They entered into a 12 year restricted use Fixed Sum Credit Agreement for £20,425 and the total amount repayable after interest and charges was £41,916.26 (the 'second Credit Agreement').

Both their fourth and fifth purchases ran concurrently.

Under the terms of the FPOC, Mr and Mrs O could exchange their fractional points for holidays. And, at the end of the projected membership term, they also had a share in the sale proceeds of a property tied to their membership (the 'Allocated Properties').

Mr and Mrs O, using a professional representative ('SC'), wrote to FHF on 4 October 2019 (the 'Letter of Complaint') to complain about a number of matters.

Mr and Mrs O say that the Supplier made a number of misrepresentations at both Times of Sale, giving them a claim under Section 75 of the CCA, which are as follows:

- Mr and Mrs O were coerced by the Supplier's salesperson to purchase the FPOC memberships.
- Mr and Mrs O weren't given the opportunity to decide if the product was right for them and they were pushed to sign the documentation.
- They were told that the Allocated Properties would be sold by 2030, but they say this isn't true as the trustees only initiate the sales process by appointing valuers and there's no clear indication of any duty on the trustees or Supplier to actively market and sell the properties. They also say that until the properties are sold annual management charges will continue to be incurred.

- Mr and Mrs O weren't told that the sale of the allocated properties could be postponed at the Supplier's discretion for up to two years.
- It wasn't explained to Mr and Mrs O that their beneficiaries would inherit their management fee liability.

SC also said that in their view, the FPOC membership(s) is an unregulated collective investment scheme (UCIS) and that by selling and financing this, there had been various breaches of relevant regulations.

FHF responded to SC's letter on 23 October 2019 but only to say that it wasn't possible for them to comment on the matter and so they were forwarding the complaint to the Supplier for them to respond to.

The Supplier sent their response to SC on 29 October 2019, rejecting all points of complaint.

Mr and Mrs O then referred the complaint to the Financial Ombudsman Service on 28 November 2019. In these submissions, SC also added the following points to the complaint:

- The FPOC membership(s) is a floating week timeshare and, in their view, illegal. This makes the purchase agreement between Mr and Mrs O and the Supplier null and void and this in turn makes the Credit Agreement(s) between them and FHF unfair under Section 140A of the CCA.
- FHF charging an interest rate of 13.81% compared to the Bank of England 2011 base rate of 0.50% is an unfair term under the Unfair Terms in Consumer Contract Regulations 1999 (the 'UTCCR').

The complaint was assessed initially by an Investigator who, having considered the information on file, rejected the complaint on its merits on 5 January 2021.

The complaint was then assessed again by a second Investigator. Prior to issuing their findings, they asked Mr and Mrs O's representative, SC, if they had a witness statement regarding what happened at the Time of Sale(s), obtained from Mr and Mrs O prior to the complaint being made to FHF. SC confirmed that they didn't, nor was any other direct evidence provided from Mr and Mrs O.

The Investigator therefore proceeded to issue their findings on 8 November 2023, again rejecting the complaint on its merits.

SC disagreed with the Investigator's assessment and asked for the matter to be referred to an Ombudsman for a final decision to be made. They provided some lengthy further comments and raised new points in this response which had not previously been considered. In the main, they made various points relating to the judgment in a Judicial Review of one of the lead decisions previously issued by this Service (*R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (the 'Judicial Review')).

As agreement on the outcome could not be reached at this stage, the complaint was passed to me for a decision.

I issued a provisional decision on this case dated 23 April 2024, in which I set out my reasoning as to why I didn't think the complaint should be upheld. We have received both parties' responses to this, and so I'm finalising my findings within this final decision.

I have summarised my provisional decision below:

- In relation to the alleged misrepresentations at the Times of Sale, without more detailed testimony from Mr and Mrs O about what was said, by whom and in what context, I hadn't seen sufficient evidence to say that, on the balance of probabilities, there were any false statements of fact made to them by the Supplier as alleged. So,

as I didn't think there was an actionable misrepresentation by the Supplier, I didn't think FHF acted unfairly or unreasonably when it declined Mr and Mrs O's Section 75 claim.

- Mr and Mrs O's representative said the product, in their view, is an unregulated collective investment scheme (UCIS) and that they were sold to them as an investment. And, they raised the effect of the Judicial Review judgment on Mr and Mrs O's complaint. I provisionally concluded that I didn't think it was likely the Supplier breached the prohibition on selling timeshares as investments, based on the lack of evidence provided to support that allegation and the fact that the judgment in the Judicial Review didn't find that FPOC memberships, like Mr and Mrs O's, were inevitably sold as investments.
- I also said that even if I was wrong about the memberships being sold as investments, I wasn't currently persuaded that the investment element(s) of the memberships were important enough to Mr and Mrs O's purchasing decisions to render their credit relationship with FHF unfair to them if the memberships had, in fact, been sold as investments.
- I said that whether such memberships amounted to UCISs was a matter of law and was decided in the Judicial Review, when such a finding was rejected by the judge. Since Mr and Mrs O acquired timeshare rights under the two purchases, they did not amount to UCISs.
- Mr and Mrs O's representative had said they feel a timeshare that provides for a 'floating week' or the ability to use points to book holidays, is a voidable agreement, but I noted that they hadn't provided anything to make me think this is the case. Taking into account all relevant legislation, rules and regulations, I couldn't see anything that would mean the agreements were voidable, prohibited in English law, or that all timeshare agreements had to refer to a specific apartment or set week.
- Lastly, in relation to the level of interest charged on the loan, I did not see that charging interest would have led to an unfairness in this case since being charged interest when borrowing money is normal. And, while I accepted that the interest rate on Mr and Mrs O's loan was somewhat higher than the Bank of England base rate at the time, I explained I could see the interest rates were set out on the faces of the two loan agreements, so they would have been clear to Mr and Mrs O. And, since I hadn't been provided with any reason why such rates were unfair given Mr and Mrs O's circumstances, I couldn't say the level of interest led to an unfairness that requires a remedy in this case.
- So, overall, I intended to reject the complaint because I didn't think that FHF acted unfairly or unreasonably when it declined Mr and Mrs O's Section 75 claim, and I wasn't persuaded that FHF was party to a credit relationship with Mr and Mrs O under the Credit Agreement(s) that was unfair to them.

FHF confirmed they had nothing further to add in response to my provisional decision. Mr and Mrs O's representative (SC) confirmed they did not accept the decision and their further comments are summarised as follows:

- They provided copies of some of the Supplier's sales and training materials that were used when selling FPOC memberships and said this was supported by witness statements from management staff working for the Supplier. They said this evidence clearly shows the Supplier sold the products as an investment to consumers and this was also applicable to Mr and Mrs O. They referred to two previous decisions issued by the Service which they said reached this conclusion and upheld the complaints.
- They felt the fact that Mr and Mrs O had made both purchases within a relatively short period of time showed the intense nature of the sales pressure put on them.

- The membership(s) clearly doesn't work as an investment since Mr and Mrs O have been unable to sell them, even at a loss.
- SC based their complaint to FHF on Mr and Mrs O's recollections. There was no requirement to send a witness statement along with the complaint at the outset or when bringing it to our Service.
- As the prohibition on selling the timeshares as investments was breached, the credit relationship(s) between Mr and Mrs O and FHF is unfair under Section 140A of the CCA.
- Mr and Mrs O have faced substantial financial detriment due to the loans they took out to fund their purchases. And, they wouldn't have entered into these agreements if the Supplier hadn't breached the prohibition on selling the memberships as investments and enticed them to keep purchasing with larger financial returns.

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

When making my decision, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's handbook to take into account the:

"*(1) relevant:*

(a) law and regulations;

(b) regulator's rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

Where evidence is incomplete, inconclusive, or contradictory, I make my decision on the balance of probabilities i.e. what I think is more likely than not to have happened based on the evidence available and the wider circumstances of the complaint.

My role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

<u>Mr and Mrs O's Section 75 complaint</u>

As I explained in my provisional decision, BPF doesn't dispute that Mr and Mrs O entered into a contract with the Supplier for services financed by a debtor-creditor-supplier agreement in Mr and Mrs O's name. As I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs O, FHF (as the creditor) is also liable.

Mr and Mrs O's representative didn't make any further points in relation to this part of the complaint. Indeed, they haven't said they disagreed with any of my provisional conclusions in relation to it. Since I haven't been provided with anything more in relation to this part of the

complaint by either party, it follows that my conclusions remain the same as set out in my provisional decision. For completeness, I confirm these and the reasons why, below.

Mr and Mrs O said they were coerced by the Supplier to purchase the FPOC memberships and that they weren't given the opportunity to decide if the product was right for them.

These comments were described as misrepresentations but, in my view, these represent concerns with the way in which the memberships were sold to them.

And, in any event, I don't have any detailed explanation from Mr and Mrs O about how exactly they were coerced and I can see they had a 14 day cooling off period available to them as well for both purchases.

I'm also mindful that these two purchases in question were their fourth and fifth purchases. I acknowledge that SC have said they feel this shows the continued pressure Mr and Mrs O were put under, but I still think it's reasonable to say that they were presumably familiar by that stage with how the product worked and with the general sales practices the Supplier used, as well as having time to reflect on their three previous purchases. I also still think their past purchasing history shows that they were interested in the Supplier's memberships, so I think it's likely that they bought these memberships for that reason rather than due to a coercive sale.[1] I haven't been provided with anything further that makes me think otherwise.

Mr and Mrs O also say that they were told the FPOC memberships would end after a number of years, but this wasn't true.

For me to say there was a misrepresentation made by the sales agent in the sale of the memberships, I would have to say there is evidence that Mr and Mrs O were told something that was not true.

Looking at the FPOC Rules and other available documentation, I can see it explains the steps of the sales process, the duties that there are on the Trustees (such as using reasonable endeavours to obtain the most advantageous selling price) and that 'sale date' means the date on which the sale process for an Allocated Property begins.

There is nothing that makes me think they were told it was guaranteed that the FPOC memberships would end, and Mr and Mrs O would get a return at a set date in the future and that it would therefore 'work as an investment' as they've mentioned. From what I know about the Supplier's sale process, I think it was most likely Mr and Mrs O were told that the Allocated Property would be placed for sale at a set time and the proceeds of sale would then be divided up, not that there was a guaranteed date on which the Allocated Property would sell. And I think that fits with common sense, it would be unlikely a promise would be made that a property would sell on a set future date as that could not be guaranteed. I think it is more likely that Mr and Mrs O were told that the Allocated Property would be sold at the end of the contract period, and that they would be given their fractional share of the proceeds, which is a factual description of how FPOC membership worked.

I've also not seen anything which makes me think Mr and Mrs O won't receive their share of any proceeds from the sale of the Allocated Properties which are due to them

Mr and Mrs O's other two points, (not being told that the sale of the Allocated Properties could be postponed at the Supplier's discretion for up to two years and it not being explained that their beneficiaries would inherit their management fee liability) relate to information they say they weren't given at the Times of Sale. I note that it does explain, for example, that the sale of the Allocated Property could be postponed in the FPOC Rules documentation. But, in any event, I can't say that not being told a certain piece of information, in and of itself, amounts to a misrepresentation i.e. a false statement of fact.

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[1] These allegations, if true, could give rise to an unfair debtor-creditor relationship. However, as I can't agree the sale was coercive, I also can't say this led to an unfairness that requires a remedy.

Overall, without more detailed testimony from Mrs and Mr O about what was said, by whom and in what context, I haven't seen sufficient evidence to say that, on the balance of probabilities, there were any false statements of fact made to them by the Supplier as alleged. I recognise that they have concerns about the way in which their FPOC membership was sold. But, given the evidence in this complaint, I'm still not persuaded that there was an actionable misrepresentation by the Supplier for the reasons Mr and Mrs O allege. And, for that reason, I don't think FHF acted unfairly or unreasonably when it declined Mr and Mrs O's Section 75 claim.

Mr and Mrs O's complaint there was an unfair debtor-creditor relationship

In relation to why SC felt there might be an unfair debtor-creditor relationship, they said the product is in their view, a UCIS and later said that it was sold to Mr and Mrs O as an investment. In response to our Investigator's view, SC raised the effect of the Judicial Review judgment on Mr and Mrs O's complaint. SC argued that other Ombudsmen had upheld complaints about the sale of similar timeshares and therefore this complaint should be upheld too. In response to my provisional decision, SC largely repeated this argument and also provided a copy of one of the Supplier's sales slide packs and product owner's guide and said they felt these showed that not only did these products have investment elements to them, but were also sold and marketed as investments to consumers.

Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') prohibited the Supplier from marketing or selling the FPOC membership as an investment. At the Times of Sale, the provision said:

"*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 regulate contract.*"

In relation to the slide pack and owner's guide, the documents appear to be from 2011 and 2016 respectively. SC have accepted that this is generic evidence, in the sense that it isn't specific to Mr and Mrs O or the particular purchases they're complaining about here. And, in relation to the slide pack provided I'm aware that it was only in use up to 2013 i.e. prior to the sales that Mr and Mrs O are complaining about.

But in any event, while it's possible the product was sold to Mr and Mrs O as an investment, I don't ultimately think it's *probable* or that it's more likely than not what happened, based on the evidence provided in this particular case.

The reason I say this is that Mr and Mrs O haven't described what was said to them, by whom and in what circumstances to support the suggestion in question. SC have said in their response that they based the original complaint submitted to FHF on Mr and Mrs O's recollections. But in that complaint, it wasn't alleged that the Supplier sold the FPOC memberships to Mr and Mrs O as investments. So, it wouldn't therefore seem that Mr and Mrs O have any particular recollections of the sale in this regard, or I would've expected this information to have been included in the original complaint. Given this, while it's possible the product was sold to Mr and Mrs O as an investment, I'm still not sufficiently persuaded by what's been provided that this is more likely than not what happened in their particular case and Times of Sale.

I think it's again important to note that the judgment in the Judicial Review didn't find that FPOC Memberships, such as Mr and Mrs O's, were inevitably sold as investments or that there was any widespread mis-selling of such products.

We look at each case individually and just because two other Ombudsmen found the Supplier sold different, albeit similar, memberships to different consumers as investments, it doesn't follow I must come to the same overall conclusion in Mr and Mrs O's case. Here, based on the evidence provided in this particular case, I don't think it's more probable than not that the Supplier breached the prohibition on selling timeshares as investments.

Even if I'm wrong about that, based on what I've seen, I haven't been provided with sufficient evidence to suggest that the investment elements of the FPOC memberships were important enough to Mr and Mrs O's purchasing decision(s) to render their relationship with FHF unfair to them in a way that required a remedy if the memberships had, in fact, been sold as investments. Again, if it was important to them and that was something they remembered about their purchase, I would've expected it to have been included in the original complaint, considering SC have said that was made based on Mr and Mrs O's recollections.

Lastly, SC said previously that the FPOC Memberships amounted to UCISs. However, as I've said previously, that is a matter of law and was decided in the Judicial Review, when such a finding was rejected by the judge (at 39 to 54). It follows, as Mr and Mrs O acquired timeshare rights under the two purchases, they did not amount to UCISs.

Other points

Similarly with the other points of Mr and Mrs O's complaint, SC didn't make any further comments in relation to this part of it. Again, since I haven't been provided with anything more in relation to this part of the complaint by either party, it follows that my conclusions remain the same as set out in my provisional decision. For completeness, I confirm these and the reasons why, below.

Mr and Mrs O's representative SC argued the FPOC membership is a 'floating week' timeshare and in their view, illegal. They say this makes the purchase agreement(s) between Mr and Mrs O and the Supplier null and void and this in turn makes the debtor-creditor relationship(s) unfair under Section 140A of the CCA.

SC haven't explained the reasons why they feel a timeshare that provides for a 'floating week' or the ability to use points to book holidays, is a voidable agreement, or provided any evidence to support this assertion. There remains nothing I have seen that makes me think this is the case. Instead, having taken everything into account, including all relevant legislation, rules and regulations, I can't see anything that would mean the agreements were voidable. Points based timeshares were common models that haven't been prohibited in English law and I've seen nothing to suggest that all timeshare agreements had to refer to a specific apartment or set week.

Mr and Mrs O's representative also said that FHF charging an interest rate of 13.81% compared to the Bank of England 2011 base rate of 0.50% is an unfair term under the UTCCR.

FHF lent money to Mr and Mrs O and charged interest when doing so – that is normal, and I still do not see that charging interest would have led to an unfairness in this case.

SC argued that the rate of interest was too high when compared to the Bank of England base rate in force at the time. I accept that it was somewhat higher than that base rate, however I also see the interest rates were set out on the faces of the two loan agreements, so they would have been clear to Mr and Mrs O. Further, I've not been provided with any reason why such rates were unfair given Mr and Mrs O's circumstances, so I can't say the level of interest led to an unfairness that requires a remedy in this case.

Conclusion

Overall, taking into account all facts and circumstances of this complaint, I don't think that FHF acted unfairly or unreasonably when it declined Mr and Mrs O's Section 75 claim and I'm not persuaded that FHF was party to a credit relationship with Mr and Mrs O under the Credit Agreement(s) that was unfair to them. And, having taken everything into account, I see no other reason why it would be fair or reasonable to direct FHF to compensate Mr and Mrs O.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O and Mr O to accept or reject my decision before 26 June 2024.

Fiona Mallinson
Ombudsman