

## **The complaint**

Mrs M's complaint is, in essence, that First Holiday Finance Limited acted unfairly and unreasonably by: (1) participating in an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974; and (2) deciding against paying claims under Section 75 of that Act.

## **What happened**

I issued a provisional decision on this complaint in April 2024 in which I described what had happened as follows:

"Mrs M and her husband entered into an agreement with a holiday company for a trial membership of a holiday club in May 2011. The purchase price was £3,995, Mrs M paid a deposit of £500 and she entered into a fixed sum loan agreement with First Holiday Finance for a loan of £3,495 but she withdrew from that loan within the fourteen day withdrawal period.

Mrs M and her husband then entered into an acquisition agreement in August 2011 to buy 1,100 holiday club membership point rights from the holiday company (the 'Purchase Agreement'). The purchase price was £14,634 and they traded in their trial membership which was given a value of £3,995 so the balance due from them was £10,639. Mrs M's husband entered into a loan agreement with another lender for a loan of £6,387 and Mrs M entered into another fixed sum loan agreement (the 'Credit Agreement') with First Holiday Finance for a loan of £4,252. Mrs M agreed to make 144 monthly payments of £60.60 to First Holiday Finance but the loan was fully repaid by a debit card payment prior to the first monthly payment being collected in September 2011.

Mrs M, using a legal adviser, wrote to First Holiday Finance in April 2019 to complain about:

1. misrepresentations by the holiday company at the time of sale and a breach of contract, giving her claims under Section 75; and
2. First Holiday Finance's participation in an unfair credit relationship under the Credit Agreement and the related Purchase Agreement for the purposes of Section 140A.

Her representative's letter to First Holiday Finance said that: Mrs M had a claim for misrepresentation and that First Holiday Finance was jointly and severally liable with the holiday company for those misrepresentations; the misrepresentations and practices in the sales presentation made the loan agreement unfair; the lending was irresponsible; and there was no assessment Mrs M's financial position prior to the loan being made.

First Holiday Finance forwarded those claims to the holiday company and provided its response to Mrs M's representative. Mrs M wasn't satisfied with that response so

a complaint was made to this service. First Holiday Finance then said that the claims were time-barred under the Limitation Act 1980.

Our investigator didn't recommend that Mrs M's complaint should be upheld. She thought that First Holiday Finance was entitled to rely on the timing of Mrs M's misrepresentation claim to turn it down. She also thought that Mrs M's claim under Section 140A was made too late under the Limitation Act and she said that she hadn't seen anything persuasive to suggest that the lending was unaffordable for Mrs M.

Mrs M's representative says that Mrs M first became aware that she had cause for complaint when she took legal advice in March 2016 and it has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it used so this complaint has been passed to me for a decision".

### **My provisional decision**

I said in my provisional decision:

"I've read and considered all the available evidence and arguments to decide:

1. whether this service's jurisdiction permits me to consider the entire complaint and, if relevant;
2. what's fair and reasonable insofar as the merits of the complaint are concerned.

Having done so and subject to any further comments or evidence that I receive from any of Mrs M, her representative and First Holiday Finance, my provisional decision is that I intend to conclude that:

1. Mrs M's complaint about a credit relationship with First Holiday Finance that was unfair to her isn't within this service's jurisdiction because it wasn't referred to this service within the time limits set out in Rule 2.8.2 R(2) of the Dispute Resolution Rules ('DISP') in the Financial Conduct Authority's Handbook; and
2. Mrs M's complaint about First Holiday Finance's decision to reject her concerns about the holiday company's misrepresentations under Section 75 was made in time under DISP 2.8.2 R(2) but that it wouldn't be fair or reasonable for me to require it to take any action in response to her complaint.

### Was Mrs M's Section 140A complaint made in time?

Section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor. An assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into and the courts have said that determining whether or not the relationship complained of was unfair has to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which is the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

In alleging that she was subject to an unfair credit relationship under Section 140A, Mrs M's complaint extends to First Holiday Finance's acts and omissions, in being party to such a relationship and perpetuating its unfairness, right up until the moment that her credit relationship with it ended.

DISP 2.8.2 R covers whether Mrs M's complaint was made in time for the purposes of allowing this service to consider it and says: *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service ... more than: (a) six years after the event complained of; or (if later) (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that she had cause for complaint; ... unless ... in the view of the Ombudsman, the failure to comply with the time limits ... was as a result of exceptional circumstances ..."*.

#### (a) Six Years

The event complained about for the purposes of DISP 2.8.2 R (2)(a), is the allegation that First Holiday Finance was party to an unfair credit relationship with Mrs M and, during the currency of that relationship, it perpetuated the unfairness, failing in its responsibilities to take the necessary steps to correct the situation.

First Holiday Finance has provided evidence to show that Mrs M repaid the loan in full in September 2011 so I consider that the Credit Agreement and, in turn, Mrs M's credit relationship with First Holiday Finance, ended in September 2011. But her complaint about that credit relationship was first made to First Holiday Finance in April 2019 so it's clear that she complained more than six years after the event complained about.

#### (b) Three Years

DISP 2.8.2 R (2)(b) could provide Mrs M with more time to complain about the event in question if she did so within three years of the date she became aware, or ought reasonably to have become aware, that she had cause to complain. This raises the question as to whether Mrs M was aware, or ought reasonably to have been aware, more than three years before she first complained to First Holiday Finance that she had cause to complain to it.

So, that's what I've considered here and to answer that question, I need to consider whether and when Mrs M was aware, or ought reasonably to have been aware, that:

1. there was a problem with the lending or with the holiday club membership;
2. the problem(s) caused her a loss;
3. another party's actions (or its failure to act) may have caused the loss; and
4. the other party may have been First Holiday Finance.

Mrs M's representative's April 2019 letter sets out the reasons why Mrs M considers her credit relationship with First Holiday Finance to be unfair to her under the Credit Agreement and Purchase Agreement.

It says that: the lending was irresponsible and should never have been made; and First Holiday Finance: didn't make an assessment of Mrs M's financial position prior to granting the loan; and is in breach of the appropriate guidelines.

It's not unreasonable to suggest that most people would realise the importance to a lender of understanding a person's income before lending them money. And as Mrs M says that First Holiday Finance didn't make an assessment of her financial position, it seems to me that she ought reasonably to have known in August 2011 that First Holiday Finance had agreed to lend to her when there were serious questions left unanswered as to whether she could afford the loan – which is one of the arguments she's now making for why the credit relationship with First Holiday Finance was unfair to her.

This alone means that Mrs M ought reasonably to have realised that she had cause to complain that her credit relationship with First Holiday Finance might have been unfair to her long before she did so.

The letter also says that Mrs M and her husband encountered problems with: the lack of availability of holidays (especially during school and college holidays); their attempts to sell, assign, or rent out their membership; and the annual management fees increases being significantly greater than the rate of inflation. It says: *"In 2012, [Mrs M and her husband] attempted to sell their Points Membership. When they contacted [the holiday company], they were informed that they do not buy back Points, and that they would have to do so privately".*

It seems likely to me that it wouldn't have been long after August 2011 that Mrs M and her husband would have known that there were significant problems with the purchase causing Mrs M financial losses because of the lack of availability of holidays, them being told in 2012 that the holiday company didn't buy back points and the annual management fees increases being significantly greater than the rate of inflation.

So, when it looked like it was more difficult to holiday in the way that Mrs M and her husband wanted to, when they were told that the holiday company didn't buy back points and when they believed that their annual management charge increased by more than the rate of inflation for the first time, Mrs M knew, or ought reasonably to have known, that another party was responsible for the losses that followed. One of those parties was, quite obviously, the holiday company, but Mrs M also knew that First Holiday Finance had financed part of the purchase of the timeshare and that the holiday company had brokered the finance.

The April 2019 letter says: *"After approximately six-seven hours and based on what they had been told and shown, our clients agreed to trade in their Trial Membership, for Points Membership. The purchase was funded by way of a £6,387.00 Fixed-Sum Loan with [another lender], and a £4,252.00 Fixed-Sum Loan with [First Holiday Finance], both arranged by the [the holiday company's] representatives".*

Given the size of the financial commitment that Mrs M found herself with because of the purchase and the associated loan, and the long-term financial consequences of both of those commitments for her, I think it's reasonable to have expected Mrs M to carry out enquiries when concerns about the loan and the membership first arose in order to establish what her rights were.

What's more, Mrs M signed a complex contract, and with that being the case, if she wasn't already aware of the implications of her concerns and the possible complaints that she might make in light of them, the obvious course for her to take was to make further enquiries and seek advice. Such enquiries seem to me to have been a step she ought reasonably to have taken shortly after August 2011 when she began to have concerns about how the membership had been sold to her and how it was

working in practice. And had Mrs M carried out such enquiries, I think they would have led her to discover that First Holiday Finance, as a connected lender that financed part of her purchase, may well have borne responsibility for the holiday company's alleged failings.

With all of that being the case, I think that Mrs M ought reasonably to have been aware that she had cause to complain about First Holiday Finance holding her in an unfair credit relationship within the first few years of taking out the membership and certainly more than three years before she first complained. So, I'm not persuaded that the three-year part of the relevant time limit extends the six-year part of it for the purpose of Mrs M's complaint about an unfair credit relationship under Section 140A. And that means that she had to complain about First Holiday Finance's role in such a relationship by September 2017. But as she didn't do that until April 2019, her complaint was too late under the rules that I have to apply.

### Exceptional Circumstances

I can consider the merits of a complaint referred to this service after the expiry of the relevant time limit if there are exceptional circumstances that justify why it was late. But I can't see that there are any such circumstances that apply to Mrs M's complaint about an unfair credit relationship with First Holiday Finance.

I realise that this will be disappointing for Mrs M but I hope she understands why I can't disregard the rules that apply.

### Mrs M's Section 75 complaint

Section 75 operates quite differently to Section 140A and, when it applies, it can give borrowers a very different ground for complaint against their lender. Whereas, as I've explained, Section 140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, Section 75 simply creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything that the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which Section 75 imposes on the lender a "*like claim*" to that which the borrower enjoys against the supplier. If the lender is notified of a valid Section 75 claim, it should pay its liability and if it fails or refuses to do so, that failure or refusal can give rise to a complaint to this service.

So, when a complaint is referred to this service because of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages this service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the 6 and 3 year time limit under DISP 2.8.2 (2) R to complain about an unsuccessful attempt to initiate a Section 75 claim doesn't usually start until the respondent firm answers and refuses the claim. It's clear that this complaint about First Holiday Finance's handling of Mrs M's Section 75 claim was referred to this service in time for the purpose of the rules on our jurisdiction.

However, as I've already said, I don't think that it would be fair or reasonable to uphold this complaint for reasons relating to Mrs M's Section 75 claim. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 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's relevant to consider whether Mrs M's Section 75 claim was time-barred under the Limitation Act before she made it to First Holiday Finance.

A claim under Section 75 is a "*like claim*" against the creditor. It essentially mirrors the claim that the consumer could make against the supplier. A claim for misrepresentation against a supplier would ordinarily be made under Section 2(1) of the 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, under Section 2 of the Limitation Act.

But a claim, like the one in question here, under Section 75 is also "*an action to recover any sum by virtue of any enactment*" under Section 9 of the Limitation Act and the limitation period under that provision is also six years from the date on which the cause of action accrued. The date on which Mrs M's cause of action accrued was the time of the sale in August 2011. I say this because Mrs M entered into the Purchase Agreement at that time based on the alleged misrepresentations of the holiday company – on which she says she relied - and as the loan from First Holiday Finance was used to help finance the purchase, it was when she entered into the Credit Agreement that she suffered a loss.

Mrs M first notified First Holiday Finance of her Section 75 claim in April 2019 and as more than six years had passed between the time of sale and when she first made her claim to First Holiday Finance, I don't think it was unfair or unreasonable of First Holiday Finance to reject Mrs M's concerns about the holiday company's alleged misrepresentations".

Subject to any further comments or evidence that I received from any of Mrs M, her representative and First Holiday Finance, my provisional decision was that: this service's jurisdiction doesn't permit me to consider the merits of Mrs M's complaint about an unfair credit relationship with First Holiday Finance because it wasn't made within the time limits set out in DISP 2.8.2 R (2); and I don't consider that First Holiday Finance needs to do more in regard to the claim made under Section 75.

First Holiday Finance says that it has nothing further to add but neither Mrs M nor her representative has responded to my provisional 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.

As First Holiday Finance says that it has nothing further to add and neither Mrs M nor her representative has responded to my provisional decision, I see no reason to change the findings that I set out in my provisional decision. For the reasons set out in my provisional decision, I don't consider that First Holiday Finance needs to do more in regard to the claim made under Section 75.

I'm issuing a separate decision about Mrs M's complaint about an unfair credit relationship with First Holiday Finance.

### **My final decision**

My decision is that First Holiday Finance Limited needs to do no more in regard to the claim made under Section 75.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 8 July 2024.

Jarrold Hastings  
**Ombudsman**