DRN-5082223

The complaint

Ms N complains that Vacation Finance Limited ('VFL') is liable to pay her compensation following complaints made about timeshares bought using credit provided by VFL.

What happened

Ms N has made multiple purchases of timeshare memberships from a timeshare provider (the 'Supplier'), four of which were funded by point-of-sale loans provided by VFL. This decision relates to those four purchases and the associated finance agreements with VFL.

Each purchase (the 'Membership') was made following a sales presentation by the Supplier, and used a trade in allowance/deposit payment, with the balance of the purchase price covered by a loan from VFL which also consolidated the outstanding balance of the previous loan. The purchases, with their respective purchase dates and purchase prices were as follows:

Date	Purchase price	Total credit on loan agreement from VFL
14/02/2017	£116,539	£107,539
24/10/2017	£118,962	£111,762
28/01/2018	£154,604	£136,711
27/11/2018	£177,146	£160,646

The final loan agreement dated 27 November 2018 for £160,646 was paid off by Ms N after she made a lump sum payment on 27 November 2020.

On 23 June 2021, Ms N, via a professional representative (the 'PR') complained to VFL about each of the four purchases above. Although separate complaints, each made the same points about each sale and associated credit agreement:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against VFL under Section 75 of the Consumer Credit Act 1974 (the 'CCA'), which VFL failed to accept and pay.
2. A breach of contract by the Supplier giving her a claim against VFL under Section 75 of the CCA, which VFL failed to accept and pay.
3. VFL being party to unfair credit relationships under each of the credit agreements and related purchase agreements for the purposes of Section 140A of the CCA.
4. The decision(s) to lend being irresponsible because (1) VFL did not carry out the right creditworthiness assessment and (2) the money lent to her under the credit agreements was unaffordable for her.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Ms N says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told her that the Membership was an excellent investment which could be sold at a profit whenever she wished through the Supplier's resale scheme – this was not true.
- Told her that the purchase price being offered would only be available on that day – this was not true.
- Told her that the Membership would allow her to rent out her timeshare to make a profit – this was not true.

Ms N says that she has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against VFL, who, with the Supplier, is jointly and severally liable to Ms N.

(2) Section 75 of the CCA: the Supplier's breach of contract

Ms N says that the Supplier breached the Purchase Agreement(s) because it went into liquidation, and as a result Ms N says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against VFL, who, with the Supplier, is jointly and severally liable to Ms N.

(3) Section 140A of the CCA: VFL's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Ms N says that the credit relationships between her and VFL were unfair to her under Section 140A of the CCA. In summary, in addition to the misrepresentations set out above, they include the following:

- The Membership was marketed and sold to her as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The Supplier offered her the opportunity to enter into a regulated contract at a promotion or sales event, when the invitation did not indicate the purpose of the event, in breach of Regulation 14(2) of the Timeshare Regulations.
- She was pressured into purchasing the Membership by the Supplier and was not given sufficient time to read the purchase documentation prior to signing.
- The Supplier's sales presentation at the times of sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
- The decision to lend was irresponsible because no affordability checks were carried out on Ms N's ability to afford the loan(s) and VFL didn't carry out the right creditworthiness assessment.
- The Supplier failed to disclose the level of commission it would receive.

Other than acknowledging receipt of the letters of complaint, VFL did not send a formal response, so on 6 December 2022 Ms N, via the PR, referred each of her four complaints to this Service. As a result of the referral VFL sent the PR its final response letters for each complaint on 18 January 2023, rejecting each on every ground.

Ms N confirmed to our Service that she did not accept VFL's responses, so her complaints were assessed by an Investigator who, having considered the information on file, rejected each complaint on its merits.

Ms N disagreed with the Investigator's assessments and asked for an Ombudsman's decision on each – which is why the matter was passed to me.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4 R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Patel v Patel* [2009] EWHC 3264 (QB).
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

Having considered all the evidence and arguments that had been made, I didn't think Ms N's complaint ought to be upheld. I set out my provisional thoughts in a provisional decision, and invited all parties to respond with any submissions if they wished. In my provisional decision I said:

Ms N's complaint is in relation to four separate and distinct sales, each with its own credit agreement. As such, in this decision I need to consider each sale, and the linked credit agreement separately.

And having done that, I do not currently think any of Ms N's complaints should be upheld. But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75 of the CCA – misrepresentation and/or breach of contract

As there were four sales of the Membership, each with its own credit agreement, there are, in effect, four claims under Section 75 of the CCA.

The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against VFL under Section 75 essentially mirrors the claim Ms N could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed. But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. I have gone on to say what I think this means in respect of Ms N's Section 75 claims.

I have set out in the table above, the purchase price for each of the four Memberships purchased by Ms N which are the subject of these Section 75 claims. As can be seen, each purchase price is in excess of £30,000 so I am satisfied that none of Ms N's claims for misrepresentation under Section 75 of the CCA can succeed.

But as I've said, Section 75A of the CCA allows for a claim should the price of the purchase be over £30,000, but only in relation to a breach of contract by the Supplier. Ms N says that the Supplier breached the purchase agreements because it went into liquidation, so I'm satisfied the claim includes an element which is an alleged breach of contract, so this could potentially be considered under Section 75A. There are other criteria in order for Section 75A to apply, but I don't consider that I need to make a finding on that because, as I go on to explain below, whether it be under Section 75 or 75A, I do not think that VFL was unfair or unreasonable when it rejected Ms N's claim.

No date was given for when the liquidation Ms N has referred to occurred, nor did Ms N expand on how she thought this meant that the terms of her purchase agreement(s) had been breached. I can see that certain parts of the Supplier's business were taken over by another business, but neither Ms N nor the PR have said, suggested or provided evidence to demonstrate that as a result of this she is no longer able to utilise the Membership in the way she was entitled to when she made the purchase(s).

Overall, therefore, from the evidence I have seen to date, I do not think VFL is liable to pay Ms N any compensation for misrepresentation(s) or a breach of contract by the Supplier.

And with that being the case, I do not think VFL acted unfairly or unreasonably when it dealt with the Section 75 claims in question.

Section 140A of the CCA: did VFL participate in an unfair credit relationship?

I have already explained why I am not persuaded that VFL dealt with Ms N's Section 75 claims unreasonably. But Ms N also says that the credit relationships between her and VFL were unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales processes at the times of sale that she has concerns about. It is those concerns that I explore here.

As I have said, there were four purchases which are the subject of this complaint, each with an associated credit agreement, so each must and will be considered as individual events. However, the evidence provided by Ms N and the PR is identical for each, so I see no purpose in this provisional decision to repeat my findings four times. So, whilst treating them as individual events and having considered them as such, I will set out my findings as one.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationships between Ms N and VFL were unfair. But, for the reasons I've explained below, I don't currently think the credit relationships between Ms N and VFL were unfair to her for any of the reasons she's raised.

Ms N's complaints about VFL being party to unfair credit relationships were made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Ms N and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for her Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

PR also says that VFL breached Regulation 14(2) of the Timeshare Regulations by not indicating to Ms N the purpose of the invitation to the event(s) at which she made the purchases. However, I'm not persuaded that it is likely there was a breach here. From the evidence provided, I can see Ms N has made multiple purchases from the Supplier since 2011, and there are four such purchases being considered here. So given her purchasing history, and what Ms N must have known about the Supplier's marketing practices by 2017, I find it inherently unlikely that she was unaware that the meetings she attended in 2017 and 2018 were likely to be sales presentations.

PR has said that the credit relationships between Ms N and VFL were rendered unfair to her by virtue of undisclosed commission being paid to the Supplier by VFL. But there has been no evidence to suggest that any commission was paid, and VFL has stated in its final response letters that none was paid, so on balance, I am not persuaded that it was. And it follows that the credit relationship between Ms N and VFL cannot have been rendered unfair for this reason.

The PR says that the right checks weren't carried out before VFL lent to Ms N. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that VFL failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Ms N on each occasion was actually unaffordable before also concluding that she lost out as a result, and then consider whether the associated credit relationship with VFL was unfair to her for this reason.

I appreciate that Ms N has said that she is now finding her finances more difficult than they would have been had she not purchased the Membership(s) and taking the associated credit agreements. And I can see she has said she has had to access her savings to clear the balance of the final credit agreement. But the evidence provided, in the form of the 'Finance Calculator' document completed and signed at the time of the final loan application by Ms N suggests that this was likely to have been her intention all along, as it says, "Money is coming from Savings & Investment & is easily affordable". And having considered the bank statements that she has provided from around the time of each of the sales, I cannot see that the required repayments for any of the loans were likely to have been unaffordable given Ms N's circumstances and income/expenditure at the time. I understand that Ms N has since had to take an advance on her mortgage and a personal loan to pay for some essential repairs and purchases as she no longer had the savings to help with these, but I cannot see that these outgoings were in any way foreseeable at the times of the lending decisions, and they do not mean that the loan(s) in themselves were unaffordable for her.

So, from the information provided, I am not satisfied that any of the four loans were unaffordable for Ms N. If there is any further information on this (or any other points raised in this provisional decision) that Ms N wishes to provide, I would invite her to do so in response to this provisional decision.

Ms N says that she was pressured by the Supplier into purchasing the Membership on each occasion. I acknowledge that she may have felt weary after a sales process that went on for a long time, but she says little about what was said and/or done by the Supplier during her sales presentations that made her feel as if she had no choice but to purchase the Membership(s) when she simply did not want to. And there is nothing wrong with offering on-the-day incentives to purchase, especially as she was also given a 14-day cooling off period after each of the four purchases, and she has not provided a credible explanation for why she did not cancel any of her memberships during that time. Moreover, she did go on to upgrade her Membership three times after the initial purchase, and had been a customer of the Supplier since at least 2011 – which I find difficult to understand if the reason she went ahead with the purchases in question was because she was pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Ms N made the decision to purchase any of the Membership(s) under consideration here because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that any of Ms N's credit relationships with VFL which are being considered here were rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationships with VFL were unfair to her. And that's the suggestion that each Membership was marketed and sold to her as an investment in breach of the prohibition against selling timeshares in that way.

<u>Was the Membership marketed and sold as an investment in breach of Regulation 14(3) of the Timeshare Regulations?</u>

VFL does not dispute, and I am satisfied, that each of Ms N's Membership(s) met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling timeshare membership 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."

But PR says that the Supplier did exactly that at each time the Membership was sold to Ms N. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

To conclude, therefore, that the Membership was marketed or sold to Ms N as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold the memberships to her as an investment, i.e. told her or led her to believe, at the time of sale, that the Membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

I accept that it has been a feature of some traditional timeshares that consumers could benefit from a share of the sales proceeds of a relevant shared property. However, the main emphasis of the type of timeshare product being considered in this decision, seems to have been much more on securing long-term rights of accommodation for members rather than creating a property investment, with the ultimate possibility of a financial return not normally very immediate or likely and not therefore an attractive selling point in relation to them. But I understand from what PR said in the letters of complaint, that Ms N is alleging that the Supplier led her to believe she would be able to sell her membership (or some of the points associated with it) at any time for a profit, and she would also be able to make a profit from rental income.

After our Investigator provided his assessment of Ms N's complaint, she provided a written statement setting out her recollections of the sales and what she was told. But there is little in the statement which makes mention of the 'investment element' of the purchases and what she was told when the Membership(s) were sold to her. And that is important in the context of this part of her complaint – that being a breach of Regulation 14(3) – which had to have happened at the time of the sale. She says "I was advised all purchases would sell and given their desirability I would at least get my money back" but there is no indication of when she was told this, nor by whom and in what context. Indeed, this sentence is immediately followed by a description of a conversation which appears to have happened at some point after she had made all of the purchases. Then towards the end of her statement she says:

"…Although they were not intended to be a financial investment as such, as I stated earlier [the Supplier] had promised that they would be able to resell them for me once all their timeshares were sold and I was given the impression I would at least get my money back as all purchases was part of a pathway plan to a full fractional freehold property ownership which could be sold on the open market."

But again, there is nothing to suggest when this was said, and by whom and in what context. Indeed, the statement includes some detail of what she was told by the Supplier up to the point in 2019 that it went into liquidation, and this clearly cannot have happened at any of the points of sale being considered here. And the statement also makes mention of a "full fractional freehold property" which bears no resemblance to the memberships sold to Ms N by the Supplier.

So, I am not persuaded that it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations at any of the times of sale.

But even if I am wrong to conclude that Ms N's Membership(s) were unlikely to have been sold in that way, given what I have already said about Ms N's recollections of the sales

processes at the times of sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between VFL and Ms N rendered unfair?

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Ms N and VFL that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[1] led her to enter into the purchase agreements and credit agreements is an important consideration. And I don't think it did. Indeed, in Ms N's own statement she says "…Although they were not intended to be a financial investment as such…" which leads me to think it unlikely that any potential investment element here was not an important consideration for her – I think she would likely have pressed ahead with the purchases in any event. And this is supported by Ms N's statement, which concludes that she had "…wanted myself and my family to enjoy the fruits of my labour in my retirement" which, to my reading, can only relate to the holiday rights afforded by the Membership.

On balance, therefore, even if the Supplier had marketed or sold the Membership(s) as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Ms N's decision to purchase the Membership at any of the times of sale being

[1] which, having taken place during its antecedent negotiations with Ms N, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by VFL)

considered here was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Ms N and VFL was unfair to her even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between VFL and Ms N was unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that VFL acted unfairly or unreasonably when it dealt with Ms N's Section 75 claims, and I am not persuaded that VFL was party to a credit relationship with her under any of the credit agreements being considered here that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct VFL to compensate her.

If there is any further information on this complaint that Ms N wishes to provide, I would invite her to do so in response to this provisional decision.

Neither the Lender, Ms N nor the PR 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 neither Ms N nor the Lender responded to my provisional decision, I see no reason to depart from my findings as set out above. But I do so having reconsidered everything afresh.

My final decision

I do not uphold Ms N's complaint against Vacation Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms N to accept or reject my decision before 12 November 2024.

Chris Riggs
Ombudsman