DRN-5501798

## The complaint

Mr and Mrs W's complaint is, in essence, that First Holiday Finance Limited (the 'Lender') acted unfairly and unreasonably by (1) participating in an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 – as amended - (the "CCA"), (2) deciding against paying a claim under Section 75 of the CCA, (3) lending irresponsibly having failed to conduct the required affordability checks and (4) enforcing a credit agreement arranged by an unauthorised credit broker.

## What happened

On 25 April 2006 (the 'Time of Sale'), Mr and Mrs W upgraded their existing timeshare product by purchasing a new timeshare membership product (the 'Timeshare') from a timeshare provider (the 'Supplier'). They entered into an agreement with the Supplier to buy 2,501 timeshare points at a cost of £34,613 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £6,793 for the new Timeshare.

Mr and Mrs W paid for their Timeshare by taking finance of £6,293 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs W wrote to the Lender on 18 March 2022 (the 'First Letter of Complaint') to complain that the Supplier was not permitted or authorised to arrange loans as prohibited by section 19 of the Financial Services and Markets Act 2000 ('FSMA').

In response, the Lender said the Supplier did hold the relevant license as issued by the Office of Fair Trading (the 'OFT'), so didn't uphold Mr and Mrs W's complaint. Unhappy with the Lender's response, Mr and Mrs W, using a professional representative (the 'PR'), referred their complaint to the Financial Ombudsman Service. However, that complaint referral was subsequently withdrawn without the merits being considered by this service.

On 25 January 2024, the PR (on behalf of Mr and Mrs W) wrote to the Lender again (the 'Second Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA ('s.75'), which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under s.75, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA ('s.140A').
4. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
5. The Credit Agreement being unenforceable because it was not arranged by a regulated credit broker.

(1) S.75: the Supplier's misrepresentations at the Time of Sale

Mr and Mrs W say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- promised to buy back the Timeshare as and when Mr and Mrs W wished but did not do that;
- said Mr and Mrs W would have exclusive and unlimited access to all of the Supplier's holiday resorts within a variety of exotic locations, but that was not true;
- said the membership fee would be paid annually though the sum would gradually increase, in line with inflation (it at all), and not at an extortionate unjustified rate, but that was not true;
- said the membership was an investment that could be bequeathed to Mr and Mrs W's family to use, but that was not true; and
- said the membership was an enhancement to their previous Timeshare, but that was not true.

Mr and Mrs W say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under s.75, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs W.

(2) S.75: the Supplier's breach of contract

- Mr and Mrs W said that they found it difficult to book the holidays they wanted, when they wanted; and
- the standard of accommodation they booked wasn't to the level promised and showed to them at the Time of Sale.

As a result of the above, Mr and Mrs W's complaint suggests that they have a breach of contract claim against the Supplier, and therefore, under s.75, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs W.

(3) S.140A: the Lender's participation in an unfair credit relationship

The Second Letter of Complaint also set out several reasons why Mr and Mrs W say that the credit relationship between them and the Lender was unfair to them under s.140A. In summary, they include the following:

- They were pressured into purchasing the Timeshare by the Supplier.
- The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.
- Mr and Mrs W were not given sufficient time to consider whether they could afford the ongoing costs associated with the Timeshare

The Lender dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter on 29 April 2024, rejecting it on every ground.

Mr and Mrs W then referred their complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs W disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In doing so, the PR (on their behalf) explained in detail why it disagreed with the investigator's findings. In particular, the PR:

- raised concerns about the Lenders adherence to the Dispute Resolution Rules ('DISP') contained within the Financial Conduct Authority's (the 'FCA') Handbook which it thought should be reflected in any decision;
- argued that section 32 of the Limitation Act 1980 (the 'LA') should apply in so far as any limitation under the LA should be postponed as:
    - statements made by the Supplier were fraudulent and couldn't reasonably have been discovered by Mr and Mrs W;
    - the Lender should have been aware that the Supplier wasn't authorised to broker credit and concealed that fact Mr and Mrs W;
- referenced case law to support their argument that the claim should be considered further as the credit relationship between Mr and Mrs W and the Lender had not ended.
- Argued that the investigator had failed to expand on some of their reasons why they didn't think the relationship between Mr and Mrs W and the Lender was unfair.
- argued that the misrepresentations contributed to the unfairness between Mr and Mrs W and the Lender.
- Explained why it thought the findings in 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') should be applied to Mr and Mrs W's complaint.

Having considered the relevant information about this complaint, I was inclined to reach the same conclusion as our investigator. In some parts for slightly different reasons, and in other's I took the opportunity to expand upon the reasoning. So, I issued a provisional decision ('PD') on 9 April 2025 giving Mr and Mrs W and First Holiday Finance Limited the opportunity to respond to my findings below, before I reach a final decision.

In my PD I said:

> Relevant considerations
>
> When considering what's fair and reasonable, DISP 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
>
> The CCA introduced certain protections that afforded consumers (like Mr and Mrs W) a right of recourse against lenders (like the Lender here) that provide the finance for the acquisition of goods or services (like the Timeshare purchased) from suppliers.
>
> The concerns Mr and Mrs W have about the sale of the Timeshare they purchased only constitute a complaint that the Financial Ombudsman Service has the authority to consider if those concerns are considered with at least one of those provisions of the CCA in mind.
>
> S.75 provides protection for consumers for goods or services bought using credit. Mr and Mrs W paid for the Timeshare under a new Credit Agreement with the Lender specifically for that purpose. So, it isn't in dispute that s.75 applies here – subject to any restrictions and limitations. So, where the requirements of the CCA are met, it means Mr and Mrs W are afforded the protection offered to borrowers like them

under those provisions. As a result, I've taken this section into account - together with any related provisions within the CCA - when deciding what's fair in the circumstances of this case.

S.140A looks at the fairness of the relationship between Mr and Mrs W and the Lender arising out of the credit agreement (taken together with any related agreement). As the Timeshare purchased was funded under the Credit Agreement, they're deemed to be related agreements. Only a court has the power to make a determination under s.140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Given the facts of the Mr and Mrs W's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transaction - the purchase funded by the Credit Agreement with the Lender - took place in April 2006. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered any effect this might also have.

I want to make it clear that I've based my decision on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. When doing that, my role isn't to address every single point that's been made. So, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided by both sides.

The credit broker's authorisation

The PR believes that the Supplier wasn't authorised to broker the Credit Agreement. Because of that, it believes Mr and Mrs W's loan is unenforceable.

The Credit Agreement Mr and Mrs W entered into was dated 10 May 2006. The FCA took on the regulation of consumer credit on 1 April 2014. Prior to that, consumer credit was regulated by the Office of Fair Trading ("OFT") under the CCA. And the Supplier would need to have held a license from the OFT.

This service's records show that the Supplier (named in the Credit Agreement) came under this service's Consumer Credit Jurisdiction from 6 April 2007 – when our Consumer Credit Jurisdiction first started. To do so, the Supplier would've needed to hold a license issued by the OFT at that point. The lender has said that the Supplier did hold the necessary license from the OFT at the Time of Sale. And I've not seen any evidence to suggest that wasn't the case.

Section 27 of the Financial Services and Market Act 2000 ("FSMA") (*"Agreements made through unauthorised persons"*) only applies to (FCA) regulated activities, which in this case doesn't cover consumer credit lending prior to 1 April 2014.

In October 2019, the FCA issued explanation and guidance relating to Validation Orders to allow an otherwise unenforceable credit agreement. This was updated in February 2023. Insofar as it's relevant to Mr and Mrs W's complaint, the FCA explanation says,

*"For agreements entered into before 1 April 2014, a modified regime applies.* […] *For agreements that were entered into before this date and which are unenforceable against the borrower, the borrower has no right to recover any money paid or other property transferred under the agreement or compensation for loss".*

That aside, if Mr and Mrs W's Credit Agreement was found to be unenforceable – and I make no such finding – it would normally mean that whilst the obligations under the agreement remain in existence, one or both parties to the agreement can't enforce compliance in the courts. So, if the Lender took steps against Mr and Mrs W to enforce the agreement, there might be a defence.

However, Mr and Mrs W took the finance from the Lender and knew they had it, the amount borrowed and what it was for (the Timeshare purchase). So, even if it was found to be improperly brokered, I haven't seen anything that persuades me that it would've resulted in something that would require the payment of compensation.

Mr and Mrs W's misrepresentation complaint under s.75

At the outset, I've considered the Purchase Agreement that Mr and Mrs W entered into with the Supplier. I've seen a document headed "Application for Membership of [the Supplier's Timeshare product] and Purchase Agreement".

Schedule 2 on the front page shows that Mr and Mrs W purchased new points rights totalling 2,501 and sets out the costs as follows:

| | | | |
|---|---|---|---|
| (1) Purchase Price: | | GBP | 34,613.00 |
| (2) Membership/Dues: | | GBP | 0.00 |
| (3) Total | | GBP | 34,613.00 |
| (4) No Deposit Payable: | | GBP | 0.00 |
| (5) Trade In Value | | GBP | 27,820.00 |
| **Balance Due Before:** | 09/06/06 | GBP | 6,793.00 |

So, it appears that the agreed purchase price of the Timeshare was £34,613. And the figure of £6,793 detailed within Second Letter of Complaint was, in fact, the price paid after trade in of Mr and Mrs W's existing timeshare membership.

Having established this, I then considered what s.75 says. In particular, under s.75(1), it says:

> *"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor".*

However, s.75(3) then goes on to say:

> *"Subsection (1) does not apply to a claim—*
>
> *(b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000 […]"*

So, based upon the Purchase Agreement Mr and Mrs W provided with their claim, it appears the purchase price was for more than £30,000. And because of that, I don't think the provisions of s.75 apply to Mr and Mrs W's claim for misrepresentation of the Timeshare.

However, even if I'm wrong about that, there's another reason why I don't believe Mr and Mrs W's claim for misrepresentation should succeed.

S.75 creates a financial liability that the creditor (the Lender) is bound to pay. Liability under s.75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the Supplier. S.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 s.75 claim, it should pay its liability. And if it fails or refuses to do so, that can give rise to a complaint to this service.

However, I don't think it would be fair or reasonable to uphold Mr and Mrs W's complaint for reasons relating to the s.75 misrepresentation claim. As a general rule, creditors can reasonably reject s.75 claims that they are first informed about after the

claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr and Mrs W's s.75 claim was time-barred under the LA before it was put to the Lender.

As I've explained, a claim under s.75 is a "like" claim against the creditor. It essentially mirrors the claim Mr and Mrs W could make against the Supplier. A claim for misrepresentation against the 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 (see Section 2 of the LA).

But a claim under S75, like this one, is also *"an action to recover any sum by virtue of any enactment"* under Section 9 of the LA. 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 the cause of action accrued here was the Time of Sale. I say this because Mr and Mrs W entered into the purchase of the timeshare product at that time based upon the alleged misrepresentations of the Supplier – which Mr and Mrs W say they relied upon. And as the Credit Agreement with the Lender provided funding to help finance that purchase, it was when they entered into the Credit Agreement that they allegedly suffered the loss.

The PR first notified the Lender of Mr and Mrs W's s.75 complaint in January 2024. And as more than six year had passed between the Time of Sale and when the complaint was first put to the Lender, I don't think it was ultimately unfair or unreasonable for the Lender to reject their concerns about the Supplier's alleged misrepresentations.

Could the limitation period be postponed?

The PR argue that the limitation period should be postponed under Section 32 of the LA ('s.32') because facts relevant to Mr S's claim were deliberately concealed.

Section 32(1)(b) applies when *"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant"* [my emphasis]. But the PR haven't provided me with any persuasive evidence to demonstrate that the Supplier deliberately concealed anything in relation to the various allegations that Mr and Mrs S wouldn't have realised well before they submitted the claim.

Further, the PR suggests that the Lender should have been aware that the Supplier wasn't authorised to broker the Credit Agreement and deliberately concealed that from Mr and Mrs W. As I've already said, I've seen no evidence to suggest the Supplier wasn't appropriately authorised. And as I still can't see why, given the allegations fuelling the claim, these particular issues prevented Mr and Mrs W from making a claim or - at the very least - raising a complaint earlier, my view is that this particular argument by the PR doesn't help Mr and Mrs W's cause.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide time could be extended in keeping with the provisions of the s.32 of the LA.

Mr and Mrs W's breach of contract complaint under s.75

I've already summarised how s.75 works and why it gives Mr and Mrs W a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender may also be liable.

Mr and Mrs W say that they could not holiday where and when they wanted to and the accommodation they booked didn't meet the standard promised and shown to

them by the Supplier. On my reading of the complaint, this suggests that they consider that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement.

I've already explained why I believe that the purchase price included within the Purchase Agreement means that Mr and Mrs W's claim exceeds the limits permitted under s.75. However, section 75a CCA (s.75a') does allow claims for breach of contract relating to purchases up to £60,260.

This is what s.75a says:

> *(1) If the debtor under a linked credit agreement has a claim against the supplier in respect of a breach of contract the debtor may pursue that claim against the creditor where any of the conditions in subsection (2) are met.*
>
> *(2) The conditions in subsection (1) are—*
>
> *(a) that the supplier cannot be traced,*
>
> *(b) that the debtor has contacted the supplier but the supplier has not responded,*
>
> *(c) that the supplier is insolvent, or*
>
> *(d) that the debtor has taken reasonable steps to pursue his claim against the supplier but has not obtained satisfaction for his claim.*

Having considered this, I haven't seen any evidence to suggest that the conditions above have been met in Mr and Mrs W's case. So, it may not be possible for a successful claim to be made under s.75a.

However, even if I'm wrong about that, I don't think that Mr and Mrs W's complaint about the Supplier breaching the Purchase Agreement should succeed. I haven't seen any evidence to suggest that Mr and Mrs W were not able to secure bookings at any time Furthermore, it also looks like they made use of their Timeshare points to holiday on 12 occasions between July 2006 and September 2009. I accept that they may not have been always able to take certain holidays, although the Lender says that the Supplier has no record of Mr and Mrs W failing to secure a holiday they wanted to book.

Furthermore, I've not seen any evidence that shows that the standard of accommodation that Mr and Mrs W say they were told they could enjoy differed from the accommodation they actually booked. And with that being the case, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr and Mrs W's unfair relationship complaint under s.140A CCA

The court may make an order under s.140B CCA in connection with a credit agreement if it determines that the relationship between the creditor (the Lender) and the debtor (Mr and Mrs W) is unfair to the debtor because of one or more of the following (from s.140A CCA):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

Only a court has the power to make a determination under s.140A. But as it's relevant law, I've considered it when looking at the various allegations.

A claim under s.140A is a claim for a sum recoverable by statute – which is also governed by Section 9 of the LA. As a result, the time limit for making such a claim is also six years from the date on which the cause for action accrued.

However, in determining whether or not the relationship complained of was unfair, the High Court's decision in *Patel v Patel (2009)* decided this could only be determined by *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination".* In that case, that was the date of the trial or otherwise the date the credit relationship ended.

So, having considered this, I believe the trigger point here is slightly different. Any relationship between Mr and Mrs W and the Lender continues while the Credit Agreement remains live. So, that relationship only ends once the Credit Agreement ends and any borrowing under it has been repaid.

A statement for the Credit Agreement Mr and Mrs W entered into with the Lender shows that it was still active in October 2018. As Mr and Mrs W's complaint was submitted in January 2024, this is within six years of when the Credit Agreement was shown as being active. Based upon this, I think Mr and Mrs W's complaint under s.140A was made in time. So, it is those concerns that I will explore here.

- Misrepresentation

In determining if the relationship is unfair under s.140A (under the points detailed above), I think the alleged misrepresentations are relevant here. Further, even though I think it likely they couldn't be considered under s.75 CCA due to the effects of the LA, I think they could still be considered under s.140A CCA[1]. So, in trying to establish whether I think a court would likely find that an unfair relationship existed, I've considered the alleged misrepresentations further in addition to the various other points raised in this complaint.

For me to conclude there was misrepresentation by the Supplier in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Timeshare to Mr and Mrs W. In other words, that the Supplier told Mr and Mrs W something that wasn't true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mr and Mrs W to enter into the Purchase Agreement. This means I would need to be persuaded that they reasonably relied upon false statements when deciding to buy the Timeshare.

From the information available, I can't be certain about what Mr and Mrs W were specifically told (or not told) about the benefits of the Timeshare they purchased at the Time of Sale. While the PR has listed what Mr and Mrs W say was represented to them by the Supplier, I haven't seen any evidence to substantiate those allegations. It was, however, indicated that they were told those things. So, I've thought about that alongside the evidence that is available from the Time of Sale.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr and Mrs W's complaint, such as marketing material or any of the wider purchase documentation from the Time of Sale that echoes what the PR says Mr and Mrs W were told.

The Second Letter of Complaint suggests the Supplier promised Mr and Mrs W it would buy back the Timeshare. But the documentation provided makes no such reference. To the contrary, I've seen a document headed 'Member's Declaration'

[1] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

which Mr and Mrs W have signed. Point seven on that document says, *"We understand that* [the Supplier] *does not and will not run any resale or rental programme".* And the Lender says that the Supplier has confirmed that there's no record of Mr and Mrs W ever requesting that their Timeshare be sold. Further, I can't see that Mr and Mrs W have provided any evidence demonstrating that they did attempt to sell their Timeshare.

Mr and Mrs W allege the Supplier told them that the Timeshare was an investment that could be bequeathed to their family. But again, I've seen no evidence to support that allegation. There's nothing within the documentation from the Time of Sale to support that. In fact, Point eight of the Member's Declaration says, *"We understand that the purchase of our membership* […] *is for the primary purpose of holidays and is not an investment in real estate.* I think it unlikely the product can have been marketed and sold as an investment simply because there might have been some inherent value to it. And in any event, I've found nothing within the evidence provided to suggest the Supplier gave any assurances or guarantees about the future value of the Timeshare Mr and Mrs W purchased. The Supplier would had to have presented the product is such a way that used any investment element to persuade Mr and Mrs W to contract.

The PR refers to the findings in Shawbrook & BPF v FOS to support this allegation. However, this particular Judicial Review was concerned with a very different kind of Timeshare product that was linked to the eventual sale of an allocated property, with the resultant return of those sale proceeds to the Timeshare owners. I can't see that was the case here. So, I don't believe the findings in that particular judgment help Mr and Mrs W's case.

Finally, Mr and Mrs W allege the Supplier sold the Timeshare as an enhancement to their previous membership. From the evidence available, it appears the new Timeshare afforded additional points to Mr and Mrs W together with other benefits. I haven't seen any evidence that demonstrates that Mr and Mrs W were told that their membership would be enhanced. Or, if that were the case, that the purchase they made didn't afford them additional benefits or access to holidays.

Having considered everything available, I haven't seen anything to support the allegations here. And because of that, I can't reasonably say, with any certainty, that the Supplier did misrepresent the Timeshare Mr and Mrs W purchased in the ways alleged.

- <u>The pressured sale and process</u>

The Second Letter of Complaint suggests at various points that Mr and Mrs W were pressured or coerced into entering into the Purchase Agreement. I acknowledge what the PR has said about this and understand that Mr and Mrs W may have felt weary after a sales process that may have continued for a long time. But they don't say anything about what was said and / or done by the Supplier during the sales presentation that made them feel as if they had no choice but to purchase the Timeshare when they simply did not want to.

Furthermore, both the front page and page three of the Purchase Agreement dated 25 April 2006 clearly confirms Mr and Mrs W's right to cancel the agreement within 14 days. This is stated in block capitals immediately above their signatures. Further, there is a similar provision on the Credit Agreement next to where Mr and Mrs W signed it. However, they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs W made the decision to purchase the Timeshare because their ability to exercise that choice was – or was likely to have been - significantly impaired by pressure from the Supplier.

- The annual maintenance/membership charges

Several allegations have been made about the annual charges that Mr and Mrs W were contractually obliged to pay under the Purchase Agreement they entered into. In particular, suggesting that these either weren't highlighted or weren't adequately explained to them.

From the information available, I can see reference to the annual charges payable. In particular in points E. and F. on page two of the Purchase Agreement and point six of the Members Declaration, with reference to the Supplier's Memorandum and Articles of Association together with the Scheme Rules and Regulations of the Company. Point 11 of the Member's Declaration confirms that Mr and Mrs W *"…received a copy of our Agreement together with the notices required under the"* regulations that applied.

Mr and Mrs W already held a Timeshare product with the Supplier at the Time of Sale. And I understand they had been paying annual charges under that agreement. So, I think it's reasonable to conclude they were aware that such charges would be payable. It's also relevant that the PR hasn't demonstrated how and if the charges paid differ from what was contractually included within the wider Purchase Agreement.

It's not unusual for such agreements to include provisions for recalculation of those charges each year. So, I wouldn't consider increases to be out of the ordinary in themselves. Furthermore, and in the absence of any further supporting evidence, I don't think it's possible to reasonably assess the fairness (or otherwise) of their calculation and application here. And as I have not seen any evidence to suggest that the requirement to pay those charges operated in such a way as to cause unfairness in Mr and Mrs W's case, I can't reasonably conclude that they did.

- Credit Assessment

Whilst the allegation that the Lender failed to undertake a proper credit assessment when the Credit Agreements were first entered into by them could be considered as a separate complaint outside of s.140A, it's possible that the complaint was made too late to be considered that way. However, I have thought about whether there's any evidence to support this particular allegation, and whether that may have resulted in unfairness under s.140A.

The Lender has confirmed that it conducted its standard underwriting procedures to ensure the loan was affordable for Mr and Mrs W albeit, it hasn't provided any further details of that assessment. And with the passage of time, it's possible that information is no longer available.

If I were to find that the Lender hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that repayments under the Credit Agreements weren't sustainably affordable for Mr and Mrs W in order to uphold any complaint here.

I haven't seen any information about Mr and Mrs W's actual financial situation at the time the Credit Agreement was entered into. And there's no obvious suggestion or evidence that they have struggled to maintain repayments. So, I can't reasonably conclude the Credit Agreement was unaffordable for them. And because of that, I don't think it likely that any unfairness resulted in Mr and Mrs W's case.

Other matters

On a final note, the PR has raised concerns about the Lenders adherence to the rules set out in DISP when considering Mr and Mrs W's complaint. In particular, it thought this service should consider the Lender's conduct when considering Mr and Mrs W's complaint.

DISP 2.3.1R says that the Ombudsman can consider a complaint under its Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the regulated or other covered activities, or any ancillary activity carried on by the firm in connection with them.

In DISP 2.1.4G (3), carrying on an activity includes, *"the manner in which a respondent has administered its business, provided that the business is an activity subject to the Financial Ombudsman Service's jurisdiction."* So we can look at the activity, and how the activity was carried out (emphasis added).

The relevant case law is *R (Mazarona Properties Ltd) v Financial Ombudsman Service [2017]* EWHC 1135 (Admin). In summary, this confirms that a complaint about complaint handling is not a complaint about a 'financial service', so falls outside this service's jurisdiction.

Furthermore, It isn't the role of the Financial Ombudsman Service, nor is it afforded powers, to act upon a financial business's alleged failure to adhere or comply with the DISP rules when reaching a fair and reasonable outcome for a consumer. That is the role of the regulator – here that's the FCA.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs W's s.75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes s.140A. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that the Mr and Mrs W wish to provide, I would invite them to do so in response to this provisional decision.

With the time given for further comments and information having now passed, Mr and Mrs W's complaint has been passed back to me.

**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.

The Lender acknowledged receipt of my PD and confirmed it had nothing further to add.

Despite follow up by this service, no response was received from either the PR or Mr and Mrs W.

In these circumstances, and in the absence of anything new to consider, I've no reason to vary from my provisional findings. So, for the reasons mentioned above, I won't be asking the Lender to do anything more here.

**My final decision**

For the reasons set out above, I do not uphold Mr and Mrs W's complaint about First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W and Mr W to accept or reject my decision before 22 May 2025.

Dave Morgan
**Ombudsman**