DRN-5752663

The complaint

Mr and Mrs H's complaint is, in essence, that First Holiday Finance Ltd ('FHF') acted unfairly and unreasonably by (1) participating in an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

On 17 August 2015 (the 'Time of Sale') Mr and Mrs H entered into a credit agreement with FHF to fund their purchase of a Signature Collection Membership with a timeshare provider ('the Supplier'). Mr and Mrs H agreed to purchase 2450 points from the Supplier for £6,594. In December 2016, Mr and Mrs H settled their loan with FHF in full.

On 1 February 2023, Mr and Mrs H, through their personal representative ('PR'), complained to FHF. They complained that FHF acted unfairly and unreasonably by: -

1. Being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (the 'CCA');
2. Deciding against paying a claim under Section 75 of the CCA;
3. Lending money to Mr and Mrs H irresponsibly;
4. Enforcing a credit agreement that wasn't arranged by an authorised broker.

Mr and Mrs H's Section 75 Complaint

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

1. Their timeshare was an "investment" that would considerably increase in value.
2. They would have a share of the property and its value would considerably increase and thus they were promised a considerable return on their investment.
3. They could sell the timeshare back to the resort or easily sell it at a profit.
4. They were made to believe they would have access to the holiday apartment at any time all around the year.

Mr and Mrs H's Section 140A Complaint

The Letter of Complaint set out a number of reasons why Mr and Mrs H say the credit relationship between them and FHF was unfair to them, principal of which was that the Supply Agreement provided the Supplier with the option to rescind the Agreement in the event Mr and Mrs H failed to make any payment due under the agreement within 14 days of receiving notice from the Supplier to that effect whereupon all monies paid by them would be forfeited and the Supplier's liability discharged. The PR said this clause put Mr and Mrs H in an unfair relationship.

FHF dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 13 February 2023 rejecting it on the basis that there was a defence to the complaint under the Limitation Act 1980 (the 'LA').

As a result, the complaint was referred to the Financial Ombudsman Service on 20 March 2023. Our Investigator looked into the complaint and thought that the concerns raised by the PR in relation to section 140A were brought to us outside the time limits in our rules. In respect of the other aspects of Mr and Mrs H's complaint, the investigator saw no reason to uphold it. But the PR disagreed with the investigator's assessment and asked for an ombudsman's decision, so it was passed 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.

I should first point out the Financial Ombudsman Service doesn't have the power to investigate every complaint that's referred to us. We can only consider complaints which fall within our jurisdiction. The Financial Services and Markets Act 2000 (FSMA) gives the Financial Conduct Authority (FCA) the power to say which complaints we can and can't consider. The rules setting this out are known as the DISP rules and can be found within the FCA handbook.

As our Investigator noted, our DISP rules require that complaints are brought within certain time limits. Where – as here – a respondent business hasn't consented to us dealing with a complaint, I can't usually deal with complaints raised more than six years after the event complained about or, if later, more than three years after the complainant knew (or ought reasonably to have known) they had cause for complaint. So, I have considered, therefore, whether the complaints were made in time – starting with the Section 140A complaint and then moving onto the Section 75 complaint.

Mr and Mrs H's Section 140A Complaint

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been, or continue to be, unfair to the debtor because of the terms of the credit agreement itself and how the creditor exercised or enforced its rights under the agreement. Such a finding may also be based on the terms of any related agreement and, when combined with Section 56 of the CCA, on anything done or not done by the Supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

In cases such as this one, when restricted credit was granted, Section 56 of the CCA created a statutory agency relationship between the Supplier and FHF because it states that any negotiations between a debtor and the supplier before a transaction financed by a debtor-creditor-supplier agreement are deemed to have been conducted by the supplier as an agent of the creditor. This means that the Supplier was acting 'on behalf of' FHF when it sold Mr and Mrs H their timeshare at the Time of Sale, such that the Supplier's pre-contractual acts and/or omissions are relevant to the complaint that FHF was party to an unfair relationship under Section 140A of the CCA.

However, 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. The High Court held in *Patel v Patel* [2009] EWHC 3264 (QB) (which was recently approved by the Supreme Court in the case of *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34), that determining whether or not the relationship complained of was unfair had 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 was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

So, for as long as the Credit Agreement remained active, which in Mr and Mrs H's case was from 17 August 2015 to December 2016, FHF was responsible for the matters that might have made its relationship with Mr and Mrs H unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair.

Accordingly, in alleging that they were subject to an unfair credit relationship under Section 140A, Mr and Mrs H's complaint extends to FHF's acts and omissions, in being party to such a relationship and perpetuating its unfairness, right up until the moment their credit relationship with it ended.

Was Mr and Mrs H's Section 140A complaint made in time?

Section 2 of our DISP rules covers whether Mr and Mrs H's complaints were made in time for the purposes of allowing the Financial Ombudsman Service to consider them. This is what DISP 2.8.2 R says (insofar as its relevant to this complaint): -

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

[…]

(2) 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 he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received; […]

unless:

[…]

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R […] was as a result of exceptional circumstances; or […]"

Part 1 – Six Years

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

The Credit Agreement and, in turn, Mr and Mrs H's credit relationship with FHF started in September 2015 ended in December 2016. But their complaint about that credit relationship was first made to FHF on 1 February 2023. Clearly Mr and Mrs H's complaint was made more than six years after the event complained about. And, even though, as Mr and Mrs H's PR contends, the limitation period for S140A is six years *after* the loan was repaid in full, that would still mean that they needed to bring their complaint by December 2022. Thus, even under this metric Mr and Mrs H's complaint was not made in time.

Part 2 – Three Years

However, that isn't the end of the matter. DISP 2.8.2 R (2)(b) could provide Mr and Mrs H with more time to complain about the event in question if they did so within three years of the date they became aware, or ought reasonably to have become aware, that they had cause to complain.

This raises the question as to whether Mr and Mrs H were aware, or ought reasonably to have been aware, more than three years before they first complained to FHF that they had cause to complain to it.

So, that's what I've considered here.

To answer this question, I need to consider whether and when Mr and Mrs H were aware or ought reasonably to have been aware that:

1. There was a problem with the lending or with their timeshare.
2. The problem(s) caused them a loss.
3. Another party's actions (or its failure to act) may have caused the loss.
4. The other party may have been FHF.

The Letter of Complaint set the reasons why Mr and Mrs H think their credit relationship with FHF was unfair under the Credit Agreement, including:

1. That no affordability assessment was carried out at the Time of Sale.
2. Allegedly unfair contract terms.
3. Various concerns about the lending at the Time of Sale.

The first of these three points relates to a matter which should reasonably have occurred to them at the time they were taking out the loan. This is what that letter had to say on the subject of an affordability assessment at the Time of Sale:

"Please also bear in mind that my client does not remember any affordability assessment to have been carried out. The sales representatives of [the Time Share] acting on behalf of the bank as agents (S 56 CCA 1974) did not carry out any affordability assessment which amounts to irresponsible lending."

Having considered what was said, I think that most people would realise – when applying for credit of any description – that a lender will need to understand a person's income and ability to repay the loan prior to lending them and that doing so is part of the normal lending process. That being the case I think it is reasonable to expect Mr and Mrs H to have noticed at the Time of Sale that FHF had agreed to lend to them *without* carrying out the typical checks associated with their ability to repay the loan – which is the complaint they now make. So, whilst the six-year part of the time limit starts at the Time of Sale, I also think that the three-year part of the time limit started at the same time. I say that because that is the point I think that Mr and Mrs H ought reasonably have been aware that something was amiss and that they had cause to complain.

This alone means that Mr and Mrs H ought reasonably have realised they had cause to complain that their credit relationship with FHF might have been unfair. In any event it means they had until 16 August 2021 bring their complaint and as they didn't do so until February 2023.

Furthermore, I think that Mr and Mrs H knew, or ought reasonably have known at the time, that another party was responsible for the losses that followed. Whilst one of the parties was

the Supplier, the other was FHF which they knew had financed their purchase of the timeshare. They also knew that the Supplier had brokered the finance.

Given the long-term financial consequences of both the loan and the timeshare, I think it's reasonable to have expected Mr and Mrs H to have carried out enquiries when their concerns about the loan and the timeshare first arose in order to have understood what their rights were. Had they done so, I think they would have likely discovered that FHF, as the lender that financed the transaction, may well have borne responsibility for the problems they now claim they had with the timeshare.

What's more, Mr and Mrs H's timeshare was a complicated contract that included (amongst other things) an interest in overseas property. As such, it was, by its very nature, fraught with complexities. And with that being the case, if Mr and Mrs H weren't already aware of the implications of their concerns and the possible complaints that they might make in light of them, the obvious course for them to take was to make further enquiries and seek advice. And had they carried out such enquiries, I think they would have led Mr and Mrs H to discover that FHF, as the connected lender that financed the transaction, may well have borne responsibility for the problems they say they had with their timeshare.

With all of that being the case, I think that Mr and Mrs H ought reasonably to have been aware that they had cause to complain about FHF holding them in an unfair credit relationship at least by the time the Credit Agreement ended in December 2016. 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 Mr and Mrs H's complaint about an unfair credit relationship under Section 140A of the CCA. And that means they had to complain about FHF's role in such a relationship by December 2022, but as they didn't do that until 1 February 2023, their complaint was too late under the rules I have to apply.

I would also add here that I am conscious of the points the PR has sought to make in relation to the LA and its application to a claim under s140A. But having concluded that I've no power to deal with the s140A complaint, it follows that I won't be commenting on the relative merits of PR's arguments in relation to the effect of the LA on her clients' s140A claim.

Exceptional Circumstances

I can consider the merits of a complaint referred to the Financial Ombudsman Service after the expiry of the relevant time limit if there are exceptional circumstances that justify why it was late. But based on what I've seen so far, I can't say that there are any other exceptional circumstances that apply to Mr and Mrs H's complaint about an unfair credit relationship with FHF.

Mr and Mrs H's Section 75 complaint

Section 75 of the CCA 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 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 about 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 the Financial Ombudsman Service.

So, when a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the 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 six and three 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.

In this case, as FHF refused to accept and pay Mr and Mrs H's claim on 13 February 2023, their primary time limit (of 6 years) only started at that time. And as this complaint about FHF's handling of that claim was referred to the Financial Ombudsman Service on 20 March 2023, it was made in time for the purpose of the rules on our jurisdiction.

However, like our Investigator, I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr and Mrs H'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 LA 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 is relevant to consider whether Mr and Mrs H's Section 75 claim was time-barred under the LA before they put it to FHF.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer 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, 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 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 was the Time of Sale. I say this because Mr and Mrs H entered into the purchase of their timeshare at that time based on the alleged misrepresentations of the Supplier – which they say they relied on. And as the loan from FHF was used to help finance the purchase, it was when they entered into the Credit Agreement that they suffered a loss.

Mr and Mrs H first notified FHF of their Section 75 claim on 7 October 2022. And as more than six years had passed between Time of Sale and when they first put their claim to FHF, I don't think it was unfair or unreasonable of FHF to reject Mr and Mrs H's concerns about the Supplier's alleged misrepresentations.

Mr and Mrs H's Other Complaints

Mr and Mrs H have also complained about FHF's right to enforce the Credit Agreement because of the status of the credit broker. They also suggested that a breach of Spanish law by the Supplier had implications for the Credit Agreement.

I've seen no documentary evidence that would allow me to reasonably find that the credit broker wasn't authorised to arrange the Credit Agreement or that Spanish law can be

applied directly to the purchase agreement in question. It follows that I can't reasonably uphold either of these complaints.

My final decision

My final decision is that: -

- the Financial Ombudsman Service does not have the jurisdiction to consider Mr and Mrs H's complaint about First Holiday Finance Ltd's participation in and/or perpetuation of an unfair credit relationship under Section 140A of the CCA.
- I do not uphold Mr and Mrs H's complaint about First Holiday Finance Ltd's decision to decline their Section 75 claim for misrepresentation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 10 September 2025.

Claire Woollerson
Ombudsman