

The complaint

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

What happened

Mr and Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 3 January 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,220 fractional points at a cost of £16,274 (the 'Purchase Agreement').

Fractional Club membership gave Mr and Mrs B more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs B paid for their Fractional Club membership by taking finance of £15,747 from the Lender (the 'Credit Agreement') and making a £500 direct payment.

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 16 August 2022 (the 'Letter of Complaint') to raise a number of concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender responded to Mr and Mrs B's concerns as a complaint and issued its final response on 6 September 2022, rejecting it on every ground.

The complaint was then referred 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 B disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I issued a provisional decision explaining why I was not planning to uphold the complaint.

The Lender responded to say it agreed with my provisional decision and had nothing further to add. The PR responded on behalf of Mr and Mrs B. It reiterated the reasons it felt the credit relationship between Mr and Mrs B and the Lender was unfair to them. Including that in their opinion Mr and Mrs B's witness statement is sufficient to show that Fractional Club membership was sold to them as an investment and this was material to their decision to purchase. It also provided a letter showing that the Supplier had suspended Mr and Mrs B's membership of the Fractional Club due to non-payment of Management Charges. The PR said this showed that an unfair contract term had been applied unfairly, since Mr and Mrs B could no longer use Fractional Club membership but were left repaying the Credit Agreement.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

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.

Having done so, including considering the responses to my provisional decision, I still do not think this complaint should be upheld. However, before I explain why – which is in line with what I said in my provisional decision, 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.

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

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.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr and Mrs B'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 1980 (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 B's Section 75 claim was time-barred under the LA before they put it to the Lender.

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. That is because Mr and Mrs B entered into the Purchase Agreement at that time based on the alleged misrepresentations of the Supplier – which they say they relied on. And as the loan from the Lender was used to help finance the purchase, it was when they entered into the Credit Agreement that they suffered a loss.

Mr and Mrs B first notified the Lender of their Section 75 claim on 16 August 2022. And as more than six years had passed between the Time of Sale (3 January 2014) and when they first put their claim to the Lender, I don’t think it was unfair or unreasonable of the Lender to reject Mr and Mrs B’s concerns about the Supplier’s alleged misrepresentations.

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

There are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I’m to consider this complaint in full – which is what I’ve done next.

Having considered the entirety of the credit relationship between Mr and Mrs B and the Lender along with all of the circumstances of the complaint, I don’t think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier’s commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material.
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier.
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs B and the Lender.

The Supplier’s sales & marketing practices at the Time of Sale

Mr and Mrs B’s complaint about the Lender being party to an unfair credit relationship was made for several reasons.

The PR says that the right checks weren’t carried out before the Lender lent to Mr and Mrs B. I haven’t seen anything to persuade me that was the case in this complaint. But even if I were to find that the Lender 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 Mr and Mrs B was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs B.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, the credit intermediary named on the Credit Agreement held a consumer credit license from the Office of Fair Trading at the time. So, it appears it was authorised to broker the credit.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr and Mrs B in practice, nor that any such terms led them to behave in a certain way to their detriment, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

The Supplier has suspended Mr and Mrs B's membership of the Fractional Club due to non-payment of Management Charges (which they are contractually obliged to pay), meaning they cannot use their Fractional Points to take holidays. But the letter provided makes clear that their membership is suspended and can be reinstated. So, it does not seem to me that the terms of the contract have been applied unfairly. Mr and Mrs B paid for Fractional Club membership using the Credit Agreement. And I do not think it is unfair that they should have to repay what they borrowed. That they cannot currently use their Fractional Club membership is not the fault of the Lender, and I cannot see a persuasive reason for me to conclude that – due to this – their relationship with the Lender is unfair to them.

I acknowledge that Mr and Mrs B may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. This allegation was not made until after the Investigator issued their assessment, so it isn't clear that Mr and Mrs B or the PR considered it relevant at the Time of Complaint.

Mr and Mrs B were also given a 14-day cooling off period and 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 B made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr and Mrs B credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason why the PR says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs B's Fractional Club membership 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 Fractional Club 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 the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr and Mrs B were told by the Supplier that Fractional Club membership was an investment that would increase in value.

The term “*investment*” is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

A share in the Allocated Property could constitute an investment as it offered Mr and Mrs B the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn’t prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs B 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 membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an ‘investment’ or quantifying to prospective purchasers, such as Mr and Mrs B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier’s sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it’s equally possible that Fractional Club membership was marketed and sold to Mr and Mrs B as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it’s not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs B and the Lender under the Credit Agreement and related Purchase Agreement. That’s because the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness

for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between the Lender and Mr and Mrs B that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led Mr and Mrs B to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, I am not persuaded that the prospect of a financial gain from Fractional Club membership was a material to Mr and Mrs B's decision to go ahead with their purchase. The Letter of Complaint did not include any evidence directly from Mr and Mrs B. And nothing to indicate Mr and Mrs B's reasons for entering into the Purchase Agreement. It simply said the Supplier had breached Regulation 14(3).

The PR has provided Mr and Mrs B's comments following the Investigator's assessment of the complaint. In the accompanying letter the PR suggests that the way the Supplier sold and marketed Fractional Club membership was in itself enough to make the relationship unfair. I disagree with this, for the reasons set out above.

Mr and Mrs B's comments (made over ten years after the Time of Sale) include the allegation that they were told by the Supplier that Fractional Club membership "*would be a really good investment, because at the end of the period the property would be sold and we would be given a share of the profits*". But they do not go into any further detail about what was said or done by the Supplier, nor explain the reasons why they decided to enter into the Purchase Agreement (although they do mention feeling pressured to buy).

That doesn't mean Mr and Mrs B weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But Mr and Mrs B's comments don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit. So, I don't think it would be fair and reasonable of me to conclude in this case that a breach of Regulation 14(3) by the Supplier was material to the decision Mr and Mrs B ultimately made. I appreciate the PR disagrees with this, but its response to my provisional decision has not persuaded me that I should reach a different conclusion.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs B's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their 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 the Lender and Mr and Mrs B was unfair to them even if the Supplier had breached Regulation 14(3).

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 B Section 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 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 the Lender to compensate them.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 19 September 2025.

Phillip Lai-Fang
Ombudsman