DRN-5809483

The complaint

Mr and Mrs L's complaint is, in essence, that First Holiday Finance Ltd 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.

Background to the complaint

Mr and Mrs L purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 8 December 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 900 fractional points at a cost of £10,348 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs L more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ended.

Mr and Mrs L paid for their Fractional Club membership by taking finance of £9,848 from First Holiday Finance (the 'Credit Agreement').

Mr and Mrs L – using a professional representative (the 'PR') – wrote to First Holiday Finance on 13 December 2023 (the 'Letter of Complaint') to complain. They said that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership was an "investment" and that their share of the "asset" they owned would "grow in value like normal property".
2. told them that Fractional Club membership had a guaranteed end date when that was not true.
3. failed to tell them that on their death, their liabilities under the Purchase Agreement would pass to the beneficiaries of their estate.

Mr and Mrs L say that they have 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, they have a like claim against First Holiday Finance, who, with the Supplier, is jointly and severally liable to Mr and Mrs L.

Mr and Mrs L also say that the credit relationship between them and First Holiday Finance was unfair to them under Section 140A of the CCA. This is primarily because they allege that Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

First Holiday Finance dealt with Mr and Mrs L's concerns as a complaint and issued its final response letter on 16 February 2024, rejecting it on every ground.

Mr and Mrs L then referred the 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 L disagreed with the Investigator's assessment, so the complaint was passed to me to decide.

I considered the matter and issued a provisional decision (the 'PD'). In that decision, I said:

> I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.
>
> And having done that, I do not currently think this complaint should be upheld.
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> 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.
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> **Mr and Mrs L's claim under Section 75**
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> Certain conditions must be met for Section 75 to apply including, but not limited to, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. Because of the way in which Section 75 operates, if the Supplier is liable for having misrepresented something to Mr and Mrs L at the Time of Sale, that might give rise to a potential joint and several liability on the part of First Holiday Finance. Equally, of course, if the Supplier has a defence to such a claim, that defence is also available to First Holiday Finance.
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> Our investigator noted that the Limitation Act 1980 might afford a complete defence to the section 75 claim made by Mr and Mrs L – which does appear to be the case. However, I've not found it necessary to reach a conclusion on that line of argument, because I'm not inclined to find that the conditions necessary to bring a Section 75 claim are met in this case.
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> I say this because it's my understanding that when Mr and Mrs L entered into the Credit Agreement in August 2013, they did so with First Holiday Finance Ltd based in the British Virgin Islands ("FHFBVI") and operating from the Isle of Man, rather than the UK entity of the same name. The UK entity has provided us with evidence that shows it wasn't engaged in regulated lending activity until it applied for permission from the Financial Conduct Authority ("FCA") in 2015. On 1 August 2015, FHFBVI assigned its loan book (including Mr and Mrs L's loan) to the UK entity First Holiday Finance.
>
> Section 75 enables a claim to be brought against the creditor. At the time the Credit Agreement was made, the creditor was FHFBVI. While FHFBVI assigned its loan book to First Holiday Finance, it didn't necessarily follow that its duties or other obligations – such as any potential liability for a Section 75 claim – were similarly assigned. Although the CCA Section 189(1) definition of creditor includes an assignee, *Goode*[1] indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) Section 75.

[1] Goode: Consumer Credit Law and Practice – Division I Commentary – Part IC Consumer Credit Legislation – 45A Assignment – III Assignment and the CCA 1974: the assignee as creditor/lender or owner – 1 The basic rule – Pre-assignment breaches (para 45A.62)

That's not to say that a claim can't be made along the lines outlined by Mr and Mrs L. Rather, it highlights the inherent difficulty they might face in succeeding with that claim. And with this in mind, I can't say that First Holiday Finance acted unfairly or unreasonably towards Mr and Mrs L when it declined to pay them compensation for the claim they said it was liable for under Section 75.

Section 140A of the CCA: did First Holiday Finance participate in an unfair credit relationship?

I've explained why I'm not persuaded Mr and Mrs L's relationship with First Holiday Finance could lead to a successful Section 75 claim and outcome in this complaint. But Mr and Mrs L also make arguments that either say or infer that the credit relationship between them and First Holiday Finance was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including the Supplier's representations and parts of its sales process at the Time of Sale.

Mr and Mrs L's loan from FHFBVI was written under English law and regulated under the CCA. First Holiday Finance acquired and continued to administer the loan when Mr and Mrs L made their complaint, so Section 140A of the CCA is relevant law. It is not subject to the same difficulty as their Section 75 claim[2]. So determining what's fair and reasonable in all the circumstances of the complaint includes considering whether the credit relationship between Mr and Mrs L and First Holiday Finance was unfair.

I have considered the entirety of the credit relationship between Mr and Mrs L and First Holiday Finance along with all of the circumstances of the complaint and I do not 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 Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
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; and
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 L and First Holiday Finance.

Mr and Mrs L's complaint about First Holiday Finance being party to an unfair credit relationship was made for several reasons, including that the misrepresentations they allege were made by the Supplier in the context of their Section 75 claim could have caused unfairness for the purposes of Section 140A.

In the PR's Letter of Complaint, it is said that the Fractional Club membership was misrepresented by the Supplier to Mr and Mrs L when it told them that:

> "… *they would own a part of* [the Supplier's] *asset which would grow in value like normal property and which they could sell and recoup their investment in later years*."

[2] *Goode* (para 45A.65) indicates that section 140B empowers a Court to impose a positive liability on an assignee

Mr and Mrs L did own a share in the Allocated Property as explained above, and so I do not consider that to be a misrepresentation. As I'll come on to in more detail below, I consider that the acquisition of a share in the Allocated Property did amount to an investment – as it offered the prospect of a financial return. So presenting the timeshare as an investment would not have amounted to a misrepresentation either – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment, which I explore below.

Similarly, the amount of money Mr and Mrs L received on their investment would only be known after the membership term ended and the Allocated Property is sold. So even if I were to accept that the Supplier made comments along the lines that Mr and Mrs L's share in the property could or would grow in value over time, I cannot say they would amount to a misrepresentation.

It is also intimated within the comment mentioned above that Mr and Mrs L would have the option to sell their share in the Allocated Property, when in fact they did not. The contractual documentation that Mr and Mrs L were provided and the sales materials used by the Supplier around the Time of Sale both set out that the Allocated Property would be sold at the end of the membership term and do not suggest that Mr and Mrs L had the power to sell at an earlier juncture. I also note that in a statement made in their own words, Mr and Mrs L set out their understanding that "*at the end* [the Supplier] *would sell the property*". So I do not think the Supplier misrepresented the position as alleged within the Letter of Complaint.

The PR's Letter of Complaint also said that Mr and Mrs L were not told that the Supplier could postpone the sale of the Allocated Property for up to two years or that their beneficiaries would inherit the liability for management fees if they were to pass away before the sale. It is correct that the sale of the Allocated Property could be postponed for up to two years in certain circumstances. This was contained in the documents that would've been given to Mr and Mrs L at the Time of Sale. I don't think the Supplier need necessarily have done anything more than it did to draw this to their attention. In any event, I do not think this would have led Mr and Mrs L to a different decision, and so it is hard to see how it has caused any unfairness in their credit relationship with First Holiday Finance.

Regarding the potential liability for management charges on Mr and Mrs L's death, I've not seen anything within the contractual documentation suggests that this would pass to their beneficiaries and it is my understanding that this is not the default position. So again I do not think this has caused any unfairness in the credit relationship between Mr and Mrs L and First Holiday Finance.

The PR also says that the right checks weren't carried out before the loan was provided to Mr and Mrs L. 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 First Holiday Finance had 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 L was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with First Holiday Finance was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable the Mr and Mrs L. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs L wish to provide, I would invite them to do so in response to this provisional decision.

I'm not persuaded, therefore, that Mr and Mrs L's credit relationship with First Holiday Finance was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with First Holiday Finance 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.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

First Holiday Finance does not dispute, and I am satisfied, that Mr and Mrs L'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 membership of the Fractional Club 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 the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*[3], 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.

Mr and Mrs L's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But 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 L 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.

[3] 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 and BPF v FOS')

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 L, 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs L as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material 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 L 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 is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between First Holiday Finance and Mr and Mrs L rendered unfair to them?

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.

And in light of what the courts had to say in *Carney* and *Kerrigan,* it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs L and First Holiday Finance that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr and Mrs L have said in the course of their complaint about how the membership was sold to them and their motivation for taking it out.

I would note first of all that the evidence in this respect is fairly limited. Within the Letter of Complaint, it is said that Mr and Mrs L were told that they had purchased an investment, and that the asset they had purchased – i.e. their share of the Allocated Property – would "*grow in value*". That does not necessarily, to my mind, equate to the prospect of a financial gain – as the value may not grow to such an extent that it exceeds the cost.

As referenced above, we have also been provided with a statement in Mr and Mrs L's own words, within which they say:

> *"We ended up buying a Fractional which meant we owned part of the property and could go on holiday 1 week a year. At the end [the Supplier] would sell the property and we would get our money back."*

This does not reflect the PR's allegation that Mr and Mrs L believe they were assured of a growth in value, which is also absent from the PR's notes of the call on which this statement appears to have been based. In any case, while there is reference to a financial return of some sort, getting one's money back would not amount to a profit.

There is, then, little evidence to suggest that Mr and Mrs L were led to believe they could make a financial gain by purchasing the membership, and such evidence as there is – the limited testimony I've quoted above – does not indicate to me that it was a motivating factor in their decision to purchase it (and in turn, therefore, to enter into the Credit Agreement).

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 L'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 Mr and Mrs L and First Holiday Finance was unfair to them 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 First Holiday Finance and Mr and Mrs L was unfair to them 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.

In conclusion, given the facts and circumstances of this complaint, I did not think that First Holiday Finance acted unfairly or unreasonably when it dealt with Mr and Mrs L's Section 75 claim, and I was not persuaded that First Holiday Finance 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 could see no other reason why it would be fair or reasonable to direct First Holiday Finance to compensate them.

First Holiday Finance responded to the PD and accepted it.

The PR also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

Having received the relevant responses from both parties, I'm now finalising my 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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD only relate to the issue of whether the credit relationship between Mr and Mrs L and First Holiday Finance was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr and Mrs L as an investment at the Time of Sale.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in their response to my PD. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Fractional Club membership to Mr and Mrs L as an investment and that this was a motivating factor in their decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mr and Mrs L in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. The PR's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mr and Mrs L to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Mr and Mrs L to proceed with their purchase. In short, I was not persuaded that their decision was motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Mr and Mrs L in the course of their complaint. I recognise the PR has interpreted Mr and Mrs L's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion. I'll explain why.

The PR has highlighted part of the judgment in *Shawbrook and BPF v FOS*, suggesting from this that the term investment extends beyond profit or financial gain to the prospect of 'money back'. I have taken *Shawbrook and BPF v FOS* into account when making my decision and I don't think that is what the judge intended in the paragraph the PR has highlighted. I explained in my provisional decision that the definition of investment I used was that agreed by the parties in *Shawbrook & BPF v FOS* and I see no reason to view this differently.

In any event, even if I were to accept the PR's broader definition of an investment, this wouldn't lead me to a different conclusion. Mr and Mrs L's comments lack sufficient detail to persuade me that the prospect of any sort of return was a material factor in their decision to purchase the membership and that they would not always have done so in order to benefit from the holiday options it offered.

So for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Mr and Mrs L's decision to purchase the Fractional Club membership. That being the case, I'm still not persuaded that the credit relationship between Mr and Mrs L and First Holiday Finance under the Credit Agreement and related Purchase Agreement was unfair to them. So, I don't think it is fair or reasonable that I uphold this complaint on that basis. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct First Holiday Finance to compensate them.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs L to accept or reject my decision before 5 February 2026.

Ben Jennings
Ombudsman