DRN-5830961

The complaint

Mr and Mrs W'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 claims under Section 75 of the CCA.

What happened

Mr and Mrs W purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 23 April 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 870 fractional points at a cost of £14,473 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £4,279 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs W 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 ends.

Mr and Mrs W paid for their Fractional Club membership by paying a £500 deposit and by taking finance of £13,208[1] from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs W – using a professional representative ("PR") wrote to the Lender on 31 October 2022 (the 'Letter of Complaint') to raise a number of different 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 dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter on 23 November 2022 rejecting it on every ground.

The PR then referred Mr and Mrs W's 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.

The PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything, I also didn't think this complaint ought to have been upheld. But my reasons were more extensive that those given by our investigator, so I issued a provisional decision and invited both parties to respond before issuing a final decision.

The Lender responded to say it agreed with what I had said. The PR responded to say that Mr and Mrs W didn't accept what I said, with some further arguments as to why the complaint ought to be upheld. In light of those submissions, I will now set out my final determination on this complaint.

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[1] This sum includes £9,429 used to repay an earlier loan

The legal and regulatory context

In considering what's fair and reasonable in all the circumstances of the complaint, I'm 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.

In my provisional decision, I explained the legal and regulatory context that I thought was relevant to this complaint. As this context is no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website – it isn't necessary to set out that context in detail here. But, following my provisional decision, I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

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.

However, before I explain why, I want to make it clear that my role as an Ombudsman isn't to address every single point that has been made to date. Instead, it's to decide what's fair and reasonable in the circumstances of this complaint. So, if I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't 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.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs W could make against the Supplier. Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction.

Further, creditors can reasonably reject Section 75 claims that they're first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA'). The reason being, that 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.

The Investigator in this case felt it was reasonable for the Lender to reject this claim as it had a defence to it under the LA.

Having considered everything, I think Mr and Mrs W's claim for misrepresentation was likely to have been made too late under the relevant provisions of the LA, which means it was fair for the Lender to have turned down a Section 75 claim for this reason.

A claim under Section 75 is a 'like' claim against the creditor. 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, as per Section 2 of the LA.

But a claim like this one under Section 75 is also *"an action to recover any sum by virtue of any enactment"* under Section 9 of the LA. 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 W entered into the membership at that time based on the alleged misrepresentations by the Supplier, which Mr and Mrs W say they relied on. And, as the loan from the Lender was used to finance this membership, it was when Mr and Mrs W entered into the Credit Agreement that they suffered a loss.

Mr and Mrs W first notified the Lender of their Section 75 claim on 31 October 2022. Since this was more than six years after the Time of Sale, I don't think it was unfair or unreasonable of the Lender to reject Mr and Mrs W's concerns about the Supplier's alleged misrepresentations at the Time of Sale.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works above. 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 is also liable. And, that the relevant cause of action for a claim of breach of contract is when the actual breach(es) occurred. Since the alleged breach(es) here appear to have been in the years following the Time of Sale, I don't think this claim is out of time under the LA.

The PR suggests that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. And, in its view, this means Mr and Mrs W can't recover any amounts that are expected to be awarded by the Spanish court. But, the PR's argument is difficult to square with claim that seems to be made here under Section 75. After all, suing the Supplier in a Spanish court follows from, and is separate to, the rights and obligations that the parties to a contract might have.

What's more, in light of the Supplier's apparent liquidation, neither Mr and Mrs W nor the PR have said, suggested or provided evidence to demonstrate that if Mr and Mrs W were to reinstate the membership subject to this complaint they wouldn't be:

1. members of the Fractional Club;
   able to use their Fractional Club membership to holiday in the same way they could initially; and
2. entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.

Mr and Mrs W say that they couldn't holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier wasn't living up to its end of the bargain, and had breached the Purchase Agreement.

Like any holiday accommodation, availability wasn't unlimited – given the higher demand at peak times, like school holidays, for instance. As I understand it some of the sales paperwork given to Mr and Mrs W at the Time of Sale states that the availability of holidays was/is subject to demand. I also can't see for example, that Mr and Mrs W have described the specific instances they tried to book but were unable to do so, such as when and where exactly they were trying to book and which of those requests the Supplier wasn't able to fulfil. I accept that they may not have been able to take certain holidays. But I haven't seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I've seen to date, I don't think the Lender is liable to pay Mr and Mrs W any compensation for a breach of contract by the Supplier. And with that being the case, I don't think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already explained why I'm not persuaded that the contract entered into by Mr and Mrs W was breached by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs W also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It's those concerns that I explore here.

I've considered the entirety of the credit relationship between Mr and Mrs W and the Lender along with all of the circumstances of the complaint and 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've 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; and
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 commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement

I've then considered the impact of these on the fairness of the credit relationship between Mr and Mrs W and the Lender.

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

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

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs W. 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 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 W 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. Again, from the information provided, I'm not satisfied that the lending was unaffordable for Mr and Mrs W.

Mr and Mrs W also suggest that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they 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 didn't want to. They were also given a 14-day cooling off period and signed a 'Right of Withdrawal' form at the Time of Sale which confirmed their receipt of that information. And, they haven't provided a credible explanation for why they didn't cancel their membership during that time. With all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs W made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also says that the contractual terms allowing the Supplier to terminate membership where Mr and Mrs W failed to make a payment due under the agreement were unfair.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract didn't recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, the Supreme Court made it clear in *Plevin* that it doesn't automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

So, in order to conclude that a term in the Purchase Agreement rendered the credit relationship(s) between Mr and Mrs W and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR, and that the term was actually operated against Mr and Mrs W in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs W, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in *Link Financial v Wilson* [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice. And I've not seen any evidence which would persuade me that any of the terms mentioned by the PR are actually unfair to Mr and Mrs W, nor even that they have been enforced in a way that would render their credit relationship with the Lender unfair to them.

I'm not persuaded, therefore, that Mr and Mrs W's credit relationship with the Lender 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 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.

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?

The Lender doesn't dispute, and I'm satisfied, that Mr and Mrs W'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 the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I've considered next.

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

Mr and Mrs W'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 didn't, 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 didn't 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 W as an investment in breach of Regulation 14(3), I've 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's 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 W, the financial value of Mr and Mrs W's 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, as I understand it, disclaimers in the contemporaneous paperwork that state that Fractional Club membership wasn't sold to Mr and Mrs W 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).

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

Was the credit relationship between the Lender and Mr and Mrs W rendered unfair to them?

As the Supreme Court's judgment in *Plevin* makes clear, it doesn't 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 W and the Lender 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.

I acknowledge that the PR alleged in the Letter of Complaint that membership was sold to Mr and Mrs W as an investment at the Time of Sale. But this allegation isn't supported in any detail, including in the testimony provided by the PR to our service (from Mr and Mrs W) in mid-2023[2]. Indeed on my reading of this testimony the focus of Mr and Mrs W's compliant appears to be about the quality of holidays provided and the availability of the same.

[2] I'm also mindful this testimony is undated and was provided to our service following the judgment in Shawbrook & BPF v FOS So, there is a risk that Mr and Mrs W's testimony here has been influenced by this

So, having considered everything, there simply isn't sufficient evidence that Mr and Mrs W were induced into their purchase on the grounds that they were led to believe that the Fractional Club membership was an investment from which they would make a financial gain.

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'm not persuaded that Mr and Mrs W'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). And for that reason, I don't think the credit relationship between Mr and Mrs W and the Lender 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 the Lender and Mr and Mrs W 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.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that wasn't regulated by the FCA to carry out that activity

The PR says 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 as a result.

At the Time of Sale, the regulation of consumer credit was performed by the FCA and I've seen that the broker named on the Credit Agreement did have the requisite authorisation.

But, the actual complaint made by the PR here is that the sales staff weren't employees of the Supplier. The Lender has however confirmed to this Service that sales representatives were employed by the Supplier and had undertaken training in brokering sales. I've no reason to doubt this, so I'm not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

The Lender responded to my provisional findings to say it accepted it and had nothing further to add.

The PR responded to my provisional findings to say, in summary, that:

- So as not to influence their memories, it didn't provide Mr and Mrs W with a copy of our Investigator's view.
- When it said Mr and Mrs W disagreed with our Investigator's view it didn't mean that they had seen it just that they didn't agree with the decision not to uphold it.
- Mr and Mrs W's *'additional witness statement'* hasn't been influenced by the Investigator's view or the judgement in *Shawbrook & BPF v FOS.*
- Mr and Mrs W aren't aware of the judgement in *Shawbrook & BPF v FOS*.
- Of course, Mr and Mrs W were interested in taking holidays, however this doesn't mean they weren't interested in the investment element of Fractional Club membership.

- Mr and Mrs W's witness statement was provided to it before 17 January 2022, and this makes clear that the investment element of Fractional Club membership was promoted to them by the Supplier at the Time of Sale and that this was a motivating factor in their decision to purchase.

- The investment element of Fractional Club membership being promoted by the Supplier at the Time of Sale is supported by the handwritten notes on the pricing sheet (copy provided).

- In the judgement handed down in *Shawbrook & BPF v FOS* it wasn't challenged that the product in question was marketed and sold as an investment.

- When people invest in a property they generally have an expectation (not just a hope) that the property will increase in value and the point that properties increase in value was implied by the Supplier by what it said at the Time of Sale.

I've considered PR's response to my provisional findings but they don't persuade me that I should deviate from them.

I can't see that the PR's decision not to share our Investigator's view with Mr and Mrs W has any bearing on the outcome of this complaint and of course Mr and Mrs W were free to disagree with our Investigator's view regardless of whether they had sight of his reasons for not upholding their complaint.

The PR says that Mr and Mrs W are unaware of the judgement in *Shawbrook & BPF v FOS* and that their witness statement was provided to it before this judgement was handed down. But even if I was to accept what the PR says in this respect I'm not persuaded this has any bearing on the outcome of this complaint.

In my provisional findings I didn't say that the date on which Mr and Mrs W provided the PR with their testimony, or a knowledge of the of the judgement in *Shawbrook & BPF v FOS*, was material to my findings. What I said was that I was mindful of when Mr and Mrs W's testimony was provided to our service (and that it was undated) but that the provided testimony didn't support the submission that Mr and Mrs W were induced into their purchase on the grounds that they were led to believe that Fractional Club membership was an investment from which they would make a financial gain. And despite what the PR says on this point to the contrary I still remain of this view.

The PR says Mr and Mrs W's *'additional witness statement'* hasn't been influenced by the Investigator's view or the judgement in *Shawbrook & BPF v FOS.* But I can't see that we have ever been provided with an *'additional witness statement'* so I don't understand the point the PR is trying to make in this respect.

The PR says the investment element of Fractional Club membership being promoted by the Supplier at the Time of Sale is supported by the handwritten notes on the pricing sheet.

The first thing for me to say is that I can't see that these handwritten notes (including the unit share percentage of 2.21%) is anything other than a factual description of what Mr and Mrs W purchased.

Secondly, I don't dispute that Fractional Club membership might have been marketed or sold to Mr and Mrs W as an investment. But what I need to make a finding on isn't whether Fractional Club membership was marketed or sold to Mr and Mrs W as an investment, but whether the investment element of Fractional Club membership was a motivating factor in their decision to purchase. And I remain of the view that it wasn't.

The PR says that the Supplier implied that properties increase in value by what it said at the time of sale. But even if the Supplier did so, I can't see that such an implication was anything other than a genuinely held belief by the Supplier or that such a belief was at odds with the belief held by Mr and Mrs W's on the same point.

The PR says that in the judgment handed down in *Shawbrook & BPF v FOS,* it wasn't challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations didn't ban the sale of products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to didn't make a blanket finding that all such products were mis-sold in the way PR appears to be suggesting. Any complaint needs to be considered in the light of its specific circumstances. So just because the complaint that was subject to judicial review was upheld, it doesn't follow I must (or should) also uphold Mr and Mrs W's complaint.

Finally, I agree with PR that just because a purchaser was also interested in taking holidays with the Supplier, that doesn't preclude them also being motivated to take out Fractional Club membership by any investment element – indeed I would find it surprising if any members weren't interested in taking holidays, given the nature of the product. However, for the reasons set out in this decision, I don't find such investment motivation. And I still don't think that the credit relationship between Mr and Mrs W and the Lender 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 don't think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs W's Section 75 CCA claims, and I'm 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 s.140A 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

My final decision is I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs W to accept or reject my decision before 31 December 2025.

Peter Cook
Ombudsman