DRN-5870885

The complaint

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

What happened

Mr and Mrs S were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I will call the 'Fractional Club' – which they bought on 15 October 2013 ("the Time of Sale"). They entered into an agreement with the Supplier to buy 1,420 fractional points at a cost of £16,454 ("the Purchase Agreement").

Fractional Club membership was asset backed – which meant it gave Mr and Mrs S 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 S paid for their Fractional Club membership by taking finance of £15,954 from FHF ("the Credit Agreement"). They say that this loan also refinanced an outstanding balance from a loan taken to pay for an earlier membership.

Mr and Mrs S – using a professional representative ("PR") – wrote to FHF on 15 February 2023 ("the Letter of Complaint") to raise a number of different concerns about the membership taken out at the Time of Sale. As those concerns have not changed since they were first raised, and as both sides are familiar with them, it is not necessary to repeat them in detail here beyond the summary above.

FHF dealt with Mr and Mrs S's concerns as a complaint and issued its final response letter on 28 February 2023, 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 S 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 did not 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.

FHF responded to say it agreed with what I had said. PR responded to say that Mr and Mrs S did not 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.

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 published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context here. But I would add that the following regulatory rules/guidance are also relevant:

The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

My findings

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 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 s.75 CCA 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. FHF has said that the claim that was made by Mr and Mrs S was made too late under the provisions of the Limitation Act 1980 ("LA"). It says that under the LA, Mr and Mrs S had six years from the Time of Sale to make their claim and, as it was made over nine years later, it has a defence to any claim. Having considered matters, I agree, and so I do not think FHF acted unfairly or unreasonably when it dealt with this particular s.75 CCA claim.

However, that is not an end to the matter as misrepresentations made at the Time of Sale can still give rise to an unfair credit relationship even if the limitation period to make a freestanding claim has passed (see *Scotland and Reast v. British Credit Trust Limited* [2014] EWCA Civ 790). So although I think it fair for FHF to turn down the claim made under s.75 CCA, I will consider the substance of the alleged misrepresentations here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs S were:

1. Told that they had purchased an investment that would "considerably appreciate in value".
2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.
3. Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.
4. Made to believe that they would have access to "the holiday apartment" at any time all year round.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there is not any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or both of those reasons, I do not think it is probable. In the Letter or Complaint, those allegations are given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And those allegations are not mentioned at all in Mr and Mrs S's evidence that they provided later on. As there is not any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I do not think it was.

So, while I recognise that Mr and Mr S have concerns about the way in which Fractional Club membership was sold by the Supplier, I am not persuaded that there were any misrepresentations made by the Supplier as alleged. And that means that I do not think that this could have given rise to an unfair credit relationship.

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

I have already explained why I am not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with s.140A CCA in mind if I am to consider this complaint in full – which is what I have done next.

Having considered the entirety of the credit relationship between Mr and Mrs S and FHF along with all of the circumstances of the complaint, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of s.140A CCA. 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. The commission arrangements between FHF and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

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

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

Mr and Mrs S's complaint about FHF being party to an unfair credit relationship was made for several reasons.

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

Connected to this is the suggestion by PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that FHF was not permitted to enforce the Credit Agreement. However, it looks to me like Mr and Mrs S knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. And as the lending does not look like it was unaffordable for them, even if the Credit Agreement was arranged by a broker that did not have the necessary permission to do so (which I make no formal finding on), I cannot see why that led to Mr and Mrs S's financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I am not persuaded that it would be fair or reasonable to tell FHF to compensate them, even if the loan was not arranged properly.

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

Overall, therefore, I do not think that Mr and Mrs S's credit relationship with FHF was rendered unfair to them under s.140A CCA for any of the reasons above. But there is another reason, perhaps the main reason, why PR says the credit relationship with FHF was unfair to them. And that is 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

FHF does not dispute, and I am satisfied, that Mr and Mrs S'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 PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr and Mrs S were told by the Supplier that Fractional Club membership was the type of investment that would only 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 clearly constituted an investment as it offered Mr and Mrs S 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 does not 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 S 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 S, 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 is equally possible that Fractional Club membership was marketed and sold to Mr and Mrs S 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 FHF and Mr and Mrs S 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 S and FHF under the Credit Agreement and related Purchase Agreement as 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 Mr and Mrs S 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.

In my provisional decision I explained that on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when they decided to go ahead with their purchase. That did not mean they were not interested in a share in the Allocated Property. After all, that would not be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs S themselves did not persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I did not think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision Mr and Mrs S ultimately made.

I said this because of the evidence Mr and Mrs S provided in response to our Investigator's view. After their complaint was initially rejected, they provided a one-page statement to our Service in February 2024. That explained that they were invited to a presentation at the Supplier's offices in Spain where they were informed about Fractional Club membership. They said:

> *"During this presentation we were informed about Fractional Share of property, which meant that we would own a fraction of a property and at the end of the term it would be sold. So because the property would be increasing in value, we would received an increase on out investment when it is sold.*
>
> *In addition we were told that we would be able to access [the Supplier's] holiday accommodation and facilities. This all seemed like a win win investment, …"*

But in 2011, Mr and Mrs S took a trial membership with the Supplier and in 2012 upgraded that membership to a fractional membership with 1,035 points attached to it. Then, the following year at the Time of Sale, they traded in that membership for the one that is the subject matter of this decision.

Looking at their evidence, I thought it was more likely that they were referring to the earlier

sale, given that they talked about being informed about fractional membership, something I would have not expected them to have needed to be told at the Time of Sale given they would have discussed it a year earlier. Our Service asked PR about this and were told that although this statement refers to what happened at the Time of Sale, Mr and Mrs S recall the 2012 and 2013 sales being sold '*in the sale way, with the addition of the 2013 upgrade being of higher value, hence the incitement to upgrade*.' However, that explanation is simply not there in the February 2024 statement, which I found surprising if they did upgrade at the Time of Sale because Fractional Club membership was of a higher value.

I noted that Mr and Mrs S had taken out trial membership in 2011, so I thought it was clear they were interested in taking holidays with the Supplier, which is unsurprising given they were buying timeshare membership. But their statement did not comment on the holidays they could take, save for a short comment that they could access the Supplier's accommodation. So it seemed to me that their evidence was not reflective of what happened at the Time of Sale, minimising any holiday benefits they were buying and conflating the two purchases in 2012 and 2013. And I was not surprised by this, given that the statement was made over ten years after the Time of Sale and memories do naturally fade and change over time. I was also mindful that this statement was provided *after* our Investigator sent their view, when they would have known that their complaint was rejected, in part, because the Investigator did not conclude that they bought membership for any investment element. Taken as a whole, I could not conclude that Mr and Mrs S's purchase at the Time of Sale was motivated by any investment element in Fractional Club membership.

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 was not persuaded that Mr and Mrs S'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 thought 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 did not think the credit relationship between Mr and Mrs S and FHF was unfair to them even if the Supplier had breached Regulation 14(3).

I also considered whether the earlier sale in 2012 was something that might have caused an unfairness in the credit relationship arising at the Time of Sale – both the 2012 purchase agreement and credit agreement were related agreements under the CCA as the later loan refinanced the earlier one. However, Mr and Mrs S made no complaint about that sale, therefore I could not see how that could be the case.

PR respond to my provisional decision to make, in summary, the following points:

- PR did not provide our Investigator's view to Mr and Mrs S before they gave their recollections of the sale. PR said this was done to not influence their memories, so their evidence were their honest recollections and not written in light of what our Investigator had said.
- PR also said that Mr and Mrs S were not aware of the outcome of a judicial review into two Ombudsmen's decisions (*R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v. Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("*Shawbrook & BPF v. FOS*")), that held that an unfairness could be found in cases where a timeshare was sold as an investment.
- The fact that Mr and Mrs S were also interested in taking holidays did not change the fact that the prospect of a profit from their membership influenced their purchasing decision. Mr and Mrs S's case closely followed the facts of one of the decisions reviewed in *Shawbrook & BPF v. FOS*, where that purchaser was both interested in an investment element and the holidays that they could take.

- PR submitted that the evidence showed that the Supplier did sell membership as an investment and that was a motivating factor in their purchasing decision.
- PR noted that Mr and Mrs S were not asked to provide any evidence of their memories until 2023, so that ought not to be held against them. It also pointed to research that showed the people had better memories of 'valuable' words over low-value ones and it argued that high-pressured sales increase memories of that sale.

I have considered PR's submissions, but I have not changed my mind from my provisional findings.

PR has said that Mr and Mrs S were not aware of the reasons behind our Investigator's view rejecting their complaint. But following that view, PR provided an argument that their membership *had* been sold to them as an investment and provided a statement from them to that effect. In other words, the evidence from Mr and Mrs S was that Fractional Club membership had been sold to them as an investment, in contrast to the Investigator's conclusions. Further, in my mind, their statement did not go beyond that allegation and, for example, did not mention all of the alleged misrepresentations set out by PR in the Letter of Complaint, nor did it give any fulsome memories of the sale more than it being positioned as an investment. I find it inherently unlikely that they would have made that argument, in isolation, had they not been aware of the outcome and reasons of our Investigator's view. In other words, I do not think it credible that the evidence would have been solely geared toward the sale having been made in breach of Regulation 14(3), and that being important to them, had our Investigator not concluded that was not the case. Further, I do not understand how PR took instructions from Mr and Mrs S about why they rejected our Investigator's view without telling them about what they found, any why. So I do not accept the argument that Mr and Mrs S were unaware of the outcome of our Investigator's view before they wrote their statement.

As I said in my provisional decision, I think that Mr and Mrs S conflated their memories of the two sales of fractional memberships that took place. In response to that decision, there has been no explanation as to why they dealt with two sales in one brief statement without making any mention of there being two sales. I note that before my provisional decision, PR said that the two sales were the same, but for the reasons set out above, I do not think the evidence is sufficiently clear on that issue. It follows that, even if I accept that in some instances people's memories are clearer where there is a pressured sale, that does not appear to have been the case here as I do not think the evidence I have been given can be described as clear or cogent.

PR also said that in the judgment handed down in *Shawbrook & BPF v. FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations did not 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 did not 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 I upheld the complaint that was subject to judicial review, it does not follow I must (or should) also uphold Mr and Mrs S's complaint.

Finally, I agree with PR that just because a purchaser was also interested in taking holidays with the Supplier, that does not preclude them also being motivated to take out Fractional Club membership by any investment element – indeed I would find it surprising if any members were not interested in taking holidays, given the nature of the product. However, for the reasons set out in this decision, I do not find such investment motivation. And I still do not think that the credit relationship between Mr and Mrs S and FHF 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 FHF acted unfairly or unreasonably when it dealt with Mr and Mrs S's s.75 CCA claim, and I am not persuaded that FHF 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 FHF to compensate them.

My final decision

I do not uphold Mr and Mrs S's complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 15 December 2025.

Mark Hutchings
Ombudsman