DRN-5948371

The complaint

Mr and Mrs B'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 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 B purchased trial membership of a timeshare (the 'Trial Membership') from a timeshare provider (the 'Supplier'), before going on to exchange it for a full membership (the 'Fractional Club') from the Supplier. The purchases were as follows:

- Trial Membership on 19 September 2011 for £3,995 ('Purchase Agreement 1')
- 1,494 fractional points on 9 May 2013 for £20,739 – having traded in the Trial Membership. ('Purchase Agreement 2')

(which, when appropriate, I'll simply refer to as the ''Purchase Agreements')

As this complaint is concerned with the purchases on those dates, those are the 'Times of Sale' for the purposes of my decision.

Fractional Club membership was asset backed – which meant it 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 Purchase Agreement 2 (the 'Allocated Property') after their membership term ends.

Mr and Mrs B paid for their memberships by taking the following amounts of finance:

- £3,495 on 19 September 2011 ('Credit Agreement 1')
- £20,239 on 9 May 2013 ('Credit Agreement 2')

(which, when appropriate, I'll simply refer to as the 'Credit Agreements')

Credit Agreement 2 not only funded Purchase Agreement 2, but it also provided just over £1,000 to consolidate the outstanding balance on Credit Agreement 1. Further, both loans were taken from a business with the same name as FHF, but one that was registered in the British Virgin Islands (the 'BVI'). In 2015, Credit Agreement 2 was assigned to FHF.

Mr and Mrs B – using a professional representative (the 'PR') – wrote to FHF on 6 January 2017 (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.

FHF dealt with Mr and Mrs B's concerns as a complaint, but rejected it.

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.

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.

FHF responded to say it agreed with what I had said. The PR didn't respond. So I have set out my final findings on Mr and Mrs B's 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 ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out 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 Times of Sale

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 B at the Times of Sale or has breached its contract with them, that might give rise to a potential joint and several liability on the part of FHF. Equally, of course, if the Supplier has a defence to such a claim, that defence is also available to FHF.

When Mr and Mrs B entered into the Credit Agreements at the Times of Sale, they did so with First Holiday Finance Ltd based in the BVI ('FHFBVI') and operating from the Isle of Man, rather than the UK entity of the same name (FHF). 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 B's Credit Agreement 2) to the UK entity FHF.

Section 75 enables a claim to be brought against the creditor. At the time the Credit Agreements were made, the creditor was FHFBVI. While FHFBVI assigned its loan book to FHF, 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.

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

However, this is somewhat academic as I'm able to consider these matters when thinking about unfair credit relationships.

Section 140A of the CCA: did FHF participate in one or more unfair credit relationships?

I've explained why I'm not persuaded Mr and Mrs B's relationship with FHF could lead to a successful section 75 claim and outcome in this complaint. But Mr and Mrs B also make arguments that either say or infer that the credit relationship between them and FHF 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 Times of Sale they've mentioned.

Mr and Mrs B's loans from FHFBVI were written under English law and regulated under the CCA. The first loan ended before FHF took over the loans written by FHFBVI, and so I can't consider the fairness of any credit relationship between Mr and Mrs B and FHF arising out of Credit Agreement 1. But, FHF acquired and continued to administer the second loan when

[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)

Mr and Mrs B 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 B and FHF was unfair.

Having considered the entirety of the credit relationship between Mr and Mrs B and FHF 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 Times of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between FHFBVI 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 Times 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 B and FHF.

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

Mr and Mrs B's complaint about FHF being party to unfair credit relationships was and is made for several reasons. Those include alleged misrepresentations that, as things said by the Supplier at the Times of Sale, could be things that gave rise to an unfair credit relationship under section 56 of the CCA. Further, as Credit Agreement 2 refinanced Credit Agreement 1, they were related agreements and I need to consider whether what happened at Time of Sale 1 had any bearing on the fairness of the later credit relationship.

It was said in the Letter of Complaint that Trial Membership had been misrepresented by the Supplier because Mr and Mrs B were:

1. told by the Supplier that they could book a holiday at any time and at any resort they wanted, when that was not true.
2. told by the Supplier that they could book weekend breaks in the UK, when that was not true.
3. told by the Supplier that they had access to 1000s of resorts in the UK and abroad, when that was not true.

However, the evidence I have seen is that Mr and Mrs B booked two holidays abroad using their Trial Membership in 2012 and 2013 and I have not seen any evidence that sets out why they say any of the allegations made by the PR are made out. As I understand it, the Supplier did offer trial members the opportunity to book holidays at its resorts and also to use an exchange programme to book other resorts outside of its network. So without anything further, I can't say they were told anything that was untrue.

With respect to what happened at Time of Sale 2, it was alleged that the Supplier misled Mr and Mrs B and carried on unfair commercial practices under Regulations 5 and 6 of the

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

CPUT Regulations. However, as Regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Times of Sale (which I make no formal finding on), they led Mr and Mrs B to make the purchasing decisions they did, I'm not persuaded that anything done or nor done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

In addition, the PR also says that the right checks weren't carried out before FHFBVI lent to Mr and Mrs B. However, as things currently stand, this doesn't strike me as a reason why this complaint should succeed.

I haven't seen anything to persuade me that the right checks weren't carried out before FHFBVI agreed to lend given this complaint's circumstances. But even if I were to find that FHFBVI 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 FHF was unfair to them for this reason. But from the information provided, I am not satisfied that any of the lending was unaffordable for them.

I have seen that shortly before Credit Agreement 2 was entered into, Mr and Mrs B were discharged from IVAs, although FHF says there was no record of these at the time the lending was applied for. But just because Mr and Mrs B went through IVAs, it doesn't mean either that they ought not to have been lent to, nor that they would have found the repayments unaffordable. In fact, Mr and Mrs B do not mention this in a statement later provided alongside their complaint, nor have they been able to explain why they couldn't afford the loan repayments. I've seen that they did keep up the loan repayments before repaying it in full in 2025. So, based on the evidence available, I can't say the lending was unaffordable for them.

Overall, therefore, I don't think that Mr and Mrs B's credit relationship with FHF was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says the credit relationships with FHF 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

FHF 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 in the original Letter of Complaint that the Supplier did exactly that at the Time of Sale 2 – saying, in summary, that Mr and Mrs B 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 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 Times 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 FHF 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 2, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs B and FHF under Credit Agreement 2 and the related Purchase Agreement 2 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 B and FHF 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 Purchase Agreement 2 and Credit Agreement 2 is an important consideration.

But 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 Mr and Mrs B decided to go ahead with their purchases. Mr and Mrs B provided a narrative statement in their own words setting out what happened, but they simply don't say that either the Supplier's sales staff told them Fractional Club membership was an investment or that they bought it with that in mind, i.e. with the hope or expectation of making a profit. Although the PR did make the allegation in the Letter of Complaint, as Mr and Mrs B themselves haven't mentioned it, I can't say that any potential breach of Regulation 14(3) had any effect on their decision to purchase. Had that been the case, I would have expected them to have said so when recalling the sale. That doesn't mean they 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 as Mr and Mrs B themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decisions they ultimately made.

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 2 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(2). And for that reason, I do not think the credit relationships between Mr and Mrs B and FHF was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Times of Sale

The PR says that Mr and Mrs B were not given sufficient information at the Time of Sale 2 by the Supplier about the ongoing costs of Fractional Club membership.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Mr and Mrs B say that they were told that there would be no ongoing maintenance fees to be paid as Fractional Club members. However, I don't think that was the case and I think they were given enough information to realise that fees were to be paid.

On the face of Purchase Agreement 2, there is a section titled '*Details of Payments In First Year*' and it says that there were no membership fees due that year. But on page 2 of the document there are a set of terms and conditions, one of which (H) reads:

> *"Management charge: the Applicant hereby agrees to pay the Management Charge together with any Value Added Tax or other similar tax thereon. The Management Charge for the first year Is due and payable on receipt of a statement in respect of that charge by the Applicant. Management Charges are thereafter due on demand in each year in accordance with the Rules. Failure to pay Management Charges when due will lead to suspension of rights and may lead to the sale of the Fractional Rights."*

Mr and Mrs B also signed a one-page '*Members Deceleration*' and initialled next to each of 15 points. Point 3 read:

> *"We understand that currently the annual Management Charge is £888 tor 2013 and that an invoice will be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year…"*

So Mr and Mrs B were clearly told about the existence of charges in the paperwork they signed and they've not provided any explanation why they didn't question this at the Time of Sale 2 if they'd been told something different. I also think it unlikely that the Supplier would have said something that was so verifiably untrue, given that prospective customers would have realised shortly after the sale that there were ongoing charges to pay. Finally, I can't see that Mr and Mrs B complained about this at the time, which I would have expected had they been handed an unexpected bill the year after purchase. On balance, I do not find the Supplier told them there were no maintenance fees to be paid.

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs B sufficient information, in good time, on the amount of the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr and Mrs B nor the PR have persuaded me that they would not have pressed ahead with their purchases had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

Conclusion

In conclusion, as things currently stand, I do not think that FHF acted unfairly or unreasonably when it dealt with the relevant Section 75 claim, and I am not persuaded that FHF was party to a credit relationship with Mr and Mrs B under Credit Agreement 2 that was unfair to them for the purposes of Section 140A of the CCA – nor do I see any 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 B's complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 12 December 2025.

Mark Hutchings
Ombudsman