DRN-5997300

The complaint

Mr and Mrs M'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 M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 5 September 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,494 fractional points at a cost of £34,737 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance of £17,239 from FHF (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to FHF on 24 March 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.

FHF dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 25 April 2022, rejecting it on every ground.

Mr and Mrs M 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.

As Mr and Mrs M disagreed with the Investigator's assessment, their complaint was passed to me to decide. Having considered everything, I reached the same view as our Investigator in that I did not think this complaint should be upheld. As the explanation of my reasoning was more extensive than that of our Investigator, I issued a provisional decision and invited both parties to respond with anything else they wanted me to take into account before I made my final decision.

FHF responded to say it agreed with what I had said. The PR responded to say that Mr and Mrs M did not accept what I said, with some further arguments as to why the complaint ought to be upheld.

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

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, in many ways. 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 in detail 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

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done that, I do not think this complaint should be upheld. 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

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 M at the Time of Sale, 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.

Our Investigator noted that the Limitation Act 1980 might afford a complete defence to the Section 75 claim made by Mr and Mrs M. 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.

I say this because it's my understanding that when Mr and Mrs M entered into the Credit Agreement in September 2012, 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 M's loan) to the UK entity FHF.

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 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 M. 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 M 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 FHF participate in an unfair credit relationship?

I've explained why I'm not persuaded Mr and Mrs M's relationship with FHF could lead to a successful Section 75 claim and outcome in this complaint. But Mr and Mrs M 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 Time of Sale.

Mr and Mrs M's loan from FHFBVI was written under English law and regulated under the CCA. FHF acquired and continued to administer the loan when Mr and Mrs M 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 M and FHF was unfair.

I have considered the entirety of the credit relationship between Mr and Mrs M and FHF 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;

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

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; and
5. 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 M and FHF.

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

Mr and Mrs M's complaint about FHF being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

I have firstly considered whether the misrepresentations they allege were made by the Supplier in the context of their Section 75 claim could have caused any 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 as an investment, through which Mr and Mrs M would have a share of a property and obtain a "*considerable return*". 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. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

The amount of money Mr and Mrs M receive on their investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard, I cannot say they would amount to a misrepresentation. If the Supplier's sales representatives 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 isn't 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.

It is also said in the Letter of Complaint that Mr and Mrs M were told that they could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr and Mrs M were given, which they signed, at the Time of Sale. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr and Mrs M.

Lastly it was said in the Letter of Complaint that Mr and Mrs M were "*made to believe that [they] would have access to the holiday's apartment at any time all around the year*". I understand this to mean that Mr and Mrs M thought they would be able to stay at the Allocated Property whenever they wanted, which was not the case. The Purchase Agreement that Mr and Mrs M signed explained that they did have a preferential right to take holidays in the Allocated Property – but at the same week every year, rather than all year round. They could trade that right in for a number of points to purchase holidays at any time of the year. So it doesn't seem to me that they were told something that was untrue.

The PR also says that the right checks weren't carried out before the loan was provided to Mr and Mrs M. 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 FHF 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 M 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. Again, from the information provided, I am not satisfied that the lending was unaffordable for the Mr and Mrs M. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs M 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 M'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 they say their credit relationship 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.

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?

FHF does not dispute, and I am satisfied, that Mr and Mrs M'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*, 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 M'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 M 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 M 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 M 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 M 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 M 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 M and FHF that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) lead 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 Mr and Mrs M 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 M themselves did not persuade me that her purchase was motivated by a 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 they ultimately made.

In summary, my reasons for this were as follows:

- While noting it was said in the Letter of Complaint that Mr and Mrs M had been told that they had purchased an investment and could expect a profit, there was no further detail underpinning these statements and they were rather generic in nature. In fact, such assertions had been made in an identical fashion by the PR in a number of other complaints.

- Following our Investigator's view, the PR provided a statement from Mr and Mrs M made in February 2024 providing their recollections from the Time of Sale. Within this statement, I noted that of particular relevance to the point at issue they had said that:

> "[The Supplier] *told us we were buying 2 weeks ownership every year of a property … that will be sold at the end of the tenure of the membership and that we would get a share of the profits. The idea of being a part owner of a holiday home was very appealing and, given the promise of profits from sale of our Fractional Property Ownership in addition to enjoying holiday stays every year prior to the sale, we found it more compelling to sign up…*
>
> *Our decisions to purchase timeshare products from* [the Supplier] *were based mainly on verbal statements made by the representatives about the benefits such investments would bring.*"

- Taking these comments both in isolation and at face value, I noted it was Mr and Mrs M's contention that the "benefits" of the investment element – i.e. the potential profits on the sale of their share of the Allocated Property – were a major factor in their decision to purchase the Fractional Club membership. At the same time, however, they had also said that they had "*decided to take up the offer [of the Fractional Club membership] given we had been unable to book any holidays with our [existing] package up until then* …". Significantly, Mr and Mrs M were increasing the number of points they held by upgrading from their existing membership; increasing their holiday entitlement from one to two weeks.

- I was also mindful that Mr and Mrs M had only provided these comments in 2024. As well as coming some significant time after the Time of Sale, they were only provided following our Investigator's view that the complaint should not be upheld and the judgment in *Shawbrook & BPF v FOS*[3]. So I could not discount the possibility that their comments had been influenced by one, or both, of these. I was conscious that the more time that passed between a complaint and the event complained about, the more risk there was of recollections being vague, inaccurate and influenced by discussions with others. In this case, especially in the absence of an earlier account, I simply couldn't rule out the latter. Particularly given Mr and Mrs M already held a Fractional Club membership with the Supplier, yet made no reference to increasing their investment as they were effectively doing through the upgrade – and noting that they did not mention the investment element at all in their recollections relating to their previous membership.

So weighing all of this up, what Mr and Mrs M said did not persuade me that their purchase was motivated by the possibility of making a profit. 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 M'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 suggested 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 M and FHF was unfair to them even if the Supplier breached Regulation 14(3).

In their response to my provisional decision, the PR said, in summary, that:

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[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)

- They did not provide our Investigator's view to Mr and Mrs M before they gave their recollections of the sale. They said this was done so as not to influence Mr and Mrs M's memories, so their recollections were not written in light of what our Investigator had said. And even if Mr and Mrs M had been aware of the outcome of *Shawbrook & BPF v. FOS*, they would not have understood the complexity of the issues involved therein. So their statement could not have been influenced in the manner I'd suggested.

- It had not been challenged in *Shawbrook & BPF v. FOS* that the Supplier sold Fractional Club membership as an investment. It had done so in the sale to Mr and Mrs M, and this had been a motivating factor in their decision to proceed with the purchase.

I have carefully considered the PR's further submission, but the points they have raised have not, ultimately, led me to reach a different conclusion. I'll explain why.

Part of my assessment of the testimony was to consider *when* it was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*. On balance, I don't find the PR's explanation of the contents of Mr and Mrs M's evidence credible. Here, the PR responded to our Investigator's view to say that Mr and Mrs M alleged that Fractional Club membership had been sold to them as an investment and it provided evidence from them to that effect. I fail to understand how Mr and Mrs M disagreed with the view on the basis that the timeshare was sold as an investment if they didn't know our Investigator's conclusions. It follows, I think it more likely than not, that Mr and Mrs M *did* know about our Investigator's view before the evidence was provided.

So, I maintain that there is a risk that Mr and Mrs M's testimony was coloured by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I can place little weight on it.

With regard to the point that it was not challenged that the product in question was marketed and sold as an investment in the judgment handed down in *Shawbrook & BPF v. FOS*, I explained in my provisional decision that 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 the 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 does not follow that I must (or should) also uphold Mr and Mrs M's complaint.

Ultimately the question I have had to decide is whether or not any marketing of the membership as an investment to Mr and Mrs M proved to be a material factor in their decision to purchase it. The PR maintains that it did, but for the reasons given in my provisional decision and as summarised above I remain unpersuaded of this. So I still do not think that the credit relationship between Mr and Mrs M and FHF was unfair to them, even if the Supplier breached Regulation 14(3).

Unfair contract terms

The PR also says that the contractual terms included unfair default provisions. On my reading, the provisions in question effectively mean that if Mr and Mrs M were to fail to make a payment due under the Purchase Agreement (such as the annual management charges), they could, ultimately, forfeit their "fractional rights". Non-payment could therefore have

significant consequences for Mr and Mrs M, such as the loss of their share in the Allocated Property and the holidays to which their points would otherwise entitle to them – without getting back any of the money they've paid to acquire these rights.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs M and FHF unfair to them, I'd have to see that the term was unfair under the UTCCR and operated against Mr and Mrs M in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs M, have flowed from such a term because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (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.

With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr and Mrs M and FHF for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr and Mrs M, let alone unfairly.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between FHF and Mr and Mrs M was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between FHF and Mr and Mrs M 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.

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 M's Section 75 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 Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct FHF 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 M to accept or reject my decision before 14 January 2026.

Ben Jennings
Ombudsman