DRN-4557937

The complaint

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

What happened

Mr A and Mrs O purchased membership of a timeshare (the "Fractional Club") from a timeshare provider "H" on 13 August 2012. They entered into an agreement with H to buy 1,160 fractional points at a cost of £13,599 (the "Purchase Agreement"). After paying an initial £500, Mr A and Mrs O paid for the balance of their Fractional Club membership by taking finance of £13,099 from First Holiday Finance (the "Credit Agreement").

Fractional Club membership was asset backed – which meant it gave Mr A and Mrs O 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.

Using a professional representative "L", Mr A and Mrs O contacted First Holiday Finance on 27 August 2019 about what they considered to be:

1. Misrepresentations by H when selling the membership (and possible subsequent contractual breaches), giving rise to their claims against First Holiday Finance under section 75 of the CCA.
2. First Holiday Finance being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

(1) Section 75 of the CCA: H's representations when selling the membership and potential breaches of contract

Under Section 75 of the CCA, if Mr A and Mrs O have a claim in misrepresentation and/or breach of contract against H, they have a like claim against First Holiday Finance, who with H would be jointly and severally liable to them.

Mr A and Mrs O said that H made a number of pre-contractual misrepresentations at the time of the sale. Some of the arguments they made could also form the basis of a breach of contract claim.

They said that H:

1. told them if they did not use their membership then they could easily rent it out and receive a rental income, as it was very popular. However, they received no interest when they attempted to rent out in 2013.
2. told them their children and grandchildren could inherit the Allocated Property, as it was an investment for the future. They have since discovered that H will be putting

the Allocated Property up for sale in 2030[1], contrary to one of the material factors in their decision to purchase.

3. breached the Purchase Agreement because it told them that they could use their timeshare membership to book holidays around the world at times which met their needs. They say they were told they would have no problems visiting several specified destinations of interest, but this turned out not to be the case when they attempted to book one of those destinations in 2015.

(2) Section 140A of the CCA: First Holiday Finance's participation in an unfair credit relationship

Mr A and Mrs O's letter set out several reasons why the credit relationship between them and First Holiday Finance was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. H pressured them into purchasing Fractional Club membership.
2. H failed to take reasonable steps to ensure Fractional Club membership was suitable for them.
3. H's representations, omissions and sales tactics are First Holiday Finance's responsibility and give rise to the creation of an unfair credit relationship with the lender.

First Holiday Finance dealt with Mr A and Mrs O's concerns as a complaint and issued its final response letter on 10 October 2019, rejecting it on every ground.

Mr A and Mrs O referred their complaint to us. Having considered the information on file, our investigator rejected the complaint on its merits. Mr A and Mrs O disagreed with the investigator's assessment and asked for an ombudsman's decision, so the matter has been passed to me.

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.

Of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- Case law on Section 140A of the CCA – including, in particular:
  - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
  - *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*').

[1] There is some dispute between the parties about whether the Allocated Property is due to be put up for sale in 2030 or 2031. The Purchase Agreement specifies 31 December 2031.

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as I've said, I'm also required to take into account, where appropriate, what I consider to have been good industry practice at the relevant time. In this complaint, that includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the "RDO Code").

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.

Where necessary, I have reached findings on the balance of probabilities – in other words, what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Having done so, I'm not upholding Mr A and Mrs O's complaint. I'll explain why.

Section 75 of the CCA: H's representations when selling the membership and potential breaches of contract

In certain circumstances, Section 75 enables the debtor to bring a claim against their credit provider for a breach of contract or misrepresentation by the supplier of goods or services paid for with that credit. There are specific qualifying criteria, such as the connection between the contracting parties, and the cash price falling within set limits. First Holiday Finance does not dispute that the relevant conditions are met in this complaint, and for the avoidance of any doubt, I'm satisfied on this point.

This part of the complaint was made for several reasons that I set out at the start of this decision. I'm conscious that our investigator noted that time limits in the Limitation Act 1980 could provide a complete defence to Mr A and Mrs O's claims under section 75 of the CCA. That might well be the case. Even if it is not, First Holiday Finance has addressed Mr A and Mrs O's assertions of misrepresentation and breach of contract in its 10 October 2019 letter.

While I recognise that Mr A and Mrs O have concerns about the way in which their Fractional Club membership was sold, they have not, in the reasons they allege, persuaded me that there was an actionable misrepresentation by H when that membership was sold.

Mr A and Mrs O haven't submitted anything that supports a conversation about letting the Allocated Property and given the way in which Fractional Membership worked, it seems to me unlikely that the sales presentation included discussion about income from letting the Allocated Property. Under Fractional Club membership Mr A and Mrs O released any occupational and use right in relation to the Allocated Property in return for points they could use to take holidays at properties within H's resort portfolio. This does appear to be something Mr A and Mrs O would've known, noting what they've said about their enquiries over different specified destinations that were of interest to them.

I can also see the difficulty in successfully claiming misrepresentation in relation to what Mr A and Mrs O say they were told about their ability to pass on membership to children and grandchildren as an inheritance. First Holiday Finance has noted that this is something H does permit, and as such I think what Mr A and Mrs O have said they were told would fall short of being a false statement of fact, necessary to their claim in misrepresentation.

The ability to pass on membership is limited by H's sale of the Allocated Property at the end of the membership term. But I'm satisfied the sale arrangements are clearly set out in the

Schedule in the Fractional Rights Certificate H issued to them.

Mr A and Mrs O say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests they consider H was not living up to its end of the bargain and so had breached the Purchase Agreement. First Holiday Finance says that one of the specified destinations of interest to Mr A and Mrs O wasn't part of its resort portfolio, and that H has said it has no record of a request from Mr A and Mrs O about holidaying in either destination.

Like any holiday accommodation, availability at particular destinations could not have been unlimited nor guaranteed for the duration of membership. Even destinations that were part of the resort portfolio would be subject to higher demand at peak times like school holidays, for instance. I accept that Mr A and Mrs O may not have been able to take certain holidays when and where they wanted. But I'm not persuaded that is enough to demonstrate that H misled them in this respect, or that it breached the terms of the Purchase Agreement.

For these reasons, therefore, I do not think First Holiday Finance is liable to pay Mr A and Mrs O any compensation for the alleged misrepresentations or breaches of contract by H. And with that being the case, I do not think First Holiday Finance acted unfairly or unreasonably when it dealt with their section 75 claim.

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

I've explained why I'm not persuaded the contract Mr A and Mrs O entered into was misrepresented (or breached) by H in a way that makes for a successful claim under section 75 of the CCA such that this aspect of their complaint should be upheld. But Mr A and Mrs O also say that the credit relationship between them and First Holiday Finance was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of H's sales process about which they've expressed concerns. It is those concerns that I explore here.

Section 140A of the CCA is relevant law. I've taken it into account and considered whether the credit relationship between Mr A and Mrs O and First Holiday Finance was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA).

Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

The discussions between H and Mr A and Mrs O during the sale of Fractional Club membership were 'antecedent negotiations' under Section 56(1)(c) – which, in turn, meant that they were conducted by H as an agent for First Holiday Finance as per Section 56(2). And such antecedent negotiations were "*any other thing done (or not done) by, or on behalf of, the creditor*" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of H, as Lord Sumption made clear in *Plevin*, at paragraph 31:

> *"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier*

agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

"*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer*".

It was further said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts. I've considered the entirety of the credit relationship between Mr A and Mrs O and First Holiday Finance 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 have looked at evidence provided by both parties on what was likely to have been said and/or done at the point of sale. This includes H's sales and marketing practices, its provision of information (including the contractual documentation), and 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 A and Mrs O and First Holiday Finance.

Mr A and Mrs O's complaint about First Holiday Finance being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision. They include the allegation that H misled Mr A and Mrs O and carried on unfair commercial practices, as set out in their Section 75 claim for misrepresentation. But noting the limited evidence in this complaint, I'm not persuaded that anything done or not done by H was prohibited under relevant regulations.

Mr A and Mrs O say that H pressured them into purchasing Fractional Club membership. I acknowledge that they have said the sales process went on for a long time. But they've said little about what was said and/or done by H during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. Mr A and Mrs O were also given a 14-day cooling off period and they've not offered any explanation for why they did not cancel their membership during that time.

With this in mind, I can't properly find that Mr A and Mrs O made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from H.

Mr A and Mrs O's complaint submissions also suggest that they consider H failed to apply due care towards their needs and to take reasonable steps to ensure Fractional Club membership was suitable for them. They haven't elaborated on why membership might be in some way unsuitable for them or any way in which H failed to have regard for their needs.

However, one of the main aims of the Timeshare Regulations (and other consumer protections) was to enable consumers to understand the financial implications of their purchase so that they are able to make an informed decision. If a supplier's disclosure and/or the terms of a contract did not 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 relevant regulations being breached. Ultimately, that could result in the credit agreement being found to be unfair under Section 140A of the CCA.

That said, it is clear from the submissions in this complaint that there was a lot of information passed between H and Mr A and Mrs O when they purchased Fractional Club membership. Mr A and Mrs O haven't suggested that this was insufficient to meet their information needs such that it caused them any material detriment. As such, I don't think the credit relationship between First Holiday Finance and Mr A and Mrs O was rendered unfair to them under Section 140A for any of the reasons they've mentioned.

My final decision

In conclusion, given the facts and circumstances of this complaint, I don't think First Holiday Finance acted unfairly or unreasonably when it dealt with Mr A and Mrs O's section 75 claims, and I'm not persuaded that First Holiday Finance was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable to direct First Holiday Finance to compensate Mr A and Mrs O.

So for the reasons I've set out, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and Mrs O to accept or reject my decision before 1 April 2025.

Niall Taylor
Ombudsman