DRN-4525707

The complaint

Mrs H complains that First Holiday Finance Limited ("FHL") unfairly declined her claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a loan they provided her to purchase a timeshare product.

What happened

In or around August 2020, Mrs H (jointly with her husband) purchased a timeshare product from a supplier who I'll refer to as "C". The purchase price agreed was £14,388 and was funded with a loan of £13,808 from FHL in Mrs H's sole name.

In or around October 2021, using a professional representative ("the PR"), Mrs H submitted a claim to FHL under sections 75 and 140A of the CCA. Within the claim, the PR allege Mrs H purchased the timeshare product in August 2020 having relied upon representations made by C which turned out not to be true. And under section 75 of the CCA ("S75"), FHL are jointly liable for those misrepresentations. In particular, the PR allege that C told Mrs H:

- she and her husband had purchased an investment, being a share of a property and they were promised a considerable return on that investment; and
- they *"would have access to the holiday's apartment at any time all around the year".*

The PR say that C illegally sold the product as an investment contrary to regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

The PR went on to allege that a clause within the purchase agreement which addressed default in the event of non-payment of amounts due under the agreement was unfair. And they believe this renders the relationship with FHL, under the agreements, unfair pursuant to section 140A of the CCA ("S140A).

In addition, the PR alleged that:

- Mrs H was introduced to FHL by a third party who wasn't authorised by the Financial Conduct Authority ("FCA") to carry on regulated activities;
- Mrs H *"does not remember any affordability assessment to have been carried out* [sic]*"*
- C's companies are currently in an insolvency process which means Mrs H is unable to recover any amounts awarded by the Spanish Courts.

In responding to Mrs H's claim, FHL pointed out that the product that Mrs H purchased was different to the one the PR referred to in the claim and didn't agree it had been represented as an investment. They didn't agree that Spanish Law applied to the purchase agreement as it was governed by UK Law. They also didn't agree the default clause referred to was unfair believing this hadn't been interpreted correctly by the PR. FHL said Mrs H had been introduced to them by an FCA authorised party and didn't believe there was any other reason for her claim to be upheld.

The PR didn't agree with FHL's findings so referred Mrs H's claim to this service as a complaint. One of this service's investigators considered all the information provided. Having done so, they didn't think FHL's failure to uphold Mrs H's claim was unfair or unreasonable.

In response, the PR asked that the complaint be passed to an ombudsman to make a decision. In doing so, they explained further why they thought the loan was unaffordable for Mrs H and undertook to provide evidence to support that conclusion. Mrs H provided this service with information about her financial situation at the time the loan was agreed. Having considered this, our investigator didn't think there was any evidence the loan was provided irresponsibly or that it was unaffordable for Mrs H.

As an informal agreement couldn't be reached, Mrs H's complaint was passed to me to consider further. Having done so, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 21 November 2023 giving both sides the chance to respond before I reach my final decision.

In my provisional decision I said:

> Relevant considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides consumers with protection for goods or services bought using credit. Mrs H paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means Mrs H is afforded the protection offered to borrowers like her under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> S140A looks at the fairness of the relationship between Mrs H and FHL arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.
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> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe FHL's failure to uphold Mrs H's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And as I've already said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.
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> Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

[1] Dispute Resolution: The Complaints sourcebook (DISP)

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare product. In other words, that they told Mrs H something that wasn't true in relation to the allegation raised. I would also need to be satisfied that the misrepresentation was material in inducing Mrs H to enter into the contract. This means I would need to be persuaded that she reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mrs H was specifically told (or not told) about the benefits of the products she purchased. It was, however, indicated that she was told these things. So, I've thought about that alongside the evidence that is available from the time.

The claim submitted by the PR makes specific reference to a fractional timeshare product. They've also provided, what is alleged to be, a script used by C when presenting the product to Mrs H during the sales meeting. Again, the script appears to relate to the sale of a fractional timeshare product.

I've seen a copy of the agreement signed by Mrs H at the time of the sale. It's clear from this that Mrs H didn't purchase a fractional timeshare product. It was, in fact, membership of a timeshare product with points allocated to be redeemed against holiday accommodation and experiences from within a portfolio offered by C.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mrs H's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says she was told about the specific product she purchased. In particular relating to the product being represented as an investment in property that would provide a considerable return on investment. There's simply no reference to this within any of the sales documentation provided.

In fact, note 5 of the agreement (which Mrs H signed) clearly states *"We understand that the purchase of our membership* […] *is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade-in nor as a real estate interest or an investment in real estate, and that* [C] *makes no representation as to the future price or value of the* […] *product"*.

I don't think the product can have been marketed and sold as investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, I've found nothing within the evidence provided to suggest C gave any assurances or guarantees about the future value of the product Mrs H purchased. C would had to have presented the product in such a way that used any investment element to persuade her to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (FHL) and the debtor (Mrs H) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) 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).

I've considered the *"default"* clause that the PR has referred to. Having done so, it appears this relates to the consequences should Mrs H not complete the purchase by making the payment due within 14 days of the date of the agreement. I don't believe this refers to any other or subsequent charges or payments that may be payable. So, I'm not persuaded that a court is likely to find that this particular clause causes unfairness pursuant to S140A.

The authorised status of C

This service's records show that C came under our compulsory jurisdiction at the time of the product (and loan) sale to Mrs H. So, I'm satisfied that they held the necessary authority to arrange the loan. The PR have alleged that the individual who sold the timeshare (and consequently the loan) was self-employed and not an employee of C. They believe this means the individual didn't hold the necessary authority to arrange the loan. However, I've not seen any specific evidence to support that allegation. And FHL have confirmed to this service that the individual was an appropriately trained employee of C, so was authorised.

In the absence of any other evidence to the contrary, I'm not persuaded that the loan was introduced to Mrs H by a party that didn't hold the necessary regulatory authority to do so.

The impact of C entering an insolvency process

Mrs H's claim is submitted pursuant to sections 75 and 140A of the CCA. These specifically relate to instances of misrepresentation, breach of contract or unfairness. I've not seen any evidence that Mrs H has submitted a claim to either a Spanish or UK court. So, as far as I'm aware, there's been no ruling or award in her favour. It's possible FHL could incur a liability under S75 in the event that C is unable to fulfil such a court award. But as there doesn't appear to be one here, I can't see that Mrs H has suffered loss such that FHL could be held liable for that under S75. So, I don't see the relevance of this particular aspect in Mrs H's case.

Were the required lending checks undertaken?

There are certain aspects of Mrs H's claim that could be considered outside of S75 and S140A. In particular, in relation to whether FHL undertook a proper credit assessment. The PR say that Mrs H doesn't remember any affordability assessment being carried out. Mrs H added that in applying for a loan, a previous application with another lender had been declined before the FHL loan was agreed.

Regulated lenders each use their own systems, methods and processes when assessing loan applications. These are normally in conjunction with their own lending policies, guidelines and appetite at the time. A decline by one lender wouldn't automatically mean that another wouldn't agree to lend. I can't see that FHL have provided specific details of the credit assessment they undertook when agreeing to Mrs H's loan. If I were to find that the checks and tests they completed didn't comply with the regulatory requirements that applied – and I make no such finding – I would

need to be satisfied that had the checks complied, they would've revealed that the loan repayments weren't sustainably affordable for Mrs H in order to uphold her complaint here.

I've seen copies of some of Mrs H's bank statements together with a copy of her credit report. Our investigator has completed a detailed assessment of the bank statements taking into account information provided about Mrs H's income and expenditure at the time. Having considered these, I'm not persuaded there's any evidence to demonstrate that Mrs H's financial position was such that it would reasonably lead FHL to believe the loan wasn't sustainably affordable for her. The bank account(s) appear to have been well managed and the credit report reveals nothing adverse and demonstrates that all existing and previous borrowings had also been well managed, and repayments maintained within the terms agreed. Because of that, I can't reasonably conclude the loan was unaffordable for her or that she suffered loss as a consequence.

Summary

I would like to reassure Mrs H that I've carefully considered everything that's been said and provided in reviewing her complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that FHL's response to her claim was ultimately unfair or unreasonably. Because of that, I don't currently intend to ask FHL to do anything more here.

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.

FHL have acknowledged receipt of my provisional decision and confirmed, based upon those findings, they have nothing further to add at this stage.

Mrs H, through the PR, has responded at length to my provisional findings with further information and evidence for me to consider. In particular:

- reference is made to this service's assessment of Mrs H's bank statements in which it is pointed out that FHL don't have access to her bank account information – only information held on her file with the credit reference agencies;
- reiterated that an earlier application to finance the purchase with another lender was declined based upon their search information which, Mrs H believes, raises the question of why FHL failed to reach the same conclusion;
- Mrs H has been unable to obtain information from the credit reference agency confirming that FHL completed a credit search. She believes a failure to complete the search constitutes a breach of contract (under the pre-credit contract information);
- it's alleged that at the time of the sale, Mrs H was informed by C that the points membership should be considered an investment because there was an option to part exchange those points for *"actual equitable property".* Mrs H references a *"Frequently Asked Information Statement"* provided by C which she believes demonstrates they were promoting the trade-in of points ownership for freehold property;
- evidence has been provided of subsequent communications in which arrangements were made (following Mrs H's request) to hold discussions with C's real estate department in relation to potentially purchasing property; and
- Mrs H believes there was never any real opportunity to trade-in her points for a real estate purchase as C's real estate prices were (she believes) inflated when

compared to true market values.

The credit assessment

I've carefully considered the additional comments and information provided by Mrs H. I agree that FHL didn't have access to Mrs H's bank account statements. And as far as I'm aware, they weren't necessarily required to. Ordinarily, responsibility falls with the lender (FHL in this case) to conduct affordability checks as set out within the Consumer Credit Sourcebook ("CONC") - part of the FCA handbook. There isn't a set list of checks that lenders needed to carry out. But all the rules and guidance refer to any checks being proportionate.

This service's assessment of the bank statements provided by Mrs H was undertaken in an attempt to establish whether, at the time of the sale, there appeared to be anything to suggest the loan provided by FHL was likely to be unaffordable for her. And if so, whether this could reasonably have been identified or known by FHL based upon their checks and tests. I wasn't able to find anything that would lead me to believe the loan wasn't sustainably affordable for Mrs H.

In my provisional decision I explained that a proven failure by FHL to comply with their regulatory obligations here wouldn't necessarily lead to Mrs H's complaint being upheld. There needs to be evidence of loss that should've been reasonably foreseeable by FHL. Based upon the information available, I can't conclude that was the case here.

I remain of the view that the decline of a loan application by one lender doesn't automatically mean other lenders would or should also refuse to lend. Financial businesses are free to apply their own lending criteria and appetite subject to completion of an affordability assessment compliant with the regulations that apply. And while Mrs H asserts the earlier decline resulted from the outcome of that lender's credit searches, I've seen no evidence explaining the specific reason for that decline. There are many reasons why a prospective lender may choose to not to lend – not necessarily resulting solely from the outcome of a credit search.

Investment

The important point here is whether the points-based product purchased was represented to Mrs H as a financial investment. And as I've already concluded in my provisional findings, I haven't seen any evidence to suggest that was the case.

The additional comments and evidence provided by Mrs H don't change my view on that. I haven't seen anything new to suggest the points were sold as an investment contrary to Regulation 14(3) of the TRs. The fact that Mrs H may have the ability (at a future point) to trade her points in against a subsequent purchase in real estate, doesn't in my opinion, constitute representation of the points as an investment. Mrs H was under no obligation to trade-in the points she purchased. And as far as I can see, C gave no guarantees or assurances about their future value in any event.

Repeating what I stated in my provisional decision - Note 5 of the agreement (which Mrs H signed) clearly states *"We understand that the purchase of our membership* […] *is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade-in nor as a real estate interest or an investment in real estate, and that* [C] *makes no representation as to the future price or value of the* […] *product"*. So, whilst trade-in may have potentially been an option in the future, I'm not persuaded the product was represented on that basis.

Whilst the message exchanges provided by Mrs H appear to demonstrate her desire to explore future real estate purchase options, I can't reasonably conclude that the points-based product was represented and sold specifically to facilitate that purpose.

Summary

I do appreciate Mrs H's strength of feeling here. The PR have stated that in the event Mrs H's complaint isn't upheld, *"she will be seeking further legal proceedings…".* Mrs H is quite within her rights to do that. But to reiterate, my role here is to consider Mrs H's complaint as to whether I believe FHL's failure to uphold her claim under S75 and S140A appears fair and reasonable given the evidence available. It isn't to decide the legal claim.

Based upon everything I've seen and for the reasons explained above, I'm not persuaded that FHL's response was unfair or unreasonable. And because of that, I won't be asking them to do anything more.

My final decision

For the reasons set out above, I don't uphold Mrs H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 14 February 2024.

Dave Morgan
Ombudsman