

The complaint

Mrs B complains that First Holiday Finance Limited won't refund to her the money that she paid for some holiday club membership points. She's being represented in her complaint by a claims management company.

What happened

I issued a provisional decision on this complaint last month in which I described what had happened as follows:

"Mrs B and her husband entered into an acquisition agreement in July 2011 to buy some holiday club membership points from a holiday company. The purchase price of the points was £35,087 and they traded in a trial membership which was given a value of £5,995 so the balance due from them was £29,092. Mrs B and her husband entered into a fixed sum loan agreement with First Holiday Finance for a loan of £9,229 and they agreed to make 144 monthly loan repayments of £131.53 to First Holiday Finance. Mrs B also entered into a fixed sum loan agreement with another lender for a loan which she used to pay the rest of the purchase price to the holiday company.

Mrs B's and her husband's representative made claims, on their behalf, to First Holiday Finance in July 2018 under sections 75 and 140A of the Consumer Credit Act 1974 and for breach of fiduciary duty. It said that the holiday company was in breach of contract, there was a breach of fiduciary duty because First Holiday Finance paid a commission to the holiday company but didn't obtain Mrs B's and her husband's informed consent to the commission, and the agreement, and the related agreement, are unfair. Claims were also made to the other lender and a complaint relating to those claims is being dealt with separately.

First Holiday Finance didn't provide a substantive response to the claims that had been made to it so a complaint was made to this service. Mrs B's representative also raised its serious concerns about the way in which the finance was sold to Mrs B and her husband. Mrs B's husband then sadly passed away and Mrs B made a settlement offer to First Holiday Finance. The outstanding balance of the loan account in October 2019 was £4,688.62 and Mrs B offered to pay £2,700, which First Holiday Finance accepted, and the loan was closed.

Our investigator didn't recommend that Mrs B's complaint should be upheld. He set out the reasons that he wasn't persuaded that there was a misrepresentation at the time of sale and that he didn't think that the holiday company had breached the contract. He said that he hadn't seen enough to suggest that the relationship between Mrs B and First Holiday Finance was unfair and he wasn't persuaded that a court would reach the conclusion that the relationship was unfair. He also said that he hadn't seen anything persuasive to suggest that the lending was unaffordable for Mrs B and that her representative had confirmed that Mrs B had no evidence to support that allegation so it had been agreed that the complaint about unaffordable lending was resolved.

Mrs B's representative, on her behalf, says that it doesn't agree with our investigator's recommendation and has asked for this complaint to be considered by an ombudsman".

- I said in my provisional decision: "I consider that Mrs B's complaint shouldn't be upheld for these reasons:*
- we don't have a free hand to consider every complaint that's referred to us and our rules, which we're required by law to follow, say – amongst other things – that we can't normally deal with a complaint if it's referred to us more than six years after the event complained of; or (if later) more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;*
- Mrs B's complaint is about First Holiday Finance's response to the claims that had been made to it and I accept that her complaint was referred to this service within six years of her claims being made - but I need to consider whether the Limitation Act 1980 applies to her claims;*
- Mrs B's claims were made under sections 75 and 140A but I'm not determining the outcome of those claims in this decision as only a court would be able to do that - I'm considering whether or not First Holiday Finance's response to those claims was fair and reasonable in the circumstances;*
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met);*
- Mrs B's claim under section 75 is that there's been a breach of contract by the holiday company and that the membership points were misrepresented to her and her husband by the holiday company and that they wouldn't have bought them if they hadn't been misrepresented to them;*
- if the criteria for a claim under section 75 were met, First Holiday Finance would be expected to consider that claim unless the claim was brought outside of the time limits set out in the Limitation Act in which case it would be entitled to rely on the Limitation Act and to not consider the claim;*
- the time limit for a misrepresentation claim (whether under section 2 or 9 of the Limitation Act) is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);*
- I consider that Mrs B could have made a claim to the holiday company or First Holiday Finance about the misrepresentations that she says induced her and her husband into buying the membership points in July 2011 as that was the latest time that any misrepresentations would have been made to them and any loss would have been incurred as that was when they also entered into the loan agreement with First Holiday Finance;*
- I consider that her cause of action accrued at that time, so she would have had six years from then to bring a misrepresentation claim under section 75 against either the holiday company or First Holiday Finance – but such a claim wasn't made to First Holiday Finance until June 2018, more than six years later, so I consider that First Holiday Finance would have had a defence to that claim and I find that it wouldn't have been unreasonable for it to have rejected the claim;*
- Mrs B's representative has also referred to breaches of contract by the*

holiday company, but the terms of the contract that it says have been breached weren't part of Mrs B's and her husband's contract with the holiday company – and I consider that First Holiday Finance would also have a defence to any such claim under the Limitation Act;

- *I'm not persuaded that there's enough evidence to show that there's been a breach of contract by the holiday company for which First Holiday Finance would be liable under section 75;*
- *Mrs B's representative says that there was a breach of fiduciary duty because First Holiday Finance paid a commission to the holiday company but didn't obtain Mrs B's and her husband's informed consent to the commission - but it hasn't provided any more information or evidence to show that such a commission was paid and First Holiday Finance says that it didn't pay any commissions to the holiday company;*
- *I'm not persuaded that there's any evidence to support Mrs B's representative's claim that First Holiday Finance paid a commission to the holiday company or that it acted in breach of any fiduciary duty;*
- *Mrs B's representative has described the reasons that it says that there was an unfair relationship between Mrs B and her husband and First Holiday Finance, including the commission that was paid by it to the holiday company, the manner in which the points were sold, the misrepresentations that were made by the holiday company and that Mrs B's and her husband's financial means were limited and they could only afford to purchase the points with the help of the loan from First Holiday Finance;*
- *section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;*
- *I've already said that I'm not persuaded that there's any evidence to support Mrs B's representative's claim that First Holiday Finance paid a commission to the holiday company but it also described the misrepresentations that it says were made to Mrs B and her husband by the holiday company, including that:*
 - *they were advised that the standard of accommodation they experienced when using their trial membership would be the minimum standard that they should expect but the standard of accommodation that has been available to them has been far inferior to that and they've been surprised at how poor the accommodation has been;*
 - *they were advised that entering into the agreement would be the equivalent to making a minimum risk investment, they would be eligible to sell the interest back to the holiday company after two years and its value would increase – but there's no option to sell the points back to the holiday company and their value will not increase;*
 - *they believed that they were buying into an exclusive membership but almost all of the properties can be accessed and booked by non-members; and*
 - *they explained to the holiday company that they would require three bedroom accommodation but they've taken holidays and have been unable to obtain any three bedroom accommodation;*
- *although Mrs B's representative has described those misrepresentations, it*

hasn't provided detailed information about the conversations that took place between Mrs B and her husband and the holiday company or evidence to support the claims about the alleged misrepresentations;

- Mrs B and her husband signed the acquisition agreement and the loan agreement and I consider it to be likely that they would also have signed other documents relating to their purchase of the membership points but I've not been provided with copies of any of those other documents;*
- Mrs B's representative says that during the trial membership Mrs B and her husband had been placed in a luxury suite but I've seen no other evidence to show that they were advised that all of the accommodation that would be available to them using the points would be luxury accommodation and I'm not persuaded that it's likely that the holiday company would have said that all of the accommodation would be luxurious;*
- I consider that it would be reasonable to expect that any assurance about the holiday company buying their points from them after two years would be confirmed in writing but there's nothing in the acquisition agreement about a buy-back and Mrs B hasn't provided any other evidence to show that the holiday company said that it would buy the points from her and her husband after two years or that she and her husband have tried to sell their points back to the holiday company;*
- I'm not persuaded that it's likely that the holiday company would have advised Mrs B and her husband that the points would increase in value or that they were sold to them as an investment – nor am I persuaded that it's likely that it would have said that the resorts were exclusive to members of the holiday club;*
- Mrs B's representative says they Mrs B and her husband explained to the holiday company that they would require three bedroom accommodation but they bought membership points which entitled them to book accommodation and I've seen no evidence to show that the holiday club doesn't include any three bedroom accommodation or that they've unsuccessfully tried to book accommodation with three bedrooms;*
- Mrs B and her husband would have been aware of such issues when they took their holidays and I consider that it would be reasonable to expect them to have contacted the holiday company about such issues soon after they'd happened – but I've seen no evidence to show that Mrs B and her husband contacted the holiday company before Mrs B's representative made claims to First Holiday Finance in June 2018 – about seven years after they'd bought the points;*
- I'm not persuaded that there's enough evidence to show that the membership points were misrepresented to Mrs B and her husband by the holiday company or that they were induced into entering into the acquisition agreement by any such misrepresentations;*
- nor am I persuaded that there's enough evidence to show Mrs B and her husband were unduly pressurised into buying the membership points or entering into the loan agreement or that the holiday company used unacceptable sales practices against them;*
- if Mrs B and her husband had been unduly pressured into entering into the agreements, the holiday company had used unacceptable sales practices on them or they were concerned about the manner in which the points were sold to them, I would expect them to have complained to the holiday company or*

First Holiday Finance about those issues soon after they'd happened – but I've seen no evidence to show that they complained about those issues until Mrs B's representative's letter to First Holiday Finance in June 2018, about seven years later;

- *Mrs B's representative says that Mrs B's and her husband's financial means were limited and they could only afford to purchase the points with the help of the loan from First Holiday Finance - First Holiday Finance says that it carried out standard underwriting procedures based on the information supplied by them in order to ensure that the loan was affordable for them;*
- *the loan account statement shows that the monthly payments were made from September 2011 to October 2019 when the account balance was £4,688.62 and that First Holiday Finance then accepted £2,700 from Mrs B in settlement of the loan and I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mrs B and her husband in July 2011 when it was made to them;*
- *our investigator said that Mrs B's representative had confirmed that Mrs B had no evidence to support an allegation about unaffordable lending so it had been agreed that the complaint about unaffordable lending was resolved and her representative has made no further comment in response to that;*
- *I'm not persuaded that there's enough evidence to show that the loan was mis-sold to Mrs B and her husband or that their relationship with First Holiday Finance was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mrs B and First Holiday Finance in these circumstances;*
- *First Holiday Finance didn't issue a substantive response to the claims that were made to in June 2018 so I can't say that its response to those claims was fair and reasonable – but if it had properly responded to the claims I consider that it would have been fair and reasonable for it not to have upheld them; and*
- *I sympathise with Mrs B for the loss of her husband and for the issues that she's had with the membership points, but I find that it wouldn't be fair or reasonable in these circumstances for me to require First Holiday Finance to refund to Mrs B any of the money that she paid under the loan agreement, to pay her any compensation or to take any other action in response to her complaint”.*

Subject to any further comments or evidence that I received from any of Mrs B, her representative and First Holiday Finance, my provisional decision was that I didn't intend to uphold this complaint. I've received no further comments or evidence in response to my provisional decision.

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.

As I've received no further comments or evidence in response to my provisional decision, I see no reason to change the findings that I set out in that provisional decision.

My final decision

My decision is that I don't hold Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 28 September 2023.

Jarrold Hastings
Ombudsman