DRN-4604438

The complaint

Mr and Mrs M complaint is, in essence, that First Holiday Finance Limited (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 8 May 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,264 fractional points at a cost of £46,840 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £16,820 for membership of the Fractional Club.

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 £16,320 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 1 May 2018 (the 'Letter of Complaint') to complain about the Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA. In particular, it was said:

1. The Supplier misrepresented Fractional Club membership to Mr and Mrs M, that meant the credit relationship was unfair.
2. Mr and Mrs M were not told that a commission payment was made by the Lender to the Supplier.
3. Fractional Club membership was marketed and sold to them as an investment, with them being told they would make back exactly what they put in.
4. They were pressured into purchasing Fractional Club membership and entering into the Credit Agreement by the Supplier.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 18 May 2018, 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, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs M at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing

decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs M was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender 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 issued a provisional decision as I came to a different conclusion to our Investigator. I thought that Mr and Mrs M's complaint should not have been upheld and I explained why I thought that. An extract of that provisional decision read as follows:

> ***"The legal and regulatory context***
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> *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.*
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> *I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:*
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> - *The CCA (including Section 75 and Sections 140A-140C).*
> - *The law on misrepresentation.*
> - *The Timeshare Regulations.*
> - *The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').*
> - *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT 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).*
> - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
> - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
> - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
> - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
> - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
> - *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').*
>
> ***Good industry practice – the RDO Code***
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> *The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').*
>
> ***My provisional findings***
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> *I have considered all the available evidence and arguments to decide what is fair and*

reasonable in the circumstances of this complaint.

And having done that, I do not currently think this complaint should be upheld.

But 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.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Mr and Mrs M's complaint

A summary of Mr and Mrs M's complaint has been set out above, but I think it is helpful to set out exactly what they said went wrong.

In the Letter of Complaint, the PR said:

> *"In May 2012, our clients were on holiday in Tenerife when they were approached by your brokers representatives. Our clients advise that your brokers representatives invited them to a quick chat regarding timeshare. Our clients advise that they had previously been put in similar situations by your brokers representatives and knew that this was likely not going to be a quick chat. Our clients declined the invitation and were subsequently harassed by your brokers representatives who followed our clients around the resort, came to the door of their apartment and made a number of calls to them. Our clients advise that due to the large amount of pressure they were being subjected to by your brokers representatives, they then attended the "quick chat". This was a highly pressured sales presentation which lasted all day, as our clients suspected it would be. Our clients advise that during the sales presentation, your brokers representatives continued to pressure our clients into making a purchase on the day. Your brokers representatives advised our clients that this was a special offer only available on the day and that if our clients did not purchase there and then, the offer would be off the table. Your brokers representatives advised our clients that their previous points were an issue and that they should purchase fractional points as this would be a guaranteed exit. Your brokers representatives advised our clients that a purchase of fractional points would be an upgrade of their points and would provide better availability of holidays. Your brokers representatives also advised our clients that this would be an investment, and that our clients would make back exactly what they put in. Our clients were also advised that after 19 years, your broker would see the product and our clients would be definitely out of their timeshare and not have any liabilities in relation to the same. Our clients were advised that this would make them money."*

Provided as part of the referral of Mr and Mrs M's complaint to our service was a 'client statement'. This was unsigned, but it was dated 12 March 2018 and gave Mr M's recollections of what happened. He set out the background, explain that in 2009, he and his wife purchased a membership from the Supplier following a pressured sale. Mr M said that they had problems booking the exact holidays they wanted using their membership. Mr M went on to say, they tried to resolve these issues by taking out a further membership in 2011.

With respect to the purchase of Fractional Club membership, which forms the substance of this complaint, Mr M had the following to say:

> *"Finally, in May 2012, we were on holiday again in Tenerife. On this occasion, again, we were approached by the representatives telling us that they had to have a quick chat with us about our current timeshare products and advise us of the up to date position. By this time, we knew fine well that it wasn't going to be a quick chat; we went along and, lo and behold, we were stuck with them all day. Every single time you go, you get stuck with them. I should say that I said no the very first time they asked us for the chat during this holiday, however they followed me around the resort, came to our door, made lots of calls and put an awful lot of pressure on us to go along to this presentation. Eventually, we did go along to the presentation. It was complete and utter rubbish, and they were really horrible to us (as they always are) and made us buy on the day. Again, they said it was one of these special offers that was only available until the close of play and if we didn't buy right there and then, the offer would be off the table.*
>
> *This time, they sold us fractional points. They told us that our previous points were an issue and that we should buy fractional points because it would mean that we would have a guaranteed exit. They told us that this would be an upgrade of our points and it would be much better for us in terms of holidaying and availability. They also told us that this would be an investment. They said that we would make back exactly what we put in. They said that after 19 years, they would sell the product and that we would definitely be out of our timeshare and we would have no more liabilities whatsoever for it, and we would also be making money at the same time."*

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

Mr and Mrs M say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs M and the Lender 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.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the 'Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs M;s membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender 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 the Supplier, 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".*

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

> *"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."*[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

> *"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."*

Instead, it was 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 have considered the entirety of the credit relationship between Mr and Mrs M and the Lender 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; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *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 the Lender.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

[1] *The Court of Appeal's decision in Scotland was recently followed in Smith.*

Mr and Mrs M's complaint about the Lender 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.

The PR says that the right checks weren't carried out before the Lender lent 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 the Lender 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 the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for 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.

Mr and Mrs M say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier 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. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr and Mrs M have said that the Supplier misrepresented matters at the Time of Sale that induced them into taking out the Purchase and Credit Agreement. However, in neither the Letter of Complaint nor Mr M's client statement was it explained what representation was untrue, why that was the case and why Mr and Mrs M relied on it when entering the two agreements. Having read the file, there's nothing that persuades me that there were any false statements of existing fact made to Mr and Mrs M at the Time of Sale that amounted to misrepresentations. However, there are two matters I will deal with in more detail further in this decision. That is whether there was a misrepresentation firstly that the Supplier told Mr and Mrs M that Fractional Club membership was an investment and secondly that they would make back exactly what they put in. For the reasons I will come on to, the first statement would not be untrue and I am not satisfied that the second statement was made to them.

It has been alleged that the Lender paid the Supplier a commission that was not disclosed to Mr and Mrs M. However, the Lender is part of a group of companies sharing the same parent as the Supplier and the only lending it undertook was to prospective clients of the Suppler. The Lender has said that it never paid a commission to the Supplier, which to me makes sense given the close connection between the businesses. So I do not think any commission was paid in this case.

I'm not persuaded, therefore, that Mr and Mrs M credit relationship with the Lender 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 the Lender 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?

The Lender does not dispute, and I am satisfied, that Mr and Mrs M 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 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 does not 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.[2]

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 evidence in this complaint 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

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[2] *For this reason, had Mr and Mrs M been told this was an investment, it would not amount to a misrepresentation.*

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. For example, in the Member's Declaration that they would have signed, it was said[3]:

> *"We understand that the purchase of our Fractional Right is for the primary purpose of holidays and is not specifically for the direct purpose of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate (all as explained in the Information Statement)."*

Further, Mr and Mrs M were provided a twelve-page Information Statement, which contained further disclaimers, including:

> *"…Fractional Right have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." (page 2)*

> *"…The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market, supply and demand and exchange rates at the time of sale." (page 3)*

However, there were other aspects of the Information Statement that, in my view, may have given the impression that Fractional Club membership was to be treated as an investment:

> *"**Investment advice***
>
> ***The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority or any relevant authority to provide investment or financial advice, (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs, (d) no warranty is given as to any future values or returns in respect of an Allocated Property.**" (page 8)*

It seems to be that the inclusion of that disclaimer was only necessary if the Supplier was aware that Fractional Club membership ran the risk of being presented as an investment, either in the marketing materials the Supplier produced or orally by its sales staff.

Despite the disclaimers being ambiguous in some areas, I do think the Supplier attempted to specifically avoid giving any future value or estimate of what Mr and Mrs M's return from the sale of the Allocated Property was. In fact, the disclaimer on page 3 of the Information Statement, explains why no specific amount could be given. So although I understand Mr and Mrs M believed they were told they would "make back

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[3] *I have not seen a copy of Mr and Mrs M's actual Member's Declaration, but I am aware that this form of words was used in it at around the Time of Sale. If either part things these words were not used, they can let me know in response to this provisional decision.*

exactly what we put in", without any explanation why that was at odds with the written information they were given, I cannot say, on balance, that this representation was made to them.

With that said, 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. And I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3), given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition. However, even if that was the case, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr and Mrs M rendered unfair?

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"*

So, 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 the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr and Mrs M, is covered

by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But here, Mr and Mrs M have been clear that they were led to believe that they would "make back exactly what we put in". As noted above, I am not convinced on the balance of probabilities that they were told that. But what is important is that it is not part of Mr and Mrs M's complaint that they were led to believe they could (or would) make a profit. In fact they say they were acting under the impression that they would not make any profit.

As noted above, I have taken the definition of investment as "a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit". But, given that Mr and Mrs M were not expecting or hoping to make a financial gain or profit, I cannot say that Fractional Club membership being marketed or sold as 'an investment' was central to their decision to take it out.

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 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 think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3) as it seems to me they were motivated by the better holiday options and a shorter membership term, with the prospect of getting something back, albeit not with any expectation of making a profit. And for that reason, I do not think the credit relationship between Mr and Mrs M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Conclusion

In conclusion, I am not persuaded that the Lender was party to a credit relationship with Mr and Mrs M 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 the Lender to compensate them."

The Lender didn't respond to my provisional decision.

The PR, on Mr and Mrs M's behalf, did respond. It highlighted that our Investigator thought it was likely the Supplier breached Regulation 14(3) during Mr and Mrs M's sale and it argued that Mr and Mrs M had been consistent in saying that throughout the complaint process. The PR pointed to other decisions issued by other Ombudsmen that set out how they thought memberships, similar to Mr and Mrs M's, were sold. In particular, they pointed to a decision where an Ombudsman thought the sale of a similar membership did breach Regulation 14(3).

With respect to Mr and Mrs M's evidence, the PR argued that saying they would be "*getting all their money back*" was as good as saying they would make a profit on the sale, once they had factored in the cost of the holidays and they said they thought they would make a financial gain following the sale of their fractional points. It was also argued that I had placed insufficient weight on Mr M's evidence that *"we would also be making money at the same time"*, which falls within the category of purchasing for potential financial gain. The PR said that where there was any inconsistency or ambiguity in Mr and Mrs M's evidence the fair and reasonable approach should be "*that the least ambiguous evidence should be preferred which in our opinion is the sentence which contains the phrasing to "financial gain"*".

What I have decided

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

Having done so, I have not changed my mind on the conclusions I reached in my provisional decision.

Given the response I have received to my provisional decision, it seems that the only issue I have to decide is confined to whether the way in which Fractional Club membership was sold breached Regulation 14(3) and, if so, whether that led to an unfair credit relationship that the Lender must remedy. So, for the reasons set out above, I do not uphold Mr and Mrs M's complaint for any of the other reasons they put forward.

The PR has asked me to consider other decisions issued by Ombudsmen dealing with the sales of memberships similar to Mr and Mrs M's Fractional Club membership, arguing that this shows the sale would have breached Regulation 14(3). But this overlooks the paragraph in my provisional decision, where I said:

> *"With that said, 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. And I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3), given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition. However, even if that was the case, I am not currently persuaded that would make a difference to the outcome in this complaint anyway."*

What I found was crucial was that, on the evidence I had seen, I didn't find that any breach of Regulation 14(3) led to an unfair credit relationship that warranted relief. So that is the key issue I must consider.

In response to my provisional decision, the PR has pointed to parts of the evidence that suggests Mr and Mrs M bought Fractional Club membership due to it being an investment. The first was Mr M's evidence that "*[The Supplier] said that after 19 years, they would sell the product and that we would definitely be out of our timeshare and we would have no more liabilities whatsoever for it, and we would also be making money at the same time."* It would have been possible to infer from that passage that Mr M expected to make a profit on what they paid for membership. However, this has to be read in conjunction with the sentence that immediately preceded it – "*They said that we would make back exactly what we put in.*" In my view, the fact that Mr M has consistently said that he expected to '*make back exactly"* what they *"put in"* means Mr M has explicitly said he did not expect to receive a profit as he has explained precisely what his expected return was.

Similarly, PR said "in our opinion "*getting all their money back" is as good as saying they would make a profit factoring in the cost of the holidays etc.*" But I cannot see that Mr and Mrs M thought that was the case in the evidence I have seen. If Mr and Mrs M had thought that any 'profit' or 'gain' was to be made by combining any return from the sale of the Allocated Property with any savings they made on the holidays they took, I would have expected them to have said that. But again, the only thing said about the expected return was that Mr M thought he would make back exactly what they put in. So I simply can't say their purchase was motivated by the expectation or hope of making a financial gain or profit. Given that, I do not uphold Mr and Mrs M's compliant for the same reasons as set out in my provisional decision.

My final decision

I do not uphold Mr and Mrs M's complaint against First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 11 February 2025.

Mark Hutchings
Ombudsman