DRN-4617614

The complaint

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

Background to the complaint

Mr and Mrs R purchased membership of a timeshare ('Fractional Club 1') from a timeshare provider (the 'Supplier') on 2 July 2014 ('Time of Sale 1'). They entered into an agreement with the Supplier to buy 1,200 fractional points they could use every even-numbered year, at a cost of £11,084 ('Purchase Agreement 1').

Mr and Mrs R paid for their Fractional Club membership by taking finance from the Lender ('Credit Agreement 1'), paying £500 by other means and borrowing the remaining balance. This loan was paid off in full on 19 October 2015.

On 1 July 2015 ('Time of Sale 2'), Mr and Mrs R traded in their Fractional Club 1 membership[1] for another Fractional Club membership ('Fractional Club 2'). They entered into an agreement with the Supplier at a cost of £17,277 ('Purchase Agreement 2'). This membership gave them the right to book holidays in a specific apartment at a specific time of every even-numbered year. If they chose not to use this right, they would instead receive 1,820 fractional points which could be exchanged to book holidays across other locations.

Mr and Mrs R also paid for Fractional Club 2 membership by taking finance from the Lender (the 'Credit Agreement 2'), again paying £500 by other means, and borrowing the remaining balance.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs R more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreements (the 'Allocated Property') after their membership terms ended.

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 8 April 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale 1 and 2, giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

[1] In trading their Fractional Club 1 membership, Mr and Mrs R no longer have any right to the net sales proceeds from Allocated Property 1.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr and Mrs R say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale 1 and 2 – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true.
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.
5. told them they could use their points gained through Fractional Club 2 to book accommodation during the school holidays, but they say they could only do this if they agreed to a downgraded standard of accommodation.

Mr and Mrs R say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

The Letter of Complaint set out several reasons why Mr and Mrs R say that the credit relationships between them and the Lender were unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The contractual terms setting out (i) the duration of their Fractional Club memberships and/or (ii) the obligation to pay annual management charges for the duration of their memberships were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. They were pressured into purchasing Fractional Club memberships by the Supplier.
3. The Supplier's sales presentation at the Times of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter, explaining that matters would be best handled by the Supplier. It referred the complaint to the Supplier, who issued its own response dated 26 April 2019, rejecting it on every ground.

Mr and Mrs R then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs R disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

And having considered the complaint, I agreed with the outcome reached by the Investigator. I did not think that Mr and Mrs R's complaint should be upheld, but in reaching that conclusion I expanded on the reasons why. So, I set out my initial thoughts in a Provisional Decision ('PD'). I invited both Mr and Mrs R, the PR, and the Lender to respond with any new evidence or arguments if they wished to.

In my PD, I began by setting out the legal and regulatory context:

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.

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:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').*
- *The UTCCR.*
- *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

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

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.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale 1 and 2

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs R could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs R at the Time of Sale 1 and 2, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. And although there were two purchases, the PR has made global alleged misrepresentations, so I have considered them in respect of both sales. They include the suggestion that the Fractional Club memberships had been misrepresented by the Supplier because Mr and Mrs R were told that they were buying an interest in a specific piece of a property when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs R's share in the Allocated Property 1 and 2 were clearly the purchase of a share of the net sale proceeds of specific properties in specific resorts. And while the PR might question the exact legal mechanism used to give them those interests, it did not change the fact that they acquired the interests.

The PR says that the Fractional Club memberships were sold as an "investment" by the Supplier to Mr and Mrs R. But, if this was said, I don't think it is a misrepresentation as Fractional Club membership does include an investment element, that being the share in the Allocated Property. I will explain this further below.

The PR's Letter of Complaint includes the suggestion that Fractional Club memberships 1 and 2 had been misrepresented by the Supplier because Mr and Mrs R were told that the memberships had a guaranteed end date in 2033. But Mr and Mrs R do not say the sale was guaranteed in their first statement at all – they only say they were led to believe the membership was for 15 years, after which time the Allocated Property would be sold. In their supplementary statement, which the PR provided after the Investigator sent her findings, they say that they were promised the Allocated Property would sell after 15 years. Here, the PR and Mr and Mrs R have given slightly different recollections. I prefer the evidence that has come from Mr and Mrs R directly as I think it is more likely to reflect what they were told and what they believed happened at the Times of Sale. And they have not said they were

told the sales were "guaranteed", so I don't think that's what the Supplier said. Looking to the supporting documents, I can see that the process of selling the Allocated Property was due to start for Fractional Club 1 on 31 December 2032, and for Fractional Club 2, was due to start on 31 December 2034. I find it unlikely the Supplier's sales representative would have said the membership was for 15 years as this could have been easily discovered upon reading the documents. And, while the sales documents do not contain any such guarantee that the Allocated Properties would be sold on those dates, the Terms and Conditions do set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. Further to this, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, including themselves. So, I am not persuaded that the Supplier made a misrepresentation about the end date of the memberships or the sale dates of the Allocated Property.

Lastly, the PR says Mr and Mrs R were told the membership would give them exclusive access to holidays at the resorts, but non-members had been able to book resorts over the internet. But I don't think it's likely they were told the resorts were only for the use of members, as they first stayed in one of the resorts as non-members. And as they say in their response to the Supplier's rejection of their complaint:

"When their sales process starts with offering the opportunity to win a "free" holiday, via people approaching everyone in the airport queue at the departure gate, it doesn't give the impression of being "exclusive".

The PR's letter does not specify whether one or both memberships were sold as "exclusive", but I do note that the Fractional Club 2 membership provided them with the first right to book a particular apartment at a particular time of year, every even-numbered year. So, to this extent, the membership did provide exclusive access to holidays at that resort.

I have also thought about the allegations raised by the PR in the Letter of Complaint that Mr and Mrs R were only able to secure holiday accommodation during the school holidays using their points gained through their Fractional Club 2 membership if this was of a lower standard. And that they could only stay in the Allocated Property for one week and had to spend another week at a different resort.

The PR has not explained exactly what was said at the Time of Sale 2 that led Mr and Mrs R to believe the points could be used in addition to the right to use the week in the Allocated Property. Nor why the points would give them access to the same standard of accommodation as the Allocated Property. And, bearing in mind they traded their Fractional Club 1 membership in as part of the purchase of their Fractional Club 2 membership, they only held the right to stay at the Allocated Property for one week in 2016 or trade that right to stay elsewhere. But Mr and Mrs R stayed at the Allocated Property in 2016. So, I am unsure what entitlements they used to gain the second week of accommodation at the other resort, but I am satisfied the evidence suggests this was not booked through the Fractional Club 1 or 2 memberships.

I can see Mr and Mrs R's membership provided them with exclusive access to accommodation in the Allocated Property during week 30, which falls within the school holidays at the end of July. So, I think they were able to use the accommodation provided for them by the membership and I am not persuaded the Supplier has misrepresented the benefit they could expect to receive from the memberships.[2]

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[2] In its Letter of Complaint, the PR raised this allegation as a misrepresentation. I think this could have also been considered as an allegation of a breach of contract under section 75 CCA, so I have thought about this. I am not persuaded the claim ought to

So, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs R by the Supplier at the Time of Sale 1 and 2, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs R any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs R was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs R also say that the credit relationships between them and the Lender were 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 1 and 2 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 relationships between Mr and Mrs R 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 sales of Mr and Mrs R's memberships of Fractional Club 1 and 2 were conducted in relation to transactions financed

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have succeeded on those grounds either, as I cannot agree that Mr and Mrs R have shown that the Supplier breached the contract.

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."[3]

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

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

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 relationships between Mr and Mrs R and the Lender along with all of the circumstances of the complaint and I do not think the credit relationships between them were 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 1 and 2 – which includes training material that I think is likely to be relevant to the sales; and*
2. *The provision of information by the Supplier at the Time of Sale 1 and 2, 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 1 and 2, and;*
4. *The inherent probabilities of the sales given their circumstances.*

I have then considered the impact of these on the fairness of the credit relationships between Mr and Mrs R and the Lender.

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

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

They include the allegation that the Supplier misled Mr and Mrs R and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs R. 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 R 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 for either loan was unaffordable for Mr and Mrs R. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs R wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs R say that they were pressured by the Supplier into purchasing the Fractional Club memberships at the Time of Sale 1 and 2. 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. Mr R says that he felt uneasy during one presentation when he returned to his apartment

to retrieve a credit card that was used to pay the deposit. I appreciate he may have felt some pressure at this point of the sale, but don't think this was to such a level as to have caused him to purchase something he otherwise would not have done. Mr and Mrs R were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their memberships during that time if they felt the sales were pressured. Moreover, they did go on to upgrade their Fractional Club 1 membership – which I find difficult to understand if the reason they went ahead with the purchase was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs R made the decision to purchase either of their Fractional Club memberships because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs R's credit relationships with the Lender were 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 R's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the PR says that the Supplier did exactly that at the Time of Sale 1 and 2. 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 R's share in each Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that the Fractional Club 1 and 2 memberships were marketed or sold to Mr and Mrs R as investments 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 the membership to them as an investment, i.e. told them or led them to believe that the Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

As the sale of Fractional Club 1 and 2 involved different products which were sold at different times, I have considered the facts and evidence available for each sale separately and have noted this where applicable. These include the contemporaneous paperwork, witness evidence, training and sales materials.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Clubs as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that the Fractional Club memberships were not sold to Mr and Mrs R as an investment. For example, the Member's Declaration, signed by both Mr and Mrs R for Fractional Club 1, says:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and Is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction".

The Member's Declaration for Fractional Club 2 reads very similarly:

"We understand that the purchase of our Fractional Rights is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights."

And I think Mr and Mrs R were aware of these disclaimers as they said in their evidence which was first sent alongside their complaint:

"[The Supplier] state that the [Fractional Club] membership is not a monetary investment and that they make no representation as to the future price or value of the Fraction. We understand the [Fractional Club] membership is not intended as a monetary investment however it was the [Supplier's] sales rep/manager who brought this up as an additional benefit to us. We both distinctly remember the term "nest-egg" being used to describe it. No exact values were mentioned, however it was mentioned to us that we would receive a share of the profits from the future sale of the property, making it seem more attractive."

And, they reiterate this point with respect to the second sale:

"[The Supplier] again mention the point about the scheme not being an investment. As already mentioned, these were not our words but the words of the sales rep/manager when trying to sell the product and make it look like an additional benefit."

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, notwithstanding Mr and Mrs R being aware of the disclaimers, their evidence suggests that the salesperson at the least highlighted the investment elements of membership. So, I accept that it's possible that Fractional Club membership was marketed and sold to Mr and Mrs R 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 memberships without breaching the relevant prohibition.

However, I don't think it is necessary to make a finding on this point because, as I'll go on to explain, 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 R 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 R 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 R, 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 led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Having considered everything, it is my view that any alleged breach of Regulation 14(3) did not lead Mr and Mrs R into taking out either of the memberships. In coming to that view, I acknowledge that this is a finely balanced decision. I was not there at the Times of Sale, so it is hard to know precisely what was said and what motivated the sales. However, having considered everything, on balance I have come to the following findings. In doing so, I consider the evidence from Mr and Mrs R to be preferable to the submissions from their PR,

but I have thought about everything I have been given. And I have highlighted some relevant parts of the Letter of Complaint to give context to the complaint.

At the Time of Sale 1, the PR says the Supplier "asked [Mr and Mrs R] about themselves, their families, hobbies and the kind of holidays they like to take, and how often". The Supplier learned that they were due to go on a honeymoon in two years' time. The sales representative explained how many points they would need to take holidays at different locations. The PR says: "on the face of it, to [Mr and Mrs R] it seemed that they would make significant savings, on holidays, over the years".

In their testimony, Mr and Mrs R say:

"I have delivered many presentations in the course of my working life, and what they delivered was not a presentation, but rather a carefully thought out sales process designed to counter every argument put forward and based around the promise of luxury holidays and a demonstration of how to use the points in order to get more than one holiday a year, or keep points back to use the following year, something that when we tried to put it in to practice never worked as the holidays, dates and/or accommodation we were looking for never seemed to be available."

Regarding the sale of the Fractional Club 2 membership, the Letter of Complaint says:

After breakfast, they were taken across to [one of the Supplier's resorts], where they were shown a Suite, which they describe as "very high-end", with Egyptian cotton linen and towels, Apple smart TV, other branded electrical accessories and a hot tub on the balcony". …

"They were then shown a luxury two-storey property, which was even nicer than the one in [the first resort], with a back garden and blue-tooth accessible hot tub."

And:

"Any objections they had were brushed aside, while they asked why they would not want the better holidays that buying extra Points would get them."

Regarding issues the PR says Mr and Mrs R faced when using Fractional Club 2 membership, and the suggestion they needed to agree to a downgraded level of accommodation, it says:

"[Mr and Mrs R] were very unhappy about this suggestion, as it defeated the whole purpose in their upgrading their ownership in the first place".

So, I think both the Letter of Complaint and the testimony indicate that the sale of the Fractional Club 1 and 2 memberships were centred around the holiday rights Mr and Mrs R would receive as members and the problems they say they had in taking those holidays. Their testimony suggests to me that they were interested in taking holidays and can see that they also received and used a "Bonus Week" that allowed them to take an additional holiday outside of the membership. Further, the PR says that Mr and Mrs R's decision to purchase Fractional Club 2 membership was to access accommodation of a higher standard than their Fractional Club 1 membership provided them. I am persuaded that the holiday rights they gained from Fractional Club 1 and 2 was the primary reason they entered both agreements. So, I have then looked at what both parties say about the investment element of the memberships.

In its response to the Letter of Complaint, the Supplier says that Fractional Club membership was not sold as an investment. I've thought about what Mr and Mrs R say in their first statement, which I think is the most reliable evidence of what they were told at the Times of Sale as this was written closer to that time and in their own words. When assessing the meaning of what they say, I have assessed the evidence as a whole to take what I think is the most reasonable interpretation of their motivations for purchasing the memberships.

In their first statement, Mr and Mrs R say:

"[The Supplier] state that the [Fractional Club] membership is not a monetary investment and that they make no representation as to the future price or value of the Fraction. We understand the [Fractional Club] membership is not intended as a monetary investment however it was the [Supplier] sales rep/manager who brought this up as an additional benefit to us. We both distinctly remember the term "nest-egg" being used to describe it. No exact values were mentioned, however it was mentioned to us that we would receive a share of the profits from the future sale of the property, making it seem more attractive."

Regarding the sale of Fractional Club 2 membership, they say in their first statement:

"[The Supplier] again mention the point about the scheme not being an investment. As already mentioned, these were not our words but the words of the sales rep/manager when trying to sell the product and make it look like an additional benefit."

So, with both sales, Mr and Mrs R describe the investment element of their memberships as being sold to them as an additional benefit, which to me strongly implies that it was not a central part of their decision to purchase on both occasions. And they have accepted that they understood the memberships were not intended as monetary investments, even though they recall the sales representative using the term "nest-egg" during the sale of the Fractional Club 1 membership. Here, I think it is reasonable to understand the use of the term nest-egg to mean that they would receive something back in the future, and that this did not necessarily indicate they would receive back more than their initial outlay. I think this is supported by Mr and Mrs R's further statement that they were told they would receive a share of the profits from the future sale, but that they make no mention of receiving this in addition to their initial outlay.

In a "Supplementary Statement" signed and dated on 29 January 2024, which was after the Investigator rejected the complaint, Mr and Mrs R say:

"We were also told about Fractional Property Ownership, which [the Supplier] said involved buying a share in a property, which would be sold in 15 years, and the proceeds of the sale would be split between the owners. We were told we would get our money back at the end, together with a share of the profits from the sale.

It was suggested that it would be a good investment, and a nest egg for when we retired".

And in the Supplementary Statement, they say:

"We were promised a share in "bricks and mortar", and a holiday home for our family, which we could use at certain times of the year, and promised a sale, after 15 years, which would return our investment, with a profit on top".

I have considered what Mr and Mrs R say in this later statement and whether I think this changes, or clarifies, anything they said up to that point. And I think it does to an extent, in that here they say they were told they would get their money plus a profit on the sale of the Allocated Property. But I need to consider the context in which this statement was provided –

that being to explain why the Investigator ought to have upheld their complaint. Given this, and the time that passed since the Times of Sale, I am minded to place much less weight on what they say in the Supplementary Statement than what came before. This is because this statement was provided many years after the sales and memories do change and evolve with time. Further, if the Supplier had said they would get back what they paid for their memberships plus a profit, I would have expected that to have been said in their earlier statement. And, in any case, I am still not persuaded that the prospect of receiving money back, with a profit or otherwise, was a motivating factor for them, as they have not said that it was. And, as I've covered above, Mr and Mrs R say they were told the sale of each Allocated Property would take place after 15 years, but the contractual documents made it clear that this was not the case.

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 R's decisions to purchase the Fractional Club 1 and 2 memberships at the Time of Sale 1 and 2 were 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 purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs R and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs R when they purchased membership of the Fractional Clubs at the Times of Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR says the Supplier's presentation at the Time of Sale 1 and 2 involved aggressive commercial practices, misleading acts, and misleading omissions as defined by the CPUT Regulations 5 to 7, and this contributed to an unfair relationship between Mr and Mrs R and the Lender. In addition to the reasons that I've covered above, the PR says the Supplier did not set out the risks involved with the purchases, and that it gave the impression that the deal was only available for a limited period of time.

The PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And 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 the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's

alleged breaches of the CPUT Regulations and the UTCCR are likely to have prejudiced Mr and Mrs R's purchasing decision at the Time of Sale 1 and 2 and rendered their credit relationships with the Lender unfair to them for the purposes of section 140A of the CCA. The PR says the duration of the memberships and Mr and Mrs R's obligation to pay management fees for the duration of the memberships was unfair within the meaning of Regulation 5 of the UTCCR. But it has not explained why it was unfair of the Supplier to charge the fees, or why the duration is in itself unfair. I don't agree that these contractual terms cause a significant imbalance in the parties' rights in and of themselves, and I am not persuaded there is any detriment caused to Mr and Mrs R by the Supplier exercising these terms or any evidence that they have in fact been exercised unfairly against them. And I haven't seen any persuasive evidence that any of the Supplier's actions, omissions or commercial practices led to a breach of the CPUT Regulations that caused Mr and Mrs R to suffer any harm or prejudice as a consequence.

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

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs R was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

I then invited the parties to provide any responses.

The Responses to my PD

The Lender did not respond to my PD.

The PR provided a lengthy response to my PD, explaining why it thought I reached the wrong outcome and has asked me to reconsider my position on the complaint because it says it's clear Mr and Mrs R purchased the Fractional Club membership because:

- they were told they could realise "*financial returns*" on the funds they invested in the membership.
- They were told that they were converting a product with no resale value to a product with a resale value.
- They were led to believe they would receive a return on investment because property prices historically trended upwards.

The PR then provides an analysis of training documents and what it thinks most likely happened during one of the sales.

The PR says the Lender "*has not provided any evidence to prove that the facts alleged do not give rise to unfairness*", and so I have reversed the "*burden of proof*".

The PR has suggested that the Lender paid the Supplier some commission. It has asked me to provide it with the amount of commission that was paid.

Lastly, the PR gives what it calls "*a detailed comparison*" of my PD to the "*other FOS decisions previously analysed*". It says that my approach to Mr and Mrs R's complaint is inconsistent with the approach taken by other ombudsmen in the interpretation of Regulation 14(3), assessment of witness statements, consideration of the Supplier's sales practices,

application of the "unfair relationship" test, consideration of commission, and reliance on precedents. It concludes that this highlights what it calls a "*need for greater clarity and consistency in the FOS's application of relevant laws and regulations, as well as its evaluation of evidence and assessment of "unfair relationships*"".

My findings

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

Having considered everything again, I still reject Mr and Mrs R's complaint, for the reasons set out in the extract of my PD. I will also deal with matters raised by the PR in response to my PD. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been raised in response. Instead, it is to decide what is reasonable in the circumstances of this complaint. So, while I have read the PR's response in full, I will confine my findings to what I think are the salient points.

Firstly, the PR now says Mr and Mrs R were told they could make "*financial returns*" and that they were led to believe the value of the Allocated Property would increase. But this is not what was said by Mr R in his testimony about either sale. And it is not what was said by the PR in the Letter of Complaint. Therefore, I am not persuaded that this is what the Supplier was likely to have said to Mr and Mrs R at either Time of Sale 1 or 2 as this is not what they have said happened until now.

The PR says Mr and Mrs R were told they were converting a product with no resale value to a product with a resale value. But, according to its own Letter of Complaint, they were new customers of the Supplier at the Time of Sale 1 and did not hold any product to convert. So, I find it implausible that they were told this by the Supplier at the Time of Sale 1, and I find it very unlikely they were told this at the Time of Sale 2 as I don't find this to be clear or consistent with what I have been told about that sale before.

In its response, the PR says that, within my PD, "*there is significant weight placed upon what Mr and Mrs R have said*" and that this is an incorrect and inappropriate position to take in relation to a complaint made under Section 140A CCA. I think what Mr and Mrs R have said in relation to the events at the Time of Sale 1 and 2 *is* of great importance when considering their complaint about an unfair relationship. And I think what they said closer to the Time of Sale 1 and 2 is more persuasive than what they said in response to the Investigator's rejection of their complaint for the reasons I gave in my PD.

Turning to the PR's comparison of my PD with other decisions, I am required to consider the facts as they appear in this case, which is what I have done.

As I set out in my PD, the Supreme Court's judgement in *Plevin* makes clear that regulatory breaches do not automatically create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

And as I also set out in my PD, and being mindful of *Carney and Kerrigan*, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs R and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration. The PR has not explained why it disagrees with my reading of those two judgments. Further, the judgment in *Shawbrook & BPF v FOS* (at [185]) appreciated, for there to be an unfairness that warranted

compensation, there needed to be a link between any breach of Regulation 14(3) with a consumer's purchasing decision:

"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness –in particular to whether they had regard to all relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial ***and the constituent conduct causative of the legal relations entered into: timeshare and loan****. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair.* ***It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments.*** *Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."*
(emphasis my own)

For the reasons set out in my PD, I do not think Mr and Mrs R have said that they purchased either of their Fractional Club memberships with the hope or expectation of financial profit or gain. That was based on the plain reading of their own words, and I've not seen anything to make me change my mind about that. It follows that, I can't say that any breach of Regulation 14(3) was causative of them taking out that membership and, therefore, that there was an unfairness that warrants any remedy.

And having considered everything submitted by the PR in response to my PD, I remain satisfied that any possible breach of Regulation 14(3) by the Supplier at the Time of Sale 1 and 2 was not critical to Mr and Mrs R's decisions to purchase memberships of the Fractional Club.

The PR says that I failed to address the "*issue of commission and its potential impact on the fairness of the credit relationship*". It has referred to a recent judgment from the Court of Appeal. It says that Mr and Mr R "*raised a complaint that the interest rate was excessively high*" and it now says it is "*of the view that the interest rate was high because a commission was paid to them by the Supplier, which made the financial arrangement unfair*". It does not clarify who it means by "them", so I will take this to mean the Lender.

I can't see that the PR has raised the issue of commission at any stage in the complaint until now. And while I can see that the Letter of Complaint refers to the rate of interest as being "high", it did not make an expression of dissatisfaction about the interest rate applicable to either loan, so I do not consider this to be something the PR wanted me to consider until now. In any case, the interest rate is clearly stated on the Loan Agreement, so I don't agree this is the cause of any unfairness to Mr and Mrs R as they would have seen the interest applicable to the loan at the Time of Sale 1 and 2. I would only add that the UTCCR exclude from the assessment of fairness the appropriateness of the price payable. The interest payable is the price payable for the credit provided under the Credit Agreements. So, I cannot reasonably consider whether the rates at which interest was charged by the Lender has led to any unfairness.

The Lender says it did not pay the Supplier any commission and the PR has not provided me with any persuasive evidence that the Supplier received any commission from the

Lender. Given the Lender is, in essence, the Supplier's in-house finance provider, I think it's unlikely there was any payment of commission involved in either transaction.

My final decision

Given the facts and circumstances of this complaint, and for the reasons I set out above, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs R's Section 75 claim. And I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreements and related Fractional Club Purchase Agreements 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. So, I do not uphold their complaint against First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R and Mrs R to accept or reject my decision before 9 April 2025.

Andrew Anderson
Ombudsman