

The complaint

Mr K and Ms L'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.

What happened

Mr K and Ms L were members of a timeshare club offered by a timeshare supplier ('the Supplier') and by 2017 they held timeshare points bought for around £4,000. These points could be exchanged every year to stay at the Supplier's properties.

Mr K and Ms L purchased membership of a new timeshare (the 'Fractional Club') from a the 'Supplier' on 19 September 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to exchange their existing points and additional points to bring the overall to 800 fractional points at a cost of £10,089 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr K and Ms L 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 K and Ms L paid for their Fractional Club membership by taking finance of the full purchase amount, £10,089, less a £500 advance payment, so £9,589, from the Lender in a joint agreement (the 'Credit Agreement').

Mr K and Ms L – using a professional representative (the 'PR') – wrote to the Lender on 17 August 2022 (the 'Letter of Complaint') to complain about:

- misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender did not accept and pay;
- the loan being unenforceable due to an unauthorised credit broker;
- 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;
- the decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment;
- the sales company having gone into administration so customers are unable to recover money under litigation because of the sales company's insolvency.

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

Mr K and Ms L's PR says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership was an "investment" which would appreciate in value;
2. told them that they would have a share of a property when this wasn't true;
3. that they could sell the share back to the resort or easily at a profit;

4. that they would have access to the property at any time.

Mr K and Ms L's PR says 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 K and Ms L.

(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 K and Ms L say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment (which would be in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')).
2. The contract contained unfair terms.

The Lender dealt with Mr K and Ms L's concerns as a complaint and issued its final response letter on 26 August 2022, rejecting it on every ground.

Mr K and Ms L then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, did not uphold the complaint on its merits.

The Investigator thought that there wasn't sufficiently persuasive evidence that the Supplier had marketed and sold Fractional Club membership as an investment to Mr K and Ms L at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And therefore, the Investigator concluded that the credit relationship between the Lender and Mr K and Ms L was not rendered unfair to them for the purposes of section 140A of the CCA. She also did not uphold it on any other grounds such as misrepresentation, unfair terms, or unaffordable lending.

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

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is set out in my provisional decision in full and forms part of this decision, so I don't think it's necessary to repeat this here.

My Provisional Decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I was minded to uphold Mr K and Ms L's complaint and set out how the complaint should be resolved. Mr K and Ms L accepted the provisional decision, whilst First Holiday Finance Ltd disagreed with my findings and my redress proposals, making some additional points.

What I've decided – and why

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

As Mr K and Ms L accepted my provisional decision, and the Lender's comments did not persuade me to change the outcome, I don't consider that I need to amend the findings that I reached in my provisional decision to uphold the complaint.

I have set my previous findings out below and adopt them as my findings in this decision. I have addressed the points First Holiday Finance Ltd made in response to my provisional decision at the end of this decision. It also disputed the proposed redress in my provisional decision to resolve the complaint which will also be addressed below.

In my provisional decision I said:

"[I think that] this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr K and Ms L as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, 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, while I recognise that there are a number of aspects to Mr K and Ms L's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- the Supplier misrepresented the Fractional Club membership and the Lender ought to have accepted and paid the claim under Section 75 of the CCA;*
- the supplier's sales representatives were not authorised credit brokers;*
- the Lender did not carry out the right creditworthiness assessment.*

Because even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr K and Ms L in the same or a better position than they would be if the redress was limited to misrepresentation or irresponsible lending.

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

Having considered the entirety of the credit relationship between Mr K and Ms L and the Lender, along with all of the circumstances of the complaint, I 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;*
- 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; and*
- 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 K and Ms L and the Lender.

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr K and Ms L'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 Fractional Club membership 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 Mr K and Ms L say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

"One of the manager joined our meeting to make the final push making us believe than the membership could become an income for us with Interval international partnership by selling holidays to friends and family, he even told us that he was doing it and was making money or else, because any deals or any luxurious hotel anywhere in the world should have been cheaper than any prices on the market, that way we could have charged a reasonable price for whoever would have bought holidays from us and still making profit a win-win situation (guess what? it never happened), then they played in the "long run" card make appealing that a permanent membership (which meant to last 19 years) could became a retirement bonus as after 19 years (or end of the membership), we could sell our share and get the money back and possibly more depending on the value of the property/share at the time, they really underlined that part, I liked the idea of leaving something to my wife, so we signed." (sic)

Mr K and Ms L allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

- (1) There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property – and a potential profit from selling on their holiday rights.*
- (2) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

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 K and Ms L's share in the Allocated Property clearly 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 Fractional Club membership was marketed or sold to Mr K and Ms L 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 K and Ms L, 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 Fractional Club membership was not sold to Mr K and Ms L as an investment.

For example, in the Member's Declaration signed by Mr K and Ms L it said:

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

And in the Additional Information section of the Information Statement, signed by Mr K and Ms L, it said:

"5. Primary Purpose

The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."

However, weighing up what happened in practice is, in my view, rarely as simple as only looking at the contemporaneous paperwork. And there are a number of strands to Mr K and Ms L's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including that membership of the Fractional Club could result in a financial gain and/or would retain or increase in value.

So, I have considered:

- (1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr K and Ms L or led them to believe during the wider marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e. a profit); and, in turn*
- (2) whether the Supplier's actions constitute a breach of Regulation 14(3).*

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

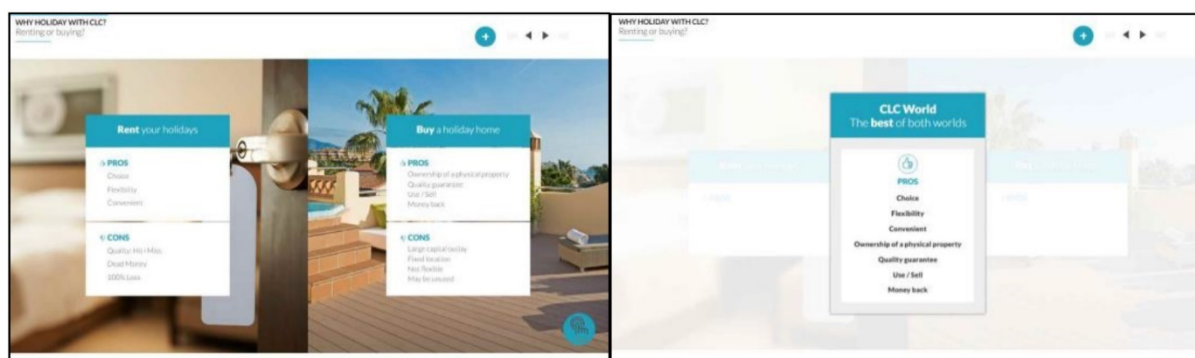
How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr K and Ms L's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual').

Mr K and Ms L's PR provided us with a copy of different training manual, however this seems to be an earlier version before the 2017 manual was used. As I understand it, the 2017 Fractional Training Manual was used from November 2016 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr K and Ms L appear to have purchased. It is not entirely clear whether Mr K and Ms L would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

- (1) the training the Supplier's sales representatives would have got before selling Mr K and Ms L Fractional Club membership; and
- (2) how the sales representatives would have framed the sale of Fractional Club membership to Mr K and Ms L.

Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seem to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr K and Ms L that holidaying with the Supplier combined the best of (1) and (2) below, including, amongst other things, ownership of a physical property and money back – which were benefits that were front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide that was part of one of the Supplier's earlier training manuals and which was used to help it sell the first version of Fractional Property Owners Club:



All three slides indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

- (1) "Rent Your Holidays"
- (2) "Buy a Holiday Home"
- (3) "The Best of Both Worlds"

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking 'normal' holidays and purchasing a holiday home. Further, for the reasons I will come onto, although the word 'investment' did not appear in the 2017 Fractional Training Manual, I think the idea that Fractional Club membership offered the same benefits as purchasing an investment property did form part of the sales process.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And like an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially when combined with the phrase "money back".

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

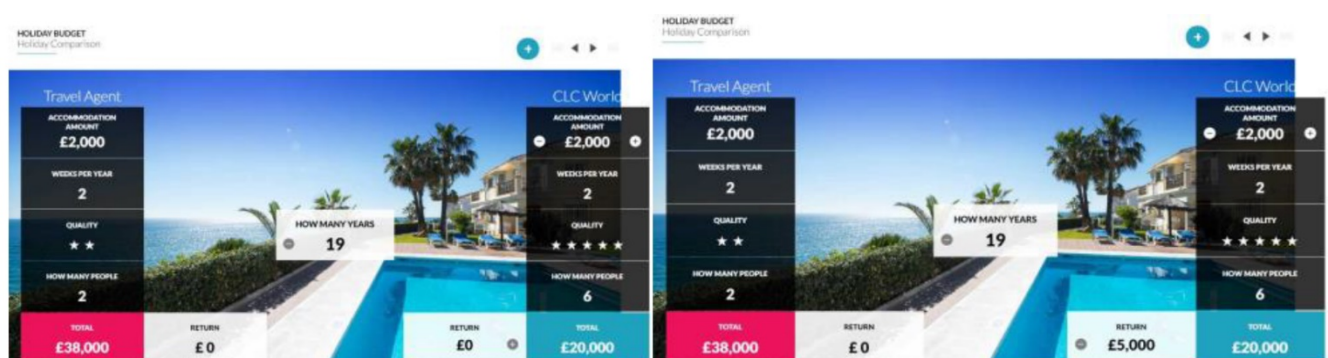
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

"So really FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back?"

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:



“We aren’t only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spent over £... with no return.

However, with [the Supplier] you would still have spent the same £... because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only say £5,000, it would still be more than you would get renting your holidays from a travel agent wouldn’t it.”

I acknowledge that the slides above set out a “return” that is less than the total cost of the holidays and the “initial outlay”. But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

- (1) the right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
- (2) a significant financial return at the end of the membership term.*

And to consumers (like Mr K and Ms L) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

What’s more, I think the Supplier’s sales representatives were encouraged to make prospective Fractional Club members (like Mr K and Ms L) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier’s sales presentations by describing membership as a form of property ownership referring to the prospect of a “return”. In addition, Mr K and Ms L have said that the sales representative also told them they could sell their holiday rights on to friends and family and that he himself would make use of that option, again indicating that buying the fractional points would be a way of making a profit, or at least some “return” on their money spent. And with that being the case, I think the language used during the Supplier’s sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr K and Ms L the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that “[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).”¹ And in my view that

¹ The Department for Business Innovation & Skills “Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)”.

must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

*"[...] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, **it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3).** [...] **Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective. [...] If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit? [...] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."

*"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. **It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.** Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*
(my emphasis)

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional Club membership to prospective members (including Mr K and Ms L), combined with what Mr K and Ms L have said about their recollections, I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it.

Overall, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective

members. As noted above, I can't say for sure the precise training that the sales staff would have had for Mr K and Ms L's sale, but on balance I think it's fair to say it would have been similar to that I've set out above, which indicates that the Supplier's sales representative was likely to have led Mr K and Ms L to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e. a profit) in the future.

In addition to this, Mr K and Ms L have provided us with a detailed statement about the sale and taken together with what we know about the training and sales practices, I don't find Mr K and Ms L either implausible or hard to believe when they say:

"[...] making us believe than the membership could become an income for us [...] by selling holidays to friends and family, [...] that way we could have charged a reasonable price for whoever would have bought holidays from us and still making profit a win-win situation [...].

"[...] a permanent membership (which meant to last 19 years) could became a retirement bonus as after 19 years (or end of the membership), we could sell our share and get the money back and possibly more depending on the value of the property/share at the time, they really underlined that part, I liked the idea of leaving something to my wife, so we signed." (sic)

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr K and Ms L were led by the Supplier to believe at the relevant time.

I have also referred above to disclaimers in the Information Statement signed by Mr K and Ms L. The same section from which I quoted above and that set out the primary purpose of the membership also contained the following paragraph:

"11. Investment advice

*The Vendor, or any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisers authorised by the Financial Services 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 **it 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 advisers 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." (my emphasis)*

The purpose of this disclaimer seems to be to clarify that the Supplier was not giving any investment advice, even if its agents may be perceived to do so, and telling customers to seek their own investment advice, repeating the point that the returns from Fractional Club membership weren't guaranteed.

However, I think it's fair to say that – while a prospective member who read the disclaimer in question might well have thought that they would be best to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier – it would not have done much to dissuade them from regarding the membership as an investment. In fact, I think the opposite was the case, as the question arises why anyone would be recommended to seek investment advice when no investment was marketed.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an

investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

So from looking at the contemporaneous paperwork, it would be reasonable to conclude that the section about investment advice would suggest that the sale was indeed including an investment aspect for Mr K and Ms L to consider, and that this was marketed to them as such.

And for that reason, as well as what has been discussed above, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr K & Ms L and the Lender under the Credit Agreement and related Purchase Agreement.

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.

If I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr K and Ms L and the Lender that was unfair to them and warranted relief as a result, it also seems to me that – in light of the respective judges' comments relating to causation in Carney and Kerrigan – it is an important consideration whether the Supplier's breach of Regulation 14(3) led Mr K and Ms L to enter into the Purchase Agreement and the Credit Agreement.

On my reading of Mr K and Ms L's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - their testimony demonstrates that they quite clearly were and that is not surprising given the nature of the product at the centre of this complaint.

However, whilst the Lender made the point that Mr K and Ms L never raised any concerns until the time of the complaint, it's clear to me from the testimony that Mr K and Ms L's purchase of full Fractional Club membership was influenced by how it was sold to them as an investment – in future income from selling holiday rights as well as more long-term returns from the Allocated Property. Mr K and Ms L's PR has provided evidence that the statement of testimony was sent to her shortly before the complaint to the Lender was made and the testimony is detailed and clearly written in Mr K and Ms L's own words, so I have no reason to doubt its credibility or accuracy. I appreciate that Mr K and Ms L have referred to different dates than those on the Purchase Agreement, however as they only purchased the trial membership and then the full Fractional Points membership this complaint is concerned with, I don't think that a confusion of dates means that the testimony as a whole refers to another sale or would otherwise not be reliable.

The Lender also raised that sales notes from the Time of Sale show that Mr K and Ms L "were very excited with the purchase and that they'd had plenty of time to think it through." Whilst this may have been the case, this does not mean that the membership was not marketed as an investment or that such marketing did not lead to their purchase decision.

The Lender also said "[...] it is inconceivable that the reason for this purchase was for a 2.00% share in a one bedroom apartment they had never seen, in a resort they had never

been to, that would be paid to them in 2034.” However, as Mr K and Ms L say (plausibly, in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by exactly that – their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that had a strong influence on their decision to go ahead with the purchase. It’s clear from their testimony that the combination of holidays and an investment that would offer some money back at the end of the term was their main motivation to enter into the agreement. And with that being the case, I think the Supplier’s breach of Regulation 14(3) was material to the decision they ultimately made.

Mr K and Ms L have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I’m not persuaded that they would have pressed ahead with their purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr K and Ms L under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.”

Response to my Provisional Decision

As stated above, Mr K and Ms L accepted my provisional decision, but First Holiday Finance Ltd disagreed with my findings and made some additional points.

The Lender argues that the sales notes from the trial membership Mr K and Ms L purchased in April 2017 demonstrated that “*their sole focus on becoming [Supplier] Members, was quality holidays*”. However, as the sales notes the Lender refers to are from the sale of the trial membership a few months before the full Fractional Club membership, these don’t provide evidence of how the full membership in September 2017 was sold to Mr K and Ms L. So I don’t think that their motivations for the trial membership – which also was not asset backed – are relevant to findings on the later sale of fractional points.

The Lender also pointed out in its response that the comment from Mr K in his testimony, stating that he liked the idea of “leaving something to his wife”, was confusing. The Lender argues that at the Time of Sale, Mr K and Ms L were in their early 40s and purchased a 16-year membership. So by the time the Allocated Property was sold, they would only be in their mid to late 50s.

Mr K was 42 at the Time of Sale and Ms L was 39, so I appreciate they were some time away from retirement or any period one would consider likely to ‘leave something’ to their partner. The same might be said for 16 years later. However, while the sale of the Allocated Property would happen at the end of the membership term, their share of the sale price would still constitute an asset that Mr K could ‘leave to’ his partner (or vice versa) at any age. So regardless of the length of time the asset-backed membership lasted, it still constituted an investment of sorts, with the hope for some profit after the sale of the Allocated Property.

So it's not unreasonable that Mr K liked the idea of holding an asset his partner could benefit from in future – and I still think Mr K and Ms L's recollections demonstrate that the Fractional Club membership was sold to them as such an investment, in breach of Regulation 14(3).

Regarding their recollections more generally, the Lender said that Mr K and Ms L's testimony from the time of sale was provided much later than the complaint was made, and, more importantly, only in August 2023, so after the judgment on a judicial review relevant to this subject matter was handed down. The Lender argued that this could indicate the testimony was influenced by said judgment and publicity around it. However, Mr K has confirmed the testimony he and Ms L provided was from February 2022 and we've seen evidence of this being sent at that time. So considering the timing, I don't have any reason to doubt the authenticity and honesty of Mr K and Ms L's recollections from the Time of Sale.

Lastly, the Lender argued that if the investment element was Mr K and Ms L's main motivation to buy Fractional Club membership and they were swayed by the prospect of being able to sell the membership and holiday rights to friends and family, then the Lender would have expected to see attempts to do so. However, there is no record of Mr K and Ms L attempting to sell points/holidays or the membership.

I can't see the argument was made that Mr K and Ms L purchased the membership with the prospect of selling it on. But they did say that the sales representative pointed out the opportunity to sell holidays on to friends and family. It's clear that Mr K and Ms L were impressed by this option, according to their testimony about the sales event. However, whether or not they would make use of this option is not an indication of how they understood the benefits of the membership when it was sold to them. The prohibition in Regulation 14(3) concerns a timeshare being *marketed and sold as* an investment – how a timeshare is then used in practice after it has been purchased, or whether or not the fractional membership brings an actual return on the purchase price is of little relevance to considering the sale in light of the prohibition of such marketing. The important point is that the sales representative(s) at the Time of Sale told Mr K and Ms L that they would not just buy holiday rights but could also hope for a potential profit from the sale of the Allocated Property, as well as being able to sell holidays on to friends and family. And from their testimony as well as the circumstances of the sale, it's clear to me that the investment element was a key motivation that had a material bearing on their decision for Mr K and Ms L to enter into the Purchase Agreement (and the Credit Agreement) for the Fractional Club membership.

So overall, I still find that Mr K and Ms L's Fractional Club membership was sold in breach of Regulation 14(3) and I think the Lender participated in and perpetuated an unfair credit relationship with Mr K and Ms L under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. So, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Putting things right

Having found that Mr K and Ms L would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back into the position they would have been in had they not purchased the Fractional Club membership (i.e. not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement (taking into account the effect purchasing Fractional Club membership had on their trial membership) – provided Mr K and Ms L agree to assign

to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr K and Ms L were trial members before purchasing Fractional Club membership. As I understand it, trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened here at the Time of Sale. Mr K and Ms L's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

The Lender's submissions regarding the proposed redress

The Lender has disputed the fairness of the cost of the trial membership bought by Mr K and Ms L in April 2017 being refunded as part of the compensation calculation I set out in my provisional decision. It says the trial membership did not act as a deposit and can be reinstated, and to do so would put Mr K and Ms L back in the position they would have been in had there not been a breach of Regulation 14(3) at the Time of Sale.

But, having considered what the Lender has said here, I don't agree. I'll explain why below. The trial membership cost £3,995 and was paid for by Mr K and Ms L by taking finance from another lender. This trial membership allowed them to take five weeks of accommodation from the Supplier's portfolio of resorts over the following three years. But as far as I can see, Mr K and Ms L never actually used this trial membership. They were given a free 'prelude' week – in their testimony referred to as a holiday 'prize' they had won – and it was during this promotional holiday week that they bought the Fractional Club membership.

Whilst the Lender says that the trial membership can be reinstated by the Supplier, the reason for taking a trial membership was to enable the customer to experience the type of holiday and accommodation the Supplier could provide. And as I've said, according to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members. Further, the Supplier is no longer open to new members. So the reasons for taking the trial membership no longer exist, and I do not think it is right to say that reinstatement puts Mr K and Ms L back in the same position they would have been in had they not purchased the Fractional Club membership.

Further, part of the basis for taking a trial membership was that any 'unused' part of the trial membership could be used to reduce the cost of a full membership. Here, the purchase price of Mr K and Ms L's 800 fractional points was set by the Supplier as £14,084. But Mr K and Ms L traded in their unused trial membership and ended up paying £10,089 for membership of the Fractional Club. So the trial membership did act as a deposit against their purchase, and they would likely have had to pay the full purchase price of £14,084 had they not had the trial membership to trade in. In other words, the trial membership worked exactly as designed and fulfilled its purpose. With this in mind, I consider it fair that everything they paid, both as a deposit and the remaining balance, is refunded as set out in the provisional decision and below.

So, given all of the above, here's what I think needs to be done to compensate Mr K and Ms L – whether or not a court would award such compensation:

- (1) The Lender should refund Mr K and Ms L's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
- (2) In addition to (1), the Lender should also refund:
 - a. The annual management charges Mr K and Ms L paid as a result of Fractional Club membership.
 - b. The trade-in value given to Mr K and Ms L's trial membership.
- (3) The Lender can deduct:
 - i. the value of any promotional giveaways that Mr K and Ms L used or took advantage of; and
 - ii. the market value of the holidays* Mr K and Ms L took using their Fractional Points.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)
- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr K or Ms L's credit file(s) in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr K and Ms L's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr K and Ms L took using their Fractional Points, deducting the relevant annual management charges (that correspond to the years in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

For the reasons given above, my decision is that I uphold Mr K and Ms L's complaint. I direct First Holiday Finance Ltd to compensate Mr K and Ms L in line with the approach set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K and Ms L to accept or reject my decision before 12 September 2025.

Lea Hurlin
Ombudsman