

The complaint

Mr G's complaint is, in essence, that First Holiday Finance Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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

On 6 January 2016 Mr G purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier').

Whilst on holiday, Mr G purchased full membership of a timeshare (the 'Fractional Club') from the Supplier on 21 August 2016 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 900 fractional points at a cost of £21,840 (the 'Purchase Agreement'). But after trading in his existing trial membership, he ended up paying £17,845 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr G more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement (the 'Allocated Property') after his membership term ends.

Mr G paid for his Fractional Club membership by paying a £500 deposit and taking finance of £17,345 from the Lender in his sole name (the 'Credit Agreement').

Mr G – using a professional representative (the 'PR') – wrote to the Lender on 1 November 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him 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. A breach of the Lender's fiduciary duty.

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

Mr B says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told them that Fractional Club membership was an "investment" when that was not true.
- Told them that the property would be sold after the fractional period and they would then be free of all liabilities, when this was not true.

Mr B says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above. Therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr B.

(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 B says that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

- There was commission paid to the Supplier by the Lender, and this was not disclosed to Mr B.
- Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

(3) The Lender's breach of its fiduciary duty

- Mr B says that the Lender breached its fiduciary duty by not disclosing to him that it paid commission to the Supplier for brokering the Credit Agreement.

The Lender dealt with Mr B's concerns as a complaint and issued its final response letter on 28 February 2022, rejecting it on every ground.

The PR, on behalf of Mr G, then referred the complaint to the Financial Ombudsman Service. As part of its submissions, the PR provided a written testimony from Mrs G (who had been present at the Time of Sale) dated 10 May 2021 which set out her recollections of their entire relationship with the Supplier. Mr G subsequently confirmed that he agreed with everything said in the statement. Mrs G said:

"On 9th January 2016 we purchased a Trial Membership with [the Supplier]. We received a phone call from [the Supplier] who invited us to meet them in Covent Garden in London. This was slightly pressurising as we were led to believe that we would miss out on the deal as this was a one-time opportunity. We were attracted to the membership as we would be able to access 5 weeks holiday, leaving us to just pay for flights. We were told that the standard was very high and we would be able to access a hot tub outside our room.

Therefore, we purchased a Trial Membership with [the Supplier]. This cost £3995 and we paid for this using a loan. This loan was arranged by [the Supplier] and we do not know who the loan was with. We do not have any paperwork for this loan however it was transferred over to the second loan that we purchased.

On 21st August 2016 we purchased 900 Fractional Points with [the Supplier] Fractional Property Owners Club. We were on holiday using our Trail [sic] Membership and we were invited to meet for lunch with the sales team. We had 4 small children with us and the meeting lasted 8 hours, making it very intense. We were offered a Fractional membership as an investment, and we were told that this would allow us to access a large apartment to accommodate our whole family whilst investing our money in property which would increase in value. At this stage the Trial Membership was a very high standard accommodation, and we were told we could access this same apartment as part of the Fractional scheme investment. However, when we used this scheme, we were placed in a lower standard apartment and we were placed quite high up, which wasn't appropriate for our young child, who could have easily climbed over the balcony. We have also found that there is limited availability in the school holidays, unless you book two years in advance, and even then, it is very limited. We were told that the Fractional

points would act as an investment, and we could easily sell these points and make a profit from this. [Mr G] has spoken to [the Supplier] about this however they were not helpful with this. we are now struggling to afford this scheme as the maintenance fees have increased over the years, again this was not advised when purchasing.

Therefore, we purchased 900 Fractional Points with [the Supplier] Fractional Property Owners Club. This cost £17 845 and we paid for this using a First Holiday Finance Loan. This loan was arranged by [the Supplier] and they suggested that we use this provider as this was who they use. There were no other options given for any other finance and no commissions were advised.

“We were offered a Fractional membership as an investment, and we were told that this would allow us to access a large apartment to accommodate our whole family whilst investing our money in property which would increase in value.

[...]

We were told that the Fractional points would act as an investment, and we could easily sell these points and make a profit from this.”

The Investigator’s view

Mr G’s complaint was assessed by an Investigator at this Service who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr G at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr G was rendered unfair to him for the purposes of section 140A of the CCA.

The Investigator said:

“I’ve read and thought about all the available evidence and arguments to come to what I think is fair and reasonable outcome given the facts and circumstances of this complaint. When doing that, I’ve also taken into account the relevant regulatory and legal context along with what I think was good industry practice – which includes, amongst other things:

- *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’)*
- *The Resort Development Organisation Code of Conduct (the ‘RDO Code’)*
- *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] (‘Shawbrook & BPF v FOS’)*

And having done that, I think the following:

1. *The Supplier is more likely than not to have marketed and sold Fractional Club membership to [Mr G] as an investment contrary to Regulation 14(3) of the Timeshare Regulations.*
2. *Doing so rendered the relationship between [Mr G] and the Business unfair under section 140A of the CCA.*

3. *This complaint should be upheld as a result.*

I say this because [Mr G] has been clear and consistent in saying that membership of the Fractional Club was marketed to him at the Time of Sale as an investment.

I acknowledge that there were disclaimers in some of the paperwork he was given that say membership wasn't an investment. And I accept that it was possible to sell membership of the Fractional Club without breaching Regulation 14(3). But the investment element was clearly a major part of its rationale and the Supplier's justification for its cost. So, I find it hard to argue that the Supplier would have included the feature without relying on it to promote sales – which is what [Mr G] says happened at the Time of Sale. And as I haven't seen enough evidence to persuade me that I should doubt or disbelieve him when he says and explains why membership of the Fractional Club was sold to him as an investment by the Supplier, I think it's more likely than not that the Supplier presented the investment element of Fractional Club in a way that, from his perspective, led him to believe that he could make a profit at the end of his membership term.

As a result, I think the Supplier's conduct at the Time of Sale knocked away important consumer protection. And I think [Mr G] was prejudiced by the Supplier's failings, rendering the credit relationship between him and the Business unfair. After all, he ended up borrowing and repaying a substantial sum of money that the Business benefited from when he probably would not have done had membership of the Fractional Club not been marketed and sold as an investment. And with that being the case, I think he was unfairly treated by the Supplier acting on the Business' behalf."

The Investigator then set out how he thought the Lender should calculate and pay fair compensation to Mr G.

The responses to the Investigator's view

Mr G agreed with what the Investigator had said but the Lender did not. It questioned the accuracy and veracity of Mrs G's statement and the date the PR said it was taken. It highlighted that it contained allegations which did not form part of the original complaint, and it contained the same phrases and was written in the same vein as other statements produced by this PR.

It said the statement contained the following inconsistencies:

- The presentation for the trial purchase, on 9 January 2016 was described as "*slightly pressurising*" but it did not complete until 17 January 2016.
- It is odd that Mr and Mrs G can remember precise details of the day, but cannot remember who they made the loan repayments to. This suggests the statement is based on the paperwork, not their recollections.
- They were aware of the need to attend a presentation as this was detailed on the voucher.
- They were taken for breakfast, not lunch, and the sale was agreed by 15:00hrs. This demonstrates the claims are exaggerated.
- All Mr and Mrs G's children were offered the opportunity to spend the day at the Children's Club.
- They understood that the Fractional Club was for holiday enjoyment.
- Contrary to what they say, the accommodation provided on their next holiday was the

same type of apartment they had stayed in previously.

- The only occasions the Supplier could not offer their requested accommodation was when they gave two months' notice for specific dates in specific resorts – not with two years' notice as suggested.
- Mr G has never spoken to the Supplier about selling the Fractional Club membership.
- Mrs G did not sign the documents in the apartment, rather they were signed in the office.

The Lender asked for an Ombudsman's decision.

The second Investigator's view

Mr G's complaint, and the Lender's response to the first Investigator's view was considered afresh by a different Investigator. And having looked at everything again, the second Investigator also thought the complaint ought to be upheld. He said:

"So, having considered everything, I'm satisfied the testimony was taken as stated in May 2021 and it was [Mr G's] recollection of the sale. Moreover, the testimony indicates there was a breach of Regulation 14(3) and the breach was material to his purchasing decision hence why this complaint was upheld.

You've also suggested that the witness testimony should be disregarded as you've been able to highlight a number of inaccuracies and discrepancies which you feel casts some doubt over [Mr G's] recollections.

Whilst I appreciate there may have been some inaccuracies in the testimony, I think some errors and inconsistencies are a normal part of trying to recollect something from some time ago. Inconsistencies in parts of the statement do not necessarily mean everything within it ought to be disregarded. What I need to consider is whether there is a core of acceptable evidence from [Mr G], such that the inconsistencies have little to no bearing on whether I can rely on the testimony, or whether the inconsistencies are fundamental enough to undermine, if not contradict, what is said about how the product was sold as an investment.

Ultimately, whilst [Mr G] may well have also been motivated by holidays – as you've suggested, he has indicated in his testimony that there was a breach of regulation 14(3) and that this was material to his purchasing decision as he said 'We were offered a Fractional membership as an investment, and we were told that this would allow us to access a large apartment to accommodate our whole family whilst investing our money in property which would increase in value... "We were told that the Fractional points would act as an investment, and we could easily sell these points and make a profit from this." And again, whilst there may have been some inaccuracies in relation to his recollections over other things, I haven't seen anything material that would lead me to doubt what he's said about the membership being marketed and sold to him as an investment. As such, I feel we reached the correct outcome initially, and this complaint was correctly upheld."

The second Investigator then set out how he thought the Lender should calculate and pay fair compensation to Mr G.

The Lender's response

In response, the Lender continued to question the authenticity of the statement. In addition, it considered it significant that the testimony:

- Does not indicate that any sales materials were shown to them which would have indicated the Membership was an investment.
- Does not indicate that they were unclear about any of the content of the sales presentation or that they felt the need to ask more questions due to any uncertainty about the nature of the product and its purpose.
- Lacks any context in respect of what conversations were had with the sales representative about the Membership and there is nothing in the statement which indicates why or how the presentation led them to believe this was an investment.
- Mrs G did not return to the apartment with her children and sign the documents there. They were signed in the office before they went and collected the children from the Children's Club.
- It was reiterated that Mr G had never discussed the resale of his fractional points.

It maintained that that the statement was not produced until after the Judicial Review¹ and so there was a risk it had been influenced by the judgement.

As no agreement could be reached the matter was passed to me for a decision.

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 as follows:

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations

Section 75: Liability of Creditor for Breaches by a Supplier

Sections 140A: Unfair Relationships Between Creditors and Debtors

Section 140B: Powers of Court in Relation to Unfair Relationships

Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.

¹ *Shawbrook & BPF v FOS* – see *Legal and Regulatory context*

2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust* [2014] EWCA Civ 790 ('*Scotland and Reast*') sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *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*').

My Understanding of the Law on the Unfair Relationship Provisions

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."

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such

antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140A(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.”²

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

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

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

² The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

“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.

The Law on Misrepresentation

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn’t alter the rules as to what constitutes an effective misrepresentation. It isn’t practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn’t need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn’t a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn’t usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party’s decision to enter a contract. And the courts aren’t too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’)

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I’m not deciding – nor is it my role to decide – whether the Supplier (which isn’t a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor’s agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract

- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.³

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, County Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)
4. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston)
5. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff)

³ See Recital 9 in the Preamble to the 2008 Timeshare Directive.

Relevant Publications

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').

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.

And having done that, I agree with the findings of the two Investigators, for broadly the same reasons. 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 G as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr G and the Lender unfair to him for the purposes of Section 140A of the CCA.

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 G's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier made misrepresentations at the Time of Sale and the Lender ought to have accepted and paid the claim made under Section 75 of the CCA because, even if that aspect of the complaint ought to succeed, the redress I'm directing the Lender to calculate and pay puts Mr G in the same or a better position than he would be if the redress was limited to misrepresentation.

The witness testimony

I have considered everything that has been said by the Lender in relation to the testimony submitted in this case. And having done so, I feel able to place weight on, and rely on what Mrs G has said. I acknowledge that there are some inconsistencies in the testimony, but I do not think these fundamentally undermine the core of acceptable evidence it contains. I also accept that the statement was not produced in evidence until December 2023 which was after the judgement in *Shawbrook & BPF v FOS*. But as has been said by the first Investigator, there is evidence that the statement was given on 10 May 2021 in the form of a system screenshot from the PR. So, on balance, I am persuaded that it was written on the date recorded on the statement, so was not influenced by the above judgement as suggested by the Lender.

So, whilst being cognisant of the fact that memories can fade over time, I am satisfied that it is an accurate reflection of their memories of the Time of Sale.

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

Having considered the entirety of the credit relationship between Mr G 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 G 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 G'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 as has been set out, Mr G says that the Supplier did exactly that at the Time of Sale.

Mr G alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

- (1) There were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.
- (2) He was told by the Supplier that he would get his 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 G's share in the Allocated Property clearly constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 G 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

And, for broadly the same reasons as set out by the Investigators in this case, and having considered everything that has been said and submitted, I am satisfied that the Supplier breached Regulation 14(3) at the Time of Sale. I'll explain.

How the Supplier marketed and sold the Fractional Club membership

As has been set out, Mr G went through a sales presentation from one of the Supplier's sales staff. The type of membership being sold here was the Supplier's second version of what it called the 'Fractional Property Owners Club' (FPOC2 - I shall continue to refer to it as the Fractional Club).

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives to sell FPOC2. The contents of this training material is well known to both sides, so I do not intend to repeat it here, but I am satisfied the Supplier's sales representatives were likely to have been encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And this seems to be reflected in what Mrs G says in her statement:

"We were offered a Fractional membership as an investment, and we were told that this would allow us to access a large apartment to accommodate our whole family whilst investing our money in property which would increase in value...."

And indeed, as the Fractional Club training manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentation was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the training slides 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, they indicate that the Supplier's sales representative was likely to have led Mr G 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. And with that being the case, I don't find Mr G either implausible or hard to believe when he says that was how the Supplier led them to view Fractional Club membership.

On the contrary, on the balance of probabilities, I think that's likely to be what Mr G was led by the Supplier to believe at the relevant time.

I do acknowledge, as did both Investigators, that 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 G, the financial value of his 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 G as an investment.

However, the relevant sales paperwork was not given to and signed by Mr G until after the sales presentation and after he had agreed to make the purchase. And in any event, they do not seem to have been focussed on by Mr G at the Time of Sale.

So, for all of these reasons, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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 G 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.

It also seems to me in light of *Carney* and *Kerrigan*, that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr G and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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

But as Mrs G says (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 Mr G's purchase was motivated by his share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more traditional points-based timeshare memberships available.

And Mrs G says as much when she concludes her statement:

"We were told that the Fractional points would act as an investment, and we could easily sell these points and make a profit from this."

What's more, based on all the evidence available, I do not think that Mr G would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. After all, Mr G faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, so had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that he would have pressed ahead with his purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made, and so the associated credit relationship was rendered unfair to Mr G as a result.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr G 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.

Putting things right

Having found that Mr G 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 Mr G was unfair under section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr G agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr G was a trial member 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 a 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 at the Time of Sale. Mr G'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.

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

- (1) The Lender should refund Mr G'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:
 - i. The annual management charges Mr G paid as a result of Fractional Club membership.
 - ii. The trade-in value given to Mr G's trial membership.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways that Mr G used or took advantage of; and
 - ii. The market value of the holidays* Mr G took using his 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 G's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr G's Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his 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 G took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) 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 his usage.

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

My final decision

I uphold this complaint and direct First Holiday Finance Limited to calculate and pay fair compensation to Mr G as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 28 August 2025.

Chris Riggs
Ombudsman