DRN-4672221

The complaint

Mr and Mrs W'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 claims under Section 75 of the CCA.

What happened

Mr and Mrs W were existing members of a points-based timeshare arrangement (the 'Vacation Club') from a timeshare provider (the 'Supplier').

Mr and Mrs W traded in their Vacation Club timeshare towards the purchase of a new type of timeshare membership (the 'Fractional Club') from the Supplier on 6 November 2011 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,290 fractional points at a cost of £25,859 (the 'Purchase Agreement'). But after the trade-in value attributed to their existing Vacation Club points, they ended up paying £7,699 for membership of the Fractional Club.

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

Mr and Mrs W paid for their Fractional Club membership by making a deposit payment of £500 and taking finance of £7,199 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 8 December 2021 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter on 3 January 2022, rejecting it on every ground.

Mr and Mrs W then referred the complaint to the Financial Ombudsman Service. As part of its submissions it provided a statement from Mr and Mrs W. Although this was not signed or dated, the PR provided evidence that it had been taken over the telephone on 18 October 2018.

The statement read, as far as is relevant to the Time of Sale:

> *"The representatives advised that [the Supplier] was not using European points and that all members were required to exchange to fractional points.*
>
> *Fractional points were an investment in property that would make money that we could use against our yearly fees or sell in the future.*

The representatives were going in and out of the office and changing to other representatives to try and persuade us to purchase fractional points.

Representatives were claiming that they had purchased high end cars and had bought their family fractional shares as the investment return was so good.

We were advised that fractional points were a property ownership that would only last a short length of time before it required to be sold and we would be able to exit our contract with a profit from the sale."

The first Investigator's view

Mr and Mrs W's complaint was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs W at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs W was rendered unfair to them for the purposes of Section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision.

The second Investigator's view

As part of a review of cases which were waiting to be considered by an Ombudsman, Mr and Mrs W's complaint was looked at afresh by a different Investigator. And having considered everything submitted, they too thought that the complaint ought to be upheld. The second Investigator said:

"Did the Supplier breach Regulation 14(3) of the Timeshare Regulations?

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. A large number of ombudsman decisions have been issued concerning the material the Supplier used at the time of [Mr and Mrs W]'s sale, so I won't set out the detail of the training material here. However, in summary, I think the following matters can be drawn out from the material:

- *the Supplier's sales staff were instructed to highlight the idea of ownership in the Allocated Property and that being an advantage over 'renting' your holiday accommodation (e.g. booking a hotel through a travel agent), and*
- *it was highlighted to prospective customers that they would get a return when the Allocated Property was sold at the end of their membership term.*

I don't think the Supplier explicitly set out the likely return that a customer might expect to get, but it was implied that the return was likely to lead to an overall profit or financial gain and that was a good reason to purchase a membership, which is likely to have breached the prohibition in Regulation 14(3).

Here, [Mr and Mrs W] said:

- *Fractional points were an investment in property that would make money that we could use against our yearly fees or sell in the future*

- *Representatives were claiming that they had purchased high end cars and had bought their family fractional shares as the investment return was so good*
- *We were advised that fractional points were a property ownership that would only last a short length of time before it required to be sold and we would be able to exit our contract with a profit from the sale*

I have also thought about the disclaimers that there were in the Supplier's sales documents, however I don't think they are enough to make me think the Supplier didn't breach Regulation 14(3) during the sale. That is because they were only shown to [Mr and Mrs W] after they'd been through the oral sales process and after they'd decided to take the Membership out. And I don't think they were drawn to [Mr and Mrs W]'s attention, nor are they sufficiently strong to overcome the problems in the sales presentation.

On balance, given the evidence I've seen, including the training material and [Mr and Mrs W]'s own memories of the sale, I think it's likely that the Supplier did lead them to believe that the Membership was an investment that might lead to a financial gain. So I think the Supplier did breach Regulation 14(3) of the Timeshare Regulations.

Did the breach of the Timeshare Regulations mean the credit relationship was unfair?

I think that for me to conclude that a breach of Regulation 14(3) led to a credit relationship between [Mr and Mrs W] and the Business that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Membership and the Credit Agreement is an important consideration.

Here, [Mr and Mrs W] have explained that they took out the Membership on the advice of the representatives who'd highlighted to them that they would make a return. So it seems to me that the prospect of a profit or financial gain from the Membership was an important and motivating factor when they decided to take it out. That doesn't mean that [Mr and Mrs W] weren't also interested in other things, such as the holidays they could've taken using their membership. But based on everything I've seen, I don't think they would've gone ahead with their purchase if Regulation 14(3) hadn't been breached.

The Business' points in response to my colleague's views

The Business questioned whether the witness testimony provided in 2023 was actually [Mr and Mrs W]'s recollections. The Business also highlighted a number of inaccuracies within [Mr and Mrs W]'s witness testimony and argued that we should disregard the testimony that's been provided.

[Mr and Mrs W]'s professional representatives provided evidence that the witness statement was taken from [Mr and Mrs W], during a phone call, in 2018 and I have no reason to doubt that the witness statement was [Mr and Mrs W]'s recollection of the sale.

And whilst I appreciate that there may be some inaccuracies in [Mr and Mrs W]'s testimony, most of what's been highlighted by the Business appears to be immaterial to the reason this complaint was upheld. 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. Ultimately, I haven't seen anything material that would lead me to doubt what [Mr and Mrs W] said about the membership being marketed and sold to them as an investment.

Conclusion

Given everything, I think the Business was a party to an unfair credit relationship with [Mr and Mrs W], so I think this complaint should be upheld."

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

The Lender's response

In response the Lender continued to question the authenticity of the statement, both when it was written, and that it thought it was a templated statement from the PR, and so not an accurate representation of Mr and Mrs W's memories.

It thought this because:

- when the statement said: *"Fractional points were an investment in property that would make money that we could use against our yearly fees or sell in the future."* this seemed to relate to a rental program from a different developer, and not the Supplier. It said that this view was supported by the fact that the statement made reference to *"European Points"* which were again, sold by the different developer.
- Mr and Mrs W's claims that the *"representatives were claiming that they had purchased high end cars and had bought their family fractional shares as the investment return was so good"* cannot have been true as the Fractional Club membership was brand new and Mr and Mrs W were one of the first to have been presented with it.
- Mr and Mrs W had described the membership term as *"a short length of time"* whereas it was actually 16 years.
- Mr and Mrs W's first purchase was a trial membership, and not the points-based one as set out in the statement.
- Mr and Mrs W state that the sales representatives kept going in and out of the office and changing, whereas the notes from the Supplier's internal system show there were only two sales staff involved.
- The statement is contradictory.
- Mr and Mrs W have made no attempts to sell or exit the membership.

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.
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."[1]

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

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

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

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

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

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.

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

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.[2]

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

[2] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

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

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country 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)

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 and Mrs W as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr and Mrs W and the Lender unfair to them 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 and Mrs W'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 claims 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 and Mrs W in the same or a better position than they 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 Mr and Mrs W have said.

I can see that the statement was prepared over the phone, and was written down by someone working for the PR. But because the statement was actually written by the PR and not in Mr and Mrs W's own hand is not unusual and does not mean it should be disregarded. Mr and Mrs W had engaged a professional representative, so it is not surprising that the PR wrote down what they 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, and do not undermine what Mr and Mrs W say they remember about the Time of Sale.

I also accept that the statement was not submitted in evidence until December 2023, which was after the judgement in *Shawbrook & BPF v FOS.* But as has been said by the second Investigator, there is evidence that the statement was given on October 2018 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.

So, whilst being cognisant of the fact that memories can fade over time, I am satisfied that it is a reliable 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 and Mrs W 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 and Mrs W and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs W'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 and Mrs W say that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this decision, in common with many other like ombudsman decisions, and 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.

Mr and Mrs W'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 it is important to note at this stage that 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 and Mrs W 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.

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.

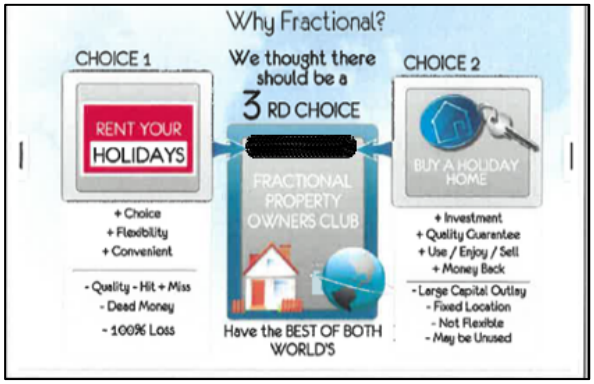
How the Supplier marketed and sold the Fractional Club membership

As has been set out, Mr and Mrs W went through a sales presentation from one of the Supplier's sales staff. The type of membership being sold here was the Supplier's first version of what it called the 'Fractional Property Owners Club' (FPOC1 - 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 FPOC1. 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.

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes

the following slide on it:



This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Mr and Mrs W 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"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs W that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

And this seems to be reflected in what Mrs G says in her statement:

> *"We were advised that fractional points were a property ownership that would only last a short length of time before it required to be sold and we would be able to exit our contract with a profit from the sale."*

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 the 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 and Mrs W 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 and Mrs W either implausible or hard to believe when they say 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 and Mrs W were 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 and Mrs W, 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 and Mrs W as an investment.

However, as the second Investigator pointed out, the relevant sales paperwork was not given to and signed by Mr and Mrs W until after the sales presentation, and after they had agreed to make the purchase. And in any event, they do not seem to have been focussed on by Mr and Mrs W 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 and Mrs W and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs W and the Lender that was unfair to them and warranted relief as a result, whether the Supplier’s breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs W’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 own 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 Mr and Mrs W 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 their 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 their existing membership, which was one of the more ‘standard’ types of timeshare. And with that being the case, I think the Supplier’s breach of Regulation 14(3) was material to the decision they ultimately made.

What’s more, based on all the evidence available, I do not think that Mr and Mrs W 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. After all, Mr and Mrs W faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, so 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.

And with that being the case, I think the Supplier’s breach of Regulation 14(3) was material to the decision they ultimately made, and so the associated credit relationship was rendered unfair to Mr and Mrs W 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 and Mrs W 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 and Mrs W 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 in 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. This is on the proviso that Mr and Mrs W agree to assign to the Lender their fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs W were existing Vacation Club members, and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had a number of Vacation Club Points. And, like the Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs W not purchased Fractional Club membership, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs W from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

So, here's what I am directing the Lender to do to compensate Mr and Mrs W with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs W'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 the difference between Mr and Mrs W's Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs W used or took advantage of; and

   ii. The market value of the holidays* Mr and Mrs W took using their fractional points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.

   For example, if Mr and Mrs W took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 Vacation Club Points at the

relevant time, any deduction for the market value of that holiday should relate only to the 50 additional fractional points that were required to take it. But if they would have been entitled to use 2,600 Vacation Club points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(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 and Mrs W's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs W'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 and Mrs W took using their 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 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(s) a certificate showing how much tax it's taken off if they ask for one.

My final decision

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

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

Chris Riggs
Ombudsman