DRN-4762434

The complaint

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

Background to the complaint

Mr M and Mrs B purchased a trial timeshare membership from a timeshare provider ("the Supplier") in 2008. This membership enabled them to take a set number of holidays with the Supplier to see if becoming full timeshare members was right for them. Mr M and Mrs B became full members of the Supplier's 'Vacation Club' in 2009, paying for membership by taking a loan from FHF.

Mr M and Mrs B traded in their Vacation Club membership for a different type of timeshare membership with the Supplier called Fractional Property Owners Club ("FPOC") on 6 May 2012 ("the Time of Sale"). They entered into an agreement with the Supplier to buy 1,932 fractional points at a cost of £28,704.00 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £9,191 for FPOC membership.

FPOC membership was asset backed – which meant it gave Mr M and Mrs B 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 M and Mrs B paid for their FPOC membership by taking finance of £8,691 from in both of their names ("the Credit Agreement"). This was repaid in full in June 2014.

Mr M and Mrs B – using a professional representative ("PR") – wrote to FHF on 28 November 2019 ("the Letter of Complaint") to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against FHF under s.75 CCA, which FHF failed to accept and pay.
2. FHF being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of s.140A CCA.
3. The decision to lend being irresponsible because FHF did not carry out the right creditworthiness assessment.

(1) <u>S.75 CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

1. told them that FPOC membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that FPOC membership was an "investment" when that was not true.

Mr M and Mrs B says that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under s.75 CCA, they have a like claim against FHF, who, with the Supplier, is jointly and severally liable to Mr M and Mrs B.

(2) s.75 CCA: the Supplier's breach of contract

Although not alleged specifically as a breach of contract, Mr M and Mrs B made the following allegations that appear to me to be alleged breaches:

1. they say that that they found it difficult to book the holidays they wanted, when they wanted.
2. some of the accommodation arranged that was not supplied by the Supplier was not of satisfactory quality.
3. the Supplier's resorts were not 'exclusive' and were available to non-members.

As a result of the above, Mr M and Mrs B might have a breach of contract claim against the Supplier, and therefore, under s.75 CCA, they could have a like claim against FHF, who, with the Supplier, is jointly and severally liable to Mr M and Mrs B.

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

The Letter of Complaint set out several reasons why Mr M and Mrs B says that the credit relationship between them and FHF was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. the contractual terms setting out (i) the duration of their FPOC membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR").
2. they were pressured into purchasing FPOC membership by the Supplier.
3. the Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 ("CPUTR") as well as a prohibited practice under Schedule 1 of those Regulations.
4. the decision to lend was irresponsible because FHF did not carry out the right creditworthiness assessment.

FHF dealt with Mr M and Mrs B concerns by forwarding them to the Supplier, which rejected the complaint on every ground in February 2020.

Mr M and Mrs B then referred the complaint to the Financial Ombudsman Service.[1] It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

Having considered everything, I issued a provision decision setting out my initial findings on the complaint. I said that I did not propose to uphold it and I gave both parties the chance to provide any further evidence or arguments they wanted me to consider before I issued my

[1] When doing so, they completed a 'Complaint Form' setting out the basis of what they wanted the Financial Ombudsman Service to consider. Although the Letter of Complaint made complaints about both the Vacation Club and FPOC sales, FHF and the Supplier only responded to the later, FPOC sale and that was the only sale referred to in the Complaint Form. So I will only consider that sale in this decision.

final decision. Here is an extract of that decision:

> ***"The legal and regulatory context***
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> *In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.*
>
> *I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:*
>
> - *The CCA (including ss.75 and 140A-140C).*
> - *The law on misrepresentation.*
> - *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").*
> - *The UTCCR.*
> - *The CPUTR.*
> - *Case law on s.140A CCA – including, in particular:*
>
> - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ("Plevin") (which remains the leading case in this area).*
> - *Scotland v British Credit Trust [2014] EWCA Civ 790 ("Scotland and Reast")*
> - *Patel v Patel [2009] EWHC 3264 (QB) ("Patel").*
> - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ("Smith").*
> - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ("Carney").*
> - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ("Kerrigan").*
> - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ("Shawbrook & BPF v FOS").*
>
> ***Good industry practice – the RDO Code***
>
> *The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 ("the RDO Code").*
>
> ***My provisional findings***
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> *I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.*
>
> *And having done that, I do not currently think this complaint should be upheld.*
>
> *But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not*

commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

S.75 CCA: the Supplier's misrepresentations at the Time of Sale

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

In short, a claim against FHF under s.75 CCA essentially mirrors the claim Mr M and Mrs B could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. However, claims also have to be made within the time limits set out in the Limitation Act 1980. With respect to claims for misrepresentations, that is normally within six years of the date of the misrepresentation. Here, Mr M and Mrs B's claim was made outside of that time, so FHF has a defence to their misrepresentation claim under s.75 CCA. However, those matters can be considered when deciding if there was an unfair credit relationship under s.140A CCA (see Scotland and Reast), so I will consider the alleged misrepresentations later in this decision.

With that being the case, I do not think FHF acted unfairly or unreasonably when it dealt with the s.75 CCA claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I have already summarised how s.75 CCA works and why it gives Mr M and Mrs B a right of recourse against FHF. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, FHF is also liable.

Mr M and Mrs B say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr M and Mrs B states that the availability of holidays was subject to demand. It also looks like they made use of their fractional points to take holidays on a number of occasions. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr M and Mrs B also say that the standard of accommodation they booked using their FPOC membership, but not provided by the Supplier, was poor. The Supplier has said that they used such accommodation once in July 2015, but no complaint was raised at the time. I have not seen any evidence of the quality of the

accommodation, so I make so finding that any term of the Purchase Agreement was breached for this reason.

Finally, I have not seen any terms in the Purchase Agreement that said the Supplier's resorts were exclusive to its members (albeit that the Supplier says that the accommodation actually available to Mr M and Mrs B was only available to its members). Further, it could be that such a term could be implied into the Purchase Agreement if there was a representation made that the accommodation was 'exclusive'. However, based on the evidence available, I do not find any such representation was made, as no such allegation is made in a statement prepared by Mr M and Mrs B.

Overall, therefore, from the evidence I have seen to date, I do not think FHF is liable to pay Mr M and Mrs B any compensation for a breach of contract by the Supplier. And with that being the case, I do not think FHF acted unfairly or unreasonably when it dealt with the s.75 CCA claim in question.

S.140A CCA: did FHF participate in an unfair credit relationship?

I have already explained why I am not persuaded that the contract entered into by Mr M and Mrs B was breached by the Supplier in a way that makes for a successful claim under s.75 CCA and outcome in this complaint, and I think the time has passed for a successful misrepresentation claim. But Mr M and Mrs B also say that the credit relationship between them and FHF was unfair under s.140A CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

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

Under s.140A 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 s.56 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.

S.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 s.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 s.12(b) 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 s.11(1)(b) 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."

FHF does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr M and Mrs B's membership of the FPOC were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by s.12(b) CCA. That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for FHF as per s.56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under s.56 CCA 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 s.56(2) 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 FHF's statutory agent for the purpose of the pre-contractual negotiations.

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

However, an assessment of unfairness under s.140A CCA is not 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 s.140A CCA, therefore, is stark. But it is not 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 s.140A CCA is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr M and Mrs B and FHF along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of s.140A CCA. 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 M and Mrs B and FHF.

The Supplier's alleged misrepresentations

This part of the complaint was made for several reasons that I set out at the start of this decision as giving rise to a claim under s.75 CCA. But such misrepresentations could also give rise to an unfair credit relationship, so I have considered them here. They include the suggestion that FPOC membership had been misrepresented by the Supplier because Mr M and Mrs B were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr M and Mrs B share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr M and Mrs B say that they were told the FPOC membership had a guaranteed end date after nineteen years, however that was not true as there was no guarantee that the property would have been sold. From what I know about how FPOC memberships were sold around the Time of Sale, I think it likely that Mr M and Mrs B

would have been told that the Allocated Property was to be placed for sale after nineteen years, but I have not seen any evidence that the Supplier told its prospective customers that there was a guaranteed end date to membership when liabilities would cease. Further, I did not think saying that there was a guaranteed end date to FPOC membership would be consistent with the written information provided at the Time of Sale and I have not seen anything to suggest the Supplier would have made a different representation orally. It is common sense that there cannot be a guarantee that a specific property could be sold on a specific day, some nineteen years in the future, so I think it inherently unlikely such a representation was made. On balance, I simply do not think it is likely Mr M and Mrs B were told their membership was guaranteed to end on the date the Allocated Property was placed for sale as set out in the membership documentation. Rather I think it was more likely the Supplier was either silent on the matter or told them how the sales process worked in practice – namely that after a set period, the Allocated Property was placed for sale and the membership ended when it was sold.

PR also said that the FPOC Membership Rules ("the Rules") meant that the Supplier had an interest in not selling the Allocated Property as it could then continue to charge maintenance fees on the unsold property. However, I disagree that is the right reading of the Rules. Part 9 of the Rules dealt with how the Property would be sold. A key provision is Rule 9.1:

"Each Allocated Property shall be sold on its respective Sale Date[3] which occurs on the date specified in the Fractional Rights Certificate for the Allocated Property, save that the Vendor may, in its absolute discretion, postpone the date of sale from the date proposed as the Sale Date for up to two years. By unanimous consent of the Owners in that Allocated Property given in writing, the sale may be postponed for such period as is agreed in such consent."

PR is right that, until the Allocated Property is sold, members have to pay ongoing maintenance fees, however I cannot see that Mr M and Mrs R alleged in their witness statement that they were told on a set future date their liabilities to the Supplier to pay maintenance fees would end. So I cannot say this was misrepresented to them.

Further, I cannot see that Mr M and Mrs B have alleged that they were told anything about the Supplier being able to stop or delay the sale, so I cannot see that this was misrepresented to them either. But, in any event, I think PR's reading of the Rules is wrong. I say that because, although there is a clause that if the Allocated Property is not sold after eighteen months, a meeting would be called where "all Owners shall decide whether or not to continue using the Property and under what terms", Rule 9.1 makes clear that any decision to postpone the sale must be unanimous. So I cannot see how the Supplier could unilaterally postpone a sale indefinitely. I note that the Vendor (a company associated with the Supplier) could postpone a sale for up to two years, but again, I fail to see how the inclusion of this term meant Mr M and Mrs B were misled about the sale, based on their own recollections.

Finally, it is alleged that the Supplier told Mr M and Mrs B that FPOC membership was an investment. I will discuss this in more detail below, but for the avoidance of doubt, if such a representation was made, it would not be untrue as membership contained an investment element.

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

[3] This is defined as the date on which the sale process for an Allocated Property begins.

Mr M and Mrs B's complaint about FHF being party to an unfair credit relationship was also made for several other reasons, all of which I set out at the start of this decision.

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

PR says that the right checks were not carried out before FHF lent to Mr M and Mrs B. I have not seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that FHF failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr M and Mrs B was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with FHF was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for the Mr M and Mrs B. If there is any further information on this (or any other points raised in this provisional decision) that the Mr M and Mrs B wishes to provide, I would invite them to do so in response to this provisional decision.

Mr M and Mrs B say that they were pressured by the Supplier into purchasing FPOC membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase FPOC membership when they simply did not want to. They were also given a fourteen-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr M and Mrs B made the decision to purchase FPOC membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I am not persuaded, therefore, that Mr M and Mrs B credit relationship with FHF was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with FHF was unfair to them. And that is the suggestion that FPOC membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

<u>Was FPOC membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?</u>

FHF does not dispute, and I am satisfied, that Mr M and Mrs B FPOC membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr M and Mrs B share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that FPOC membership included an investment element did not, itself, transgress the prohibition in Reg.14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It does not prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that FPOC membership was marketed or sold to Mr M and Mrs B as an investment in breach of Reg.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 FPOC membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing FPOC membership as an 'investment' or quantifying to prospective purchasers, such as Mr M and Mrs B, 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 purported to state that FPOC membership was not sold to Mr M and Mrs B as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned FPOC membership as an investment. And I accept that it is possible that FPOC membership was marketed and sold to Mr M and Mrs B as an investment in breach of Reg.14(3), given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of FPOC membership without breaching the relevant prohibition.

But even if I were to conclude that FPOC membership was likely to have been sold and/or marketed as an investment, I am not currently persuaded that would make a difference to the outcome in this complaint anyway. I will explain why.

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

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of s.140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

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

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

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

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Reg.14(3) led to a credit relationship between Mr M and Mrs B and FHF that was unfair to them and warranted relief as a result, whether the Supplier's breach of Reg.14(3)[4] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

When Mr M and Mrs B first complaint to FHF, PR wrote a letter on their behalf, setting out their memories of the sale and points of complaint. In that letter it was alleged that the Supplier told Mr M and Mrs B that FPOC membership was an "investment" and there was a narrative description of the sale. PR said:

"After breakfast, our clients were taken to the sales suite, where a high-pressure sales presentation began. They were told that [the Supplier] had a new scheme, called Fractional Property Ownership, which was attractive to older members of the

[4] Any such breach, having taken place during antecedent negotiations between the Supplier and Mr M and Mrs B, is covered by s.56 CCA and so falls within the notion of "*any other thing done (or not done) by, or on behalf of, the creditor*" for the purposes of s.140(1)(c) CCA and deemed to be something done by, or on behalf of, FHF.

Points Membership scheme, because it would place a time limit on their membership of [the Supplier's] timeshare scheme.

They were told that Fractional Property Ownership involved purchasing shares in a property, which would be sold after 19 years, and the proceeds of sale divided between the owners. They were told that unlike Points which was "dead money", with Fractional Property Ownership one would get something back.

This very much appealed to our clients, who would both be 70 by then, so some money back would be extremely useful.

Moreover, this suggestion was also extremely attractive to our clients, in the light of their concerns which we have explained above, because Fractional Property Ownership was sold to them on the basis that the Scheme had a fixed duration of 19 years from 2012, coming to an end in December 2030, beyond which time they would have no further liability, in respect of [the Supplier]'s annual management charges."

Mindful of the definition of "investment" I set out above, I cannot see that PR alleged that Mr M and Mrs B purchased FPOC membership with the expectation or hope of financial gain or profit, rather it seems to me that they only ever expected to get "something" or "some money" back.[5] Further, it appears that the shorter duration of FPOC membership over Vacation Club membership was an important factor in their purchasing decision.

In addition, when this complaint was referred to our service, PR wrote a letter to our then Chief Ombudsman setting out the background to the complaint and Mr M and Mrs B signed a Complaint Form formally referring it. In the letter, a number of concerns with the Supplier were set out, but at no stage was it alleged that Mr M and Mrs B had bought FPOC membership for investment purposes. And in the Complaint Form, in a section titled "how have you been affected – financially or otherwise?", the following is hand-written (the rest of the form is typed, so I have assumed this is Mr M or Mrs B's own writing):

"Concern about ongoing financial burden to children and that the sale of the property may not happen when we expected (2031) when we will be 70 yrs old."

So I cannot see the allegation that FPOC membership was sold or marketed with the hope of expectation of a financial gain or profit was made in the Complaint Form.

Finally in April 2023, after our Investigator shared their view, Mr M and Mrs B provided a signed statement. They provided their joint memories of the sale, in particular they said:

"9. We were told that [the Supplier] had a new scheme, called the "Fractional Property Owners Club", which was attractive to older members of the Points Membership scheme, because it would place a time limit on their membership of the [the Supplier's] timeshare scheme.

10. We were told that Fractional Property Ownership involved purchasing shares in a property, which would be sold after 19 years, and the proceeds of sale divided between the owners. We were told that, unlike Points Membership, which was "dead

[5] The difference between making a profit and getting something back was discussed in *Shawbrook & BPF v FOS*, for example at paragraph 72.

money", with Fractional Property Ownership we would get our money back at the end.

11. We were not informed that all the owners had to agree to the sale, or that [the Supplier] would be one of the owners.

12. The way that was presented to us, the idea of the fractional product very much appealed to us, as the main proposition put forward was that not only was it an investment in luxury holidays every year, but it was also a financial investment, as it was a vehicle to get some money back in the future. We were told that the property would definitely be sold in 2031, which would tie in perfectly with our 70th birthdays, when getting some money back would be extremely useful."

Here, although Mr M and Mrs B say they thought membership was a financial investment, I cannot see that they say that they purchased FPOC membership with the expectation or hope of a financial profit or gain. Rather, they said that they thought they "we would get our money back at the end" or they would get "some money back". So it seems to me that, although I can say Mr M and Mrs B were motivated by the ability to take "luxury holidays", have a shorter membership period and the chance to get some money back at the end of the membership term, the evidence does not suggest they expected or hoped to make a profit or gain.

On balance, therefore, even if the Supplier had marketed or sold the FPOC membership as an investment in breach of Reg.14(3) of the Timeshare Regulations, I am not persuaded that Mr M and Mrs B's decision to purchase FPOC membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr M and Mrs B and FHF was unfair to them even if the Supplier had breached Regulation 14(3).

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

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

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

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they did not fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under s.140A CCA.

However, as I have said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the

purposes of s.140A CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Here, I have not been provided with any evidence that the management fees that Mr M and Mrs B were required to pay either increased in a manner that caused an unfairness, nor have I seen anything to suggest that any other terms have been operated unfairly against them. Moreover, as I have not seen anything else to suggest that there are any other reasons why the credit relationship between FHF and Mr M and Mrs B was unfair to them because of an information failing by the Supplier, I am not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not think the credit relationship between FHF and Mr M and Mrs B was unfair to them for the purposes of s.140A CCA. And taking everything into account, I think it is fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that FHF acted unfairly or unreasonably when it dealt with Mr M and Mrs B's.75 CCA claims, and I am not persuaded that FHF was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of s.140A CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct FHF to compensate them.

If there is any further information on this complaint that the Mr M and Mrs B wishes to provide, I would invite them to do so in response to this provisional decision."

FHF responded to say it agreed with my provisional decision.

PR, on behalf of Mr M or Mrs B, responded. It disagreed with what I had said and argued that my provisional decision did not align with the judgment in *Shawbrook & BPF v FOS*, nor with other decisions issued by Ombudsmen at this service.[6]

PR argued that it was an error on my part not to make a finding on whether or not Mr M and Mrs B's sale breached Reg.14(3) of the Timeshare Regulations as, in *Shawbrook & BPF v FOS*, it was held that that provision was a "*central plank*" of consumer protection. PR said that in the other decisions it referred to, it was found that a breach of Reg.14(3) can, "*in and of itself*", render a credit relationship unfair. PR then pointed to the evidence it said suggested the sale in this instance took place in breach of Reg.14(3).

PR went on to say that the judgment in *Shawbrook & BPF v FOS* did not require there to be a finding that a customer's motivation to make a profit was central to a finding of unfairness. Further, if Mr M and Mrs B purchased membership to secure holiday rights, there was no reason why they could not have simply bought more points under their existing membership type.

PR also made the following arguments and observations:

- I used an incorrect definition of investment that did not align with the judgment in

[6] For the avoidance of doubt, one of the decisions referred to was written by me.

Shawbrook & BPF v FOS.

- At paragraph 76 of *Shawbrook & BPF v FOS,* it was held that there was a need to consider the "*fine calibration of the encouragement given*" by the Supplier. But I did not do that and instead focused on the "*literal interpretation of the words used rather than the overall impression created during the sales process*".
- I did not explain why I reached a different outcome to other Ombudsmen in the other decisions PR asked me to consider.
- I placed undue weight on the disclaimers in the sales documentation. The judgment in found *Shawbrook & BPF v FOS* that the disclaimers were insufficient to counteract a sales presentation that marketed a timeshare as an investment.
- My provisional findings on any alleged breach of contract were brief, as were my findings on FHF's creditworthiness assessment.
- I did not consider the RDO Code, which as an error of law.

What I have 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.

Having considered PR's response to my provisional decision, I have not changed my mind. So, for the same reasons as set out in the above extract of my provisional decision I still do not find that Mr M and Mrs B's complaint ought to be upheld.

For the avoidance of doubt, each complaint that is considered by an Ombudsman is considered on its own facts, circumstances and merits. And just because an Ombudsman has upheld a complaint about a similar sale, does not mean that Mr M and Mrs B's complaint ought to be upheld. So although I have read the decisions to which PR referred, the do not mean I should uphold this complaint. It also means that I will not comment on the contents of those decisions.

In my provisional decision, I did not make a finding whether or not the Supplier breached Reg.14(3) in selling FPOC membership to Mr M and Mrs B. That was because I explained that I would not uphold this complaint, even if such a finding was made, as I did not think that any such breach led to an unfairness that warranted a remedy. PR has said that this is not in line with the judgment in *Shawbrook & BPF v FOS* and argues that a breach "*in and of itself*" can render a credit relationship unfair.

In my provisional decision I quoted from the judgments in Carney and Kerrigan before saying:

> *"So, it seems to me that, if I am to conclude that a breach of Reg.14(3) led to a credit relationship between Mr M and Mrs B and FHF that was unfair to them and warranted relief as a result, whether the Supplier's breach of Reg.14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration."*

PR has not explained why it disagrees with that statement, nor how the two judgments I quoted led to any conclusion other to the one I reached. So for the reasons explained above, I am still of the view that it is an important and relevant consideration whether or not a breach of Reg.14(3) led them into taking out the Purchase Agreement and Credit Agreement. This also fits with what was said by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 185:

> *"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness –in particular to*

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

In other words, there has to be some causative link between the prohibited act of breaching Reg.14(3) and the customer going on to purchase membership. Common sense dictates this must be the case as, in the converse, it is hard to see how there could be an unfairness that warranted a discretionary remedy if somebody would have purchased membership irrespective of whether there had been any breach. So, for the avoidance of doubt, I disagree that a breach of Reg.14(3) automatically leads to an unfair credit relationship and I disagree with PR's reading of the judgment in *Shawbrook & BPF v FOS*.[7]

PR has said that I did not explain why, if Mr M and Mrs B wanted to purchase more points to exchange for holidays, they did not simply increase their earlier timeshare holding. But that was not what I said in my provisional decision. I thought the evidence pointed to the "*ability to take "luxury holidays", have a shorter membership period and the chance to get some money back at the end of the membership term"* were all important factors in their purchasing decision. But the last two of those only came with their FPOC membership, so I think there was a motivation for purchase beyond simply increasing their ability to take holidays.

PR also thought that I had used the incorrect definition of investment when I said "*I cannot see that they say that they purchased FPOC membership with the expectation or hope of a financial profit or gain. Rather, they said that they thought they "we would get our money back at the end" or they would get "some money back".* However, in my view, that is consistent with the definition in *Shawbrook & BPF v FOS* at paragraph 56 that *"an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".*

I have considered what PR said about me taking a literal interpretation of the actual words Mr M and Mrs B have used in their evidence rather than considering the overall impression created by the Supplier in the sales process. However, I have looked at the evidence provided and given the words Mr M and Mrs B used their plain meaning. I see no reason not to do that and try to infer something that was not said when the plain meaning of Mr M and Mrs B's evidence demonstrates what they thought they were getting out of the sale. So, for the reasons I gave in my provisional decision, I do not think their purchase of FPOC membership was motivated by the expectation or hope of a financial gain or profit. It follows that I do not need to comment on PR's arguments about the "*fine calibration of the encouragement given*" by the Supplier, the overall impression given in the sales process or

[7] See also the judgment in *Plevin* at paragraph 17

the weight given to the disclaimers in the documentation, as all of those matters went to the question of whether the Supplier breached Reg.14(3). But, as I have explained, that is not an end to the assessment I must do and I do not think this complaint ought to be upheld even if that provision was breached by the Supplier.

Additionally, PR has said that my provisional findings on any alleged breach of contract were brief, as were my findings on FHF's creditworthiness assessment and I did not point to any parts of the RDO Code. However, PR has not explained why, in response to my provisional decision, it disagrees with my provisional findings on the alleged breach of contract. Further, in respect of the question of whether the lending was affordable for Mr M and Mrs B, I explained that the evidence did not suggest the lending was unaffordable and invited them to provide any further evidence they wished me to consider – nothing has been provided.

Finally, PR has said I did not consider the RDO Code. As I said in my provisional decision, it is an indication of good industry practice at the Time of Sale that I must consider. However, PR has not explained in response which part of the RDO Code it says is relevant to the outcome of this complaint. So, although I am aware of its contents, without a specific refence to a specific part of the Code, I see no need to comment further.

My final decision

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

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs B and Mr M to accept or reject my decision before 25 February 2025.

Mark Hutchings
Ombudsman