DRN-5217423

The complaint

Mr and Mrs V'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 V purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 9 May 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,494 fractional points at a cost of £21,010 (the 'Purchase Agreement') after trading in their existing trial timeshare.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs V 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 V paid for their Fractional Club membership by taking finance of £20,510 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs V – using a professional representative (the 'PR') – wrote to the Lender on 9 May 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them that purchasing Fractional Club membership had a guaranteed end date when that was not true;
2. told them that purchasing Fractional Club membership was the only way they could exit from their existing timeshare membership; and
3. told them that they were buying into an exclusive membership.

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

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

Mr and Mrs V say that the Supplier has breached the Purchase Agreement because there is no guarantee that the Allocated Property will be sold at the end of the membership term or that they will receive their share of the net sale proceeds of the Allocated Property.

As a result, Mr and Mrs V say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs V.

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

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

1. Fractional Club membership was marketed and sold to them as an investment.
2. The contractual terms setting out (i) the duration of their Fractional Club 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 (the 'UTCCR').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The decision to lend was irresponsible because the Supplier – acting as the broker - didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs V's concerns as a complaint and issued its final response letter in or around July 2018, rejecting it on every ground.

Mr and Mrs V then referred the complaint to the Financial Ombudsman Service. It 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 V at the Time of Sale in breach of Regulation 14(3) of 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 V 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 – which is why it was passed to me.

The legal and regulatory context

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

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.

- The Consumer Protection from Unfair Trading Regulations 2008.
- Case law on Section 140A of the CCA – including, in particular:

- The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
- *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
- *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
- The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
- *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
- *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
- *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Having considered Mr and Mrs V's complaint, I reached a similar outcome to that of our investigator. But as I'd expanded somewhat on the reasons given, I issued a provisional decision ('PD') on 3 December 2024 giving Mr and Mrs V and the Lender the opportunity to respond to my findings before I reach a final decision.

Mr and Mrs V confirmed receipt of my PD and said that they have no further points to add to their complaint. The PR also responded confirming that Mr and Mrs V accepts the finding in my PD.

The Lender responded to accept the findings in my PD, confirming that it plans to make a settlement offer to Mr and Mrs V.

Having received responses from both parties, Mr and Mrs V's complaint has been passed back to me.

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.

For completeness, in my PD I said:

> 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 currently 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 V as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.
>
> However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs V's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership/breached the Purchase Agreement and the Lender ought to have accepted and paid the claim under Section 75 of the CCA. I say that because, even if

those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs V in the same or a better position than they would be if the redress was limited to the misrepresentations or breach of contract claims.

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

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

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

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs V's membership of the Fractional Club 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.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

"*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer*".

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[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."

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

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

I have considered the entirety of the credit relationship between Mr and Mrs V and the Lender along with all of the circumstances of the complaint and 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; and
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 V and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs V'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 V say that the Supplier did exactly that at the Time of Sale – saying the following in the letter of complaint:

"[…] *The Seller insisted to* [Mr and Mrs V] *that the fractional points would be a fantastic investment as they would own a fraction of the property. This was very appealing to* [Mr and Mrs V] *as they believes that they would be joint owners of the property, so it appeared to* [them] *that the product was more of an investment rather than an interest to secure holidays".*

Further, in an email provided to this service by Mr V in August 2019 (which I've treated as their own recollections of the sale), he says:

"We only changed to this agreement because we were told it was an investment in property and that we could benefit from worldwide holiday accommodation with [a named holiday exchange provider]*".*

I do acknowledge that in response to our investigator's findings, the Lender didn't think Mr and Mrs V's testimony should be considered. They assert that despite having opportunity to do so, the PR hadn't previously provided this for consideration. And suggest that the document had been drafted far more recently. However,

records show that Mr V himself provided this service with an emailed 'timeline' of events in August 2019. So, I'm satisfied this was not something put together more recently.

Mr and Mrs V's allegations therefore suggest that the Supplier may have breached Regulation 14(3) at the Time of Sale because they were told that the Fractional Club membership was an investment in property from which they would benefit.

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

Mr and Mrs V's 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 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 V as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs V 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 V as an investment. These include:

- Note 5 of a document headed 'Members Declaration' which Mr and Mrs V signed says, *"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that* [the Supplier] *makes no representation as to the future price or value of the Fraction".*
- Note 5 ('Primary Purpose') of Part 6 ('Additional Information') of the Information Statement which Mr and Mrs V signed says, *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate,* [The Supplier] *makes no representation as to the future price or value of the Allocated Property or any Fractional Rights".*

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. Mr and Mrs V's allegation suggesting that the Supplier breached Regulation 14(3) at the Time of Sale, is based upon an

assertion that (1) membership of the Fractional Club was expressly described as an *"investment*" and as a consequence (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs V or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn

(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the timeshare provider in this complaint provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the 'FPOC 1 Training Manual').

As I understand it, the FPOC 1 Training Manual (or something similar) was used throughout the sale of FPOC 1 membership – which, as far as I'm aware, was sold until 31 December 2013. It isn't entirely clear whether Mr and Mrs V would have been shown the slides included in the training manual. But the Manual seems to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling FPOC 1; and

(2) how the sales representatives would have framed the sale of FPOC 1 to prospective members – including Mr and Mrs V.

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 V through three holidaying options along with their positives and negatives:

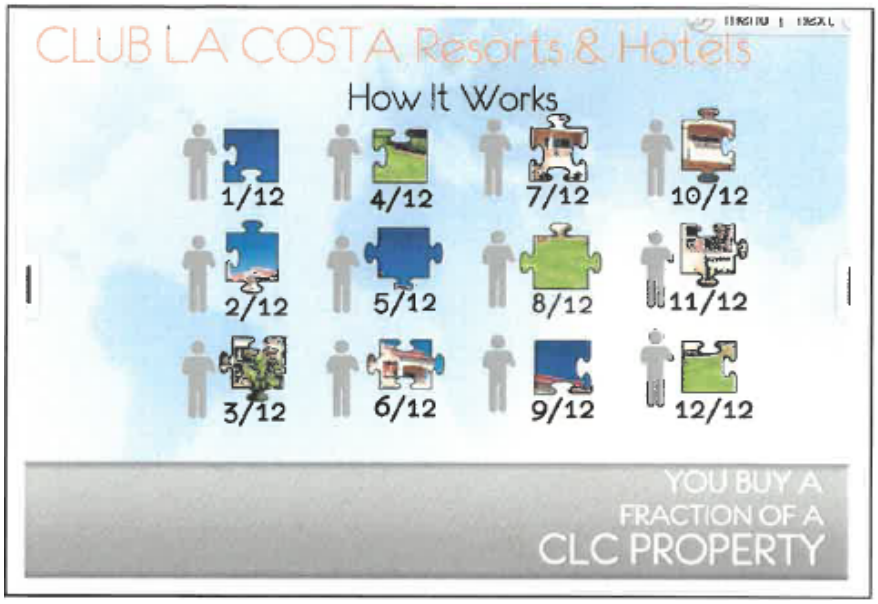
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

It was the first slide in the manual to set out any information about FPOC 1 membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs V 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.

The manual then moved on to two slides (on pages 7 and 8) concerned with how membership of FPOC 1 worked:



Having looked through the FPOC 1 Training Manual for the purpose of my decision, it seems to me that there were 10 slides on how FPOC 1 membership worked before the slides moved onto sections titled “Peace of Mind”, “Resort Management” and “Which Fractional”. And as 5 of the 10 slides look like they focused on holidays, I acknowledge that there might have been a fairly even split during the Supplier’s sales presentations between marketing membership of FPOC 1 as a way of buying an interest in property and as a way of taking holidays.

Nonetheless, even if the Supplier had spent more time discussing holidays during the FPOC 1 sales presentations, as the slides above suggest that the Supplier’s sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment, thus enticing prospective members into purchasing FPOC 1 membership given the prospect of a financial gain in the future, I can’t see why the Supplier wouldn’t have been in breach of Regulation 14(3) in those circumstances. And that, therefore, is my view.

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 V and the Lender under the Credit Agreement and related Purchase Agreement.

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

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

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

“[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor

when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs V and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs V, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs V's emailed 'timeline' received by this service in August 2019, I'm persuaded that 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, given their reference to having access to a holiday exchange programme. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs V 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, therefore, the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing trial membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs V have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. To the contrary, their testimony says, *"we only changed to this agreement because we were told it was an investment in property*

and that we could benefit from worldwide holiday accommodation with [an exchange company]*.".* And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

In responding to our investigator's findings, the Lender didn't think Mr and Mrs V's testimony should be considered. They suggested that the PR had opportunity to provide this previously when the original complaint was submitted to them. But despite that, the Lender had only been provided with their testimony more recently. The Lender believes this suggests that the testimony was *"only recently produced"* and had been *"entirely coached".*

While I acknowledge the Lender's comments here, I should point out that Mr and Mrs V's testimony was received in the form of an unprompted email to this service in 2019. And in any event, I've not based my assessment solely upon Mr and Mrs V's evidence. As I've already explained above, I've carefully considered all the evidence to establish how, on balance, it is likely that Fractional Club membership was sold in Mr and Mrs V's case.

Furthermore, in response to our investigator's findings, the Lender highlights that Mr and Mrs contacted the Supplier in November 2012 to advise that Mrs V had lost her job and they could not afford the membership. The Lender goes on to say that this was followed up with a letter from Mr and Mrs V to the Supplier in which they said that *"Unfortunately, the 19 year tie-in was not what both my husband and I understood regarding the time share agreement, where we were under the belief that we could cancel the arrangement with Costa La Club within the first year. This belief was the only reason why we signed up."*

The Lender goes on to say that they believe this letter confirms *"that the only reason they say they purchased the Membership was their mistaken belief they could cancel it within the first year and not what they are now stating; the last paragraph of page one of their statement even confirms they knew "…then a sale could be actioned. The proceeds are then shared between the fractional owners…"*

I accept that was what Mr and Mrs V said in 2012 in a letter, but it makes very little sense when taking a step back. Although they might have been under the impression that they could cancel within a year, it makes no sense that it was the only reason they signed up. In particular, as people don't normally enter into contracts for the sole purpose of exiting them. Rather, a more sensible approach is to consider what they were entitled to under the agreement and whether it makes sense that they might have been interested in purchasing holidays and/or an investment together with the other benefits that included. As I've already explained above, the evidence available from the Time of Sale leads me to conclude that Mr and Mrs V agreed to purchase the Fractional Club membership for reasons other than any misunderstanding that they could cancel it early.

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 V 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.

Fair Compensation

Having found that Mr and Mrs V 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. Ordinarily, this would be subject to Mr and Mrs V agreeing to assign to the Lender their Fractional Points or hold them on trust for the Lender. However, I understand that their Fractional Club membership was cancelled in 2014 with the Supplier confirming to Mr and Mrs V that they had no further liabilities or obligations under it. If either party disagree that this is the case, they can let me know in response to this provisional decision.

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

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs V's trial membership was, therefore, a precursor to their Fractional Club membership. And, as they paid for their trial membership using finance that they refinanced using the Credit Agreement, in the absence of any realistic prospect of the trial membership being reinstated to the satisfaction of both parties to it, the trade-in value acted, in essence, as a deposit on this occasion. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

Here's what I think needs to be done to compensate Mr and Mrs V with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs V'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 annual management charges Mr and Mrs V paid as a result of Fractional Club membership and the trade-in value given to their trial membership.

(3) The Lender can deduct

i. The value of any promotional giveaways that Mr and Mrs V used or took advantage of; and
ii. The market value of any holidays* Mr and Mrs V took using their Fractional Points.

(I'll refer to the output of Steps 1-3 hereafter as the 'Net Repayments')

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

*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 any holidays Mr and Mrs V 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 Mr V and Mrs V certificates showing how much tax it's taken off if they ask for one.

As the parties to this complaint have both accepted my provisional findings, I've no reason to vary from them. And for that reason, my final decision remains unchanged.

My final decision

For the reasons set out above, I uphold Mr and Mrs V's complaint and require First Holiday Finance Ltd Limited to settle the complaint in the manner described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V and Mrs V to accept or reject my decision before 15 January 2025.

Dave Morgan
Ombudsman