DRN-5286372

The complaint

Ms I and Mr S'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 claim under Section 75 of the CCA.

What happened

I issued a provisional decision on this complaint on 24 November 2024, a copy of which is appended to, and forms a part of, this final decision.

In my provisional decision I set out the background to, and my provisional findings on, Ms I and Mr S's complaint, so it's not necessary to reproduce these again in full. But to go over the background of the complaint again briefly:

- Ms I and Mr S purchased a membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 2 September 2012 (the 'Time of Sale'). They traded in a previous membership they had with the Supplier, and the contract said the cost of the Fractional Club membership was £27,461. They made an advance payment of £500 and financed the rest with a loan from the Lender of £26,961.

- Ms I and Mr S later complained to the Lender about sale of the Fractional Club membership. Their complaint covered various issues, including:

    - Misrepresentations and breaches of contract by the Supplier, giving them a claim against the Lender under Section 75 of the Consumer Credit Act 1974 ("CCA").
    - The Lender being party to an unfair credit relationship under the loan agreement and purchase agreement for the purposes of Section 140A of the CCA.
    - The Lender having lent to them irresponsibly.

- The Lender rejected Ms I and Mr S's complaint.

In my provisional decision, I made the following key findings, the reasons for which are fully explained in the appended document:

- Having considered Ms I and Mr S's testimony, alongside an analysis of how the Supplier had sold the Fractional Club product at the Time of Sale, I thought it was more likely than not that the Supplier had marketed the product to them as an investment, in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("Timeshare Regulations").

- I also considered Ms I and Mr S's purchasing decision had been materially impacted by the Supplier's breach of the Timeshare Regulations. I found they had been reluctant to purchase on financial grounds, but the prospect of the product being an investment helped to overcome their objections. I concluded this had rendered the

credit relationship between them and the Lender unfair, and that the Lender should provide redress as a result.

Broadly-speaking, I considered the Lender should refund the payments made towards the loan for the purchase, along with the £500 advance payment and the maintenance fees associated with the Fractional Club membership, along with compensatory interest. I considered deductions could be made in respect of any benefit Ms I and Mr S had obtained from the product, such as holidays they'd taken with it or promotional giveaways they'd used.

I asked the parties to the complaint to let me have any further submissions they'd like me to consider. While both parties accepted the provisional decision, I've received substantial submissions from them on the question of what fair compensation would look like, and further investigation has been necessary.

After some back and forth, I could summarise the Lender's position as follows:

- Ms I and Mr S's loan included the consolidation of an outstanding debt related to an earlier purchase they'd made in May 2011 in the Supplier's "Vacation Club", so they should only receive a pro-rata refund of what they'd paid to settle the loan, based on the proportion of the loan which had gone towards their Fractional Club membership.

  The repayments towards the previous loan had been £283.36 per month, and there had been 130 months remaining at the time it was consolidated. The repayments on the new loan were £384.24 per month, or £100.88 more per month.

- It would refund the £500 advance payment.

- Ms I and Mr S would have in fact paid £487.04 *more* in maintenance fees if they'd remained in the Vacation Club and not purchased Fractional Club membership, and so it intended to deduct this amount from the redress.

- Ms I and Mr S had taken holidays in August/September 2012, July 2016 and January 2017 using their Fractional Club points, in Tenerife, Austria and Spain, so the maintenance fees for those years would not be included in the calculation.

- It would pay 8% simple interest per year on any refunds.

- The Supplier would reinstate Ms I and Mr S's old Vacation Club membership, but they would be under no obligation to use it.

- It would remove any adverse credit information recorded on Ms I and Mr S's credit files, although it noted that it had not recorded any.

The Lender outlined a set of proposals in line with the above, in a letter sent to Ms I and Mr S, and copied to the Financial Ombudsman Service, on 8 January 2025.

Ms I and Mr S's position was as follows:

- They did not take any consolidation loan with the Lender. When they originally took out the Vacation Club membership, they had been sold they could sell, gift or transfer it. The Supplier had offered to buy back this membership when they purchased Fractional Club membership, and had told them they would clear the remaining loan and sell the previous membership to other clients.

- The new loan started in September 2012 and the old one was only settled in

November 2012 by the Supplier. The fact these things did not occur concurrently supported their account of events.

- The Purchase Agreement for the Fractional Club membership said the cash price of the membership was £26,961 (£27,461 prior to the advance payment). No trade in of a previous membership or consolidation of previous loans was referred to.

- They had not been on holiday using their Fractional Club membership in 2012. The Supplier had invited them on a promotional holiday which didn't use their points. In 2016 and 2017 they accepted they'd been on holiday, but they'd not used their full annual entitlement and so any calculations should be performed on a pro-rata basis.

Further investigation followed. The Lender said that it was sure the loan for the Vacation Club membership had been consolidated, and produced a document said to have been signed by Ms I and Mr S in September 2012, showing they had authorised £19,061 of the new loan to be used to pay off the old one. It also provided a more detailed breakdown of how it had arrived at its redress proposals. I also examined emails between Ms I and Mr S, and the Lender, and loan account statements, to try to determine how the loan had been settled in 2022.

I wrote informally to Ms I and Mr S to explain that, having analysed the available evidence, I thought it was likely the Lender's proposals to settle their complaint were fair and reasonable. In particular, I noted:

- Evidence had been supplied of the Vacation Club maintenance fees having been higher than the Fractional Club fees. It wasn't unreasonable of this to be factored in, and it meant that Ms I and Mr S's holidays using the Fractional Club membership would not result in a further reduction in the redress.

- I was satisfied the remaining balance outstanding on the Vacation Club loan had been consolidated into the loan for the Fractional Club membership. The complaint did not relate to the Vacation Club membership, so any payments which were essentially going towards that membership fell outside of the scope of my decision, and it was reasonable that any redress did not include these. I considered the way the Lender had accounted for this in its proposals appeared to be fair.

- It was apparent that Ms I and Mr S had settled the loan short by agreement with the Lender. I was unable to see that a settlement of £4,100 had been paid as Ms I and Mr S had claimed. It appeared the Lender had accounted for a settlement of £1,100 (pro-rata) in their redress calculations. I could see Ms I and Mr S had made settlement payments which were higher than this, but the Lender had also written off £6,564.83 in loan principal, which I thought it was reasonable to take into account when considering the overall fairness of the Lender's proposals. Looking at things in the round, I thought the redress proposals overall appeared to be fair and reasonable.

Ms I and Mrs S provided further submissions in response to my communication. I could summarise them as follows:

- The Vacation Club loan had not been consolidated and the document produced by the Lender to evidence this, was a forgery:

    - It could be seen that their signatures had been lifted from another document and placed on the consolidation document.

- Given the Vacation Club and Fractional Club products were completely different, there was no way that a loan for one would be consolidated into a loan for the other.

- The account activity on the loan statement for the Vacation Club loan was not consistent with the loan having been settled by consolidation into the Fractional Club loan.

- They could evidence they'd paid £4,100 to settle the loan. The Lender had recorded the payments in a strange way on the loan statement, but adding the relevant entries together arrived at the correct figure.

Ms I and Mrs S also made the point (which I have condensed here for the sake of brevity) that they considered the Lender and the Supplier had been engaged in underhanded behaviour throughout their relationship, and the disputes over the redress were simply the latest example of this.

The case has now been returned to me to decide.

What I've decided – and why

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

As both parties accepted my provisional decision in relation to the sale of the Fractional Club membership to Ms I and Mr S, and the impact this had on the fairness of the credit relationship between them and the Lender, I don't need to comment further on this other than to say that my conclusions, and the reasons for them, are unchanged from those set out in the appended provisional decision.

The centre of the dispute following the provisional decision, has moved on to the redress. I've carefully considered Ms I and Mr S's comments and evidence following the informal communication with them that I outlined earlier in this decision. Having done so, I would make the following points:

- I don't think I can conclude the consolidation document is a forgery or otherwise not genuine. While I acknowledge Ms I and Mr S's claim that their signatures have been cut out and pasted from other documents they'd signed, I note the specific signatures on the consolidation document are consistent with but not exact copies of their signatures on any other documents I've seen. If the signatures had been copied in the way Ms I and Mr S have suggested, I would have expected them to be identical.

- The fact that the Vacation Club and Fractional Club products were different doesn't mean that the balance of a loan taken to purchase one can't be consolidated into a loan taken to purchase the other. In my experience, this is often what happened. It's unfortunate in this case that the Supplier's purchase paperwork didn't fully reflect the details of the underlying transaction. The paperwork indicated the cash price of the Fractional Club membership was £27,461. In my experience, it was the Supplier's practice to accept a "trade in" of a customer's previous membership (whether a Trial membership or Vacation Club membership) against the price of any new membership they were buying. In some cases, such as Ms I and Mr S's, this trade in was not reflected accurately on the Purchase Agreement.

- I share Ms I and Mr S's observation that the Lender recorded the settlement payment in relation to the first loan nearly three months *after* they had purchased the

Fractional Club membership, and that the figures on the loan statement don't match the figure on the consolidation document. I don't think this indicates, however, that there was *not* a consolidation, and/or that the Supplier sold the Vacation Club membership to someone else or bought it back, using the proceeds to pay off the first loan. Looking at the statement for the first loan, it appears a delay in crediting the consolidation amount caused the balance to change due to additional payments being made and interest accruing. There is evidence that the Lender made various correcting entries to bring the balance to zero, including refunding a payment and writing off interest. I don't think there is anything necessarily suspicious about that.

- I accept Ms I and Mr S's evidence that they paid £4,100 in the months leading up to the end of the loan in order to settle it. This doesn't appear to have been fully accounted for in the Lender's redress proposals. In my communication to Ms I and Mr S, I had already found the Lender appeared not to have taken into account all of the settlement payments they'd made. But given the Lender had written off £6,564.83 in loan principal, I thought the redress remained broadly fair overall. My opinion about that hasn't changed.

In my view, the Lender's most recent settlement offer, outlined in its letter dated 8 January 2025, is fair and reasonable and consistent with the directions in my provisional decision, for the reasons explained above.

My final decision

For the reasons explained above, and in the appended provisional decision, I uphold Ms I and Mr S's complaint and direct First Holiday Finance Ltd to take the steps outlined in its letter dated 8 January 2025.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms I and Mr S to accept or reject my decision before 21 March 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've reached the same outcome as our Investigator, but I've explained my reasons in more detail in this provisional decision.

The deadline for both parties to provide any further comments or evidence for me to consider is 28 November 2024. Unless the information changes my mind, my final decision is likely to be along the following lines.

The Complaint

Ms I and Mr S'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 claim under Section 75 of the CCA.

Background to the Complaint

Ms I and Mr S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 2 September 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,932 fractional points at a cost of £27,461 (the 'Purchase Agreement'). It's possible the Fractional Club membership cost more than this, because Ms I and Mr S traded in their existing timeshare with the Supplier, but the consideration they were given for this is unknown.

Fractional Club membership was asset backed – which meant it gave Ms I and Mr S 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.

Ms I and Mr S paid for their Fractional Club membership by taking finance of £26,961 from the Lender in joint names (the 'Credit Agreement'). The amount of finance was lower than the agreed purchase price, because Ms I and Mr S made a deposit payment of £500 directly to the Supplier. The terms of the loan required Ms I and Mr S to make 144 monthly payments of £384.24. I understand the loan was repaid early, in 2022, though Ms I and Mr S say it caused them financial difficulties and should never have been lent to them in the first place.

Ms I and Mr S – initially using a professional representative (the 'PR') – wrote to the Lender on 16 March 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.
4. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

Ms I and Mr S says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date in 19 years when the Allocated Property would be sold, when that was not true.
2. told them that Fractional Club membership was an "investment" which they could sell at any time for a profit, when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Ms I and Mr S say 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 Ms I and Mr S.

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

Ms I and Mr S say that they found it difficult to book the holidays they wanted, when they wanted.

As a result of this, Ms I and Mr S say that they 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 Ms I and Mr S.

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

The Letter of Complaint set out several reasons why Ms I and Mr S says 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. Because the Supplier had made various misrepresentations to them as already outlined above.
2. The Supplier's payment arrangements for the Fractional Club membership were in breach of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
3. The non-disclosure of a commission payment made by the Lender to the Supplier.
4. They were pressured into purchasing Fractional Club membership by the Supplier.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.

The Lender dealt with Ms I and Mr S's concerns as a complaint and issued its final response letter on 10 July 2018, rejecting it on every ground.

Ms I and Mr S then referred the complaint to the Financial Ombudsman Service. In the meantime, it came to light that PR didn't have the necessary regulatory permissions to act as a claims management company, and Ms I and Mr S began pursuing their case by themselves. One of our Investigators began looking into the case and, in 2024, requested further details of Ms I and Mr S's recollections of how the Supplier had sold the Fractional Club membership to them. Ms I, on behalf of both herself and her husband, provided a narrative account which I've summarised the salient parts of below:

- They'd previously purchased a membership with the Supplier while in Malaga, and had been told they would be paying £250 per month via the Lender, and could cancel the membership at any time if they weren't satisfied.

- At the Time of Sale, they'd been on holiday with the Supplier in Tenerife and been shown cottages under construction. The Supplier had offered to sell one of these to them, but they had declined. The Supplier had then offered the Fractional Club membership to them, saying their existing membership would be converted and they'd have more weeks of holiday and even cruises for an extra £135 per month.

- They had expressed some reservations about being able to afford this and had explained their financial situation to the Supplier, but had been reassured that *"in the near future this investment will continue to grow and will benefit us".* They were also told they could sell their fractional share at any time as the products were always in high demand and *"definitely would be in profit whenever we had to [sell]".*

- They'd discovered some years later, while speaking to someone claiming to be an ex-employee of the Supplier, that the Supplier held majority shares in each fractional property and could block any sales, that the management fees would be increasing every year and the holiday properties were not exclusive to members of the Supplier.

Concluding, Ms I said that they'd not received any service from the Supplier and *"…it was not an investment but a trap to get money from people like us".*

Having considered this information, our Investigator upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Ms I and Mr S 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 Ms I and Mr S was rendered unfair to them for the purposes of section 140A of the CCA.

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

The Lender made the following key points:

- The original claim raised by PR on Ms I and Mr S's behalf was generic, and it had later come to light that PR had been involved in large scale fraud. This called into question the credibility of the allegations made.

- It questioned why, if Ms I and Mr S had been told they could sell their share at any time, they had never contacted the Supplier with a view to doing this.

- Ms I and Mr S's recollections were unreliable because key details were wrong. For example, there was no way they could have been shown cottages for sale in Tenerife, as the Supplier had nothing under construction on the island at that time. However, it accepted that the Supplier had *"…introduced…the concept of purchasing a holiday home with them in the region of £300,000 in either Florida or Turkey."*

- Ms I and Mr S's early repayment of the loan was not indicative of being unable to afford it, or having had financial difficulties. Notes made at the Time of Sale suggested Ms I and Mr S were optimistic about using income from a new business to pay down the loan.

- The conversion of Ms I and Mr S's existing membership with the Supplier, to the Fractional Club, had benefited them by reducing their annual management fees from 1,731 Euros to £1,198.

- The Supplier had denied being unable to meet Ms I and Mr S's requests for holidays – noting that they had never requested anything until July 2016, around four years after their purchase.

Ms I and Mr S were asked for their comments on the Lender's rebuttal of the Investigator's assessment. They made the following points:

- It wasn't their fault if PR had turned out to have broken the law.

- They insisted that the Supplier had told them the Fractional Club membership was an investment they could sell at any time with profits. The Supplier had told them something similar about their previous membership also.

- The Supplier had been unable to get any other lender to lend to them due to their credit history, which is why the Lender had been brought in, and had been described as a "sister company" to the Supplier.

- They were sure the Supplier had shown them new cottages in Tenerife which could either be bought outright or in fractions. They didn't have enough money to invest in this, so they had been persuaded to upgrade their contract with the promises of more weeks, cruises, and a share in the property that could be sold later with profits.

- They disagreed that they'd not tried to make a booking before July 2016. They said they'd complained about this and been told they should book earlier and avoid school holidays.

- They asked why they'd agree to pay nearly £6,000 per year and then not go on any holidays, unless they thought a key part of the deal was the prospect of selling the membership for a profit.

The case has now been passed to me to decide.

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 CPUT Regulations.
- 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*').

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

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

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 Ms I and Mr S 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 Ms I and Mr S complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the product was misrepresented, that an undisclosed commission was paid, that there were problems with the availability of holidays, or that the loan was granted irresponsibly by FHF.

That's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Ms I and Mr S in the same or a better position than they would be if the redress was limited to that which would be fair and appropriate if the other parts of their complaint were upheld.

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 Ms I and Mr S 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 Ms I and Mr S'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."

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 Ms I and Mr S 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;
4. The inherent probabilities of the sale given its circumstances.

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

I have then considered the impact of these on the fairness of the credit relationship between Ms I and Mr S 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 Ms I and Mr 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 Ms I and Mr S say that the Supplier did exactly that at the Time of Sale – that when they expressed reservations about their ability to afford to upgrade to the Fractional Club membership, the Supplier reassured them that it was an investment that would grow and benefit them, and they'd definitely make a profit in the future.

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

(1) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.
(2) They were told by the Supplier that Fractional Club membership was the type of investment that would "definitely" increase in value.

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.

Ms I and Mr S'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 Ms I and Mr S 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 that the Supplier generally made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms I and Mr S, 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, normally disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to prospective purchasers as an investment. Those disclaimers have not been supplied by the Lender or Ms I and Mr S in this case, although I acknowledge it's possible they exist, given they appear to have been outlined in standard documents completed as part of the Supplier's sales process. If either party want to provide any documentation they wish me to consider, they can do so in response to this provisional decision.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Ms I and Mr S's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (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 Ms I and Mr S 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 Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Ms I and Mr S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

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

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 Ms I and Mr S through three holidaying options along with their positives and negatives:

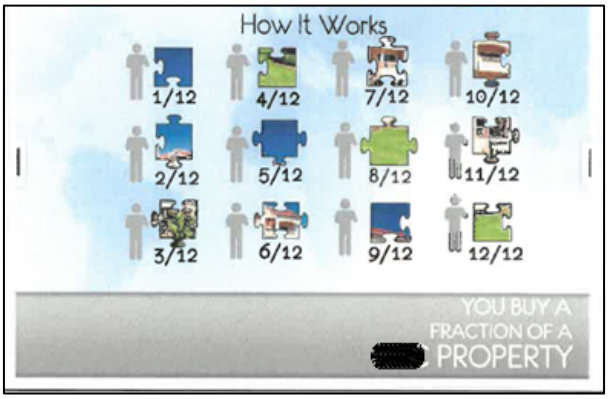
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

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

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Ms I and Mr S 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 Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as) , I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Ms I and Mr S the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'*[2] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

Ms I and Mr S say, in their own words, that the Supplier positioned membership of the Fractional Club as a profitable investment to them when they raised objections to upgrading to the Fractional Club on financial grounds. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Ms I and Mr S. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find them either implausible or hard to believe when they say they were told that they could buy either a whole property or a fraction of one, which would they could sell in the future at a profit.

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[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Ms I and Mr S were led by the Supplier to believe at the relevant time. I note also that it's undisputed by the Lender and the Supplier that, immediately prior to selling the Fractional Club membership to Ms I and Mr S, the Supplier had attempted to sell a physical holiday property to them but had encountered a lack of interest and/or ability to pay. It appears therefore that the Supplier's sales pitch that day had already introduced the concept of purchasing as an investment and I find it plausible, given the slides I've referred to, that it would have continued to pursue this thread when pivoting to the sale of the Fractional Club membership which, as the Supplier itself claimed, combined 'the best of both worlds': the investment potential of a real estate purchase, with the flexibility and convenience of renting holidays.

So for the reasons I've outlined above, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Ms I and Mr S 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 Ms I and Mr S 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 Ms I and Mr S, 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 Ms I and Mr S's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they were, at least to an extent. And that is not surprising given the nature of the product at the centre of this complaint. But Ms I and Mr S say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as a share of a property that could be "sold later with profits" and "an investment that would continue to grow". I think this overcame their reluctance to go ahead with the purchase on financial grounds. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Ms I and Mr S 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. Indeed, it appears to me that they had considerable concerns about taking on more debt, and the Supplier used the prospect of the membership being a profitable investment as a means of overcoming their objections on these grounds. I appreciate the Lender has questioned whether Ms I and Mr S's financial situation was truly so poor at the time as the Supplier's notes recorded them as having apparently spoken in optimistic terms about a new business venture from which they hoped to be able to settle the loan early. I don't find it surprising that people starting out on a business venture would express hope about its future success. It would be unusual if they were to say otherwise. But it doesn't necessarily mean they were in a strong financial position. Ultimately, I have not seen enough to persuade me that they would have agreed to make their purchase regardless of the Supplier's breach of Regulation 14(3).

I've considered the other points made by the Lender in response to our Investigator's assessment, but I don't think these are persuasive. For example, I don't think the allegedly unscrupulous nature of their former representatives is relevant when considering the reliability of testimony they've provided long after the representatives in question ceased to act for them. Nor do I think alleged factual inaccuracies in their testimony on points such as whether the holiday they were on was a promotional holiday, or whether cottages they said they were shown were for sale or not, are damaging to the overall credibility of what they've said.[3]

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Ms I and Mr S under the Credit Agreement and

[3] To some extent these inaccuracies appear to be distinctions without much in the way of a difference. The Supplier accepts, for example, that Ms I and Mr S were offered properties for sale, but they disagree that these properties were ones shown to them in Tenerife. And, to me, whether the holiday was a promotional holiday, or a 'free week' given to them as valued customers, seems to be neither here nor there.

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 Ms I and Mr S 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, provided Ms I and Mr S agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

(1) The Lender should refund Ms I and Mr S's repayments to it under the Credit Agreement, cancel any outstanding balance if there is one, and reimburse the £500 advance payment or deposit that was paid directly to the Supplier.
(2) In addition to (1), the Lender should also refund the annual management charges Ms I and Mr S paid as a result of Fractional Club membership.
(3) The Lender can deduct

   i. The value of any promotional giveaways that Ms I and Mr S used or took advantage of; and
   ii. The market value of the holidays* Ms I and Mr S took using their Fractional Points, but *not* including any holidays taken using points or holiday rights acquired under previous purchases from the Supplier.

   (the 'Net Repayments')

   *I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Ms I and Mr S 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.

(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 Ms I and Mr S credit files in connection with the Credit Agreement.
(6) If Ms I and Mr S's Fractional Club membership is still in place at the time of this decision, as long as they to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

My Provisional Decision

For the reasons explained above, I am minded to uphold Ms I and Mr S's complaint. I now invite the parties to the complaint to let me have any further submissions they'd like me to consider, by 28 November 2024.

I will then review the complaint again.

Will Culley
Ombudsman