DRN-5379710

The complaint

Mr and Mrs B'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 B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 23 July 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,660 fractional points at a cost of £35,177 (the 'Purchase Agreement'). But after trading in their existing fractional timeshare, they ended up paying £7,575 for membership of the Fractional Club.

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

Mr and Mrs B paid for their Fractional Club membership by paying a £500 deposit and taking finance of £7,075 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 21 October 2019 (the 'Letter of Complaint') to complain about:

1. A misrepresentation 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 B say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier told them that Fractional Club membership had a guaranteed end date when that was not true[1].

Mr and Mrs B say that they have a claim against the Supplier in respect of the misrepresentation(s) 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 B.

[1] The PR listed other points here as alleged misrepresentations, but on my reading of the complaint they appear to relate to other elements of the complaint. So, I've listed those other points in other sections accordingly.

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

Mr and Mrs B also say that they found it difficult to book the holidays they wanted, when they wanted.

Although not specifically raised as such a claim, as a result of the above, Mr and Mrs B suggest 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 B.

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

The Letter of Complaint set out some other points which suggest Mr and Mrs B feel 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. The Fractional Club membership is an unregulated collective investment scheme (UCIS), the promotion and financing of which is illegal.
2. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender responded to the complaint on 19 November 2019, in which they explained they had forwarded the complaint to the Supplier for them to respond. The PR then referred the complaint to the Financial Ombudsman Service.

As part of that, the PR sent a letter to this Service confirming their points of complaint, including that they were making a complaint of an unfair credit relationship under Section 140A of the CCA for the following reasons (in addition to what they've already outlined in the Letter of Complaint to the Lender):

1. The Purchase Agreement is void as the membership is a floating week timeshare which is illegal.
2. The interest rate on the loan being 13.81% compared to the Bank of England base rate in July 2013 being 0.50% is an unfair term.

The Supplier subsequently sent a response to the complaint on 5 December 2019, rejecting it on all grounds.

The complaint was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits, and set out how they thought Mr and Mrs B ought to be compensated.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

In response to the Investigator's view, the PR also wrote a further letter in which they explained that they didn't agree with some aspects of the Investigator's proposed redress.

I considered the matter and issued a provisional decision dated 19 February 2025. In that decision, I said:

"***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 Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').*
- *The Consumer Protection from Unfair Trading Regulations 2008 (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 have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair

and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs B could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase[2] and the nature of the arrangements between the parties involved in the transaction.

Further, creditors can reasonably reject Section 75 claims that they're first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA'). The reason being, it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court.

Having considered everything, I think Mr and Mrs B's claim for misrepresentation is likely to have been made too late under the relevant provisions of the LA, which means it would have been fair for the Lender to have turned down their Section 75 claim for this reason.

A claim under Section 75 is a 'like' claim against the creditor. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued, as per Section 2 of the LA.

But a claim like this one under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. The limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued for the claim was the Time of Sale. I say this because Mr and Mrs B entered into the membership at that time based on the alleged misrepresentations by the Supplier, which Mr and Mrs B say they relied on. And, as the loan from the Lender was used to finance this membership, it was when Mr and Mrs B entered into the Credit Agreement that they suffered a loss.

Mr and Mrs B first notified the Lender of their Section 75 claim on 21 October 2019. Since this was more than six years after the Time of Sale, I don't think it was unfair or unreasonable of the Lender to reject Mr and Mrs B's concerns about the Supplier's alleged misrepresentations at the Time of Sale.

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

I've already summarised how Section 75 of the CCA works above. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable. And, that the relevant cause of action for a claim of breach of contract is when the actual breach(es) occurred. Since the alleged

[2] Which I note is also an issue here, since the purchase price prior to trade-in was over £30,000.

breach(es) here appear to have been in the years following the Time of Sale, I don't think this claim is out of time under the LA.

Mr and Mrs B say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork given to Mr and Mrs B at the Time of Sale states that the availability of holidays was/is subject to demand. I also can't see for example, that Mr and Mrs B have described the specific instances they tried to book but were unable to do so, such as when and where exactly they were trying to book and which of those requests the Supplier wasn't able to fulfil. It also looks like they made use of their fractional points to holiday on several occasions. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

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

Mr and Mrs B also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As 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 Mr and Mrs B 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 B'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."[3]

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

---

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

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 Mr and Mrs B and the Lender, along with all of the circumstances of the complaint, and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of 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.*

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs B and the Lender.

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

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

I'll firstly address the main reason why they suggest the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of the prohibition against selling timeshares in that way. This is the reason the Investigator originally upheld the complaint.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs B'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 membership of the Fractional Club 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 the PR suggests that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The PR has said that the Fractional Club membership amounted to a UCIS. However, that is a matter of law and was decided in Shawbrook and BPF v FOS, when such a finding was rejected by the judge (at 39 to 54). It follows, as Mr and Mrs B acquired timeshare rights under the purchase, it did not amount to a UCIS.

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 B'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 B 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 B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs B as an investment.

I've also considered the testimony Mr and Mrs B have provided. I note firstly that when the complaint was first made, no evidence was provided to support the allegation of membership being sold or marketed as an investment.

The PR did later provide a witness statement from Mr and Mrs B. This was provided to our Service on 17 October 2023, but it's not signed or dated and there's no evidence to confirm when it was drafted. In this statement, Mr and Mrs B said:

> *"On this last visit in 2013 we were sold fractional at Sunningdale Tenerife advising we were investing in luxurious holidays and it would have a limited time and a resale value at the end and that our beneficiaries could sell it if something happened to us."*

Our Investigator also spoke with Mrs B directly over the phone, with their PR also present, in October 2023. In this call, Mrs B said it was when they were sold fractional membership that "they (the Supplier) tried to make it clearer to us that it was an investment…there was going to be a resale value at the end, we could have great holidays while using it".

The testimony that's been provided isn't particularly detailed such as how exactly it was sold to them as an investment, by whom and in what context. And on my reading of what they've said, this only represents a factual description of how the fractional product worked rather than Mr and Mrs B being told or led to believe that membership offered them the prospect of a financial gain or profit.

Given the date the statement was provided and when the telephone call took place, I'm also mindful that their recollections could have been influenced by the outcome in Shawbrook & BPF v FOS.

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

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

<u>Was the credit relationship between the Lender and Mr and Mrs B rendered unfair?</u>

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 B 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 B, 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) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I note that in Mr and Mrs B's written testimony (again bearing in mind when it was provided), it says they thought what they were investing in was 'luxurious holidays'. And they've also set out why they're unhappy with the membership now, including:

> *"We feel we were mis-sold the actual holiday part also as telling us things like you can take short notice deals, if you plan ahead you can get school holidays, but most of the time we couldn't get into the resort we wanted to or at the times we wanted to".*

Further, in the aforementioned phone call with the Investigator, Mrs B, after describing the sales process, said that "more often than not, even though my husband and I were self-employed, even if we booked eighteen months ahead, we still couldn't get into the resorts we wanted to, so think for the money we paid for it, only ever got one week or two weeks maximum holiday per year out of it, and you have to pay for flights separately."

Mrs B also said that prior to going into the sales process at the Time of Sale, there was "no end" to the existing timeshare they had, and they were "concerned about that, their children having to take it on and stay with the Supplier".

The Lender has also provided the sales notes made by the Supplier at the Time of Sale which I can see indicates that they were upgrading "as they have a large family and the friends travel with them".

All of this evidence suggests to me that Mr and Mrs B likely purchased the membership because of the holidays it provided (hence their subsequent unhappiness with how it functioned for them as a holiday product) and the shorter membership term it offered.

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

think the credit relationship between Mr and Mrs B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Other points

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs B when they purchased membership of the Fractional Club at the Time of Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision, namely in relation to the annual management charges and that these have increased.

However, I can see that the Purchase Agreement explained that purchasers would be required to pay an annual management charge, and this would be payable whether weeks were used or not. It also explained that the charges would be distributed among the fractional owners fairly and equitably according to the number of weekly periods each owner was entitled to use each year. And, that charges would be subject to increase or decrease according to the costs of managing the Fractional Club and would be due annually in advance each year.

Mr and Mrs B also haven't explained what information they were given about this at the Time of Sale, and why this was insufficient. So, I'm not persuaded this caused an unfairness in the credit relationship that requires a remedy.

In relation to the Purchase Agreement being voidable, I note that the PR didn't explain the reasons why they feel a timeshare that provides for a 'floating week' or the ability to use points to book holidays, is a voidable agreement, or provided any evidence to support this assertion. There is nothing I have seen thus far that makes me think this is the case. Instead, having taken everything into account, including all relevant legislation, rules and regulations, I can't see anything that would mean the agreement was voidable. Points based timeshares were common models that haven't been prohibited in English law and I've seen nothing to suggest that all timeshare agreements had to refer to a specific apartment or set week.

In relation to the interest rate on the loan, I acknowledge this was somewhat higher than the base rate, but I can see that the applicable rate was clearly explained on the Credit Agreement in question, which Mr and Mrs B signed. Further, the PR hasn't explained why they feel the interest rate was unfair in this particular case or why it causes the credit relationship to be unfair. Being charged interest when borrowing money is normal and I haven't seen anything to persuade me that this caused an unfairness in the credit relationship.

So, overall, I'm not persuaded that Mr and Mrs B's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs B was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs B's Section 75 claims, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA.

And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

The Lender responded to my provisional decision and confirmed they had nothing further to add. The PR disagreed, and provided some further information they wished to be considered in relation to whether the Fractional Club membership was sold to Mr and Mrs B as an investment.

Having received the responses from both parties, I'm now finalising my decision.

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

As noted above, the further comments and evidence the PR provided in response to my provisional decision only related to the issue of whether Fractional Club membership was sold to Mr and Mrs B as an investment at the Time of Sale and whether, in turn, that caused the credit relationship between them and the Lender to be unfair. The PR didn't make any further points in relation to the other parts of their complaint. Indeed, they haven't said they disagreed with any of my provisional conclusions in relation to those other points. Since I haven't been provided with anything more in relation to those other parts of the complaint by either party, it follows that my conclusions in relation to them remain the same as set out in my provisional decision.

Turning to the PR's further comments and evidence, they said they remain of the view that Fractional Club membership was marketed to Mr and Mrs B at the Time of Sale as an investment, and they say this was the reason they purchased it.

They've provided a letter from Mrs B in which she has said the same. She has said that in December 2012, seven months before the purchase which is the subject of this complaint, the Supplier sold them another Fractional Club membership, which they say was also sold to them as an investment.

Mrs B says that during that earlier sale, she made handwritten notes which support that the reason they made that previous purchase was because it had been sold to them as an investment. She also provided a copy of those notes.

Mrs B then goes on to say that at their next purchase (the Time of Sale), the Supplier "*followed the exact same process as what was told to us at the December 2012 seminar. The figures were slightly different to the December 2012 seminar but the investment promotion was the same where can make a profit from purchasing 2 weeks at the Sunningdale resort*".

Mrs B says they did not make the purchase at the Time of Sale for holidays, since they were sold a similar product six months earlier as an investment and it was the financial gain that convinced them to purchase both times.

Lastly, Mrs B has said that her parents already owned a yacht in Turkey that they could use for holidays so there was no need for them to make the purchase for holidays.

I've considered what's been said here and while Mrs B's recollections and the accompanying notes are useful context to what happened leading up to the purchase that is the subject of this complaint, I can't see that this is particularly relevant to the issue of whether it was more likely than not that the Supplier marketed and/or sold membership to them as an investment at *this* particular Time of Sale, which as I explained in my provisional decision, is what I have to consider.

Mrs B's recollections remain extremely light on detail as to how exactly the Fractional Club membership was sold to them at this Time of Sale, including what exactly they were told and who by, for example. She's only said it was sold to them in the same way as it was at their previous sale, without explaining in detail how exactly it was sold to them on that occasion either.

With all of that said, I acknowledged in my provisional decision, and continue to acknowledge here that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

But again, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I remain unpersuaded that makes a difference to the outcome in this complaint anyway.

This is because even if the Supplier had marketed or sold Fractional Club membership to Mr and Mrs B as an investment at the Time of Sale, I remain unpersuaded that the prospect of a financial gain was material to Mr and Mrs B's decision to purchase.

Again, Mr and Mrs B haven't provided any further evidence which makes me think that is the case. They've only said that Mrs B's parents already owned a yacht in Turkey, so they had no need of the Fractional Club membership for holidays. But, this belonged to Mr and Mrs B's parents, not them and is ultimately a different type of holiday (and much more restrictive) than the holidays offered by the Fractional Club membership. So, it's still entirely possible that they wished to purchase the membership for themselves for the different holidays it could provide. Indeed, if Mr and Mrs B had no need of the holidays the membership offered as they've now alleged, I'm unclear why, as per their earlier testimony, they took holidays with the Supplier.

Further, it's ultimately difficult to reconcile these further comments with the other evidence previously provided that I outlined in my provisional decision, such as Mr and Mrs B's testimony that they were unhappy with how the membership functioned as a holiday product. And, the contemporaneous sales notes which suggest they were upgrading in order to accommodate the size of their family and the friends that travel with them.

So, while I acknowledge what Mrs B has now said, for these and all of the reasons I explained in my provisional decision, I'm still not persuaded that their decision to purchase at the Time of Sale was motivated by the prospect of a financial gain. It follows that I still do not

think the credit relationship between Mr and Mrs B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 11 April 2025.

Fiona Mallinson
Ombudsman