DRN-5463168

The complaint

Mrs E and Mr S's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

Mrs E and Mr S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 9 May 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £10,574 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mrs E 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.

Mrs E and Mr S paid for their Fractional Club membership with a £500 payment on a credit card, and the remaining balance by taking finance of £10,074 from the Lender in their joint names (the 'Credit Agreement').

Mrs E and Mr S – using a professional representative (the 'PR') – wrote to the Lender on 23 September 2019 (the 'Letter of Complaint') to complain about 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.

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

1. The Supplier put them under undue pressure – they felt unable to leave until they signed the contract.
2. The contractual documentation created an unfairness under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')[1] in that:

    i. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms.

    ii. The Terms and Conditions contain complex provisions which are unclear and contradictory, and not expressed in plain and intelligible language.

    iii. They were misled about their liability to pay management fees and as to their future cost.

    iv. They were not given sufficient time to read and understand the documentation

[1] The Letter of Complaint said this particular issue was contrary to the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR'). However, at the time of sale the relevant regulation in force was the Consumer Rights Act 2015 (the 'CRA') so I have considered it as such.

contained within the Purchase Agreement.

3. The Supplier engaged in unfair commercial practices, aggressive sales practices, misleading actions and omissions, contrary to The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').

4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.

The Lender forwarded Mrs E and Mr S's complaint to the Supplier for it to respond. It did so, rejecting it on every ground.

The PR, on Mrs E and Mr S's behalf, then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mrs E and Mr S disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. Mrs E also submitted a written statement, dated 3 March 2024, setting out her recollections of the circumstances surrounding the Time of Sale.

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I thought the complaint ought not to be upheld, but I had additional reasons for reaching that outcome. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments they wished me to consider before making a final decision.

In the PD I first set out the legal and regulatory context:

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 CRA.
- 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').

As regards the merits of Mrs E and Mr S's complaint I said:

"*I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.*

And having done that, I 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 140A of the CCA: did the Lender participate in an unfair credit relationship?

Mrs E and Mr S 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.

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 Mrs E and Mr S and the Lender was unfair.

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

So, having taken all of this in mind, I have considered the entirety of the credit relationship between Mrs E and Mr S 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;*
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 Mrs E and Mr S and the Lender.

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

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

They include the allegation that the Supplier knew Mr S did not have indefinite leave to remain in the UK. The PR has not said why this is material to the sale of Fractional Club, nor has it said why or how this has caused an unfairness in the credit relationship between Mrs E and Mr S and the Lender. And having considered it, I cannot see that it is likely to have done so. I know of no provision which prohibits the sale of Fractional Club to non-British nationals or those without indefinite leave to remain, and this also goes for the decision by the Lender to provide the finance, which I will cover in more detail below.

Mrs E and Mr S also say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. And in her statement Mrs S has said:

"After eight hours, we were exhausted to the end of our tether, and we succumbed to the pressure. Not because we wanted to, but because we had been bullied into a position where we felt we had no choice."

But they have also said that they didn't actually sign the purchase and finance documentation until the following day. And they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. I can't see why, having been able to consider the purchase overnight, they would have gone ahead and agreed the following day had they not actually wanted to make the purchase. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time if, as they now attest, they only purchased Fractional Club due to the pressure placed on them to do so by the Supplier. And with all of that being the case, I am not currently persuaded that Mrs E and Mr S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

They also made the allegation that the Supplier misled Mrs E and Mr S and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But other than the bare allegation, the Letter of Complaint gives no detail about what was said or done, and by whom, which gives rise to this concern. Mrs E, in her statement, has described feeling helpless because they were unable to leave, and feeling like they were being held captive, but there is little evidence of who said or did what, and in what context to support this aspect of the allegation. So given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

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

I'm not currently persuaded, therefore, that Mrs E and Mr S's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But although it was not part of their original complaint to the Lender, there is another reason set out in Mrs E's statement, which may have caused their credit relationship with the Lender to be unfair. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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 Mrs E and Mr S'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 Mrs E says in her statement:

> *"We were told that [the Supplier] had a scheme, called "Fractional Property Owners Club" (FPOC) [the Fractional Club], which involved buying a share or fraction in a property, which would be sold after 19 years, and the sales proceeds split between the other fractional owners.*
> *…*
> *We were told that the property we would be buying a share of would go up in value over time, so it would be a great investment. They also said that we would get our investment back, and some profits, due to property prices going up."*

So, this is what I have considered next.

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

Mrs E 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 Mrs E 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 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 Mrs E 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, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs E and Mr S as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And while that was not alleged by either Mrs E and Mr S nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, 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.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mrs E and Mr S's initial recollections of the sales process at the Time of Sale, as set out

in the Letter of Complaint, that is not what appears to have happened at that time. The Letter of Complaint makes no mention of Fractional Club being sold as anything other than providing timeshare membership. There is nothing said about it being sold as an investment. At no point does the Letter of Complaint say or suggest that the Supplier led Mrs E and Mr S to believe that their Fractional Club membership would, or could, lead to a financial gain (i.e., a profit).

But Mrs E has now submitted a signed statement, dated 3 March 2024, written and submitted following the Investigator's rejection of their complaint. I have gone on to think about how much weight I can place on this statement.

The events being described by Mrs E occurred some seven years earlier, so there is always the risk of memories fading over time. And I also think there is a risk of Mrs E's memories being affected, even subconsciously, by the judgement in Shawbrook & BPF v FOS which was handed down in 2023, and the Investigator's response to their complaint. So given all of this, and given her evolving version of events, I do not feel able to place much weight on the statement at all.

This statement was, after all, the first time that either Mrs E and Mr S, or the PR on their behalf, has suggested that the Supplier sold and/or marketed Fractional Club to them as an investment, and I find that hard to understand. The Letter of Complaint prepared by the PR on Mrs E and Mr S's behalf, presumably based on their initial recollections, was put together much closer to the Time of Sale. It is therefore, in my view, although not including any direct evidence from themselves, a record of what they probably told the PR about what they remember of the sales process at that time and why they were unhappy with it. And if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, it is difficult to understand why Mrs E and Mr S did not mention that to the PR when providing their initial recollections.

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mrs E and Mr S as an investment in light of Mrs E's more recent recollections, I'm not persuaded that that was the case. As a result, as the initial complaint is the best evidence I have of what Mrs E and Mr S remember of their Fractional Club purchase, given the facts and circumstances of this complaint, and bearing in mind that I am making this decision on the balance of probabilities (i.e., what I consider most likely to have happened at the time), I'm not persuaded that the Supplier is likely to have breached the prohibition on selling timeshares as investments.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way, given what I have already said about Mrs E's recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

<u>Was the credit relationship between the Lender and Mrs E and Mr S 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, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs E 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)[2] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in the Letter of Complaint that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. And as I've said, if that was the case, and Mrs E and Mr S were motivated to purchase Fractional Club membership by its investment potential, I find it hard to understand why that was not mentioned in the Letter of Complaint. It is something I would have expected to see them say if it was important to them or caused them to enter into the Purchase Agreement and/or the Credit Agreement.

Mrs E and Mr S were at the Supplier's resort on a complimentary week's holiday, having attended a presentation by the Supplier in the UK. So it is, in my view, a fair assumption that they were interested in holidays, and specifically the type of holidays the Supplier could provide. So given there was no suggestion up until very recently that the sale was motivated by the prospect of a financial gain (and I have explained why I do not feel able to place much weight on this recent testimony), I think Mrs E and Mr S most likely bought Fractional Club membership for the holidays it could provide them with.

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 Mrs E and Mr S'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

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[2] which, having taken place during its antecedent negotiations with Mrs E 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

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 Mrs E and Mr S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs E and Mr S when they purchased membership of the Fractional Club at the Time of Sale. But the Letter of Complaint says that the Supplier failed to give them sufficient time to read and understand the documentation provided with the Purchase Agreement, and the terms and conditions were unclear and contradictory. It also said that Mrs E and Mr S were misled about their liability to pay ongoing management fees and their future cost.

The PR also set out in the Letter of Complaint that certain aspects of the sale of Fractional Club and the contractual documentation were in breach of the UTCCR. But as I've said, the legislation in force at the Time of Sale was the CRA, so I've considered these complaint aspects under the CRA.

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

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Unfair term(s)

The Letter of Complaint set out that the Purchase Agreement contains unfair contract terms in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mrs E and Mr S and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mrs E and Mr S in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs E and Mr S, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by the PR have led to any unfairness in the credit relationship between

Mrs E and Mr S and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against them, let alone unfairly. The PR hasn't explained why exactly they feel these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Mrs E and Mr S in any event.

The provision of information at the Time of Sale

The Letter of Complaint, and Mrs E's statement also set out that they weren't given adequate time to review the Purchase Agreement documentation before having to sign. But, from what I've seen, they were given these documents to review the following day when the sale was finalised. And it seems they signed all the relevant documentation to say they had received and read it. And as I've said, Mrs E and Mr S were given a 14-day cooling off period, during which time they would have been able to cancel both the Purchase Agreement and Credit Agreement without penalty. So although there was a lot of information to go through, I can't see that, even if they were unable to fully comprehend it at the time, they would have been unable to read it fully in their own time.

The letter of complaint also says Mrs E and Mr S weren't given a transparent explanation as to the features of the loan agreement which may have made it unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, high interest and total charge for the credit provided.

But the PR hasn't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Mrs E and Mr S. They also haven't described what they feel should have been explained or what information should have been given that wasn't, nor why this causes the credit relationship to be unfair.

So, while it's possible the Supplier didn't give Mrs E and Mr S sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Mrs E and Mr S's credit relationship with the Lender unfair to them.

The PR also says that the terms and conditions set out in the Purchase Agreement and members documentation are not expressed in plain and intelligible language. But I cannot see that this has caused any unfairness here. I'm not persuaded that had the terms and conditions been set out in a different way, it would have likely made any difference to Mrs E and Mr S's purchasing decision. And the PR has not explained which of the terms and/or conditions were misunderstood by Mrs E and Mr S, and how this misunderstanding led them to purchase something that they didn't actually want. And I think it unlikely that Mrs E and Mr S would have been unaware of the need to pay management fees under their Fractional Club membership. And having considered the contractual documentation I can see that the requirement to pay management fees, and how they are calculated and become payable, is set out.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of CRA are likely to have prejudiced Mrs E and Mr S's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mrs E and Mr S was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

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 Mrs E and Mr S 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 complaint on that basis.

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

The responses to my PD

The Lender agreed with the outcome I had reached and had nothing further to add.

The PR, on Mrs E and Mr S's behalf, did not agree, and sent a comprehensive reply setting out the reasons why they thought I was mistaken and that their complaint ought to be upheld. In summary, they said:

The PD's reasoning is flawed and inconsistent with *Shawbrook & BPF v FOS* and other final decisions written by the same Ombudsman:

- The PD errs in not finding there was a breach of Regulation 14(3) at the Time of Sale as a breach can, in and of itself, render the credit relationship unfair under Section 140A of the CCA.

- The evidence suggests that there was a breach of Regulation 14(3) and the statement from Mrs E, combined with the circumstances of the sale supports the inference that the investment aspect was a relevant factor.

- The PD's justification for not making a finding on a potential breach of Regulation 14(3) is flawed and inconsistent with other decisions. Whether a breach occurred must be determined before assessing its impact on the fairness of the relationship.

The PD errs in its assessment of causation and unfairness and is inconsistent with other decisions.

- The PD ignore the context and inherent probabilities of the sale, and that the mere mention of 'investment' in the context of a share in property, combined with a lack of clear and prominent warnings to the contrary, could easily mislead consumers.

- The PD places undue emphasis on Mrs E and Mr S's stated motivation for the purchase. Whilst it is relevant, it is not the sole determinant of causation. Even if the primary motivation was holidays, the investment aspect could have been a material factor influencing their purchasing decision. The PD fails to adequately explore this possibility.
- The PD is inconsistent with the generally accepted principle that even if other factors (such as holidays and the removal of booking fees) played a role, the investment element could still be a 'significant reason' for the purchase. The PD dismisses the investment aspect despite evidence suggesting it was presented as a benefit.

The witness testimony is largely dismissed, which is inconsistent with the approach taken in other decisions.

Misrepresentations under Section 75 of the CCA:

- The PD dismisses the s.75 claim based on a lack of evidence. However, the statements provided by Mrs E and Mr S describe being told the membership was an investment.

Lastly, the PR also said the PD's dismissal of the concerns regarding the creditworthiness assessment is similarly brief. And, a more thorough examination of the assessment conducted by the Lender is necessary.

As the deadline for further responses has now passed, the case has come back to me for further consideration.

What I've decided – and why

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

And having done so, and having considered everything that has been submitted in response to the PD, I'm satisfied that the outcome is fair and reasonable in the circumstances. I do not think this complaint ought to be upheld, for the reasons set out above in the extract from the PD.

I first want to make clear, that each complaint is considered separately, and each turns on its own merits. And I have looked at and considered this complaint on its own merits.

I will also deal with the other matters raised by the PR in response. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable, on the balance of probabilities, in the circumstances of this complaint. So, while I have read the PR's response in full, I will confine my findings to what I believe are the salient points.

The PR has said the reasoning in the PD is flawed and inconsistent with *Shawbrook & BPF v FOS* and other final decisions written by myself in other complaints. It says this is because I have erred in not making a finding as to whether there was a breach of Regulation 14(3) of the Timeshare Regulations by the Supplier at the Time of Sale. It said that finding whether or not a breach had occurred must be determined, before assessing the impact of such a breach on the fairness of the credit relationship.

But I think the PR is mistaken here. In my PD I *did* make a finding on whether I thought it likely there had been a breach of Regulation 14(3). In my PD I said:

> "*So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mrs E and Mr S as an investment in light of Mrs E's more recent recollections, I'm not persuaded that that was the case. As a result, as the initial complaint is the best evidence I have of what Mrs E and Mr S remember of their Fractional Club purchase, given the facts and circumstances of this complaint, and bearing in mind that I am making this decision on the balance of probabilities (i.e., what I consider most likely to have happened at the time), I'm not persuaded that the Supplier is likely to have breached the prohibition on selling timeshares as investments.*"

This, I think makes clear that I was not persuaded that there had been a breach of Regulation 14(3) at the Time of Sale. In other words, on the balance of probabilities based on the evidence that had been submitted, I did not think a breach of Regulation 14(3) had occurred. But I then went on to say that even if I was wrong about that, I did not think it made

a difference to the outcome given the circumstances of *this* case.

The PR, in response to the PD, went on to say my assessment of causation and unfairness is inconsistent with other final decisions. It says I was wrong to largely dismiss the witness testimony in this complaint, as this makes clear that Fractional Club was sold and/or marketed to Mrs E and Mr S as an investment, and they were motivated to make the purchase, alongside the holidays, due to this investment element.

But, as I said in my PD, I considered how much weight I could place on the contents of the statement from Mrs E:

> "*The events being described by Mrs E occurred some seven years earlier, so there is always the risk of memories fading over time. And I also think there is a risk of Mrs E's memories being affected, even subconsciously, by the judgement in Shawbrook & BPF v FOS which was handed down in 2023, and the Investigator's response to their complaint. So given all of this, and given her evolving version of events, I do not feel able to place much weight on the statement at all.*
>
> *This statement was, after all, the first time that either Mrs E and Mr S, or the PR on their behalf, has suggested that the Supplier sold and/or marketed Fractional Club to them as an investment, and I find that hard to understand. The Letter of Complaint prepared by the PR on Mrs E and Mr S's behalf, presumably based on their initial recollections, was put together much closer to the Time of Sale. It is therefore, in my view, although not including any direct evidence from themselves, a record of what they probably told the PR about what they remember of the sales process at that time and why they were unhappy with it. And if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, it is difficult to understand why Mrs E and Mr S did not mention that to the PR when providing their initial recollections.*"

And I remain of that opinion now. I find it hard to understand that if, as they now attest, Fractional Club was sold and/or marketed as an investment to them at the Time of Sale, and they had been motivated to purchase it, even partly, due to this investment element, that was not mentioned at all in the Letter of Complaint. The first time it was mentioned was following the Investigator's assessment of their complaint. So, as I said in the PD, as there was such a significant change to the way the Time of Sale was described, I think there is a real risk that Mrs E's memories have been affected by the judgement in *Shawbrook & BPF v FOS* and/or the Investigator's assessment.

So, I still do not feel able to place much weight on the statement at all.

The PR says the PD dismisses Mrs E and Mr S's Section 75 of the CCA claim for misrepresentation due to a lack of evidence. It says Mrs E and Mr S describe being told by the Supplier that the membership was an investment. But having read the Letter of Complaint to the Lender, there is no claim made under Section 75 of the CCA. There is only a complaint of unfairness under Section 140A of the CCA. For me to consider a complaint about how a lender dealt with a claim under Section 75 of the CCA, I'd have to be satisfied that a claim was actually made. And as I've said, there is no mention of a claim in the Letter of Complaint.

The PD has said that I should undertake a more thorough examination of the creditworthiness assessment undertaken by the Lender before it agreed to provide finance to Mrs E and Mr S for the purchase of Fractional Club at the Time of Sale. But as I said in the PD, I hadn't seen anything to persuade me that the Lender failed to do everything it should have when it agreed to lend, and I still haven't. And in any case, I would have to be satisfied that the money lent to Mrs E and Mr S was actually unaffordable, before also

concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. I invited Mrs E and Mr S to submit further evidence regarding the loan's affordability, and anything else about the brokering of the Credit Agreement, and nothing further has been submitted. So, I am not satisfied that the lending was unaffordable for Mrs E and Mr S.

Having reconsidered everything in light of the PR's submissions following the PD, I remain satisfied that it would not be fair or reasonable to uphold this complaint.

My final decision

I do not uphold Mrs E and Mr S's complaint about First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E and Mr S to accept or reject my decision before 5 May 2025.

Chris Riggs
Ombudsman