DRN-5491200

The complaint

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

What happened

Previous timeshare purchase (not the subject of this complaint)

Mr M and Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 12 May 2014 for a price of £11,294 (the '2014 Purchase'). This gave them 1,200 bi-annual points to use on holidays, and a share (a one-week fraction) in the net sale proceeds of a property named in the agreement, which they would receive when the property is sold at the end of their membership term. Mr M and Mrs A paid for the purchase using a loan from Loan Provider H and paid off the loan using funds from Mr M's bank account on 24 February 2016.

The purchase which Mr M and Mrs A are complaining about

On 9 September 2015 Mr M and Mrs A upgraded their Fractional Club membership by entering into a new agreement with the Supplier (the 'Purchase Agreement'). This gave them 900 annual points and share (a two-week fraction) in a different property named on the Purchase Agreement (the 'Allocated Property') at a cost of £16,729. In doing so they traded in their existing membership, which was attributed a value of £11,294 in the transaction by the Supplier, leaving Mr M and Mrs A with £5,480 to pay.

Mr M and Mrs A paid for the Purchase Agreement by making a £500 up-front payment and taking finance of £4,980 from the Lender (the 'Credit Agreement'), which was interest-free and repayable over 12 monthly repayments. Mr M and Mrs A paid off the loan with the final monthly repayment in October 2016.

The complaint

On 3 February 2020, Mr M and Mrs A – using a professional representative (the 'PR') – wrote to the Lender (the 'Letter of Complaint') to complain about:

(1) Misrepresentation by the Supplier at the Time of Sale (by telling Mr M and Mrs A that the Allocated Property would be sold in 2033 when that was not true), which gives Mr M and Mrs A a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

(2) 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 because the Fractional Club was an unregulated Collective Investment Scheme, which the Supplier should not have sold since it was not authorised to do so rendering the Purchase Agreement null and void.

The Lender's response to the complaint

The Lender did not respond to the complaint within eight weeks, so the PR referred it to the Financial Ombudsman Service on Mr M and Mrs A's behalf.

The Lender wrote to the Financial Ombudsman Service on 1 September 2020, setting out its position on the complaint. It explained that it had not received the Letter of Complaint until the Financial Ombudsman Service forwarded it. The Lender provided a response from the Supplier which, in summary, said:

- The process of selling the Allocated Property will begin on the sale date in 2033 in accordance with the Rules of the Fractional Club. The sale will be managed by a trustee, which holds the property in trust for the fractional owners.

- The Fractional Club is not an Unregulated Collective Investment Scheme, but a Timeshare.

Additional complaint points

When submitting the complaint to the Financial Ombudsman Service Mr M and Mrs A, through the PR, added the following complaint points, which had not previously been raised with nor considered by the Lender:

- The terms of the Credit Agreement were not fully explained to Mr M and Mrs A before they were signed.

- Proper credit checks were not carried out.

- Mr M and Mrs A were not given adequate time to consider the terms of the proposed loans.

- Mr M and Mrs A were subject to high pressure selling.

- False representations were made by the Supplier relating to the financial impact of the regulated credit agreements.

- Mr M and Mrs A were not properly informed, or were misled, or both, as to the duration of the regulated credit agreement.

- Mr M and Mrs A have concerns about undisclosed commission.

If the Lender wishes to provide any comments or information about the above allegations that it wants me to consider, it should do so in response to his provisional decision.

Our Investigator's assessment of the complaint

Our Investigator assessed the complaint, and having considered the information on file, they thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr M and Mrs A at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr M and Mrs A was rendered unfair to them for the purposes of section 140A of the CCA.

Responses to the assessment

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

- I should not give much evidential weight to Mr M and Mrs A's recollections of what happened at the Time of Sale because:
    - Their recollections were provided in 2023, by which time the Financial Ombudsman Service had issued lead decisions in similar cases which had been the subject of Judicial Review (Shawbrook & BPF v FOS).
    - There were significant factual inaccuracies in Mr M and Mrs A's recollections of what happened at the Time of Sale, including saying that they had no prior experience of timeshares.
    - The Supplier's notes indicate that:
        - During the 2014 Purchase, Mr M and Mrs A purchased Fractional Club membership primarily to take holidays, and at that time expressed interest in upgrading their membership in the future.
        - At the Time of Sale Mr M and Mrs A were aware of and happy with the added benefits that would come from upgrading from a single-week fraction to a multi-week fraction, such as two-for-one holidays.
- The main thrust of the complaint was that Fractional Club membership was an Unregulated Collective Investment Scheme, and Shawbrook & BPF v FOS had confirmed that it was not – and that this should be the only argument that I consider in respect of whether or not the relationship was unfair.

The PR responded to say that the Lender and Financial Ombudsman Service did not ask for a witness statement from Mr M and Mrs A until late 2023, but that the PR had in 2020 discussed with Mr M and Mrs A that Fractional Club membership had the characteristics of an investment and an Unregulated Collective Investment Scheme. And that in the Letter of Complaint it said that Fractional Club membership was promoted and sold as an investment in breach of Regulation 14(3) of the Timeshare Regulations. The PR said that *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') confirms this claim and that this created an unfair relationship. But the PR disagreed with some aspects of how the Investigator said the Lender should put things right.

My provisional decision

I issued a provisional decision on 2 April 2025. In this I explained that I was not planning to uphold the complaint. A copy of my provisional findings incorporated below, and forms part of my final decision.

Responses to my provisional decision

The Lender responded to say that it agreed with my provisional decision and had nothing further to add.

The PR responded on behalf of Mr M and Mrs A to say the following:

1. Section 75 of the CCA: Misrepresentation by the Supplier

   Mr M and Mrs A were told by the Supplier in clear terms that the Allocated Property would be sold in 2033, and this was a key selling point they relied upon when agreeing to the purchase. It implied a fixed timeframe for realization of value, suggesting the proceeds would be accessible in 2033, not some future undefined point. Because of this Mr M and Mrs A believed they were securing a valuable short-term investment. So this was a misrepresentation, and Mr M and Mrs A would not have proceeded with the purchase if they had known 2033 was merely an anticipated start to the sales process rather than a guaranteed sale date.

2. Section 140A of the CCA: unfair relationship

   a. Breach of Regulation 14(3)

      The Supplier's training materials at the Time of Sale made reference to financial return, resale potential and property appreciation. Mr M and Mrs A were explicitly told they would profit from the resale of their allocated share – which meets the definition of an investment. This was a key inducement for their agreement, without which they would not have entered into the Purchase Agreement. The PR provided a link to an online video of the Supplier's Director confirming selling Fractional products as investments.

   b. Witness statement and memory reliability

      The statement was taken in early 2020 and the core elements have remained consistent. Some minor errors in recall (for example lender names or specific dates) are entirely normal, particularly given the lapse of time. The critical elements – being told the timeshare was an investment with strong future value and pressure to sign without full understanding – remain credible and unrebutted. To reject the statement on the basis of potential confusion with a prior 2014 purchase seems overly dismissive when both events were within the same scheme, run by the sale Supplier.

   c. Causation and relevance

      Even if marketing as an investment was not the sole motivation, it need not be under Section 140A of the CCA. As confirmed in *Kerrigan* and *Plevin*, unfairness may arise even where other factors contributed to the borrower's decision. The unfairness lies in the overall conduct of the Supplier, who acted as agent of the Lender. Mr M and Mrs A entered into the Credit Agreement in reliance on this marketing, and the Lender should bear the consequences of that statutory agency.

3. Additional points

   a. Pressure and cooling off period: The mere existence of a cooling-off period does not negate pressure at the point of sale. Many consumers hesitate to cancel due to confusion, trust in the process, or administrative uncertainty.

   b. Undisclosed Commission: If the Lender asserts that no commission was paid, the PR requests disclosure of the full financial arrangements between the Lender and the Supplier.

c. Affordability and Credit Checks: While affordability may not have been a key issue at the time, the rapid approval and lack of meaningful due diligence contributed to the overall unfairness.

4. In conclusion, the PR said that there was a misrepresentation, the credit relationship was unfair due to breach of Regulation 14(3) of the Timeshare Regulations, and my provisional decision fails to fully address the cumulative effect of misleading sales conduct, lack of transparency and statutory agency.

I have considered the responses of the Lender and the PR when reaching my final decision.

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, Holiday Products, Resale and Exchange Contracts Regulations 2010 (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*').
    - *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').

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.

My provisional findings are below and form part of my reasons for reaching my final decision. I address the responses to my provisional decision below. But having considered these, I have not been persuaded to change my provisional decision. So, I have decided not to uphold this complaint.

START OF COPY OF PROVISIONAL FINDINGS

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done that, I do not currently think that I should uphold this complaint.

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 M and Mrs A could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I am satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr M and Mrs A at the Time of Sale, the Lender is also liable.

The Letter of Complaint mentioned a number of things under this section, including problems with the availability of holidays, increasing management charges and Mr M and Mrs A not being told that their children would inherit the membership (which the Supplier says they will not if they do not want to). But these do not appear to be potential misrepresentations, no statements of fact having been allegedly made by the Supplier regarding availability, management charge increases or what would happen with the membership upon the death of Mr M and Mrs A.

The only potential misrepresentation mentioned was that the Supplier told Mr M and Mrs A that the Allocated Property would be sold in 2033. The Fractional Rights Certificate, dated 26 October 2015, indicates the Sale Date of the Allocated Property is 31 December 2033 and that, *"On this date the trustee will start the sales process on the allocated property in accordance with the rules and following the completed sale distribute to the owner (2.68%)"*.

So, if the Supplier did tell Mr M and Mrs A that the Allocated Property would be sold in 2033, that could have been an untrue statement of fact. I say this because if the sale process only starts on 31 December 2033, it is unlikely that the sale would be completed until 2034.

But to reach that conclusion I would need to be satisfied that, on the balance of probabilities, the Supplier did tell Mr M and Mrs A that the Allocated Property "will be sold in 2033". I do not think I can reach that conclusion. It is not clear that what the PR has been said in the Letter of Complaint is an accurate reflection of what the Supplier told Mr M and Mrs A at the Time of Sale. Mr M and Mrs A have not mentioned being told this in their witness statement. And there is a lack of detail surrounding the allegation in the Letter of Complaint.

However, even if the Supplier did tell Mr M and Mrs A that the Allocated Property would be sold in 2033, I do not think I can fairly and reasonably conclude that this would have made a difference to Mr M and Mrs A's decision to go ahead with the purchase. For example, the Letter of Complaint and witness statement do not say that this was of importance or that Mr M and Mrs A would not have entered into the agreement if they had realised the sale of the Allocated Property would not complete until later.

For these reasons, therefore, I do not think the Lender is liable to pay Mr M and Mrs A any compensation for the alleged misrepresentations of 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 M and Mrs A say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA due to the Fractional Club being an Unregulated Collective Investment Scheme.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr M and Mrs A 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 does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr M and Mrs A'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.140A(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 is not limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it is not a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

> *"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."*

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

I have considered the entirety of the credit relationship between Mr M and Mrs A 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.

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[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 Mr M and Mrs A and the Lender.

Was the Fractional Club an Unregulated Collective Investment Scheme?

The PR says that Fractional Club membership was an Unregulated Collective Investment Scheme.

The term Collective Investment Scheme is defined by the *FSMA (Collective Investment Schemes) Order 2001/1062*. This included *Schedule 001 Arrangements Not Amounting to a Collective Investment Scheme*, Paragraph 13 of which states that arrangements do not amount to a Collective Investment Scheme:

> *"…if the rights or interests of the participants are rights under a timeshare contract or a long-term holiday product contract"*

I am satisfied that Fractional Club membership was a timeshare contract (as defined by the Timeshare Regulations), so it cannot also have been a Collective Investment Scheme.[2]

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?

Because of the broad scope of what must be considered when thinking about whether the credit relationship between Mr M and Mrs A and the Lender was unfair on them, our Investigator also considered whether Fractional Club membership was sold or marketed to Mr M and Mrs A at the Time of Sale as an Investment. They concluded that it was and that this was an important consideration for Mr M and Mrs A when they decided to enter into the Purchase Agreement. But I disagree.

The Lender does not dispute, and I am satisfied, that Mr M and Mrs A'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."*

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

Mr M and Mrs A'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 does not prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

[2] This was dealt with at length in *Shawbrook & BPF v FOS* at paras 39 to 54.

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 M and Mrs A 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.

The Letter of Complaint

The Letter of Complaint makes the claim that Fractional Club being an investment is illegal. It does not explain why the PR thinks that other than in relation to it being an Unregulated Collective Investment Scheme. But a timeshare having an investment element does not breach the Timeshare Regulations – unless it is marketed or sold as an investment. The Letter of Complaint does not make any claim or suggestion that Fractional Club membership was sold or marketed as an investment to Mr M and Mrs A. It merely says it was an investment and that the Supplier sold it to them.

How the Supplier marketed and sold Fractional Club membership at the Time of Sale

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 M and Mrs A, 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 M and Mrs A as an investment.

The PR says that the judgement in *Shawbrook & BPF v FOS* confirms that Fractional Club membership was sold and marked as an investment. But I can see that the judgement concerned one sale of Fractional Club membership which happened some time before the Time of Sale, when a different presentation and training materials were in use by the Supplier – which specifically used the word investment. It did not make findings of systemic failings on the part of the Supplier. And the judgement stressed the importance of a case-by-case approach – meaning that it is important to look at the specific circumstances of Mr M and Mrs A's complaint when making my decision.

With that said, I acknowledge that the Supplier's training material in use at the Time of Sale left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it is *possible* that Fractional Club membership was marketed and sold to Mr M and Mrs A as an investment at the Time of Sale in breach of Regulation 14(3). But I do not think I need to make a finding on that here. This is because even if there was a breach of Regulation 14(3), I do not think there is sufficient evidence in this case for me to conclude that it was material to Mr M and Mrs A's decision to enter into the Purchase Agreement.

Was the credit relationship between the Lender and Mr M and Mrs A rendered unfair?

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of 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 M and Mrs A and the Lender that was unfair to them and warranted relief as a result, it is important to consider whether the Supplier's breach of Regulation 14(3)[3] led them to enter into the Purchase Agreement and the Credit Agreement.

<u>Mr M and Mrs A's recollections</u>

The PR has provided a witness statement from Mr M and Mrs A that says the following:

1. *In 2015, we received a offer for a free holiday at Club La Costa's main resort in Fuengirola, Spain*

2. *When we arrived at the resort, we were invited to a sales seminar which lasted 4 long hours where we were brainwashed to purchase the timeshare. It was a hard sales pitch and we literally had to purchase before we could leave the seminar.*

3. *We never had any experience of timeshares before coming to CLC's seminar.*

[3] (which, having taken place during its antecedent negotiations with [Consumer] is covered by Section 56 of the CCA and so falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender)

4. *The key points made at the seminar on the purchase of the fractional was:*

    a. *We would get a free holiday every year.*

    b. *We can rent out our 2 weeks through CLC and we would get rental income. We tried this and never received any rental money.*

    c. *We were told that we would own a share of a property investment and we would get a lot more money when the property was sold – much more money that what we paid for the fractional.*

5. *We finally at the end of the seminar, signed to purchase the fractional with a loan from ['Loan Provider H'].*

This suggests the Supplier described Fractional Club membership as an investment. But the witness statement was not provided until 7 November 2023. This is eight years after the Time of Sale, over three years after the complaint was made to the Lender, and six months after judgement was handed down in *Shawbrook & BPF v FOS*.

So, how much evidential weight can I give to the witness statement? In considering this, I have thought about a number of things, which I discuss below.

<u>When was the witness statement written?</u>

The PR has said that the witness statement was its *"original statement note of when we first spoke to the Clients with their early recollections"* and that it was received from Mr M and Mrs A around 6 January 2020.

But the PR did not provide any evidence corroborating this (such as metadata showing when the electronic file was created) despite our Investigator requesting it. This leaves open the possibility that the witness statement was created after *Shawbrook & BPF v FOS* was decided. Given the judgement in that case confirmed that it was open to an ombudsman to decide a breach of Regulation 14(3) of the Timeshare Regulations could lead to an unfair credit relationship, this creates a risk that the witness statement has been influenced by that finding.

<u>How reliable are the memories in the witness statement?</u>

I have compared what Mr M and Mrs A recall about the sale with what I know about it. And there are some errors in their recollection.

Mr M and Mrs A say the sale took place while they were on a free holiday in Spain. But the Supplier has confirmed they were on holiday in Türkiye using their existing Fractional Club membership purchased in 2014 and were not on a free or promotional holiday.

Mr M and Mrs A say they never had any experience of timeshares before attending the sales presentation in 2015. But they were already Fractional Club members at that point having made their initial purchase in 2014.

Mr M and Mrs A say they were told they could rent out their "two weeks" through the Supplier and receive rental income. But the documents provided at the Time of Sale make clear that the Supplier did not offer any rental programme. So, it seems unlikely that they would have been told this. The Supplier has also found no record of Mr M and Mrs A ever requesting that it rent out their points for them.

Mr M and Mrs A say they made the purchase using a loan from Loan Provider H. But that is not the lender they used for this purchase and against which this complaint has been made.

Given the above, I do not think I can give much evidential weight to the witness statement.

While I do not expect a consumer to accurately recall all the details of a sale that happened a long time ago, and minor inaccuracies in recollection would not necessarily undermine everything a consumer remembers, in this case it seems very likely that Mr M and Mrs A's recollections in the witness statement are actually referring to the 2014 Purchase of Fractional Club membership, not what happened at the Time of Sale in 2015. The reason I say this is that when making the 2014 Purchase they were on a promotional holiday in Spain, they would have had no prior experience of timeshares, and they made the 2014 Purchase using a loan from Loan Provider H. So, this makes it hard for me to conclude that any part of the witness statement is about the Time of Sale.

What motivated Mr M and Mrs A to enter into the Purchase Agreement

The Supplier's notes from the 2014 Purchase show that during a follow-up discussion about their membership on 14 May 2014, Mr M and Mrs A indicated they *"would possibly upgrade in 3 years"*. That suggests that even when making their initial purchase they were considering upgrading their membership in the future.

In upgrading at the Time of Sale, Mr M and Mrs A significantly increased their holiday purchasing power – from 1,200 points every two years (averaging 600 points per year) to 900 points every year – a 50% increase.

And the Supplier's notes from the around the Time of Sale indicate that Mr M and Mrs A were aware of, and happy with, the additional benefits (such as two-for-one holidays) that the upgrade to a multi-week fraction would provide them, and that part of their motivation was that their family also wanted to use the membership.

So, the notes made by the Supplier from around the Time of Sale and the increased holiday purchasing power obtained by upgrading strongly suggest to me that Mr M and Mrs A had significant reasons to purchase the upgrade other than because it was sold or marketed to them as an investment by the Supplier at the Time of Sale.

I acknowledge that the Supplier is unlikely to have recorded anything in its notes that would confirm there was a breach of the Timeshare Regulations. But given the other significant reasons for Mr M and Mrs A to enter into the Purchase Agreement, I think that it is likely they would have done so regardless of whether or not the Supplier sold or marketed it to them as an investment. So, even if the Supplier did so at the Time of Sale, I do not think this would have created an unfair relationship because it would have made no difference to Mr M and Mrs A's decision to enter into the Purchase Agreement.

Pressure

Mr M and Mrs A 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. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to.

Mr M and Mrs A had previously expressed some interest in upgrading their membership and were also given a 14-day cooling off period. They have not provided a credible explanation for why they did not cancel their membership during that time – as you might expected them

to if they only purchased because of pressure during the sales process. And with that being the case, I think there is insufficient evidence to demonstrate that Mr M and Mrs A made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Arrangement of the Credit Agreement

Mr M and Mrs A have made allegations about how the Credit Agreement was arranged, namely that:

1. The terms of the Credit Agreement were not fully explained to Mr M and Mrs A before they were signed.

2. Mr M and Mrs A were not given adequate time to consider the terms of the proposed loans.

3. Mr M and Mrs A were not properly informed, or were misled, or both, as to the duration of the regulated credit agreement.

It appears that the necessary information about the Credit Agreement, including its duration, was provided to Mr M and Mrs A before they entered into the Credit Agreement. And even if it was not, they had 14 days in which they could have considered this information (shown on the Credit Agreement they signed) and asked any additional questions before the cooling off period expired. In that time, Mr M and Mrs A could have changed their mind and cancelled both the Credit Agreement and the Purchase Agreement without having to give any reason. So, it does not appear to me that, even if they were not given a full explanation of the Credit Agreement (and I make no finding to that effect), this caused them any loss.

4. False representations were made by the Supplier relating to the financial impact of the regulated credit agreements.

Mr M and Mrs A have not specified what false representations were made. So, it is not possible for me to consider whether such alleged false representations took place or caused them any loss.

5. Proper credit checks were not carried out.

Mr M and Mrs A say that the right checks were not carried out before the Lender lent to them. I have not seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that 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 Mr M and Mrs A 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 Mr M and Mrs A. If there is any further information on this (or any other points raised in this provisional decision) that Mr M and Mrs A wish to provide, I would invite them to do so in response to this provisional decision.

Undisclosed commission

Mr M and Mrs A have expressed concern that the Lender may have paid commission to the Supplier in relation to the Credit Agreement without telling them about it.

My understanding is that the Lender paid no commission to the Supplier* in relation to the Credit Agreement. As such there was no commission to be disclosed and so this cannot have caused there to be an unfair relationship.

**If this is incorrect, the Lender should let me know when responding to this provisional decision and provide details of the commission payment/s.*

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr M and Mrs A's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mr M and Mrs A 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 see no other reason it would be fair or reasonable to direct the Lender to compensate them.

END OF COPY OF MY PROVISIONAL FINDINGS

Responses to my provisional decision

The Lender did not have anything further to add. So, the below deals with the PR's response to my provisional decision.

Misrepresentation

I remain of the opinion that there was no misrepresentation on the part of the Supplier at the Time of Sale. And that even if there was, this did not induce Mr M and Mrs A to enter into the contract when they otherwise would not have done so. I am not persuaded by what the PR has said in this regard, given the evidence available, for the reasons explained in my provisional findings.

Unfair relationship

For the same reasons I explained in my provisional findings, I remain of the opinion that if there was a breach of Regulation 14(3) at the Time of Sale, this was not material to Mr M and Mrs A's decision to enter into the Purchase Agreement.

The video referred to by the PR was posted online in 2011 and seems to show a then Director of the Supplier (or part of its group of companies) at a trade show talking about selling holiday apartments to other businesses. He does not appear to be discussing the sale of Fractional Club membership to individual consumers or to Mr M and Mrs A (the Time of Sale being some years later). So, this does not strike me as being of importance to the outcome of this complaint.

In terms of the witness statement, I still do not feel able to give it significant evidential weight such that I can conclude there was a breach of Regulation 14(3) at the Time of Sale that was material to Mr M and Mrs A's decision to enter into the Purchase Agreement.

Even if the statement was written in early 2020, I do not think I can reasonably conclude that it is an accurate reflection of what happened at the Time of Sale. It appears far more likely that the recollections relate to the earlier sale in 2014, given the details in the statement (the location of the meeting, that Mr M and Mrs A had no experience of timeshares, the name of the credit provider) all apply to the 2014 sale, and not to the one that is the subject of this complaint. I think that is more than a minor inaccuracy. And because of that, it would not be fair and reasonable of me to take the comment about Mr M and Mrs A being told by the

Supplier that Fractional Club membership was an investment as being an accurate reflection of what happened at the Time of Sale.

Even if I did take that comment in that way, the witness statement is nevertheless silent on what attracted Mr M and Mrs A to make the purchase. So, even if there was a breach of Regulation 14(3) at the Time of Sale, it is not clear to me from the statement that I could then conclude this was material to Mr M and Mrs A's decision to enter into the Purchase Agreement such that it rendered their relationship with the Lender unfair to them for the purposes of Section 140A of the CCA.

Pressure, undisclosed commission, affordability and credit checks

The PR has not provided anything further that leads me to change my provisional findings on these points. I'm satisfied that the Lender paid no commission to the Supplier.

The PR has requested that it see the Lender's full financial arrangements with the Supplier But, I do not think I need to see such detailed and commercially sensitive information for me to make a fair and reasonable decision on this complaint. And even if I did see such information, in the interests of natural justice I would likely only communicate a summary of the relevant points that I had relied on. And that would be unlikely to go beyond saying that there was no evidence that commission was paid to the Supplier in relation to Mr M and Mrs A's Credit Agreement.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr M and Mrs A's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mr M and Mrs A 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 see no other reason it would be fair or reasonable to direct the Lender to compensate them.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs A to accept or reject my decision before 14 May 2025.

Phillip Lai-Fang
Ombudsman