

## **The complaint**

Mr and Mrs W complain that First Holiday Finance Ltd (the 'Lender') is liable to pay them compensation following a complaint made about a timeshare, bought using credit provided by it.

## **What happened**

Mr and Mrs W were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 1 May 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,988 fractional points at a cost of £9,857 (the 'Purchase Agreement').

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

Mr and Mrs W paid for their Fractional Club membership by making a £500 credit card payment, and by taking finance of £9,357 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs W wrote to the Lender on 5 May 2022 (the 'Letter of Complaint') to complain, in essence, that the Credit Agreement with the Lender was unlawful because:

- It had been confirmed through the courts that Fractional contracts sold as investments were unlawful; and
- Taking deposit payments in the 'cooling off' period was unlawful.

Mr and Mrs W also wrote to the Financial Ombudsman Service at the same time.

The Lender responded to Mr and Mrs W's concerns and said it was unable to cancel the Credit Agreement as it had not acted unlawfully. It then later sent its final response to Mr and Mrs W's complaint, rejecting it on all grounds. Unhappy with the Lender's answer, Mr and Mrs W asked for an Investigator at this Service to consider their complaint.

It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

## **The legal and regulatory context**

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

The legal and regulatory context that I think is relevant to this complaint is set out below:

- The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA').
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:
  - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
  - *Scotland v British Credit Trust* [2014] EWCA Civ 790 ('*Scotland and Reast*').
  - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
  - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
  - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
  - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
  - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

#### Relevant Publications

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And as I've said above, I'm also required to take into account, where appropriate, what I consider was good industry practice at the time – which, in this complaint, is 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.

And having done that, I agree with the outcome reached by the Investigator, for broadly the same reasons. I do not 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.

When bringing their complaint to the Lender, Mr and Mrs W didn't set out on what regulatory or legal basis they felt it needed to do something to put right what they said went wrong – I make no criticism of them in not doing so as I wouldn't expect them to necessarily know these things. When they referred the complaint to this Service, they said they were bringing it under Section 140A of the CCA, which is how our Investigator considered it.

Having considered everything, I agree that this is correct, so I've reflected that in my approach to this complaint.

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

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

I have considered the entirety of the credit relationship between Mr and Mrs W 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; and
4. The inherent probabilities of the sale given its circumstances.

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

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

Although not set out in the complaint to the Lender, when Mr and Mrs W referred their complaint to this Service, they said that the right checks weren't carried out before the Lender lent to them. 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 Mr and Mrs W 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. From the information provided, I agree with the findings of the Investigator on this point. I am not satisfied that the lending was unaffordable for Mr and Mrs W.

Mr and Mrs W argue that, because similar purchase agreements have been found to be unlawful under Spanish law in light of certain information failings by the Supplier, I should treat that Agreement and the Credit Agreement as rescinded by Mr and Mrs W and award them compensation accordingly.<sup>1</sup>

However, as the Lender wasn't party to any court proceedings in Spain, and as I can't see that the Supplier (i.e., the company that entered into the Purchase Agreement) is the subject of a Spanish court judgment in Mr and Mrs W's favour, it seems to me that there is an argument for saying the Purchase Agreement is valid under English law for the purposes of

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<sup>1</sup> Although not set out in these terms, this would be in keeping with the judgment of the UK's Supreme Court in *Durkin v DSG Retail* [2014] UKSC 21 ('*Durkin*').

*Durkin.*

I also note that the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract governed by English law, it was English law that applied, not Spanish.

What's more, as Mr and Mrs W have gone some way to taking advantage of the Purchase and Credit Agreements, an English court might hesitate to uphold a claim for rescission of either Agreement because there are equitable reasons to do so.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, I'm not persuaded that it would be fair or reasonable to uphold this complaint for this reason.

I am also not persuaded that any unfairness has been caused to the credit relationship between Mr and Mrs W and the Lender by it taking their deposit payment. Mr and Mrs W say this was taken during the 14-day cooling off period, and it should not have been. The Lender, in response, says that this didn't happen, and having seen the credit card statement which details the payment made, I think the Lender is likely to be correct here. I can see the deposit payment was made on 1 May 2013 (the Time of Sale) but the funds were not taken by the Lender until 17 May 2013, which is after the 14-day cooling off period.

I'm not persuaded, therefore, that Mr and Mrs W's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of 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?**

As I said at the start of this decision, I am looking at the merits of Mr and Mrs W's arguments while taking into account (i) relevant 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. And that includes both the Spanish court ruling that Mr and Mrs W have cited, along with *Shawbrook & BPF v FOS*.

But whilst being mindful of these, and the entire legal and regulatory context, I am making my decision on what I consider most likely to have happened.

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs W the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs W 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.

And there is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs W, 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.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs W as an investment in breach of Regulation 14(3).

However, for reasons I will come on to shortly, just because there may have been a breach of the relevant prohibition by the Supplier, does not mean that a complaint that the associated credit relationship was unfair as a result, must be upheld.

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

As I've said above, it's possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, and so I now need to consider what impact any potential breach (if there was one) had on the fairness of the credit relationship between Mr and Mrs W and the Lender under the Credit Agreement and related Purchase Agreement. This is because case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs W and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) would have led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs W decided to go ahead with their purchase. I am simply not persuaded that was the case from what they've had to say. That doesn't mean they weren't interested in a share in the Allocated Property - after all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But I think Mr and Mrs W were motivated to buy the Fractional Club membership due to the holidays it could provide, as I can see family holidays were important to them. And I can also see that Mr and Mrs W wanted to give up their Fractional Club membership as it no longer suited their personal and financial circumstances. For example, in April 2022, which was prior to the complaint being made to the Lender, Mr and Mrs W wrote to the Supplier asking to surrender their membership. This was for reasons relating to being carers for elderly parents and because they could no longer travel as a family. I find it

hard to understand why, if the membership was bought as an investment as Mr and Mrs W are now saying, they would have been willing to simply hand it back and not stand to receive their share in the net proceeds of the sale of the Allocated Property.

So, as Mr and Mrs W themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think any potential breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

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

And for that reason, I do not think the credit relationship between Mr and Mrs W and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

### **Section 140A: Conclusion**

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

### **My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W and Mr W to accept or reject my decision before 24 September 2025.

Chris Riggs  
**Ombudsman**