DRN-5513376

The complaint

Mrs and Mr H's complaint is, in essence, that First Holiday Finance Ltd acted unfairly and unreasonably by (1) declining to meet their claim in misrepresentation under Section 75 of the Consumer Credit Act 1974 ("CCA") and (2) being party to an unfair credit relationship with them under Section 140A of the CCA.

Mrs and Mr H bring their complaint with the assistance of a third party professional representative "S".

Background to this decision

I recently issued my provisional decision setting out the events leading up to this complaint and my intended conclusions on how I considered the dispute best resolved. I've reproduced that provisional decision here and it is incorporated as part of my overall findings. I invited both parties to let me have any further comments they wished to make in response, and I will address their responses later in this decision.

My provisional decision

In April 2016, Mrs and Mr H bought a timeshare trial membership from a provider "C". The cost of membership of C's 'Destinations Club' was £3,995, which was part-funded by a loan from First Holiday Finance. This gave Mrs and Mr H the right to reserve up to five holiday weeks over a three-year period, as well as a 'prelude' week.

While on the prelude week in August 2016 (the "Time of Sale") Mrs and Mr H attended a further sales meeting with C, as a result of which they upgraded their Destinations Club trial membership to C's Fractional Points Owners' Club (the "Fractional Club"). Fractional Club membership was asset backed – which meant it gave Mrs and Mr H more than just holiday rights. It also included a share in the net sale proceeds of a property (the "Allocated Property") named on Mrs and Mr H's agreement with C (the "Purchase Agreement") after the 18-year membership term ended.

The Purchase Agreement bought Mrs and Mr H 870 fractional points, described therein as equivalent to one week of fractional rights, at a cost of £14,630. Again, this purchase was part-funded by credit of £13,130 in Mrs and Mr H's names, provided by First Holiday Finance (the "Credit Agreement").

According to C's records Mrs and Mr H took two holidays using their Fractional Club membership, but in mid-2018 informed C that they were in a difficult financial position. They do not appear to have taken any further holidays under their membership, and in May 2019 authorised a professional representative "S" to act on their behalf in pursuing complaints about their financial arrangements.

With S's assistance Mrs and Mr H wrote to First Holiday Finance on 8 October 2019 (the "Letter of Complaint") to complain about:

- Misrepresentations, omissions and unfair sales practices by C at the Time of Sale, including failing to give them important information relevant to their decision to purchase Fractional Club membership.
- First Holiday Finance unlawfully funding the arrangements of an Unregulated Collective Investment Scheme ("UCIS"), contrary to the provisions of the Financial Services and Markets Act 2000 ("FSMA").

The Letter of Complaint makes the argument that First Holiday Finance is, as deemed principal of C, liable to Mrs and Mr H for the above and sets out a claim in damages.

First Holiday Finance issued a letter dated 29 October 2019 in which it passed the matter on to C for response. First Holiday Finance but didn't agree that it was liable to compensate Mrs and Mr H. Again using S as their representative, Mrs and Mr H referred their complaint to us on 18 November 2019 (the "Complaint Referral Letter").

The Complaint Referral Letter was more specific than the Letter of Complaint in relation to the alleged breaches of law and regulatory principles Mrs and Mr H considered the responsibility of First Holiday Finance. It expands on the reasons set out in the Letter of Complaint. It includes the assertions that the interest rate charged by First Holiday Finance was an unfair contract term, and that First Holiday Finance was party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

Mrs and Mr H raised several points in relation to C's pre-contractual acts and omissions at the Time of Sale, which I've summarised below, drawn from both the Letter of Complaint and the Complaint Referral Letter. These are that:

- C made an untrue statement to them that Fractional Club membership had a guaranteed end date of 31 December 2030, by which the Allocated Property would be sold. They say there was no clear indication as to C's duty to actively market and sell the Allocated Property. And until the property was sold, Mrs and Mr H would continue to incur management fees.
- C failed to tell them that the developer could postpone the sale, in its absolute discretion, for up to two years past the set sale date.
- C didn't explain to Mrs and Mr H that based on the contractual documentation, their beneficiaries would inherit their liability for management fees.
- C coerced or otherwise pressured Mrs and Mr H to buy Fractional Club membership.
- C's salesperson didn't give Mrs and Mr H the opportunity to decide if Fractional Club membership was right for them. At the Time of Sale they were pushed to sign so many documents.
- the Fractional Club membership sold to Mrs and Mr H was a UCIS, the promotion and financing of which was unlawful.
- the interest rate on the Credit Agreement was 13.810% compared to the Bank of England base rate of 0.50%, which was an unfair contract term.
- their Fractional Club membership was a floating week timeshare, which was illegal. That made the Purchase Agreement null and void and so created an unfair credit relationship under Section 140A.

Mrs and Mr H said that in light of the concerns expressed against C, under the section 56 deemed agency and section 75 connected lender liability[1] provisions of the CCA, First Holiday Finance is liable to compensate them. They also referenced a number of FCA core principles they argued hadn't been complied with, as shown by the points they'd made.

First Holiday Finance was provided with a copy of the Complaint Referral Letter, but its position remained the same.

Mrs and Mr H's complaint was assessed by an investigator who asked them to provide their account of what had happened (the "Witness Statement"). After receiving this document and, having considered the information on file, our investigator proposed that the complaint should be upheld on its merits. But First Holiday Finance disagreed with the investigator's assessment[2] and asked for an ombudsman to review and determine matters.

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 Consumer Rights Act 2015 ("the CRA").
- The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").
- 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

[1] Although the relevant sections of the CCA weren't specifically referenced by Mrs and Mr H in the Letter of Complaint, they were cited in the Complaint Referral Letter.
[2] A copy of First Holiday Finance's response to the investigator's assessment has been shared with S.

The Timeshare Regulations provided a regulatory framework. But I'm 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 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 propose to uphold this complaint.

Before I explain why, I want to make it clear that my role as an ombudsman isn't to address every single point that has been made to date. Rather, it is to decide what's fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

Where necessary, I've reached my conclusions on the balance of probabilities; in other words, based on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75: C's alleged 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 First Holiday Finance under section 75 essentially mirrors the claim Mrs and Mr H could make against C.

Certain conditions must be met for section 75 to apply including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. I'm satisfied those conditions are met in this case, and note that First Holiday Finance doesn't dispute this aspect. Bearing in mind the way in which section 75 operates, if C is liable for having misrepresented something to Mrs and Mr H at the Time of Sale, First Holiday Finance is also liable.

Although S (on behalf of Mrs and Mr H) included in its submissions several examples of what it considered to be C's misrepresentations, I think only one of the points made could reasonably meet the definition of a false statement of fact (or law) necessary to a claim in misrepresentation. That is, that C told them that Fractional Club membership had a guaranteed end date of 31 December 2030, by when the Allocated Property would be sold. The other points are at best allegations of acts or omissions that would not be covered by a section 75 claim.

I don't think the available evidence supports that C made a statement about the sale date of the Allocated Property or guaranteed membership would end on the date in question. The Schedule to the Fractional Rights Certificate C issued to Mrs and Mr H doesn't contain any such guarantee, or reference a date in 2030. It says that the sales process will be started (not completed) on the Allocated Property on 31 December 2033. Despite this clear discrepancy, there is no mention of it in Mrs and Mr H's Witness Statement.

As a result, I don't think First Holiday Finance unfairly or unreasonably declined Mrs and Mr H compensation for the misrepresentations they said it was liable for under section 75[3].

Section 140A: did First Holiday Finance participate in an unfair credit relationship?

I have already explained why I'm not persuaded C misrepresented the Purchase Contract in a way that makes for a successful section 75 claim and outcome in this complaint. But Mrs and Mr H also make arguments that either say or infer that the credit relationship between them and First Holiday Finance was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of C's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As section 140A of the CCA is relevant law, I have considered it when determining what is fair and reasonable in all the circumstances of the case. That means considering whether the credit relationship between Mrs and Mr H and First Holiday Finance was unfair.

Under section 140A, 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)[4].

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. It also creates a statutory agency in particular circumstances. The most relevant to this complaint is negotiations "*conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c)*"[5].

The arrangements between Mrs and Mr H, C, and First Holiday Finance were such that the negotiations conducted by C during its sale of Fractional Club membership to Mrs and Mr H were antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by C as an agent for First Holiday Finance 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 section 140A(1)(c).

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[3] I'm conscious Mrs and Mr H's Witness Statement contains some comments that might be interpreted as allegations of a breach of contract in relation to the availability of properties under their Fractional Club membership. This might give rise to a section 75 liability, but as it didn't form part of their Letter of Complaint or the Complaint Referral Letter, it's not for me to reach any finding in this respect.

[4] Section 140A(1) of the CCA.

[5] Section 56(1)(c) of the CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of C, based on my understanding of relevant law[6]. I note that in the case of *Scotland and 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, 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.*"[7]

It follows that I see no great difficulty with Mrs and Mr H's position that C is deemed agent of First Holiday Finance for the purpose of the pre-contractual negotiations.

I recognise that an assessment of unfairness under section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was 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.

Despite the breadth of the unfair relationship test under section 140A, it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

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

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

I've considered the entirety of the credit relationship between Mrs and Mr H and First Holiday Finance along with all of the circumstances of the complaint. Having done so, I don't think the credit relationship between them was likely to have been rendered unfair for section 140A purposes. In coming to that conclusion, and in carrying out my analysis, I've looked at:

1. C's sales and marketing practices at the Time of Sale – which includes any material provided that I think is likely to be relevant to the sale; and
2. C's provision of information at the Time of Sale, including the contractual documentation and disclaimers made by C;
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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[6] See, for example Plevin, at paragraph 31, and Shawbrook & BPF v FOS at paragraph 135

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

I've considered the impact of these on the fairness of the credit relationship between Mrs and Mr H and First Holiday Finance.

C's sales and marketing practices at the Time of Sale

Mrs and Mr H complained about First Holiday Finance being party to an unfair credit relationship for several reasons, which I've set out in this decision. They include the allegation that C misled Mrs and Mr H and carried on unfair commercial practices contrary to the CPUT Regulations. But given the limited evidence in this complaint, I'm not persuaded that anything done or not done by C was prohibited under the CPUT Regulations.

Mrs and Mr H say that they were pressured by C into purchasing Fractional Club membership at the Time of Sale. They've indicated the sales process lasted around five hours, that there were so many documents to sign, and that there was an immense amount of pressure to proceed.

But across the Letter of Complaint, the Complaint Referral Letter and the Witness Statement, Mrs and Mr H have said little about what C actually said and/or did during the sales presentation that made them feel as if they had no choice other than to purchase Fractional Club membership when they didn't want to. Neither the overall time Mrs and Mr H spent with C during the sales process nor the number of documents they needed to read and sign appear to me to be particularly excessive, given the nature of the purchase they were making.

Further, while Mrs and Mr H were given a 14-day cooling off period, they didn't try to cancel their membership during that time. First Holiday Finance has provided emails between Mrs and Mr H and C in September 2016, shortly after the Time of Sale. I don't find this correspondence suggestive that Mrs and Mr H felt pressured or that they didn't have time to think about their decision. In fact, their email says they have decided to continue with the purchase of Fractional Club membership, which indicates that they could have reached a different decision had they wanted to do so.

Taking all of this into account, I don't propose to reach a finding that the available evidence demonstrates that Mrs and Mr H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by undue coercion or pressure from C.

Mrs and Mr H's concerns include that C failed to mention certain information at the Time of Sale. They say there was no clear indication as to C's duty to actively market and sell the Allocated Property, that the sale could be postponed and that Mrs and Mr H would continue to incur management fees. They also say C didn't explain to them that liability for management fees would pass to their beneficiaries. Noting the effect of section 56 of the CCA as I've previously set out, First Holiday Finance could be held responsible for any such omissions by C where, say, they amounted to an unfair commercial practice or a breach of the Timeshare Regulations. So the issues raised are relevant to considering the fairness of the credit relationship between First Holiday Finance and Mrs and Mr H.

First Holiday Finance included in its submissions to us a copy of a letter from C to S, in which C rejects the assertion that Fractional Club membership (and its attendant liabilities) would automatically transfer to Mrs and Mr H's beneficiaries. My understanding of the Fractional Club membership rules is that this is correct. I'm also conscious that the information Mrs and Mr H have said C failed to tell them is set out in

the documents provided to them at the Time of Sale. This is consistent with the Timeshare Regulations requirement that key information is provided in writing.

I've considered those aspects cited by Mrs and Mr H in their complaint correspondence, which they say was the information they considered deficient that was material to them making an informed purchase decision. Having done so, I'm not minded to think it likely that there were material omissions or a lack of clarity as alleged by Mrs and Mr H. And whether or not this info was required by the CPUT and/or Timeshare Regulations, I can't see that they'd have done anything differently had the information been set out more clearly. So that doesn't point towards an unfair credit relationship with First Holiday Finance.

I turn to the suggestion that the Purchase Agreement is to be treated as null and void. I'm not satisfied that Mrs and Mr H's submissions make out a persuasive case for their Purchase Agreement being illegal, or why a timeshare that provides for a 'floating week' or the ability to use points to book holidays is a void (or indeed voidable) agreement. None of the relevant legislation, rules or regulations I've seen indicate this.

Further, while the interest rate on the loan was rather higher than the Bank of England base rate, no reason has been offered for why this would form the basis of an unfair contract term. The applicable interest rate was clearly set out on the Credit Agreement with due transparency and prominence. Schedule 2, Part 1 of the Consumer Rights Act 2015 contains an indicative albeit non-exhaustive list of example terms (commonly referred to as the 'grey list') which may be regarded as unfair. The interest rate comparison described doesn't fall within this list, and absent any reason why it should be unfair *per se* to charge interest above the base rate, I can't see how such an argument could be successful.

For the reasons I've explained, that Mrs and Mr H's credit relationship with First Holiday Finance was rendered unfair to them under Section 140A for any of the reasons above. But there is a further reason why their credit relationship with First Holiday Finance might be rendered unfair to them. That's the suggestion that Mrs and Mr H purchased Fractional Club membership because C marketed and sold it to them as an investment in breach of a 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, and if so, was this aspect material to Mrs and Mr H's decision to purchase membership?

I'm aware Mrs and Mr H's Letter of Complaint and Complaint Referral Letter went to some lengths to set out why they considered Fractional Club membership to be a UCIS and why this meant providing finance in relation to its sale was prohibited under FSMA. First Holiday Finance does not accept this; in line with C's response it says that membership was a timeshare rather than a Collective Investment Scheme ("CIS"), and so the arguments over the scope of FSMA do not apply.

In this respect, I must have regard for the conclusion reached in *Shawbrook & BPF v FOS*. A timeshare contract is not a CIS (nor by extension a UCIS). And I'm satisfied that Mrs and Mr H's Fractional Club membership met the definition of a "*timeshare contract*" regulated by the Timeshare Regulations. So the argument that the sale of finance in connection with a UCIS was prohibited under FSMA falls away. But that doesn't fully address the question of whether Fractional Club membership was marketed and sold as an investment.

Fractional Club membership is not prevented from being (or being thought of as) an investment just because a timeshare contract is not a CIS. 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 and Mr H'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.

Regulation 14(3) of the Timeshare Regulations prohibited C from marketing or selling membership of the Fractional Club as an investment. The provision at the Time of Sale said that "*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.*"

Mrs and Mr H's Witness Statement says that this is what C did at the Time of Sale. They have said similar in response to enquiries made of them by our investigator. So that is what I've considered next.

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 that Fractional Club membership was marketed or sold to Mrs and Mr H as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that C marketed and/or sold membership to them as an investment; that is, told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (a profit) given the facts and circumstances of this complaint.

Not only that but, as the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that any such regulatory breach would 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. That includes taking into account the material impact of any breach on the customer's decision whether to enter into the Purchase Agreement[8]. So I also must be satisfied that it was more likely than not that the prospect of a financial gain was a material factor in Mrs and Mrs H's purchase decision.

There is evidence in this case that C made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers such as Mrs and Mr H 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 wasn't sold to Mrs and Mr H as an investment.

[8] I'm mindful here of what HHJ Waksman QC (as he then was) and HHJ Worster respectively had to say in Carney (paragraph 51) and Kerrigan (paragraphs 213 and 214) on causation.

It is nonetheless *possible* that C marketed and sold Fractional Club membership to Mrs and Mr H as an investment, and so I've thought about their evidence in this respect, and what prompted them to enter into the Purchase Agreement.

Mrs and Mr H's initial recollections are set out in the Letter of Complaint and the Complaint Referral Letter. These were put together much closer to the Time of Sale and are, in my view, better evidence of what they remember of the sales process at that time and why they were unhappy with it than their more recent recollections contained in their Witness Statement and their conversations with our investigator.

But while I've noted Mrs and Mr H's more recent recollections, I must take into account that these were made following the outcome of *Shawbrook & BPF v FOS*, and that they are in some material respects quite different from the assertions made when they brought their complaint. There are inconsistencies in their recollections (for example, Mrs and Mr H recall only the promotional holiday whereas C's records show they also used their membership for two other holidays).

I accept of course that being asked to recall specific information some years later is rendered more difficult with the passage of time. But it does seem to me that evidence has evolved over time in such a way that, in my view, it would be incorrect to place significant weight on what has been said more recently as being motivating factors in Mrs and Mr H's decision to purchase membership.

There was no suggestion in Mrs and Mr H's initial recollections of the sales process at the Time of Sale that C 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.

Had Fractional Club membership been marketed and sold as an investment by C at the Time of Sale *and* been a key factor in Mrs and Mr H's purchase decision, it is difficult to understand why they and S did not mention this in the Letter of Complaint or the Complaint Referral Letter, particularly in light of the lengths to which those documents went in seeking to demonstrate the UCIS point. Additionally, there's nothing in the way of any specific detail about what they were told about a financial gain or the profit they might make.

On balance, therefore, even if C 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 and Mr H's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (a profit).

On the contrary, I think the evidence – in particular, Mrs and Mr H's email exchanges shortly after the sale – suggests their purchase decision was founded on their attraction to the holiday arrangements Fractional Club membership provided. So I'm minded that 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'm not currently inclined to think the credit relationship between Mrs and Mr H and First Holiday Finance was unfair to them whether or not C breached Regulation 14(3).

Given all of the facts and circumstances of this complaint, I don't think the credit relationship between First Holiday Finance and Mrs and Mr H was unfair to them for the purposes of Section 140A. So I don't propose to uphold this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that First Holiday Finance acted unfairly or unreasonably when it dealt with Mrs and Mr H's Section 75 claim. And I am not persuaded that First Holiday Finance was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable to direct First Holiday Finance to compensate them.

Responses to my provisional decision

First Holiday Finance accepted my intended conclusions and said it had nothing further to add. S, responding on Mrs and Mr H's behalf, didn't accept my provisional decision. It said, in summary:

- The Letter of Complaint mentioned that Fractional Club membership had the attributes of an investment and had been sold as such
- Mrs and Mr H's Witness Statement contained their recollection that C's representative pitched the merits of Fractional Club membership being an investment and the sale of the property
- Mrs and Mr H had told our investigator in conversation that Fractional Club membership was sold as an investment, and that they had only used the Fractional Club membership once when they purchased it
- The investigator's assessment had concluded that C had promoted Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations
- It couldn't understand how I had concluded that I did not believe any of this evidence but that on balance of probabilities C did nothing wrong in selling Fractional Club membership as an investment, and asked me to reconsider my decision

What I've decided – and why

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

I've read S's submissions in response to my provisional decision. S hasn't said anything that I didn't take into account or explain at some length (and in great detail) in that provisional decision. Unfortunately, S's response wrongly attributes findings I haven't made and rather misses the conclusions I did reach.

To be quite clear, my provisional findings were that Mrs and Mr H's Fractional Club membership did include an investment (a profit) element – albeit not a UCIS – that it was possible that it was marketed and sold to them in that way in breach of Regulation 14(3), but that there was no persuasive evidence that a profit motive had been a material factor in Mrs and Mr H's decision to purchase membership. Nothing that S has said in response points me towards reaching a different set of conclusions, or gives me good reason not to adopt my provisional findings in full as part of this final decision.

Accordingly, for the reasons I've set out here and in my provisional decision, I remain of the opinion that First Holiday Finance did not act unfairly or unreasonably when it dealt with Mrs and Mr H's Section 75 claim, or that it was party to a credit relationship with them that was unfair for the purposes of Section 140A of the CCA.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 26 May 2025.

Niall Taylor
Ombudsman