DRN-5516939

The complaint

Mr T's complaint is, in essence, that First Holiday Finance Ltd ('the Lender') acted unfairly and unreasonably by (1) declining to meet his claim of misrepresentation under Section 75 of the Consumer Credit Act 1974 ("CCA") and (2) being party to an unfair credit relationship with him under Section 140A of the CCA. Mr T brings his complaint with the assistance of a third-party professional representative (the 'PR').

What happened

In early 2017, Mr T bought a timeshare trial membership from a supplier (the "Supplier"). The cost of membership was funded by a loan from The Lender. While on holiday provided by the Supplier in April 2017 (the "Time of Sale") Mr T attended a further sales meeting with the Supplier, as a result of which he and Mrs T upgraded their trial membership to the Supplier's Fractional Points Owners' Club (the "Fractional Club") membership.

Fractional Club membership was asset backed – which meant it gave Mr T more than just holiday rights. It also included a share in the net sale proceeds of a property (the "Allocated Property") named on Mr T's agreement with the Supplier (the "Purchase Agreement") after the just over 15-year membership term ended.

The Purchase Agreement (in both Mr T and Mrs T's names) bought Mr T and Mrs T 1500 fractional points, described therein as equivalent to one week of fractional rights, at a cost of £12,815. Again, this purchase was part-funded by credit of £12,315 (in Mr T's sole name), provided by The Lender (the "Credit Agreement").

According to the Supplier's records Mr T and Mrs T took thirteen holidays using their Fractional Club Membership up to and including in 2019 and had recommended friends to the Supplier. In February 2020 they appointed the PR to act on their behalf in pursuing complaints about their financial arrangements. With PR's assistance Mr T complained to The Lender on 3 April 2020 (the "Letter of Complaint") to complain about[1]:

- Misrepresentations under S75 of the CCA which led to Mr T losing out and which also led to an unfair relationship under s140A of the CCA.
- Omissions and unfair sales practices by the Supplier at the Time of Sale, including failing to give them important information relevant to their decision to purchase Fractional Club membership.
- The Lender unlawfully funding the arrangements of an Unregulated Collective Investment Scheme ("UCIS"), contrary to the provisions of the Financial Services and Markets Act 2000 ("FSMA").
- That the loan and credit agreement were voidable due to the above UCIS argument.
- The Supplier made an untrue statement to them that Fractional Club membership had a guaranteed end date by which the Allocated Property would be sold. They say there was no clear indication as to the Supplier's duty to actively market and sell the

[1] As the Credit Agreement was in Mr T's sole name, only he is able to bring this complaint to our service

Allocated Property. And until the property was sold, Mr T would continue to incur management fees.

- The Supplier 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.
- The Supplier didn't explain to Mr T that based on the contractual documentation, his beneficiaries would inherit their liability for management fees.
- The Supplier coerced or otherwise pressured Mr T to buy Fractional Club membership.
- The Supplier's salesperson didn't give Mr T 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 Mr T was a UCIS, the promotion and financing of which was unlawful.
- The interest rate on the Credit Agreement was exceedingly high compared to the Bank of England base rate which was an unfair contract term.
- The 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

The Letter of Complaint makes the argument that The Lender is, as deemed principal of the Supplier, liable to Mr T for the above and sets out a claim in damages. The Lender didn't respond to the PR, so it brought the complaint to this service, and we liaised with the parties. The Lender issued a letter dated 01 February 2021 to this service saying it had passed the matter on to the Supplier for response, but the Lender didn't agree that it was liable to compensate Mr T. The Supplier also issued a response to Mr T's claim rejecting it on every ground.

Mr T's complaint was assessed by an investigator and having considered the information on file, our investigator proposed that the complaint should be not upheld on its merits. But the PR disagreed with the investigator's assessment and asked for an ombudsman to review and determine matters.

I issued a provisional decision dated 09 April 2025 which didn't uphold Mr T's complaint. An extract of that provisional decision reads as follows (italicised and in smaller font for clarity).

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

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 is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, 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: The Supplier'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 The Lender under section 75 essentially mirrors the claim Mr T could make against the Supplier.

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 the Lender doesn't dispute this aspect of the matter. Bearing in mind the way in which section 75 operates, if the Supplier is liable for having misrepresented something to Mr T at the Time of Sale, the Lender is also liable.

I have set out above the alleged misrepresentations made by the Supplier at the Time of Sale. Although PR (on behalf of Mr T) included in its submissions several examples of what it considered to be the Supplier'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 the Supplier told them that Fractional Club membership had a guaranteed end date, 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 will consider these allegations in the remainder of this decision when considering whether there is an unfair credit relationship.

I don't think the available evidence supports that the Supplier 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 the Supplier issued to Mr T doesn't contain any such guarantee. It says that the sales process will be started (not completed) on the Allocated Property on 31 December 2032. Despite this clear discrepancy, there is no mention of it in Mr T and Mrs T's handwritten statement on the matter. So even if there was such a statement made, I can't see that it was important to them when deciding to purchase. If follows, I don't think this was an actionable misrepresentation.

As a result, I don't think The Lender unfairly or unreasonably declined Mr T's compensation for the misrepresentations he said it was liable for under section 75.

Section 140A: did The Lender participate in an unfair credit relationship?

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

As section 140A of the CCA is relevant law, I 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 Mr T and The Lender 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), (Section 140A(1) of the 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. 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)" (Section 56(1)(c) of the CCA).

The arrangements between Mr T, the Supplier, and The Lender were such that the negotiations conducted by the Supplier during its sale of this Fractional Club membership to Mr T were 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 section 140A(1)(c).

Antecedent negotiations under Section 56 cover both the acts and omissions of C, based on my understanding of relevant law (See, for example Plevin, at paragraph 31, and Shawbrook & BPF v FOS at paragraph 135). I note that 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, in paragraph 74:

"[...] there is nothing in the wording of PR.56(2) to suggest any legislative intent to limit its application so as to exclude PR.140A. Moreover, the words in PR.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 PR.56(1)(c) and which are deemed by PR.56(2) to have been conducted by the supplier as agent of the creditor. Indeed, the purpose of PR.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." (The Court of Appeal's decision in Scotland was recently followed in Smith.)

It follows that I see no great difficulty with Mr T's position that the supplier is deemed agent of the Lender 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 Mr T and the Lender 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. the Supplier'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. the Supplier'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.*

I've considered the impact of these on the fairness of the credit relationship between Mr T and The Lender.

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

Mr T complained about The Lender being party to an unfair credit relationship for several reasons, which I've set out in this decision.

Mr T says that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. He has indicated the sales process lasted several hours, that there were so many documents to sign, and that there was an immense amount of pressure to proceed. But across the correspondence we have Mr T has said little about what the Supplier actually said and/or did during the sales presentation that made Mrs T and Mr T feel as if they had no choice other than to purchase Fractional Club membership when they didn't want to. Neither the overall time Mr T spent with the Supplier 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 Mr T was given a 14-day cooling off period, he didn't try to cancel their membership during that time. The Lender has provided evidence from the Time of Sale and afterward including evidence of Mr T planning to recommend friends towards taking memberships from the Supplier. That along with Mr T's actions at the time aren't suggestive to me that Mr T felt that he had no viable alternative to purchasing the membership or made a purchasing decision he otherwise wouldn't have done but for a pressured sale. Overall, I'm not persuaded he was pressured into taking this membership.

Mr T's concerns also include that the Supplier failed to mention certain information at the Time of Sale. He says there was no clear indication as to the Supplier's duty to actively market and sell the Allocated Property, that the sale could be postponed, and that Mr T would continue to incur management fees. He also says the Supplier 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,

The Lender could be held responsible for any such omissions by the Supplier 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 The Lender and Mr T.

The Lender included in its submissions to us a copy of a letter from the Supplier in which it rejects the assertion that Fractional Club membership (and its attendant liabilities) would automatically transfer to Mr T's beneficiaries. My understanding of the Fractional Club membership rules is that this is correct. I'm also conscious that the information Mr T has said the Supplier failed to tell him/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 Mr T and Mrs T 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 don't think it likely that there were material omissions, or a lack of clarity as alleged by Mr T. 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. And I say that because Mr T and Mrs T made no reference to any of this missing information in their handwritten statement, which to me points to it not being an important consideration in their purchasing decision. So that doesn't point towards an unfair credit relationship with The Lender.

Turning to the suggestion that the Purchase Agreement is to be treated as null and void. I'm not satisfied that Mr T'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, nor has PR pointed to the relevant part of the regulations that it says makes this the case.

Further, while the interest rate on the loan was 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, so I think Mr T was aware of what he was paying each month and agreed to take out the loan on that basis. 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 the explanatory notes to section 64 explain that the appropriateness of the price paid is excluded from an assessment of the fairness of terms. Here, in my view, the interest charges are the price of credit and therefore is exempt from the fairness test. I can consider whether the rate of interest causes an unfairness under s.140A CCA, however I do not think it is particularly high or out of kilter with other loans available in the marketplace. So, I do not think the Lender needs to do anything in respect of the interest rate.

For the reasons I've explained I'm not persuaded that Mr T's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is a further reason why their credit relationship with The Lender might be rendered unfair to him. That's the suggestion that Mr T purchased Fractional Club membership because the Supplier marketed and sold it 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, and if so, was this aspect material to Mr T's decision to purchase membership?

I'm aware Mr T's PR 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. The Lender does not accept this; in line with the Supplier'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 T's and Mr T's Fractional Club membership met the definition of a "timeshare contract" regulated by the Timeshare Regulations. Accordingly, 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.

Mr T'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 the Supplier 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." And Mr T's PR has argued that this is what happened in this case, albeit more so latterly.

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 in itself. 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 Mr T 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; 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.

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 Mr T's purchase decision. 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 T and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr T, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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 Mr T 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 Mr T as an investment. It is nonetheless possible that the Supplier marketed and sold Fractional Club membership to Mr T as an investment, and so I've thought about their evidence in this respect, and what prompted them to enter into the Purchase Agreement.

I think the handwritten letter signed by both Mr T and Mrs T about what happened to be an accurate reflection of what they remembered about the sale. Particularly seeing as it was written by Mr T and Mrs T who were present at the sales process concerned and was written closer to the Time of Sale than later submissions from their PR. Across three pages of handwritten description of their reasons for complaining about this membership there is no comment indicating that this membership was purchased because it was marketed/sold as an investment. I also note that the PR's original correspondence on the matter addressed to the Lender doesn't make that allegation, nor does it suggest that marketing the membership as an investment was a reason Mr T took out the credit agreement to purchase the membership.

But while I've noted Mr T's PR's more recent submissions, 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 the complaint originally. 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 by the PR as being motivating factors in Mr T's decision to purchase membership over and above his own written memories.

Had Fractional Club membership been marketed and sold as an investment by the Supplier at the Time of Sale and that been a key factor in Mr T's purchase decision, it is difficult to understand why Mr T and Mrs T's handwritten letter and their PR's original position on the matter did not persuasively argue this in their original correspondence 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 the Supplier 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 T'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 suggests Mr T and Mrs T's purchasing 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 Mr T and The Lender was unfair to them whether or not the Supplier breached Regulation 14(3).

In summary, given all of the facts and circumstances of this complaint, I don't think the credit relationship between The Lender and Mr T was unfair to him for the purposes of Section 140A. So, I don't propose to uphold this aspect of the complaint on that basis.

Conclusion

In conclusion and given the facts and circumstances of the complaint I do not think the Lender has acted unfairly or unreasonably when it considered Mr T's S75 claim. Furthermore, I'm not persuaded the Lender was party to an unfair credit relationship with Mr T under the Credit Agreement that was unfair to him under S140A of the CCA. Having considered everything in this matter I see no persuasive reason that the Lender should compensate Mr T.

Comments following my Provisional Decision

The Lender accepted my provisional position and said it had nothing further to add. The PR made a number of arguments on the matter. These included:

- That under Mr T's S75 claim my findings hadn't sufficiently considered:
  - "*The absence of clear and prominent disclaimers in oral presentations*
  - *The inherent imbalance in knowledge between the sales staff and Mr T*
  - *The cumulative impact of multiple misstatements, including:*
  - *Membership would provide investment-level returns*
  - *There was a guaranteed exit with no continuing liabilities*
  - *That the property would be sold at the end of term, returning capital*"
- That under Mr T's S140A claim that my findings hadn't sufficiently considered:
  - "*Sales Conduct and Pressure*
  - *Inadequate Disclosure of Continuing Liabilities*
  - *Unsuitability of Credit – Age and Financial Circumstances."*
- That in relation Regulation 14(3) – Marketing as an Investment my findings didn't properly consider that:
  - "*Mr T and Mrs T were clearly told that "They had a share in property that would be sold at a profit," "That they could recoup their capital," "That this was a "wise financial move*."
- That with regard to causation and materiality that my provisional decision;
  - "*appears to interpret causation and impact too narrowly*."
  - And that "*Our Client's position is without the investment-based misrepresentation, our Client wound not have concluded the sale. Mr T's belief in future value and capital return were equally central to his decision to proceed*."

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.

Having considered everything again I am not persuaded to uphold this complaint for the same reasons as I've set out in the extract of the provisional decision quoted above. I will also deal with the matters the PR has raised in response. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been made to me. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I have read the PR's response in full, I will confine my findings to what I find are the salient points.

Mr T's testimony

The PR has made a number of comments regarding my findings regarding Mr T's handwritten letter and submissions later made via his PR later. Much of this is to do with

how I have placed weight on the evidence before me and I think it's helpful to quote from the judgment in Smith v. Secretary of State for Transport [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr T and the PR have provided. Paragraph 40 reads as follows:

"*At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251).*

Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:
a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).
b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).
c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).
d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).
e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).
f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. It is also the case that in such evidence, particularly in long running disputes that there can be submissions which are not relevant to the matters at hand including where representatives are involved. I think the key consideration is whether there is a core of acceptable evidence from complainants that any inconsistencies or irrelevancies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an

investment. I should add that it is for me to weigh up what is before me and allocate it weight in my decision making and give reasons for any such weighting.

I'll repeat what I said in my provisional position:

> *"I think the handwritten letter signed by both Mr T and Mrs T about what happened to be an accurate reflection of what they remembered about the sale. Particularly seeing as it was written by Mr T and Mrs T who were present at the sales process concerned and was written closer to the Time of Sale than later submissions from their PR. Across three pages of handwritten description of their reasons for complaining about this membership there is no comment indicating that this membership was purchased because it was marketed/sold as an investment. I also note that the PR's original correspondence on the matter addressed to the Lender doesn't make that allegation, nor does it suggest that marketing the membership as an investment was a reason Mr T took out the credit agreement to purchase the membership.*
>
> *But while I've noted Mr T's PR's more recent submissions, 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 the complaint originally. 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 by the PR as being motivating factors in Mr T's decision to purchase membership over and above his own written memories.*
>
> *Had Fractional Club membership been marketed and sold as an investment by the Supplier at the Time of Sale and that been a key factor in Mr T's purchase decision, it is difficult to understand why Mr T and Mrs T's handwritten letter and their PR's original position on the matter did not persuasively argue this in their original correspondence 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."*

The importance of this handwritten evidence and the weighting I've given it in my consideration is such for the following reasons. Firstly, this service received the above document in 2020, so I'm satisfied that is the year of its origin (at the latest). Mr T and Mrs T have set out their concerns in 'free form' about the purchase of the membership here in what appears to be either Mr T or Mrs T's own handwriting. As I'm satisfied this document originates from 2020, I can also be satisfied that this document couldn't have been coloured by what has happened and been learned from subsequent legal cases or indeed the judicial review which happened subsequent to this letter being received. And as I noted above although the three pages of handwritten comments illustrates their displeasure at a number of facets of this membership, nowhere within all of these comments do Mr T and Mrs T raise the issue of the membership it being marketed/sold to them as an investment.

Similarly, I note that the PR's response to the Investigator's assessment and indeed its response to my provisional decision came after the judicial review on a similar case so there was at least the possibility (however faint or conscious or unconscious) that these submissions by the PR could have been tainted by the knowledge gained through consideration of the legal cases and judicial review.

I should also note that whilst the PR acknowledges that Mr T's handwritten letter over three pages doesn't mention the membership being sold as an investment, the PR goes on to say this should not lead to the conclusion of "*excluding investment promises simply because it doesn't mention them*." I have not 'excluded' any of the arguments made here, but rather allocated weighting to what I considered more persuasive evidence and that which I consider less persuasive. I also note that the PR gives no persuasive reason for why the submissions made on Mr T's behalf vary so significantly over time. Nor does the PR explain why it makes

submissions such as "*The Supplier promoted the product as a form of property investment*" latterly, when this argument isn't mentioned in the handwritten letter at all and not persuasively in the PR's original lengthy and detailed submissions to the Lender originally. So, with no persuasive explanation for the significant change in the submissions made on behalf of Mr T, I cannot discount that its arguments made latterly have been tainted by hindsight. Accordingly, and having considered everything afresh I see no persuasive reason to depart from my provisional finding that I'm not persuaded that if this membership was marketed/sold as an investment to Mr T, that had a material and important impact on the purchasing decision.

The Section 75 claim

With regard to the PR's comments about Mr T's S75 claim made in response to my provisional decision it has to be remembered that Mr T has to make out his claim with regard to breach of contract and or misrepresentation. For the reasons given in my provisional decision I'm not persuaded he has. And I don't think the PR's comments in response to my provisional decision make any difference to that finding. It is of note that Mr T made use of the holidays available to him repeatedly and with regard to the sale date and any proceeds from the sale no such breach has been demonstrated. The PR's arguments on this matter are broad and to my mind either do not demonstrate either breach of contract or misrepresentation or are not supported by Mr T's own signed comments on the matter. Accordingly, I'm not persuaded to change my views on Mr T's S75 claim.

The S140A claim

Here the PR has said I had not sufficiently considered '*Sales Conduct and Pressure'* '*Inadequate Disclosure of Continuing Liabilities'* and '*Unsuitability of Credit – Age and Financial Circumstances*.' I note in my provisional decision I said:

> "*The Lender included in its submissions to us a copy of a letter from the Supplier in which it rejects the assertion that Fractional Club membership (and its attendant liabilities) would automatically transfer to Mr T's beneficiaries. My understanding of the Fractional Club membership rules is that this is correct. I'm also conscious that the information Mr T has said the Supplier failed to tell him/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 Mr T and Mrs T 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 don't think it likely that there were material omissions, or a lack of clarity as alleged by Mr T. 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. And I say that because Mr T and Mrs T made no reference to any of this missing information in their handwritten statement, which to me points to it not being an important consideration in their purchasing decision. So that doesn't point towards an unfair credit relationship with The Lender."*

Bearing in mind the above and my comments on the weighting I've given to the various submissions made by Mr T and on his behalf, and what I've said before in my provisional decision, I see no persuasive reason to deviate from my provisional position on the matter. I'd also repeat what I'd said previously in relation to Mr T's comments about being pressured into this purchase. And having considered the comments about affordability, having considered everything here, I'm not persuaded on balance that it was unaffordable to them. And I should add that just because I disagree with the PR on these issues doesn't mean I've not considered them properly. Furthermore, as the PR hasn't provided further evidence or persuasive analysis on these points but simply and largely repeated previous arguments

made (which I've previously addressed) then I see no persuasive reason to deviate from my reasoning on the matter.

My final decision

It is my final decision for all the reasons given that Mr T's complaint about First Holiday Finance Ltd does not succeed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 27 May 2025.

Rod Glyn-Thomas
Ombudsman