DRN-5529868

The complaint

Mrs D's complaint is, in essence, that First Holiday Finance Limited ("FHF") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her and her late husband under s.140A of the Consumer Credit Act 1974 (as amended) ("CCA") and (2) deciding against paying a claim under s.75 CCA.

Background to the complaint

Mrs D, alongside her late husband, Mr D, took out a timeshare membership from a timeshare provider ("the Supplier") in 2013. This type of membership was asset backed, which meant it gave Mr and Mrs D more than just holiday rights. It also included a share in the net sale proceeds of a property after their membership term ended. With this membership, they also had 1,050 fractional points they could use each year to take holidays at the Supplier's resorts.

Later that year, Mr and Mrs D took out a further timeshare membership ("Fractional Club") from the Supplier on 30 June 2013 ("the Time of Sale"). They traded in their earlier membership and entered into an agreement with the Supplier to buy 1,800 fractional points at an additional cost of £7,291 ("the Purchase Agreement").

Fractional Club membership was again asset backed. Here Mr and Mrs D acquired 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 D paid for their Fractional Club membership by taking finance of £7,291 from FHF in both of their names ("the Credit Agreement").[1]

Mr and Mrs D – using a professional representative ("PR1") – wrote to the Lender on 9 October 2017 ("the Letter of Complaint") to make a claim under s.75 CCA. Although the Letter of Complaint ran to five pages, at no point did it set out the factual basis on which PR1 alleged FHF ought to have accepted the claim. However, attached to the Letter of Complaint were several other documents:

1. A thirty-five page 'Position Statement'. Although this document has Mr and Mrs D's names on the first page, it does not mention them again, nor does it contain any complaint specific information.

2. A five-page witness statement signed by Mr and Mrs D, attaching other documents containing their memories of the sale.

On 18 December 2017, FHF responded to PR1, stating that the material provided was too broad for it to have any claim or complaint to answer. But it noted there were some concerns raised about the Supplier, so it had forwarded the complaint onwards. On the same day, the

[1] The Credit Agreement was actually taken with a similarly named business based outside of the United Kingdom, but the loan was assigned to FHF in 2015 and so it is the respondent to this complaint.

Supplier wrote to PR1 to state that it did not accept Fractional Club membership had been mis-sold or that it was liable to Mr and Mrs D for any other reason.

Unhappy with FHF's response, PR1 referred a complaint to our service on Mr and Mrs D's behalf.

One of our investigators considered Mr and Mrs D's complaint, but did not think FHF needed to do anything further to answer it. PR1 disagreed and asked for everything to be considered again by an ombudsman.

Before that happened, Mr and Mrs D's complaint was considered again by a different investigator in light of a court judgment that might have affected the outcome. But that investigator again did not think the complaint ought to have been upheld.

But at this stage, a different professional representative ("PR2") responded on Mrs D behalf. It provided a witness statement from Mrs D that explained that Mr D had sadly passed away, but Mrs D provided her memories of the sale and a description of the problems she said she had with Fractional Club membership. In particular, PR2 argued that the Supplier had marketed and sold membership to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations") and this caused an unfair credit relationship as defined by s.140A CCA. So, PR2 asked for an ombudsman to review the complaint in light of its submissions and in taking account of the judgment in *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*").

The complaint was passed to me and I issued a provisional decision ("PD"), setting out my thoughts. I agreed with our Investigators that the complaint ought not to be upheld, but I did so for more detailed reasons. So I invited both parties to consider what I said and respond with any further evidence or arguments they wanted me to consider. An extract of that PR reads as follows:

> *"**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 ss.75 and 140A-140C).*
> - *The law on misrepresentation.*
> - *The Timeshare Regulations.*
> - *The Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR").*
> - *The Consumer Protection from Unfair Trading Regulations 2008 ("CPUTR").*
> - *Case law on Section 140A of the CCA – including, in particular:*
>
> - *The Supreme Court's judgment in Plevin v. Paragon Personal Finance Ltd [2014] UKSC 61 ("Plevin") (which remains the leading case in this area).*
> - *Scotland v. British Credit Trust [2014] EWCA Civ 790 ("Scotland and Reast")*
> - *Patel v. Patel [2009] EWHC 3264 (QB) ("Patel").*
> - *The Supreme Court's judgment in Smith v. Royal Bank of Scotland Plc [2023] UKSC 34 ("Smith").*

- *Carney v. NM Rothschild & Sons Ltd [2018] EWHC 958 ("Carney").*
- *Kerrigan v. Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ("Kerrigan").*
- *Shawbrook & BPF v. FOS.*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider having 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").

My provisional findings

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

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

This is especially so in the circumstances of this particular complaint due to the way in which it has been brought. As noted above, PR1 sent FHF a Letter of Complaint and a Position Statement, both of which were generic in nature and did not contain specific facts or allegations about Mr and Mrs D's complaint. For example, page 18 of the Position Statement deals with the Limitation Act 1980 and its effect on any claim that could have been made. However, PR1 first wrote to FHF within six years of the Time of Sale, so this was not relevant. Similarly, PR1's response to the first investigator's view does not deal with facts specific to Mr and Mrs D's actual complaint and is, in my view, a wholly generic response. So, I have focused on what Mr and Mrs D said happened in their evidence provided by PR1 at the outset of their complaint, the more recent statement from Mrs D and PR2's submissions that are focused on the factual background to this complaint. If Mrs D and/or PR2 disagree with this approach, they can let me know in response to this provisional decision.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

The evidence of the parties

Mr and Mrs D provided a witness statement signed on 7 November 2017 ("the 2017 Statement") that appears to have been drafted by PR1. Within it, Mr and Mrs D explained that they had participated in a 'similar fact evidence investigation' with PR1, stating that their concerns were similar to those PR1 had seen from other of its clients. With respect to their memories of sale, they said this:

> *"The Representations*
>
> *14. On the 30th of June 2013, we were invited by [the Supplier] to and did attend a sales presentation with [the Supplier]. During that presentation the seller verbally explained to us, the benefits which would flow from the timeshare, should we elect to buy it. The sale presentations took many hours and the seller elected to and did deliver many verbal representations. Some of the representations we recall, as we did believe they were truthful. When delivered to us we rely upon them and when*

made a transitional decision to buy the product. These core representations are detailed in the questionnaire we completed and are contained in Appendix 2.[2]

15. When the product was sold the seller did not refer to any contractual documents or any other document which contained any terms and conditions. We were not invited to read, peruse or consider the contract and when it was presented we could not and were not invited to personalize any documents in any way.

16. When the documents were presented they were presented in an order that the seller wanted, the documents were controlled by the seller and that signing was rushed and after a long and arduous sale event.

17. I confirm we were handed the sales documents and the finance contract but, were not given the club constitution, the rules of the club, the trust contract, the management agreement, or any other pertinent document which would assist us in fully understanding, the contractual matrix of the associated companies and contractual matrices."

The statement went on to deal with the holidays taken, what Mr and Mrs D were not told by the Supplier, a paragraph stating that representations made were false and therefore misrepresentations and a section titled "Familiar of the Respondent and the Merchant to provide Documents and Information" which dealt with information Mr and Mrs D say was missing at the Time of Sale. None of this statement contained any detail of Mr and Mrs D's actual sale and, in my view, appears to me to be the submissions of PR1, rather than the evidence of Mr and Mrs D.

Attached to the 2017 Statement at Appendix 2 was the Example Misrepresentations Document. That document does provide actual evidence from Mr and Mrs D. It ran to eleven pages and had a paragraph at the top that read:

"Enough stress cannot be placed at expressing the truth at all times. By being truthful, [PR1] can match what you were told to others who were told the same thing. With your own knowledge you may have very specific and particular representations that other may also recall, so it's important to take your time and recall as many statements the salesman made when you acquired the timeshare."

The following three pages contained a list of potential representations that could have been made for PR1's clients to 'tick' if such representations had been made. For example, the first section was titled "Before the Presentation – I was induced to attend because: (please tick all that apply)" and then gave seven possible reasons – Mr and Mrs D ticked the boxes that said "Free food/meals", "Free or discounted holiday" and "The presentation "would only last for a short time"". At times, this document asked Mr and Mrs D to answer yes/no questions, such as "Did you repeatedly tell them you were not interested in the timeshare – YES/NO" – here they circled the "yes" answer. Further, some of the document left spaces for them to enter information, for example the time at which the sales presentation started and ended.

Pages four and five of the Example Misrepresentation Document contained spaces for Mr and Mrs D to write in their own words details of the sale. It was titled "The Resort Promises" and gave five boxes that could be filled in, each giving space for Mr and Mrs D to explain what the Supplier told them at the Time of Sale, why the statement was false and why it was of material significance to them. Mr and Mrs D filled in two of the five boxes. Their first issue was that they say the Supplier told them that they were taking a free week of holiday and the Supplier insisted they attend the sales presentation, otherwise they would have to leave their holiday accommodation. Their second issue was that the Supplier spent several hours

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[2] This was a document attached to the witness statement titled "EXAMPLE MISREPRESENTATIONS CONSUMERS ARE SUBJECTED TO BUY TIMESHARE SELLERS (POINTS TO CONSIDER AND USE THAT HAVE BEEN USED IN PREVIOUS MISREPRESENTATION CASES)" (sic) ("the Example Misrepresentations Document").

convincing them they did not have sufficient existing points to take any holidays and they felt bullied into buying more points.

The remainder of the Example Misrepresentation Document contained questions specific to the Supplier (over other timeshare providers). Here, Mr and Mrs D wrote to say that they realised there was a misrepresentation in January 2017 and that they had been misled about the Supplier selling the timeshare for them. They said that at the 'first presentation', they were told they would be able to sell on the timeshare if they could no longer afford it. But when they asked about this later, the Supplier said it was not their policy to resell timeshares. Finally, Mr and Mrs D were asked to write down, in their own words, what happened at the sales presentation. They said:

> *"As given discounted holiday and told on arrival that we had to attend presentation next morning for breakfast and need only take an hour or two it lasted all day. We were told it was mandatory to attend as part of discounted holiday."*

Having considered the 2017 Statement, it is my view that I cannot place any evidential weight on the body of its contents. It appears to me that this statement is wholly generic and, on balance, likely templated. It contains no evidence from Mr and Mrs D of what actually happened to them at the Time of Sale. This is clear when compared to a second statement Mrs D went on to provide, dated 4 January 2024, via PR2 ("the 2024 Statement"). An excerpt of that statement, dealing with what happened at the Time of Sale, reads as follows:

> *"17. We took another holiday in late June of the same year by using the bonus points we were given. Upon arrival we were asked to attend the sales room again, however, I do not recall the name of the representative…."*

The language in the 2024 Statement is completely different, written in a conversational tone and giving details of Mrs D's actual memories of the sale.

It is my view that Mr and Mrs D's actual evidence is contained in the Example Misrepresentation Document and not in the 2017 Statement. So, I place no weight on the contents of the 2017 Statement, rather I have taken what was in the Example Misrepresentation Document as their evidence given at that time.

I also have the 2024 Statement from Mrs D. This statement contains a description of both sales between Mr and Mrs D and the Supplier that took place in 2013, as well as a description of some problems Mrs D said there were with the memberships.

FHF has provided two written responses from the Supplier, disputing the complaints made by Mr and Mrs D, as well as the documents from the Time of Sale and information about the holidays taken.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

The CCA introduced a regime of connected lender liability under s.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 FHF under s.75 CCA essentially mirrors the claim Mr and Mrs D could make against the Supplier.

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

From my reading of the two statements and PR2's response, I think there is an allegation that the Supplier made the following misrepresentations:

1. *It told Mr and Mrs D that they did not have sufficient existing points that meant they had to upgrade their membership to be able to take holidays.*

2. *It told Mr and Mrs D that they could sell their Fractional Club membership at any time and that it would help arrange the sale.*[3]

Having considered everything, I am not persuaded that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons alleged.

With respect to the first alleged representation, the Supplier has said its records show that Mr and Mrs D increased the number of points they held so they could take more holidays every year. But just because the Supplier's records do not record the alleged misrepresentations, it does not mean they were not made to them. I say that because, had the Supplier's salesperson misled Mr and Mrs D to induce them into purchasing Fractional Club membership, I would be surprised if they went on to record that a misleading statement was made in the sales notes.

Mrs D gives more detail about what happened in her 2024 Statement:

> *"18. It was explained that we had not bought enough points when we made our 1st purchase in May therefore, needed to as a matter of urgency upgrade our property portfolio so that we could get the holidays we expected.*
>
> *19. We explained that we did not want any more, however, they explained that if we did not buy anymore, we would have to leave the resort today as we did not have enough to stay at the resort.*
>
> *20. We were very angry, but the representative was insistent, explaining someone made a big mistake as we did not have the necessary quota of points and if we did not meet the minimum threshold, we would lose all the money we had currently invested. He explained he was trying to be helpful. He explained the minimum requirement was 2,650 points and we simply did not have the qualifying minimum.*
>
> *21. To put the matter right we needed a further 1,600 points…"*

However, I do not think Mrs D's memories of what happened could have been right. I say that because, at the Time of Sale, Mr and Mrs D traded in their existing membership, increasing their total number of fractional points from 1,050 to 1,600. So, had they been told they needed 2,650 points to take holidays, I do not understand why they only ended up with 1,600. Although I do not doubt Mrs D's evidence as her honest recollections, it seems to me that they are mistaken.

I have also looked at what was said in the Example Misrepresentation Document that, having been completed in August 2017, was done so earlier and at a time much closer to the Time of Sale. Here, Mr and Mrs D hand wrote two matters they say they were told at the Time of Sale:

> *"This was a free week as an enticement from first presentation. They insisted we attended a second presentation otherwise we would have to vacate the apartment and complex."*

And

> *"They spent several hours after taking us away from resort we were staying in by car convincing us we did not have sufficient points to have any holidays"*

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[3] If Mrs D or PR2 think I have misunderstood or missed any alleged misrepresentations, they can let me know in response to this provisional decision.

It seems to me that these two statements have been conflated in Mrs D's later, 2024 Statement as Mrs D said they had to buy more points to remain at the resort, whereas in the earlier statement they said they had to attend a presentation to stay at the resort and had to buy more points to take further holidays. Given that, I will consider each of these two alleged misrepresentations separately.

My understanding on how the Supplier's business model worked is that it invited either existing or prospective customers on promotional holidays, a condition of which was that they had to attend a sales promotion. If somebody refused to attend the sales presentation the Supplier would require them to pay for the holiday, however if they attended and did not purchase anything, they would not be charged. So, I would not find it surprising that Mr and Mrs D would have been told they would have been charged for their holiday if they did not attend the presentation at the time, nor would such a statement be untrue. I cannot say whether Mr and Mrs D were told they would have to leave their holiday apartment if they did not attend the presentation, however if such a statement was made, it would only have encouraged them to attend the presentation. And I cannot see that any such statement caused them to enter into the Purchase or Credit Agreement at the subsequent presentation, so I cannot see how it could amount to a misrepresentation that FHF would be liable to answer.

Mr and Mrs D say that they were told that they did not have sufficient points to take any holidays and therefore had to upgrade. From what I know about how the Supplier's business worked, at the Time of Sale, I think it was possible for Mr and Mrs D to take a holiday with the 1,050 points they already held. So, for the purposes of this decision, I will assume that if they were told they needed more points to take any holidays that would be a misrepresentation.

I have considered that Mr and Mrs D made this allegation in 2017, so only four years after the Time of Sale and at a time when their memories would have been fresher. And they have been clear that this was what they were told at the Time of Sale.

However, if Mr and Mrs D were told that their 1,050 points were not sufficient to book any holidays that would not have been true and easily verifiable, so I think it was an inherently unlikely thing to have been said at the Time of Sale. Further, the Supplier has recorded that Mr and Mrs D said that they wanted to increase their holiday entitlement so that they could take four holidays per year, although as noted above, that is not determinative of the matter.

Having looked at the holidays Mr and Mrs D took using their membership, they booked a holiday in May 2014 using 600 points. That means they would have known in May 2014 that it would have been untrue if they were told eleven months earlier that they could not book any holidays with 1,050 points.[4] However, they continued to use their membership for a further five years and I cannot see they complained that they were misled before first complaining in 2017.

Having considered everything said by both parties, on balance, I do not think it more likely than not that Mr and Mrs D were told they could not take any holidays using their existing points.

Mr and Mrs D have also said that they were told by the Supplier that they could sell their membership at any time and that the Supplier would help arrange that. It is true that Mr and Mrs D could sell their membership at any time and there were contractual provisions to enable the transfer of membership to another party. However, at the Time of Sale, Mr and Mrs D signed a one-page 'Member's Declaration' that set out fifteen key points about their membership. Point four read:

> *"We understand that [the Supplier], the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation*

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[4] I also note that this is around three years earlier than when Mr and Mrs D said they first realised, in January 2017, that they had been told something untrue.

Club Points) or act as an agent in the sale other than as a trade in against future property purchases…"

So, the Supplier explicitly said that it would not arrange any sale or transfer on Mr and Mrs D's behalf. If they were told that the Supplier would arrange any sale, I find it hard to understand why they signed this one-page document on the same day stating the opposite. On balance, I do not find it more likely than not that any such representation was made by the Supplier at the Time of Sale.

Further, as there is nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs D by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think FHF is liable to pay Mrs D any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think FHF acted unfairly or unreasonably when it dealt with the s.75 CCA claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I have already summarised how s.75 CCA works and why it gives Mrs D a right of recourse against FHF. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, FHF is also liable.

In the 2024 Statement, Mrs D has said that she was not able to take the holidays she wanted and sometimes no holidays were available. On my reading of the complaint, that suggests that she considers that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs D states that the availability of holidays was subject to demand. It also looks like they made use of their fractional points to holiday on seven occasions between 2014 and 2019. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think FHF is liable to pay Mrs D any compensation for a breach of contract by the Supplier. And with that being the case, I do not think FHF acted unfairly or unreasonably when it dealt with the s.75 CCA claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs D was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under s.75 CCA and outcome in this complaint. But PR also says that the credit relationship between Mr and Mrs D and FHF was unfair under s.140A 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.

As s.140A CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs D and FHF was unfair.

Under s.140A CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with s.56 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.

S.56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while s.56(1) CCA sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by s.12(b) CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And s.11(1)(b) CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

FHF does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs D's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by s.12(b) CCA. That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for FHF as per s.56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

Antecedent negotiations under s.56 CCA cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

> *"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v. FOS, at paragraph 135:

> *"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".*

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of s.56(2) CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

> *"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."*[5]

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

So, the Supplier is deemed to FHF's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under s.140A CCA is not limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs D and FHF 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 s.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; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

In their evidence, Mr and Mrs D raised a number of matters that could give rise to a complaint about FHF being party to an unfair credit relationship. I will explore those further.

In the Example Misrepresentation Document, Mr and Mrs D say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. They describe the atmosphere during the sale as being 'uncomfortable and overwhelming' and described feeling bullied and pressured into taking out membership. In the 2024 Statement, Mrs D explained further that she felt they had to take out the membership to avoid being evicted from the resort. I have already dealt with the substance of some of these allegations above, when dealing with the misrepresentation claim under s.75 CCA. However, Mr and Mrs D were given a fourteen-day cooling off period and they have not provided a credible explanation why they did not cancel their membership during that time. I acknowledge that they may have felt weary after a sales process that went on for a long time. But, having considered everything, I think there is insufficient evidence to demonstrate that Mr and Mrs D made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I am not persuaded, therefore, that Mr and Mrs D's credit relationship with FHF was rendered unfair to them under s.140A CCA due to the alleged pressure. But there is another reason,

perhaps the main reason, why PR2 says their credit relationship with FHF was unfair to them. And that is 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?

FHF does not dispute, and I am satisfied, that Mr and Mrs D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

> *"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."*

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr and Mrs D's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It does not prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs D, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was sold to Mr and Mrs D for the primary purpose of taking holidays. However, prospective customers such as Mr and Mrs D were only shown the contractual paperwork after any sales presentation and after they had expressed an interest in purchasing the membership. In my view, determining what they were told during the sales presentation goes further than reading the sales paperwork.

During the course of considering complaints about the sale of timeshare, the Supplier has shared with the Financial Ombudsman Service materials it used to train its sales staff. Having considered the materials that were used around the Time of Sale, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have

positioned Fractional Club membership as an investment. So, I have taken all of that into account. However, on my reading of the evidence provided, I do not think I need to make a finding on whether the Supplier breached Regulation 14(3) in this case at the Time of Sale. And that is because, even if I did think Fractional Club membership was marketed or sold as an investment, I am not currently persuaded that would mean this complaint ought to be upheld – I will explain why.

Was the credit relationship between FHF and Mr and Mrs D rendered unfair?

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"*

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs D and FHF that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.[6] In deciding that question, I have started by looking at what Mr and Mrs D said when they first complained to our service.

As noted above, much of what was presented by PR1 was not specific or tailored to Mr and Mrs D's actual sale and so it is very difficult to know what their actual concerns were about. The only evidence that was specific to them was contained in the Example Misrepresentations Document attached to their 2017 Statement. The first three pages of this document contained a number of statements that Mr and Mrs D could tick to indicate they were made by the Supplier at the Time of Sale as well as lists of other possible things that

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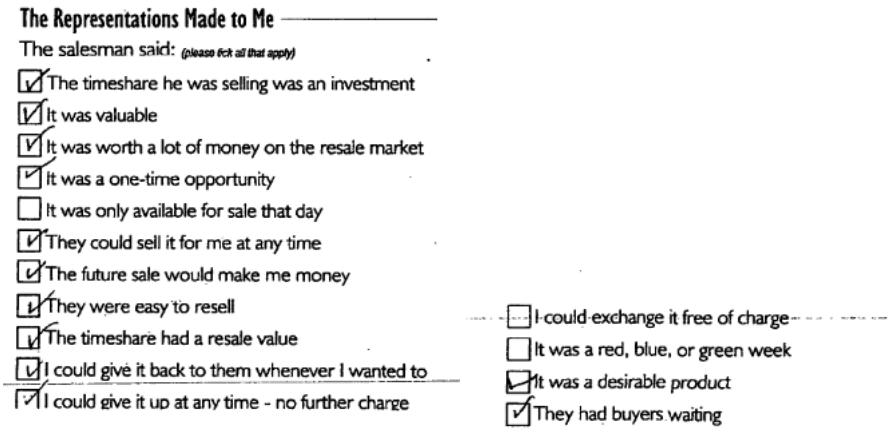
[6] In saying this, I bear in mind that any breach by the Supplier took place during its antecedent negotiations with Mr and Mrs D, so is covered by s.56 CCA and falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of s. 140(1)(c) CCA and is deemed to be something done by FHF.

were done during the sale, again that Mr and Mrs D could indicate were done. The section dealing with representations made read as follows:



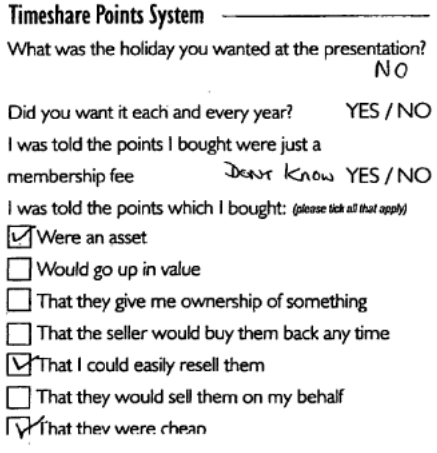
The Representations Made to Me

The salesman said: *(please tick all that apply)*

- ☑ The timeshare he was selling was an investment
- ☑ It was valuable
- ☑ It was worth a lot of money on the resale market
- ☑ It was a one-time opportunity
- ☐ It was only available for sale that day
- ☑ They could sell it for me at any time
- ☑ The future sale would make me money
- ☑ They were easy to resell
- ☑ The timeshare had a resale value
- ☑ I could give it back to them whenever I wanted to
- ☑ I could give it up at any time - no further charge
- ☐ I could exchange it free of charge
- ☐ It was a red, blue, or green week
- ☑ It was a desirable product
- ☑ They had buyers waiting

On one hand, the fact that some of the boxes were not ticked appears to show that Mr and Mrs D carefully considered them before only ticking the ones that applied to their sale. However, I have serious reservations about the way in which PR1 went about gathering this evidence. Here, rather than asking for Mr and Mrs D to provide their own recollections of the sale, several possible representations made by the Supplier have been suggested to them already. This runs the real and serious risk that this is not an accurate reflecion of their memories, as a list of prompted responses suggesting an answer for them could very well contaminate their honestly held memories of the sale.

I also note that some of the boxes are contradictory, for example, I cannot reconcile Mr and Mrs D ticking to say they were told it was a "one-time opportunity", but not to say it was "only available for sale that day" – those statements seem somewhat synonomous to me. Further, Mr and Mrs D have ticked to say they were told "They could sell it for me at any time", but as noted above, this is in direct contradiction to the contemperanous evidence available from the Time of Sale. This is further contradicted in the Example Misrepresentations Document itself, where they go on to say:



Timeshare Points System

What was the holiday you wanted at the presentation? NO

Did you want it each and every year? YES / NO

I was told the points I bought were just a membership fee Don't know YES / NO

I was told the points which I bought: *(please tick all that apply)*

- ☑ Were an asset
- ☐ Would go up in value
- ☐ That they give me ownership of something
- ☐ That the seller would buy them back any time
- ☑ That I could easily resell them
- ☐ That they would sell them on my behalf
- ☑ That they were cheap

So, on one hand Mr and Mrs D say that the Supplier told them it would sell their Fractional Club membership for them at any time, but they also say the Supplier did not say it would sell points on their behalf.

In the remainder of the Example Misrepresentations Document, Mr and Mrs D were given space to describe the sale and any problems they had in their own words. As noted above, they wrote about the pressured nature of the sale. But they did not mention, or imply, that the Supplier had positioned Fractional Club membership to them as an investment, nor that any

such positioning was an important factor in their purchasing decision. Instead, they indicated that they only bought it due to the pressure applied by the Supplier (which I have dealt with above).

Overall, given the internal inconsistencies and the suggestive nature of the tick-box evidence gathering by PR1, I place little evidential weight on the contents of this document, apart from what Mr and Mrs D wrote in their own words. I simply cannot say what is their evidence and what is something that was suggested to them, in other words, which parts of the evidence is reliable. And when they were given the opportunity to provide their own memories of the sale, they did not mention Fractional Club membership being sold to them as an investment, so I do not think this was particularly important to them when they remembered the sale in 2017.

Mrs D's evidence in the 2024 Statement is different. In my view, the main thrust of the evidence was again the pressured nature of the sale (I have set out some relevant extracts from the statement above). However, Mrs D did say:

> *"Like the first meeting they said we were making the best investment of our lives and would be grateful in the future when we received that 'big fat cheque'."*

But this goes no further than setting out that the Supplier said Fractional Club membership was an investment, something I think is possible. What Mrs D did not say was that her and Mr D decided to buy membership, in whole or in part, down to the possibility of making a future financial gain or profit. Nor is that something that I think could be implied from her evidence. I also note that this statement was made eleven years after the Time of Sale and I fail to understand why, if the investment element was important to Mr and Mrs D at the Time of Sale, more was not made of it in their earlier Example Misrepresentations Document.

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 D'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).

Finally, it was held in Plevin, at paragraph 17:

> *"…Section 140A, by comparison, 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 the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty…"*

In this case, I do not think that Mr and Mrs D's decision to purchase Fractional Club membership was caused by any breach of Regulation 14(3). So, when considering the impact any such breach had on the fairness of the credit relationship, I do not think that either the credit relationship between Mr and Mrs D and FHF was unfair to them for this reason or, in the alternative, if the relationship could have been unfair due to a breach, the unfairness warranted relief in this case.

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

PR2 has pointed to information it says ought to have been provided by the Supplier, but was not, in breach of the Timeshare Regulations.

One of the main aims of the Timeshare Regulations was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they did not fully understand at the time of contracting, that may lead to the Timeshare Regulations being breached or the sales practices falling foul of the CPUTRs, and, potentially the credit agreement being found to be unfair under s.140A CCA. In Mrs D's 2024 Statement, she said:

"35. In contravention of the Timeshare Regulations 2010 we were not provided with the following documents.

36. Full description of the building, its location upon which rests the right expressed, the registration data, the term that is subject to the contract indicating the days and hours when the holiday starts and ends, the details of the National Consumer Institute, other Competent Bodies, the contact details of the Automatous communities in tourism and consumptions and the contract details of the municipal offices of consumption the contact details of the Property registers and Notaries.

37 The timeshare sold did not clearly state what rights were to be enjoyed if bought by us. Then exclusively for the specific period each year [consecutive or alternative], the furniture inventory was not unidentified, the exact nature of the retained inventory in the "pool", the concrete properties which the timeshare right would be enjoyed, information as to the periods those right could be enjoyed, an outline of the obligatory costs imposed under the contract, the forward annual contributions, a summary of the services, a summary of the facilities, the existence or nature of the product the main characteristics of the product, the motives for the commercial practice, the nature of the sales process, the price or the manner in which the price is calculated, our rights or the risks we may face, the availability of the product, the real benefits and liabilities of the product, the risks associated with the product, the composition of the product inventory, any assured delivery of the product, the fitness for purpose of the product [in respect to providing long-term holiday products], how to fully use and access the product benefits and or the legal validity of all the agreements and the peripheral/parallel agreements."

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

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of Regulation 12 of the Timeshare Regulations are likely to have prejudiced Mr and Mrs D's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of s.140A CCA. And I say this because I cannot see how the information that PR2 has said was missing was material in any way to their decision to purchase. For example, I cannot see how Mr and Mrs D would have acted differently had the Supplier fully identified the furniture inventory at their Allocated Property. In my view, the breaches identified in the passage above were, if found, wholly technical in nature and were immaterial to Mr and Mrs D's decision to take out Fractional Club membership.

Moreover, as I have not seen anything else to suggest that there are any other reasons why the credit relationship between Mr and Mrs D and FHF was unfair to them because of an information failing by the Supplier, I am not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not think the credit relationship between Mr and Mrs D and FHF was unfair to them for the purposes of s.140A. And taking everything into account, I think it is fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that FHF acted unfairly or unreasonably when it dealt with Mr and Mrs D's s.75 CCA claims, and I am not persuaded that FHF was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of s.140A CCA. And having taken

everything into account, I see no other reason why it would be fair or reasonable to direct FHF to pay compensation.

FHF did not respond to my PD.

PR2, on Mrs D's behalf, did respond. It disagreed with my PD and provided substantial submissions explaining why. In summary (and amongst other things), it argued:

- I have an inquisitorial role and am required to take into account all matters that are relevant in deciding whether there is an unfair relationship between Mrs D and FHF.
- Here, FHF has not provided evidence to rebut the evidence provided by Mr and Mrs D that it is required to do so given the burden it has to show there was no unfair relationship under s.140A CCA.
- With respect to Mrs D's evidence, PR2 said:

> *"[Mrs D's evidence is] the only evidence that has been provided is by the complainant, which has been consistent in recalling that the timeshare was marketed as an investment. She has provided a detailed statement. She completed an evidence questionnaire. Regarding the questionnaire the Ombudsman has erred when focussing on questions not marked "yes" and disregarded questions marked "yes" and ignores the structure of the questionnaire. The Ombudsman should have observed that that under the heading 'The Representations Made to me' the complainant was asked questions 'The salesman said and our clients confirmed the merchant was 'selling an investment', 'it was valuable', 'worth a lot of money on the resale market', was 'a one-time opportunity', was a desirable product and 'they had buyers waiting'. This evidence was then supplemented by a witness statement verified by a statement of truth."*

- I placed too much weight on what was ticked in the Example Misrepresentations Document under the heading 'Timeshare Points System' as the points did not go up in value, rather Mr and Mrs D were clear that it was the underlying Allocated Property that was an investment.
- I found that it was possible that Fractional Club membership was sold as an investment, but PR2 argues that it was in fact provable given the sales and marketing techniques the Supplier used at the Time of Sale.
- There is no evidential basis to conclude that there was an alternate reason for Mr and Mrs D to purchase Fractional Club membership, for example that they purchased it for the holidays they could take or for a shorter membership term. Mr and Mrs D already had a similar, fractional membership before the Time of Sale, so they did not take it out to get a shorter membership term and already had holiday rights with that earlier membership. PR also noted that the membership was traded in within a month of the earlier one being taken out, so Mr and Mrs D did not have the chance to use it for holidays or form a view as to the suitability of it for that purpose.
- PR2 argues that the change of Allocated Property was likely to be because the new one was marketed as a more valuable one, pointing to it being part of the investment pitch.
- The contractual terms also point to Fractional Club membership being marketed as an investment as Mr and Mrs D were told to take 'investment advice' and clause 11 of the terms was consistent with it being positioned as an investment.
- PR2 said that my PD did not follow the guidance contained in the judgment in *Shawbrook & BPF v. FOS*.

In addition to comments made about my PD, PR2 also raised two new points of complaint that could be further reasons for there being an unfair credit relationship:

- The loan was brokered by a business that was not authorised by a UK authority to broker consumer credit loans. That was in breach of s.19 of the Financial Services and Markets Act 2000 ("FSMA"). That rendered the loan unenforceable, and Mrs D is entitled to recover what was paid to FHF under the loan.
- There was a secret commission paid by FHF to the business that brokered the loan. In the circumstances of this complaint, any such payment would be treated as a bribe and therefore Mrs D was entitled to rescind the credit agreement.

What I have 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 reconsidered everything, I have decided not to change the conclusions I reached in my PD and I do not uphold Mrs D's complaint. Before I explain my reasons for coming to that conclusion, I repeat the comments made in my PD 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, although I have read everything provided to me by PR2 in response to my PD, if I have not commented on, or referred to, something said, that does not mean I have not considered it.

I will start by considering the two additional points of complaint raised by PR2 in response to my PD. Neither of these have been previously put to FHF and ordinarily I would expect it to be given the opportunity to respond before I issue my decision on these issues. However, I do not think either of them have merit and so I do not consider FHF is caused any prejudice if I decide them without asking for its submissions.

Was the Credit Agreement properly arranged?

PR2 has argued that the Credit Agreement was arranged by an unauthorised broker, rendering the loan unenforceable. But I have not made findings on those points because even if I found that the loan was improperly arranged and was unenforceable, I do not think that means Mrs D is entitled to a refund as alleged by PR2, nor do I think it would be fair to direct FHF to pay anything for any other reason.[7]

Mr and Mrs D entered into the Credit Agreement in June 2013, so it fell under the regulatory regime of the Office of Fair Trading ("OFT") and not the Financial Conduct Authority ("FCA"), which took over the regulation of consumer credit in April 2014. This meant that the legislation relevant to how the Credit Agreement was entered into was set out in the CCA and not FSMA. The corollary to this was that, even if the Credit Agreement was unenforceable under the OFT's regulatory regime, there was no automatic entitlement to a refund of what was paid under an unenforceable agreement.[8]

Further, given the circumstances of this complaint, I cannot see how, if the Credit Agreement was unenforceable as alleged by PR2, that could have led to an unfairness in the credit relationship that warranted a remedy under s.140A CCA. As noted in my PD, it was made clear in the *Plevin* judgment that a regulatory breach does not automatically create an unfairness in a credit relationship. Instead, it is the impact of such breaches (or other relevant matters) on the relationship that is important and that must be considered in the

[7] As an aside, I note that the original lender was based outside of the UK and the loan was brokered outside of the UK too, so it is arguable that no authorisation was required in these circumstances. Further, I also note that the business named as the 'Credit Intermediary' on the face of the Credit Agreement did hold an OFT license at the Time of Sale.
[8] See https://www.fca.org.uk/firms/validation-orders

round.

Here, if the Credit Agreement was unenforceable as alleged, all that meant was that FHF could not have pursued Mr and Mrs D for payment without taking other legal steps first. But Mr and Mrs D paid off the loan in 2021 and I cannot see that FHF ever tried to enforce the Credit Agreement whilst it was running. Further, they entered into the Credit Agreement in full knowledge (amongst other things) of the amount borrowed, how much they needed to repay each month and for how long. So I cannot see that the Credit Agreement operated in a way that they were not expecting or that was unfair to them. And as I cannot see a reason to conclude that the credit relationship between Mr and Mrs D and FHF was unfair because of an act and/or omission of the Supplier during the sale of Fractional Club membership, I cannot see how a credit agreement that might have been unenforceable because of a technical regulatory breach at the Time of Sale could suddenly tip the balance and render the credit relationship unfair, justifying a remedy.

Was there a commission paid by FHF to the Supplier?

Our Service has investigated a number of complaints made about timeshare sales made by the Supplier and funded by FHF. During those investigations FHF has informed our Service that it never paid any commission to the Supplier for brokering credit on its behalf. Given that the Supplier and FHF were linked and were part of the same group of companies, I do not find that surprising. So I do not think that FHF paid the Supplier any commission arising out of Mr and Mrs D's purchase of Fractional Club membership.

PR2's responses to the substance of my PD

I have carefully considered all of PR2's submissions. Before I deal with the submissions about Mr and Mrs D's evidence and the circumstances of their case, there are some general observations I think it would be helpful to set out in some detail.

The Financial Ombudsman Service is inquisitorial in nature and complaints are dealt with by way of investigation and not by way of adversarial hearings. Further, I make my findings on the balance of probabilities, in other words, having considered all of the evidence, I make a finding based on what I find more likely than not to have happened. This means that, unlike in a court, neither Mrs D nor FHF has to 'prove' anything or discharge a burden of proof. Rather, I have considered all of the evidence available to decide what I think most likely happened. So, in this complaint, I have considered everything when weighing up Mrs D's evidence and I have not accepted it in totality just because FHF has not provided any evidence in rebuttal. For example, PR2 has argued that FHF has not provided any evidence or information about or from the sales representatives involved in Mr and Mrs D's sale in rebuttal of what Mrs D said happened. However, even if FHF could provide evidence from the sales representative involved in this sale, I doubt what evidential value it would have, given the sale took place twelve years ago and I would not expect the representative to be able to provide any meaningful evidence of what happened (if they could even remember this individual sale). So just because no such evidence has been provided, it does not mean I must accept, unquestioned, Mrs D's evidence of the sale. There may be circumstances where I might uphold a complaint if one party fails to make submissions or provide evidence when the other party has, however that is not a conclusion I would reach by default. I would still need to be satisfied on the balance of probabilities that I could make the findings necessary based on the evidence and arguments provided.

PR2 has argued I erred in my interpretation of the Example Misrepresentations Document, by focusing on items not marked 'yes', disregarding one marked 'yes' and ignoring the structure of the evidence. However, none of PR2's submissions overcome what is to me the main problem with the evidence provided – Mr and Mrs D were provided with a tick-box

selection of pre-prepared answers and statements, in other words they were already presented with answers and asked to confirm if they were right. That is, in my view, a leading way of gathering evidence and runs the real risk of contaminating the evidence provided.[9] This would not have been the case if Mr and Mrs D had simply been asked to set out their recollections of the sale, but that was not done. And when Mr and Mrs D were asked by PR1 to put into their own words their memories of the sale, they did not mention Fractional Club membership being sold to them as an investment. So the unreliability I find in the Example Misrepresentations Document is in the manner of the information gathering exercise and is not confined to which boxes were actually ticked.

I do of course note that Mrs D provided a later statement via PR2 and I do not have the same concerns with the way in which PR2 drafted that statement. However, I am also conscious that memories do change and evolve over time, especially when someone is being asked to recall what happened during the process of litigation or bringing a complaint to our Service, where they will have a stake in a particular version of events.[10] So here, given the problems I have identified in the leading questions asked in the Example Misrepresentations Document, the widespread reporting of the outcome in *Shawbrook & BPF v. FOS* and there being no credible explanation of the omissions in the written memories of Mr and Mrs D in the Example Misrepresentations Document, I find I can place little weight on the contents of the 2024 Statement.

PR2 has noted that in my PD I said it was possible that Fractional Club membership has been marketed or sold to Mr and Mrs D as an investment, but it argues that it was in fact a finding that I ought to have reached. In saying this, PR2 relied on Mr and Mrs D's evidence, the sales and marketing techniques the Supplier used at the Time of Sale and parts of the documentation provided at the Time of Sale. I have considered everything and, as I said in my PD, it is possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations when selling Fractional Club membership to Mr and Mrs D. However I still do not need to make a finding on that as, for the reasons I explained in my PD, had the Supplier breached Regulation 14(3) during the sale, I do not think it led to an unfairness in the credit relationship that requires a remedy. That is because I do not think Mr and Mrs D'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).

PR2 has said that there is no basis for me to make a finding that Mr and Mrs D took out membership for any other reason than the investment element and, therefore, in the absence of any other possible explanation, I must conclude that they bought it due to the breach of Regulation 14(3). Having considered everything, I disagree with this approach to assessing the evidence. The question I must consider is to what extent Mr and Mrs D chose to take out Fractional Membership due to any (assumed) breach of Regulation 14(3). In some instances part of that assessment includes considering whether there are other reasons that a consumer could have chosen to take out a membership, so, for example, if a consumer acquired no additional holiday entitlement or shorter membership term, it might be more probable that they purchased a membership due to an investment element.

Here, PR2 correctly point out that Mr and Mrs D already held a fractional membership with the Supplier, so they could not have purchased their Fractional Club membership for a shorter membership term compared to the membership they already held. However, Mr and Mrs D increased their points holding from 1,050 fractional points to 1,800 at the Time of Sale, a 71% increase, and were provided a voucher for an additional holiday. And they paid £14,749 for their earlier points (£14.05 per point) earlier that year, but £7,291 for the additional points (£9.72 per point). So I think it is just as arguable (if not more so) that Mr and

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[9] See *Susan Saunderson & Others v. Sonae Industria (UK) Ltd* [2015] EWCA 2264 (QB), at para. 456
[10] See *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB), at para. 40

Mrs D took out Fractional Club membership due to the increased holiday rights it offered, and at a lower rate than they paid before. However I make no finding on that point because I do not need to find an alternative basis for their purchasing decision.

Instead, it is my conclusion that the evidence I have set out above leads me to the conclusion that Mr and Mrs D were not motivated by the investment element that Fractional Club membership offered when deciding to take it out. It is the lack of evidence for me to make that finding that is, in my mind, crucial to the decision I reach in this case. It follows that I am still of the view that they would have purchased membership irrespective of whether there was a breach of Regulation 14(3) and, therefore, I do not think there was an unfairness in the credit relationship that requires a remedy.

Other matters

PR2 has said that it thought that the change of Allocated Property was likely to be because the new one was marketed as a more valuable one, pointing to it being part of the investment pitch. But that is not reflected in any of the evidence I have seen from Mr and Mrs D, so although it is a possible explanation of why someone might upgrade or change their membership, there is no basis for me to make that finding in this case.

PR2 has also said that I did not follow the guidance set out in the judgment in *Shawbrook & BPF v. FOS*, directing me to an extract from paragraph 185 of the judgment. I think it is helpful to set out the paragraph in full:

> *"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness –in particular to whether they had regard to all relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial* ***and the constituent conduct causative of the legal relations entered into: timeshare and loan****. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair. It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations* ***leading up to the contractual commitments****. Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."* (emphasis my own)

I accept that the prohibition set out in Regulation 14(3) was, as the judge held, a central consumer protection safeguard for consumer buying timeshares. However, the above paragraph also points to the findings made in the two reviewed decisions that there was a link between the breach and those consumers taking out timeshare memberships. In this complaint, I do not find that any breach was causative of Mr and Mrs D taking out Fractional Club membership and, as set out in my PD, a breach is not, in and of itself, sufficient to give rise to an unfairness that warrants a remedy. Further, each complaint turns on its own facts, so just because the decision that was subject to judicial review was upheld, it does not follow I ought to uphold Mrs D's complaint.

My final decision

I do not uphold Mrs D's complaint against First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 17 June 2025.

Mark Hutchings
Ombudsman