DRN-5542162

The complaint

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

What happened

I issued a provisional decision on this case on 24 February 2025, in which I set out in some detail the background to, and my provisional findings on, the complaint. A copy of the provisional decision is appended to, and forms a part of, this final decision. For that reason, it's not necessary for me to go over all the details again. However, to summarise the relevant background very briefly:

- Mr M and Mrs G had purchased several timeshare products from a timeshare provider (the "Supplier") over a number of years. Every purchase either replaced a previous product from the Supplier or added more "points" to a type of membership already held.

- The Lender had financed two of these purchases – one in November 2012 and another in April 2013. It was these purchases which were the subject of this complaint, and both purchases had been of an asset-backed type of timeshare called "Fractional Club" membership. With this type of timeshare, the purchaser was entitled to receive a share in the net sale proceeds of a specific property named on the purchase agreement, after their membership was due to end.

- Mr M and Mrs G complained to the Supplier in 2013 and 2014 about what they considered to have been broken promises relating to annual management fees. A settlement was reached between the parties in relation to that complaint, though Mr M and Mrs G remained unhappy.

- Mr M and Mrs G had later complained to the Lender, in April 2022, first of all using a professional representative and later representing themselves. Among the things they complained about were the Lender having been a party to an unfair credit relationship with them under Section 140A of the CCA. One of the things they said had caused the credit relationship to be unfair, was the fact the Supplier had marketed and sold the Fractional Club product to them as an investment, in breach of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("Timeshare Regulations"). The Lender did not uphold the complaint.

In my provisional decision I said I was minded to uphold the complaint. Again, the full reasons for this can be found in the appended provisional decision. But to summarise:

- There had been some confusion over what purchases Mr M and Mrs G were complaining about, but it had become apparent they were complaining about both the November 2012 and April 2013 purchases.

- I considered that the Financial Ombudsman Service did not have the power to consider a free-standing complaint about the November 2012 purchase, due to the territorial limits of our jurisdiction. However, I noted that the November 2012 purchase (and associated loan, which had been consolidated into the loan used to fund the April 2013 purchase) were what the CCA calls "related agreements", which meant I could still consider the November 2012 purchase to the extent that it had led to the credit relationship entered into in April 2013 being rendered unfair.

- I noted that to market or sell a timeshare as an investment was prohibited under the Timeshare Regulations, and that to sell a timeshare in this way, financed by a credit agreement, could potentially render the credit relationship between the debtor and the lender, unfair. An investment was *"a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".*

- On balance, I considered the Supplier *had* marketed or sold the Fractional Club membership to Mr M and Mrs G during the November 2012 and April 2013 purchases, as an investment, in breach of the Timeshare Regulations. I arrived at these conclusions, broadly speaking, because:

    - My analysis of the Supplier's training material for representatives selling the Fractional Club membership at this time, suggested representatives were likely to have positioned Fractional Club membership to prospective purchasers such as Mr M and Mrs G, as an investment.

    - Mr M and Mrs G had recalled being told by the Supplier's representative in November 2012 that they would get back *at least* the original value of the fractions they'd purchased at the end of the membership (meaning they could hope for or expect a profit).

    - While Mr M and Mrs G acknowledged the April 2013 purchase had occurred because they'd not acquired enough points in November 2012 for their holiday needs, there had been a negotiation with the Supplier over purchasing 2012 fractional inventory to ensure their investment did not mature any later.

- I thought the Supplier's breaches of the Timeshare Regulations had caused the April 2013 credit relationship to be rendered unfair to Mr M and Mrs G because they had had a material impact on their decisions to go ahead with both the November 2012 and the April 2013 purchases.

I considered fair compensation would involve unwinding, as far as possible and practical, the two purchases in question, bearing in mind that any unfairness in the credit relationship beginning in April 2013 caused by breaches relating to the November 2012 purchase, was limited to the amount of credit which was consolidated from the November 2012 loan into the April 2013 loan. Matters which complicated the situation included the fact that Mr M and Mrs G had gone on to make another purchase after April 2013 (not financed by the Lender) and had, of course, already had a different kind of membership with the Supplier – called "Destinations Azure" – which they would still have had, if they'd not made the November 2012 and April 2013 purchases.

I won't reproduce all of my provisional compensation directions here as they are set out in full in the appended provisional decision. But my directions broadly involved the Lender refunding all repayments made towards the April 2013 loan (including any part of the November 2012 loan that had been consolidated), the £500 advance payment for the April 2013 purchase, and the difference between the management fees that *would* have been

paid for the Destinations Azure membership and what was actually paid for the Fractional Club membership. I noted that holidays taken by Mr M and Mrs G using the membership needed to be offset against any redress, but only to the extent that these holidays exceeded what they'd already have been entitled to under their Destinations Azure membership.

I asked the parties to the complaint to let me have any further submissions they wanted me to consider. There has since been substantial correspondence with both parties to the complaint. I'll summarise the general points made below:

Mr M and Mrs G

Mr M and Mrs G broadly welcomed the provisional decision, however there was some initial confusion, which has now been resolved, about whether or not I had considered the November 2012 purchase and the jurisdiction of the Financial Ombudsman Service to consider a complaint about that purchase.

Mr M and Mrs G also didn't consider that my provisional compensation directions went quite far enough. They considered that:

- The £500 advance payment associated with the November 2012 purchase should also be included.

- While they accepted in principle that they should pay towards the holidays they had taken, they considered that the ongoing management fees they'd paid had been used to subsidise cheap or free holidays for prospective clients of the Supplier, and this should be reflected in the compensation. They suggested they should receive compensation to the value of the last year of management fees they paid.

- They reasoned that, had they never bought Fractional Club membership, they'd have made a claim in relation to mis-selling of the Destinations Azure membership, which they considered was an illegal contract under UK law due to its long term and due to it being a floating week contract. So they'd have got out of that contract and recovered the money they'd paid. In light of this, they thought they should receive a full refund of all management fees paid to the Supplier from 2015 onwards.

Later, Mr M and Mrs G added:

- They objected to the principle of management fee refunds not being given for any specific year where they'd taken holidays. They had used internet research to value the holidays they'd taken each year and believed these to be worth significantly less than the management fees they'd paid.

- In any case, they had taken no holidays in 2020 due to the pandemic, and had paid management fees that year, which ought to be refunded in full.

The Lender

The Lender said it would accept the provisional decision. It also made the following points:

- It considered that to calculate the actual market value of the holidays was onerous and disproportionate in the circumstances. It considered it reasonable not to pay a refund of management fees for years in which a holiday, or holidays, had been taken.

- It considered that Mr M and Mrs G had consistently taken holidays using their Fractional Club membership which exceeded what would have been available to

them under their Destinations Azure membership. That membership had entitled them to one week of holiday, once a year, at any time of year, in a one-bedroom apartment. With their Fractional Club membership, Mr M and Mrs G had regularly stayed in much larger accommodation and taken multiple weeks a year.

- It noted that Mr M and Mrs G had also made use of a "World of Hotels" benefit which had involved using their points to obtain discounts on the cash price of hotel stays in 2015 and 2019.

The case has now been returned to me to decide.

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.

Both parties appear to have accepted in principle the majority of the findings and compensation proposals I made in my provisional decision, so it's not necessary for me to go over these again here where they are not in dispute. I will say only that my conclusions regarding the sale of the Fractional Club memberships financed by the Lender in November 2012 and April 2013 remain the same, and for the same reasons as explained in the appended provisional decision.

The remaining points of disagreement have focused on what fair compensation should look like in the circumstances. I am grateful to the parties for their submissions on this aspect of the complaint following my provisional decision. I can see that Mr M and Mrs G in particular have gone to some effort to try to value the holidays they took between 2013 and 2019.

It's also apparent that Mr M and Mrs G remain very unhappy about the Supplier and the Lender's business practices. I note that some of the points they've made are rather speculative – and difficult for me to incorporate into any assessment of fair compensation for the Lender having been a party to an unfair credit relationship with them (which is the basis of their complaint having been upheld).

For example, I don't have evidence to show that Mr M and Mrs G's management fees were used improperly by the Supplier. Nor could I reasonably conclude that, had Mr M and Mrs G never purchased Fractional Club membership, that they'd have a) made a mis-selling claim in relation to the Destinations Azure membership and b) that such a claim would have been successful. It's not my understanding that their previous membership would have been classified as illegal in the United Kingdom in any event.

Regarding the value of the holidays – I think Mr M and Mrs G's efforts to quantify these go to show just how difficult it is in practice to establish the market value at a specific point in time, of accommodation which was booked many years ago and may not have been available to the broader public. The market value can depend on when a booking was made, where it was taken, the size of the accommodation, how recently the property had been refurbished and myriad other factors. I think, ultimately, it is unrealistic in this case where bookings stretch back many years into the past (and bearing in mind the informal nature of the Financial Ombudsman Service), to put a value on the accommodation bookings that could be considered accurate enough, or precise enough, to be a reasonable basis to calculate fair compensation. I don't think it is realistically knowable whether the value of the bookings made between 2013 and 2019 was more or less than the relevant management fees.

In the circumstances, I think the fairest way to account for the holidays Mr M and Mrs G have taken using their membership is as I explained in my provisional decision for circumstances

where it wasn't practical or possible to determine the market value of the holidays. That's to say, that where one or more holidays were taken in a year which exceeded what Mr M and Mrs G would have been entitled to take under the Destinations Azure membership, the management fees for that year should not be included in the compensation to be paid.

I think it's also worth reiterating that any management fee refunds included in the compensation amount need to reflect the management fees associated with the Fractional Club membership purchases financed by the Lender, on a proportionate basis. So the refunds would not include management fees that would always have been payable under the Destinations Azure membership, nor any Fractional Club points Mr M and Mrs G bought over and above the amounts financed by the Lender.[1]

Finally, while I understand why Mr M and Mrs G think the £500 advance payment they made towards the November 2012 purchase ought to be included as part of the compensation payable, I don't think it's fair and reasonable to include this. The compensation is for the unfairness in their credit relationship with the Lender which started in April 2013. While I think this could be stretched to include any debt from the November 2012 purchase which was brought forward into the April 2013 loan, I don't think it would be reasonable in the circumstances to include amounts which were not paid by credit and therefore did not get consolidated into the unfair credit relationship.

Fair compensation

Bearing in mind what I've said above, and my findings in the appended provisional decision, these are the directions I am making to the Lender. As per the provisional decision, any references to the Credit Agreement refer to the April 2013 loan unless otherwise stated:

1. The Lender should refund Mr M and Mrs G's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

2. In addition to (1), the Lender should also refund the £500 advance payment made in relation to the April 2013 agreement but not the November 2012 agreement. The Lender should also refund the difference between Mr M and Mrs G's Fractional Club annual maintenance fees, and what their annual maintenance fees would have been had they not purchased Fractional Club membership.

   The reference to the Fractional Club annual maintenance fees includes only maintenance/management fees associated with the points Mr M and Mrs G purchased from the Supplier during the November 2012 and April 2013 purchases, and not any later purchases financed by other means.

3. The Lender can deduct:

i. The value of any promotional giveaways that Mr M and Mrs G used or took advantage of; and

ii. The market value of the holidays* Mr M and Mrs G took using their Fractional Points if the holidays taken by Mr M and Mrs G using their Fractional Points exceeded what they were entitled to under their previous Destinations Azure membership, to the extent that this previous entitlement would have been exceeded.

[1] I'm aware there is a live complaint which has not yet been decided against the lender which financed Mr M and Mrs G's final purchase of points in the Fractional Club.

It should be noted that in 2020 Mr M and Mrs G took no holidays and so no deduction should be made for holidays taken for that year.

(I'll refer to the output of Steps 1-3 hereafter as the 'Net Repayments')

4. Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
5. The Lender should remove any adverse information recorded on Mr M and Mrs G credit files in connection with the Credit Agreement.
6. If Mr M and Mrs G's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to determine the market value of holidays reasonably and reliably when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr M and Mrs G took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

In this case, and as discussed above, it appears impractical to determine the market value of the holidays in question, so it will be acceptable for the Lender to use the relevant annual management charges as a proportionate alternative.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr M and Mrs G a certificate showing how much tax it's taken off if they ask for one.

My final decision

For the reasons explained above, and in the appended provisional decision, I uphold Mr M and Mrs G's complaint and direct First Holiday Finance Limited to take the actions outlined in the "Fair Compensation" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs G to accept or reject my decision before **7 June 2025**.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

NB: The complainants are referred to as Mr and Mrs M in this provisional decision. For the avoidance of doubt, they are the same individuals (Mr M and Mrs G) named in the final decision above.

I've considered the relevant information about this complaint.

Having done so, while I have come to the same overall outcome as our Investigator, I've found it necessary to issue a provisional decision to explain my findings in more detail and allow the parties to the complaint an opportunity to provide further submissions.

The deadline for both parties to provide any further comments or evidence for me to consider is **10 March 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

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

What happened

Mr and Mrs M had a history of purchasing timeshare products from a timeshare provider (the "Supplier"), going back at least as far as 2009. Based on the evidence I've seen, Mr and Mrs M purchased a "Trial" membership with the supplier in September of that year, for £3,995. The following May, they upgraded to a product called "Destinations Azure" for a further £6,303, which they held for around two and a half years.

The next two purchases Mr and Mrs M made from the Supplier are relevant to this complaint, because these were both financed by loans from the Lender. On 29 November 2012 they traded in their Destinations Azure product for membership of a timeshare I'll call the "Fractional Club". They entered an agreement with the Supplier to buy 1,160 "points" in this club, which could be exchanged annually for holiday accommodation. Fractional Club membership was asset backed – which meant it gave Mr and Mrs M more than just holiday rights. It also included a share in the net sale proceeds of a property named on their purchase agreement (the "Allocated Property") after their membership term ends.

On 30 April 2013, Mr and Mrs M entered a new deal with the Supplier for a Fractional Club membership with more points than the membership they'd purchased just six months before. Under the *new* deal, they now had 1,932 points. I'll refer to this deal as the "Purchase Agreement".

There has been a degree of uncertainty over exactly what the price was of the new membership. The Purchase Agreement itself quoted a price of £17,912, but this appears to have included an amount to settle the loan Mr and Mrs M had used to purchase the original 1,160 points. More precise figures were later given by the Supplier to Mr and Mrs M later in 2013 when they asked questions. The Supplier said the purchase price had been £10,005, with £7,907 going towards the settlement of the previous loan.

In any event, after making an advance payment of £500, Mr and Mrs M entered a credit

agreement with the Lender for £17,412, repayable over 144 months at £248.15 per month. The rate of interest was quoted as 16.6% APR. I understand the loan was settled in 2024.

Mr and Mrs M made one final purchase from the Supplier in December 2014, however that purchase was financed by a different finance company, and therefore isn't relevant to the complaint about the Lender.

Mr and Mrs M's complaint history began not long after the 2013 purchase. They were engaged in correspondence with the Supplier later that year and in 2014 over promises they considered the Supplier had made relating to the annual maintenance fees for the Fractional Club membership, and which the Supplier had broken. A settlement was reached in relation to this complaint, which involved the Supplier writing off around £1,600 in fees. Mr and Mrs M also raised queries or concerns about the pricing of the 2013 purchase, which led to the clarification I've referred to above. I understand Mr and Mrs M don't feel like these concerns have ever satisfactorily been resolved.

In 2016, it seems Mr and Mrs M raised further concerns with the Supplier. Mr M has explained these were "about our financial circumstances", but I have not seen a copy of what was sent to the Supplier. I have, however, seen the Supplier's response, which suggests Mr and Mrs M had said they were concerned about their changed personal circumstances, future financial commitments, and the inability to make use of their points due to issues with accommodation availability. It also seems Mr and Mrs M mentioned concerns about the investment aspect of the Fractional Club product, as the Supplier said the following:

"As you are aware the membership…is not sold as an investment. The advantage of being a Member of the [Fractional Club] is a shorter term membership providing you with a return at the end; whereas your previous membership did not provide you with this benefit."

It wasn't until April 2022 that Mr and Mrs M complained to the Lender. They initially used a professional representative ("PR"). I've not seen a copy of the complaint PR sent to the Lender either, but I have seen responses from the Supplier and the Lender which suggest the complaint was about the following things:

1. A breach of contract by the Supplier giving Mr and Mrs M a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The payment of a secret commission by the Lender to the Supplier.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Office of Fair Trading ("the OFT") to carry out such an activity.

Mr and Mrs M then dismissed PR and added an additional point to the complaint in November 2022:

5. The loan had been lent irresponsibly by the Lender, because it had been unaffordable.

Mr and Mrs M also noted that they wanted to revisit their complaint about the maintenance fees which had been settled in 2013/2014. They said they hadn't realised until recently that they could have complained directly to the Lender.

(1) <u>Section 75 of the CCA: the Supplier's breach of contract</u>

PR appear to have said on Mr and Mrs M behalf that they found it difficult to book the holidays they wanted, when they wanted.

I understand this to mean that Mr and Mrs M consider the Supplier to be in breach of contract. As a result of the above, Mr and Mrs M say they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs M.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

Based on Mr and Mrs M's own comments, and what can be discerned about PR's complaint to the Lender, they have multiple reasons for considering the credit relationship between them and the Lender was was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold 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').
2. They were pressured into attending a sales presentation and purchasing Fractional Club membership by the Supplier.

The Lender dealt with Mr and Mrs M's concerns as a complaint. It issued a final response to PR on 9 May 2022, rejecting the parts of the complaint it considered to be its responsibility, and forwarding the rest to the Supplier, which responded on the same day, rejecting all of the remaining complaint points.

Mr and Mrs M then referred the complaint to the Financial Ombudsman Service, on 3 November 2022. It was at this point (and over the following months) that they raised additional concerns, as noted above. These were forwarded to the Lender. While the Lender was investigating, it offered to write off the remaining balance on the loan (£5,241.76). Mr and Mrs M rejected this offer.

The complaint was then assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

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

The Lender responded to our Investigator to say that it considered Mr and Mrs M's complaint had been referred to the Financial Ombudsman Service too long (more than six months) after their response to the complaint on 9 May 2022. Our Investigator clarified that we had received the complaint from Mr and Mrs M within six months of the Lender's response to the complaint.

The Lender then responded to our Investigator again, this time saying that the complaint from Mr and Mrs M had been generic and there was no personal testimony from them, so they wouldn't agree to do anything other than reiterate the original offer they'd made to write off the rest of the loan.

The complaint has now been passed to me to decide.

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 Timeshare Regulations.
- Case law on Section 140A of the CCA – including, in particular:

    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

What I've 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.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs M as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

There are a couple of points I need to cover before I continue. These points relate to the Financial Ombudsman Service's jurisdiction to consider the complaint.

First of all, the Lender has said it thinks Mr and Mrs M brought their complaint too late after it had provided its final response. Our rules say that we can't look at a complaint brought more than six months after the final response to the complaint (unless certain exceptions apply). However, I'm satisfied that Mr and Mrs M referred their complaint to the Financial Ombudsman Service within six months of the Lender's final response to their complaint. By the time we had managed to get both Mr and Mrs M's signatures to the complaint, it had been more than six months, but their initial contact with us after the Lender's final response, asking us to investigate, came within six months.

Secondly, it's become apparent while I've been reviewing the case, that although Mr and Mrs M had only ever mentioned the April 2013 sale specifically, they had *also* wanted to make a complaint about the original sale of the Fractional Club membership to them in November 2012. This is something that has only come across in more recent correspondence.

I don't think we can consider a complaint, by itself, about the 2012 loan. This is due to one of our rules[2], which says we can only consider complaints about the activities of a firm which are carried on from an establishment in the United Kingdom.

My understanding is that all loans granted by the Lender were, until 1 August 2015, lent by an entity incorporated in the British Virgin Islands. From 1 August 2015, all new loans granted by the Lender were lent by an entity incorporated in the United Kingdom, and all existing loans which were still running were assigned to this UK-based entity.

The loan Mr and Mrs M took out in November 2012 was made from the British Virgin Islands, and, because the loan was paid off (by being consolidated) and came to an end in April 2013, it was never assigned to the Lender's UK-based entity. This means we are unable to consider a standalone complaint relating to that loan, as it falls outside of our rules. But that's not the end of the matter, and it doesn't mean that I can't consider what happened during the November 2012 sale, when determining the complaint about the April 2013 loan. I'll explain why.

The unfair relationship provisions of the CCA make it clear that a credit agreement can be rendered unfair by matters relevant to what the Act calls "related agreements". The Act goes on to explain that related agreements include any prior credit agreement that has been consolidated into the agreement being complained about, and any transaction linked to the agreement which has been consolidated (for example, the purchase of a timeshare financed by that agreement).

In practical terms, this means that when considering whether, and to what extent, the April 2013 credit agreement between Mr and Mrs M and the Lender was unfair, I am able to consider the way in which the Supplier initially sold the Fractional Club membership to Mr and Mrs M in November 2012, and so that is what I will do in this provisional decision.

At this point, 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, while I recognise that there are a number of aspects to Mr and Mrs M complaint, it isn't necessary to make formal findings on all of them. This includes their complaints about:

- Poor availability of holidays.
- Having been lent to irresponsibly.
- The loan having been arranged by an unlicenced credit broker.
- Having been put under pressure by the Supplier.
- The alleged payment of a secret commission by the Lender to the Supplier.

And that is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs M in the same or a better position than they'd have been entitled to be in, had their complaint been successful on any of these other points.

[2] https://www.handbook.fca.org.uk/handbook/DISP/2/6.html

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

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

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

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

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

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

The Lender doesn't 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 M's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are*

there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

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

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

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

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[3]

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

However, an assessment of unfairness under Section 140A 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 recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it 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, 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.

As I've already explained earlier in this decision, the November 2012 purchase is a "related agreement" for the purposes of any analysis of the fairness of the credit relationship between Mr and Mrs M and the Lender which began on 30 April 2013. The facts of that purchase are relevant to the credit relationship.

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

I have considered the entirety of the credit relationship between Mr and Mrs M and the Lender, along with all of the circumstances of the complaint, and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; 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've carried out the same exercise for the November 2012 purchase.

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

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs M'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 Fractional Club membership 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 Mr and Mrs M say that the Supplier did exactly that at the Time of Sale in November 2012 – saying the following during the course of this complaint:

"The sales rep explained that I would be able to recoup what I had paid at the end of the 20 years period" and *"we were told…at the end of the 20 years we would get back at least the original value of the Fractions".*

Mr and Mrs M have acknowledged that the Supplier also focused on the holiday-related aspects of the Fractional Club membership when selling and marketing it to them.

Mr and Mrs M allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) There were two aspects to their Fractional Club membership: holiday rights and the potential to get back more than the original value on the sale of the Allocated Property.
(2) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.

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 and Mrs M's share in the Allocated Property across both purchases 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 doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs M 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 some 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 M, 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 relating to the April 2013 purchase, that state that Fractional Club membership was sold for the primary reason of being used for holidays, and that future resale values couldn't be guaranteed.

I will say here that I've not seen a copy of the paperwork relating to the original November 2012 purchase as this has not been provided by either party. But based on my understanding of how the Supplier's paperwork looked for the version of the Fractional Club that it sold during this period, I think it's almost certainly true that the same disclaimers and declarations would have appeared in the November 2012 paperwork also.

In any case, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale in November 2012 or April 2013, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs M or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes' for both sales.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

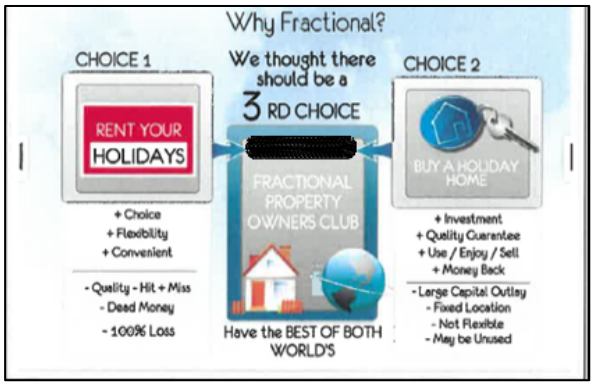
As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've

referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr and Mrs M would have been shown the slides included in the Manual, at either the November 2012 or April 2013 sales. But it seems to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Mr and Mrs M the Fractional Club membership; and

(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs M.

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Mr and Mrs M through three holidaying options along with their positives and negatives:

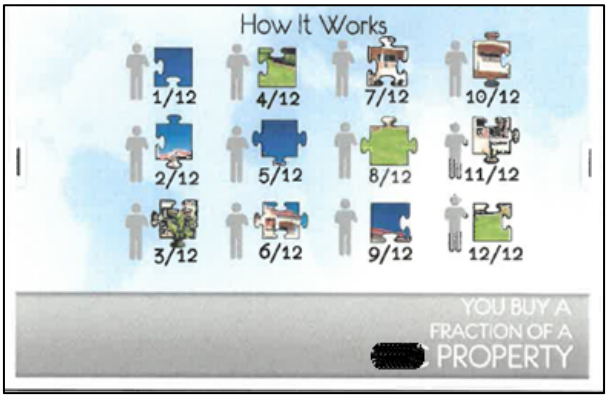
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs M that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as), I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs M the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"*[4] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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[4] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Mr and Mrs M have said, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr and Mrs M. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find them either implausible or hard to believe when they say they were were told they would get back at least the original value of their fractional asset at the end of their membership. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs M were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale in November 2012 and April 2013, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs M and the Lender under the April 2013 Credit Agreement.

It's worth restating at this point that the Supplier's breaches in relation to the November 2012 purchase can contribute to any unfairness in the credit relationship between Mr and Mrs M, and the Lender, in relation to the April 2013 Credit Agreement. However, any unfairness in the credit relationship caused by breaches relating to the November 2012 purchase, will be limited to the amount of credit which was brought forward into the April 2013 Credit Agreement from the previous loan.

The Supreme Court's judgment in *Plevin* makes it clear that 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 breaches of Regulation 14(3) led to a credit relationship between Mr and Mrs M and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breaches of Regulation 14(3) led them to enter into the November 2012 and April 2013 purchases, and their corresponding credit agreements, is an important consideration.

I've thought carefully about what Mr and Mrs M have said of their motivation for, firstly, changing their previous membership with the Supplier to the Fractional Club and then, in April 2013, buying a Fractional Club membership with more points.

Mr M has said that when he and Mrs M switched to the Fractional Club in November 2012, the key selling points for them had been that they wouldn't be tied into a long contract of around 60 years, as they had been with the previous product, and they would be tied in for a shorter period, after which they would be able to get back more than they'd put in.

Regarding the April 2013 upgrade, Mr M said that he and Mrs M had discovered they had insufficient points to meet their holiday needs, and the Supplier had encouraged them to buy more points so they could holiday in places they wanted to go, such as a particular resort in Cornwall. Mr M also said that during this sale they still viewed the product as an investment, and in fact they had negotiated the purchase of 2012 fractional inventory, rather than 2013, so they did not have to wait a year longer to realise it. This, it seems, may have been part of the reason why there was later a dispute and confusion over the maintenance fees.

On my reading of Mr and Mrs M's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with both their relevant purchases. That doesn't mean they were not interested in holidays. Their own testimony and their booking history with the Supplier, demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs M say (plausibly in my view) that Fractional Club membership was marketed and sold to them as something that offered them more than just holiday rights, on the balance of probabilities, I think both the November 2012 and April 2013 purchases were motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the membership they'd previously had with the Supplier. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decisions they ultimately made.

Mr and Mrs M have not said or suggested, for example, that they would have pressed ahead with the purchases in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchases regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs M under the Credit Agreement and related Purchase Agreements for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr and Mrs M would not have agreed to purchase Fractional Club membership in November 2012 under the related agreements, or upgrade to a Fractional Club membership with more points in April 2013, were it not for the breaches of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of those breaches meaning that, in my view, the relationship between the Lender and Mr and Mrs M was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased Fractional Club membership (i.e., not entered into either of the November 2012 or April 2013 agreements), as far as is possible and practical.

One thing to note is that, had Mr and Mrs M not bought Fractional Club membership, they would still have had their "Destinations Azure" membership instead, which appears to have been traded in as part of the November 2012 deal. They'd have always needed to pay maintenance fees of some kind in relation to this membership. With that being the case, any refund of the annual maintenance fees paid by Mr and Mrs M from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual maintenance fees they would have paid as ongoing Destinations Azure members. Mr and Mrs M should bear in mind the possibility that the maintenance fees for the Destinations Azure product may have been higher than the fees they actually paid.

At this stage, I think it's important to address a few points raised by Mr and Mrs M regarding what fair compensation might look like. Mr M has raised a lot of questions about what the real or true value was of what he and Mrs M purchased. As I understand it, Mr M is suspicious of the Supplier's pricing and what he considers to be a lack of transparency. He considers the Supplier and the Lender have made enough money out of their purchases that he and Mrs M should get back *all* the maintenance fees they've paid, without any deductions to reflect their holidays.

I think it's clear that some negotiation goes on during the sales process, as evidenced by the Supplier's responses to some of the queries Mr and Mrs M have raised over the years. So the price or value of a fraction or points may well depend on the bargain that is struck on an individual sale on a given day. I am not aware of any independent valuation of the fractions or points Mr and Mrs M purchased, but I observe the Supplier did send them a pricing sheet in response to some of their queries.

In any case, if Mr and Mrs M have taken holidays using their Fractional Club membership, then this needs to be accounted for in some way in the compensation, as these holidays would have a value. So I don't think it would be fair or reasonable to make no deductions in respect of these.

Mr and Mrs M have also spoken of their disappointment and the emotional stress they say they've experienced as a result of their purchases and what they consider to be the Supplier's dismissive attitude towards their concerns. They've referred to substandard accommodation, struggling to make payments, and being stuck in a system which they think

was designed to extract as much money from them as possible. They also say they've not been able to get a mortgage due to the loan from the Lender, and they've spent a lot of time and energy trying to resolve things. They also say the Lender failed to register the loan with the credit reference agencies for a number of years, meaning there was a risk they could have borrowed irresponsibly. Mr and Mrs M have asked, in light of this, for a 50% uplift on any compensation due.

I don't doubt that Mr and Mrs M have found their experience with the Supplier and the Lender very frustrating and disappointing, and that they wish they'd never signed up to the Fractional Club, but I don't think it would be reasonable to increase further the compensation I've outlined below, for the reasons they've stated. The purpose of compensation in this case is to remove the unfairness in the relationship between Mr and Mrs M and the Lender, and I think the redress I've proposed adequately covers that. I don't think it would be fair and reasonable to award anything further.

It's also worth mentioning that the Lender isn't responsible for the Supplier's attitude towards Mr and Mrs M after they made their purchases, for example.

Here's what I think needs to be done to compensate Mr and Mrs M with that being the case – whether or not a court would award such compensation (all references to the Credit Agreement are to the April 2013 Credit Agreement unless otherwise stated):

(1) The Lender should refund Mr and Mrs M's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the £500 advance payment made in relation to the April 2013 agreement. The Lender should also refund the difference between Mr and Mrs M's Fractional Club annual maintenance fees, and what their annual maintenance fees would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs M used or took advantage of; and

ii. The market value of the holidays* Mr and Mrs M took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Destinations Azure Points they would have been entitled to use at the time of the holiday(s) as ongoing Destinations Azure members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr and Mrs M took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 Destinations Azure Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Destinations Azure Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(I'll refer to the output of Steps 1-3 hereafter as the 'Net Repayments')

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr and Mrs M credit files in connection with the Credit Agreement.

(6) If Mr and Mrs M's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to determine the market value of holidays reasonably and reliably when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs M took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr and Mrs M a certificate showing how much tax it's taken off if they ask for one.

My provisional decision

For the reasons explained above, I am minded to uphold Mr and Mrs M's complaint and direct First Holiday Finance Ltd to take the actions outlined in the "Fair compensation" section above.

I now invite the parties to the complaint to let me have any further submissions they would like me to consider, by **10 March 2025**. I will then review the complaint again.

Will Culley
Ombudsman