DRN-5598099

The complaint

Mr and Mrs H complain that First Holiday Finance Ltd (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 a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on Mr and Mrs H's complaint on 24 April 2025, in which I set out the background and my provisional findings. A copy of that provisional decision (along with an Appendix referred to in it), is appended to and forms a part of this final decision. For that reason, it's not necessary to go over all the details of the events leading up to the complaint again, but to summarise briefly:

- Mr and Mrs H purchased membership of a timeshare (the "Fractional Club") from a timeshare provider (the "Supplier") on 22 September 2013 (the "Time of Sale"). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £13,298 (the "Purchase Agreement"). The membership allowed Mr and Mrs H to use their points annually to book holiday accommodation, but also included the right to a share in the net sale proceeds of a property named on their Purchase Agreement (the "Allocated Property") when their membership was due to end. Mr and Mrs H paid £500 by card, with the rest of their purchase being financed by a loan with the Lender (the "Credit Agreement").

- Mr and Mrs H went on two holidays with their membership in 2014, however they shortly after fell into dispute with the Supplier over whether they were obliged to pay management fees associated with the membership for their first year of use. This resulted in them walking away from the membership and stopping further payments to the Supplier. They also stopped making payments to the Lender in 2018, and the Lender subsequently wrote off the remaining balance of £10,244.

- Using a professional representative ("PR"), Mr and Mrs H later complained to the Lender that the Supplier had breached its contract with them and made misrepresentations to them, giving them a claim against the Lender under Section 75 of the CCA, and that the credit relationship between them and the Lender had been rendered unfair to them within the meaning of Section 140A of the CCA, for a variety of reasons.

    - Misrepresentations alleged to have been made by the Supplier included false statements about the term of the membership, its status as an investment in "real property" and the exclusivity of the Supplier's resorts.

    - Breaches of contract alleged to have been committed by the Supplier included failing to provide Mr and Mrs H with accommodation in South Africa, which was meant to have been available to them, and going back on a promise to include the 2014 management fees in the purchase price.

- Matters alleged to have caused the credit relationship to be rendered unfair included the Lender failing to carry out a proper creditworthiness assessment or providing certain information to Mr and Mrs H, the loan's high rate of interest, and certain sales practices of the Supplier which it was said breached various regulations.

The Lender didn't uphold Mr and Mrs H's complaint, and it was then referred to the Financial Ombudsman Service. One of our Investigators considered the complaint ought to be upheld in full because the Supplier had marketed or sold the Fractional Club membership to Mr and Mrs H as an investment, contrary to Regulation 14(3) of the Timeshare Regulations 2010. The Lender appealed this assessment, and the case was passed to me to determine.

In my provisional decision, I said that I considered the complaint ought to be upheld on only a very limited basis. I found the Supplier had been in breach of the Purchase Agreement by failing to honour the agreement to include the 2014 management fees in the purchase price. I thought that by later invoicing Mr and Mrs H for these fees, it was in breach of contract, and Mr and Mrs H could make a like claim against the Lender under Section 75 of the CCA.

I did not consider the breach was so serious, when looking at the contract overall, as to entitle Mr and Mrs H to terminate the contract (as their actions suggested they had attempted to do), and that any compensation would take the form of damages. Mr and Mrs H hadn't paid the disputed fees, so I reasoned that the damages should be equal to the value of the holidays they'd have been entitled to take in 2015 with their points, had the Supplier not suspended their membership for non-payment of the disputed fees. I observed that this compensation would need to be set off against the £10,244 the Lender had already written off the Credit Agreement, and that as things stood there was nothing I could require the Lender to pay, but that it may be necessary to require the Lender to reduce any closing balance on the agreement if it was reported to credit reference agencies. I asked the parties to the complaint for their specific submissions on this point.

As for the rest of the complaint, I did not think it ought to be upheld. Again, the reasons are set out in detail in the appended provisional decision, but I did not think the Supplier had breached the contract in any other way, or made any actionable misrepresentations to Mr and Mrs H. Regarding the matter of the allegedly unfair credit relationship, I could summarise my findings as follows:

- I had not seen evidence to allow me to make a finding that the Lender's creditworthiness assessment had failed to meet the standards it should have under the laws and industry guidance of the time but, even if I had, I still needed to be able to conclude that the lending was actually unaffordable to Mr and Mrs H and had caused them a loss. I wasn't satisfied of this based on the evidence provided. I invited further submissions on this point.

- I observed that the interest rate of the loan did indeed seem above the average rates offered by some other lenders at around the same time. I noted that most lenders at the time took into account credit risk when setting interest rates and that customers with poor credit histories were normally offered higher interest rates than average. Mr and Mrs H's credit histories had been poor, so it perhaps wasn't surprising that they'd been offered a higher rate. I also observed the interest rate had been prominently displayed to Mr and Mrs H before they entered the agreement, and that it had been open to them not to take out a loan with this rate if they'd not wanted to.

- I considered PR's submissions regarding alleged information failings by the Lender were too non-specific for me to be able to find the credit relationship had been rendered unfair for this reason.

- I thought it was possible the Supplier had breached Regulation 14(3) of the Timeshare Regulations during the sale of the Fractional Club membership, by marketing or selling the product to Mr and Mrs H as an investment. I did not make a formal finding on this question, for reasons I went on to explain. I noted that the case law supports the position that regulatory breaches do not automatically create unfairness for the purposes of Section 140A of the CCA, and that breaches need to be considered in the round and not in a narrow, technical way. I went on to note that the question of whether any breach had led Mr and Mrs H to enter the Purchase Agreement and Credit Agreement was an important consideration when assessing whether the credit relationship had been rendered unfair. I thought it was unlikely that a breach (if it had indeed occurred) had not led Mr and Mrs H to enter the agreements in this case, for the following reasons:

    - Mr and Mrs H had provided a witness statement, in which they made only very limited mention of the product being an investment, and it wasn't clear from this that it was an important factor in their purchasing decision.

    - Other parts of Mr and Mrs H's testimony explained that they'd made their purchase for other reasons – in their witness statement they explained that they had decided it was a good idea – it was a cheaper way of holidaying and would allow them to take more holidays than they currently did. Mr and Mrs H had also gone into detail about the discussions they'd had with the Supplier regarding their holiday desires, and been very focused in their testimony on their concerns over holiday-related issues and the dispute over the 2014 management fees.

    - Mr and Mrs H's action in walking away from the membership following the dispute over the management fees was difficult to square with the investment aspect of the product having been a material factor in their decision to purchase it. Walking away meant abandoning the investment and any potential return, over a dispute involving a relatively small sum of money. This did not appear consistent with someone who had purchased the product for potential investment returns.

- Concluding, I said I thought it was likely Mr and Mrs H would have gone ahead with their purchase regardless of any alleged breach by the Supplier of Regulation 14(3) of the Timeshare Regulations, and for this reason I didn't think the credit relationship between them and the Lender had been rendered unfair to them for that reason.

I went on to note that fair compensation in this case would depend on the value of the holidays Mr and Mrs H would have been entitled to take in 2015. I said I was minded to award the difference between this amount and the amount the Lender had written off the Credit Agreement. If the value of the holidays was larger then the Lender would need to pay the difference as compensation, if it was smaller there would be nothing to pay. Either way, any closing balance reported to the credit reference agencies would need to be reduced by the value of the holidays.

I invited the parties to the complaint to provide further submissions. The Lender didn't say whether or not it accepted the provisional decision, but provided some information about the value of the holidays Mr and Mrs H would have been able to take with their membership in 2015. It said Mr and Mrs H could potentially have used up to 2,204 points in 2015. The best example they said they could give of an actual monetary value was for a holiday worth 2,560

points which Mr and Mrs H had booked as a promotional holiday[1] in 2015. The Lender said this holiday had had a monetary value of £2,798.

PR asked for more time to respond to the provisional decision, which was granted. It then replied at length, disagreeing. I was disappointed with aspects of PR's submissions. For example, PR attributed words to Mr and Mrs H which didn't appear in their witness statement and seemed to have come from another of its clients' witness statements. It also addressed arguments I didn't make in my provisional decision – such as points relating to the Limitation Act 1980. Further, PR referred to other customers in its submissions when ostensibly talking about Mr and Mrs H or my provisional decision, and appeared to have an incorrect understanding of Mr and Mrs H's purchase history from the Supplier.[2] Overall, it appears PR has mixed elements of different cases when preparing its submissions.

That said, having deciphered PR's arguments against the provisional decision, I think they could fairly be summarised as follows:

- It considered it was very important that I made a definitive finding on whether or not the Supplier had in fact breached Regulation 14(3). I had failed to do so, not taking into account Mr and Mrs H's submissions relevant to this point, nor the Supplier's sales and marketing materials, while at the same time attaching too much weight to the Supplier's pre-sale disclaimers.

  PR was very sure that the Supplier had breached Regulation 14(3) and argued that this, by itself, was enough to render the credit relationship between Mr and Mrs H and the Lender, unfair.

- I had adopted too narrow a definition of "investment", restricting it only to expectation of profit, rather than the broader definition adopted in the case of *Shawbrook & BPF v FOS.*

- I had failed to consider the RDO Code.

- I had either ignored or not attached enough weight to specific things said by Mr and Mrs H in their witness statement which were relevant to the Fractional Club product having been either sold as an investment, or this having been a material factor in their purchasing decision.

- It was possible to find, and other ombudsmen had found, that being motivated to make a purchase by a desire to take holidays, did not necessarily mean that the prospect of the product being an investment was not another material factor in a person's purchasing decision.

- I had failed to consider Mr and Mrs H's complaint about the Supplier's alleged misrepresentations to them, because I had found this aspect of the complaint to be time barred by the Limitation Act 1980. I should have considered whether or not these misrepresentations rendered the credit relationship unfair, which was not subject to the same limitation period.

- I hadn't investigated the alleged breaches of contract by the Supplier thoroughly enough, and in particular I had not properly looked into the concerns regarding the availability, quality and exclusivity of the accommodation. PR provided a short

[1] I understand this was subsequently cancelled.
[2] Such as indicating Mr and Mrs H had made previous purchases of holiday products from the Supplier, when this is not the case based on the evidence provided.

statement from Mr and Mrs H in which they recalled the Supplier telling them that South Africa was not available to them.

- I had not investigated thoroughly enough the matter of the Lender's creditworthiness assessment, which I had appeared simply to have dismissed.

An overall theme of PR's submissions was that it considered by provisional decision was inconsistent with the judgment in *Shawbrook & BPF v FOS*, and with decisions made by other ombudsmen. 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.

Having done so, I've arrived at the same conclusions set out in my appended provisional decision, and for the same reasons. However, it's important to address the points made by PR.

A large part of PR's submissions have focused on the question of whether or not the Supplier had breached Regulation 14(3), and how it considered I had dealt inadequately with this in the provisional decision by not making a firm finding on it. I remain of the view that it was entirely possible that the Supplier *did* breach Regulation 14(3) when selling the Fractional Club membership to Mr and Mrs M, but I explained in the provisional decision why I was not making a finding on this point – because it didn't make a difference to the ultimate outcome.

I explained in the provisional decision how the cases of *Plevin*, *Carney* and *Kerrigan* had led me to the conclusion that the *impact* of any breach on Mr and Mrs H's purchasing decision was relevant to an assessment of unfairness. PR has argued that the potential breach *by itself* is enough to render the credit relationship unfair. It has said this is what was found in *Shawbrook & BPF v FOS*. I think PR is misreading the judgment however – this is what the judge said at paragraph 185 (my emphasis underlined in bold):

"… 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 ombudsman 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. … I am satisfied that [the ombudsmen's] findings of unfairness were properly open to them on this basis alone."*

While it was said that a breach of Regulation 14(3) was enough by itself to *lead* to a finding of unfairness, what PR has missed is the crucial element of causation, which was recognised by the ombudsmen and the judge. The breach needs to have led to some loss to Mr and Mrs H – such as entering a contract and associated loan agreement that they wouldn't otherwise have entered. I think PR is unfortunately simply wrong to suggest that the fact of the breach by itself renders the credit relationship unfair.

Regarding my definition of investment, I set this out in the provisional decision and adopted the same definition as that taken *in Shawbrook & BPF v FOS*. By this definition, there needs to be an expectation or hope of financial gain or profit. So I don't accept PR's contention that I have taken too narrow a definition.

On the matter of the RDO Code – this was something I considered although did not find it necessary to refer to specifically in the body of the decision. The Appendix does refer to the RDO Code however.

PR has also argued that I'd not given enough weight to Mr and Mrs H's testimony regarding their motivations for purchasing the Fractional Club membership. Rather than not giving enough weight to Mr and Mrs H's testimony, I think the issue here is that I take a different view to PR on the meaning of Mr and Mrs H's testimony and the conclusions that can most reasonably be drawn from it.

I accept that Mr and Mrs H do mention that the product was an investment in their witness statement. They mention it more than the one time referred to in my provisional decision, as they refer to the product, at the end of the witness statement, as having been a *"yoke around our necks and not the valuable investment we had been promised"* and that they wanted to *"make a financial claim for the investment we have made in Points."* I also accept the principle that consumers can have multiple motivations for making a given purchase, any or all of which could be material.

I think it's worth repeating here that cases are decided on their individual merits and, while PR has referenced other decisions by ombudsmen in which different conclusions were reached, those other ombudsmen would have arrived at their decisions based on the facts and circumstances of those cases.

I am dealing with the facts and circumstances of Mr and Mrs H's case and, while I appreciate PR will disagree, I still don't think it's at all clear that Mr and Ms H purchased the Fractional Club membership because they had a hope or expectation of making a financial gain or profit from the investment element of the product. I simply don't get the impression, having read both their witness statement and their other communications with the Supplier, that this was something which played much of a part in their decision. The overwhelming focus for Mr and Mrs H in their statement and their other communications was on the holidays which could be taken using the product, their disappointment when the holiday aspect did not turn out as they had hoped, and their anger over the Supplier's broken promises regarding the management fees. The limited comments about the investment aspect of the product feel, to me, like an afterthought. There also remains the point that Mr and Mrs H walked away from the membership, (and any potential investment return) following the dispute over the management fees. I don't think this is consistent with the investment aspect of the product having been a material part of their purchasing decision, and PR has not addressed this in its submissions.

I've considered PR's concerns over how my provisional decision handled the allegations of misrepresentation and breach of contract. It says I didn't consider the misrepresentations, however it appears it has confused Mr and Mrs H's case with another case here. All allegations of misrepresentation were addressed in the appended provisional decision. Regarding the allegations of breach of contract, PR will be aware that I undertook a detailed analysis of this as it was the basis for partially upholding Mr and Mrs H's complaint. Regarding the concerns over availability, exclusivity and quality, I would make the following observations:

- Mr and Mrs H haven't specifically outlined any concerns they had over the exclusivity of the accommodation they had access to (and in any event this was dealt with under the heading of misrepresentation in the provisional decision).

- Mr and Mrs H also haven't complained about the quality of the accommodation they stayed at. They did say that they found a resort they stayed at in Mexico to not be to their tastes, but that is different to the accommodation being poor quality.

- Mr and Mrs H did express concerns over the availability of accommodation – specifically in South Africa. In my provisional decision I observed that the Supplier's system notes indicated two named resorts near a particular national park Mr and Mrs H had requested in South Africa had been offered. Mr and Mrs H have since said they recall the Supplier having told them South Africa wasn't available, but they've not supplied further evidence (for example, emails) to support this. Ultimately, I am more inclined to accept the notes made at the time which mention two specific resorts, than recollections from some years later. However, even if on this occasion the Supplier had been unable to offer availability in South Africa, this wouldn't have been a breach of contract for reasons I've already explained in the provisional decision.

Finally, on the matter of creditworthiness assessment, in my provisional decision I asked PR to provide further submissions regarding the affordability of the loan for Mr and Mrs H. Had it done so, it may have been possible to look into this matter further. For the reasons I outlined in the PD, it would not be enough simply to conclude any assessment had been inadequate. It would also need to be shown that the loan had been unaffordable, for Mr and Mrs H's complaint to have been upheld on this basis.

So, overall, my conclusions remain unchanged. I think there was a breach of contract by the Supplier which Mr and Mrs H would have had a claim against the Lender in respect of, under Section 75 of the CCA. Neither party has commented on whether or not it thinks the way I proposed to calculate the compensation or damages was reasonable or not. Having considered the facts again, I think that it is a reasonable means of making the calculation.

The Lender was not able to arrive at a specific value for the holidays Mr and Mrs H would have been able to take in 2015, but valued a holiday involving a similar number of points that same year, at £2,798. PR has made no submissions on this point. In the absence of any better information to base a calculation on, I think the Lender's figure is likely to be broadly representative of the value of the holidays Mr and Mrs H could have taken in 2015. So I will direct the Lender to reduce the amount left outstanding on the Credit Agreement by this amount, adjusting any closing balance reported to the credit reference agencies.

Putting things right

The Lender needs to take the following action:

- To reduce the debt reported to the credit reference agencies in relation to the Credit Agreement (if any), by £2,798. The Lender should also update any internal records of the loan balance to reflect the fact that this amount has been offset against it.

My final decision

For the reasons explained above and in the appended provisional decision, I uphold Mr and Mrs H's complaint in part and direct the Lender to take the step outlined in the "Putting things right" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 2 July 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to reach a different set of conclusions to our Investigator, so I'm issuing a provisional decision to allow the parties to the complaint a further opportunity to comment.

The deadline for both parties to provide any further comments or evidence for me to consider is **8 May 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If First Holiday Finance Ltd accepts my provisional decision, it should let me know.

The complaint

Mr and Mrs H complain that First Holiday Finance Ltd (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 a claim under Section 75 of the CCA.

Background to the complaint

Mr and Mrs H purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 September 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £13,298 (the 'Purchase Agreement').

With their Fractional Club membership, Mr and Mrs H were entitled to use their points annually to book accommodation in the Supplier's portfolio. The membership was asset backed – which meant it gave Mr and Mrs H more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs H were also required to pay annual fees for the maintenance and management of the club. Whether Mr and Mrs H were required to pay fees for their first year of membership, is a matter of dispute between the parties.

Mr and Mrs H paid for their Fractional Club membership by making a card payment of £500 and taking a loan of £12,798 from the Lender in joint names (the 'Credit Agreement').

It appears Mr and Mrs H went on two holidays using their membership in 2014. The first holiday was a promotional holiday offered by the Supplier, while the second was a two week holiday in Mexico. At some point from around June 2015, Mr and Mrs H stopped making payments to the Supplier due to a dispute over what they considered were broken promises made at the Time of Sale. In May 2018 they also stopped making payments towards the Credit Agreement, having apparently paid £9,666. The Lender says it has written off the remaining £10,244 balance.

Mr and Mrs H – using a professional representative ('PR') – wrote to the Lender on 13 August 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. 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.

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

Mr and Mrs H say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property", and not a timeshare, when that was not true.
3. told them that Fractional Club membership was an "investment" which would go up in value, and they could sell it or the Supplier would buy it back, when that was not true because it was an entirely speculative scheme.
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.
5. told them that a "Compliance Officer" who spoke to them during the sales process was impartial, when that wasn't true because they worked for the Supplier.

Mr and Mrs H say they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, 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 them.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr and Mrs H say that the Supplier breached the Purchase Agreement because it was unable to provide accommodation in South Africa, which was meant to be available in the Supplier's portfolio.

Mr and Mrs H also say the Supplier breached the Purchase Agreement by going back on a promise to cover the cost of the 2014 management fees. While the Supplier did make an offer following a complaint about this, Mr and Mrs H considered the offer was inadequate.

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

1. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
2. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment, contrary to regulatory guidance or rules in place at the time.
3. The rate of interest on the loan was very high and adequate explanations were not given as to the features of the Credit Agreement which would have made the credit unsuitable.

It appears the Lender referred the complaint to the Supplier, which rejected the complaint in its entirety in September 2019.

Mr and Mrs H then referred the complaint to the Financial Ombudsman Service in December 2019. It was assessed by an Investigator who, having considered the information on file, considered it should be upheld on the basis the Supplier had marketed the Fractional Club membership to Mr and Mrs H as an investment, which was prohibited under the *Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010* (the "Timeshare Regulations"). This, reasoned the Investigator, had caused the credit relationship between Mr and Mrs H, and the Lender, to be rendered unfair.

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

I could summarise the Lender's disagreement with the Investigator's assessment as follows:

- It was unacceptable that a witness statement from Mr and Mrs H, which our Investigator had relied on in their assessment, had only come to light in 2023, many years after it had supposedly been written.

- They considered there were inconsistencies between what Mr and Mrs H had said in their witness statement, and the arguments made by PR on their behalf. For example, PR had argued Mr and Mrs H had been told by the Supplier that what they were buying was not a timeshare. However, in their witness statement, Mr and Mrs H had said they "knew this was about Timeshare".

- Mr and Mrs H had not been shown a specific presentation which had been used to sell an earlier version of the Fractional Club product, and which had used the word "investment".

- Mr and Mrs H's actions in paying a third party a significant sum of money to take away their Fractional Club membership, suggested they did not view it as an investment.

- The Supplier denied that Mr and Mrs H were unable to book in South Africa – its system notes showed that two different resorts were offered near the Drakensberg Mountains as requested, but Mr and Mrs H had declined.

- The Supplier denied it had gone back on a promise to cover the 2014 management fees as part of the purchase. It had made an offer to Mr and Mrs H, but this had been a gesture of goodwill.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') attached to this provisional decision, and which should be taken as forming a part of it.[3]

[3] If a final decision is later issued in this complaint, the Appendix will be appended to the final decision (as opposed to attached), so all the relevant information is contained in one document.

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 think the Supplier was likely in breach of the Purchase Agreement by failing to cover the management fees for 2014, and so the Lender did not act fairly in declining the Section 75 claim. However, I think any steps the Lender needs to take to resolve the complaint are likely to be very limited, for reasons I'll go on to explain.

But before I do that, 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.

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs H could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint and I'm satisfied that they are.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs H were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs H's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs H have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that for the following reasons:

- If the Supplier had told Mr and Mrs H that the membership was an investment then this wouldn't have been untrue, because there was in fact an investment element to the product. Marketing or selling the product as an investment was prohibited however, and I go into more detail on this issue later in the decision.

- The paperwork Mr and Mrs H signed at the Time of Sale specifically stated that the Supplier would not buy the membership back. The paperwork did say that Mr and Mrs H could sell the membership, so if the Supplier told Mr and Mrs H they could do this, this would not have been untrue.

- Regarding the allegation that the Supplier told Mr and Mrs H there was a guaranteed end date to their Fractional Club membership, there's nothing in the documents dating to the Time of Sale which would lead me to believe that unqualified guarantees would have been given that the membership would come to an end on a specific date. The documents explain that the property would be marketed for sale after a set time, and I can't see that Mr and Mrs H were told anything different to that.

- Regarding the lack of exclusivity, the contemporaneous documents I've seen relating to the membership do not say that the resorts in the Supplier's portfolio were exclusive to members. Resorts owned by the Supplier were described as "mixed use", while other resorts were described as resorts in which the Supplier had "secured accommodation…under its control" or which were "available through [our] partnerships with other resorts". None of this appears to state or imply that the resorts within the portfolio could only be booked by members. While I've no doubt the Supplier would have promoted the quality of its resorts and its services more generally, I've not seen evidence that it made specific false statements about them.

- PR has said a "Compliance Officer" who dealt with a part of the sales process was described as impartial by the Supplier, when in fact they were one of the Supplier's employees. I think there is insufficient evidence of any statements of fact made by the Supplier about the Compliance Officer. Mr and Mrs H's recollections don't include this allegation. If a statement was made, and it was false, then there would also need to be evidence that, but for the false statement being made, Mr and Mrs H would not have proceeded with the purchase. Having reviewed the evidence available in connection with this case, there's nothing that would lead me to believe that Mr and Mrs H's purchasing decision was dependent on their understanding of the Compliance Officer's role.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs H 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 the Lender is liable to pay Mr and Mrs H any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already summarised how Section 75 of the CCA works and why it gives Mr and Mrs H a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Mr and Mrs H say that they'd told the Supplier, at the Time of Sale, that they wanted to holiday in South Africa, and they had been told this was something that would be possible with the 1,200 points they had purchased. However, when they had tried to book, they found this was not possible and nothing was available.

The Supplier accepts that Mr and Mrs H wanted to book holidays in South Africa but argues that this was possible, and they had been able to offer options to Mr and Mrs H. I've seen notes from the Supplier's system which indicate Mr and Mrs H had contacted it in August 2014 to request "*safari opportunities and possibly some time in the Cape Town coastal region or possibly a stay near the Drakensberg Park*". The notes recorded that the Supplier offered a studio in one resort for 650 points or a two bedroom apartment in another resort for 1,100 points. Having studied maps of the area, both resorts appear to be either in or close to Drakensberg Park. So it's difficult to say that the Supplier failed to offer accommodation in South Africa as it had apparently promised, and was in breach of the Purchase Agreement as a result. I also note that the documents Mr and Mrs H signed at the Time of Sale, stated that accommodation would be subject to availability and was available on a "first-come, first-served" basis. So even if the Supplier had been unable to offer, on the occasion Mr and Mrs H had tried to book, accommodation in the areas of South Africa where they wanted to go, on the dates they wanted to travel, it would still be difficult to conclude that a breach of contract had taken place.

Mr and Mrs H also say that the Supplier went back on a promise to cover the 2014 management fees as part of the deal made at the Time of Sale. I can see this is something they complained to the Supplier about early in 2015, and the dispute over the fees features prominently in their witness statement. Mr and Mrs H also appear to have decided to walk away from their Fractional Club membership after the Supplier failed to resolve their complaint about this in a way they considered acceptable, so it is clearly something they felt strongly about.

The Supplier accepted, in correspondence with Mr and Mrs H, that *"…initially the management charges were to be included".* However, it went on to say that *"…as alternative finance was secured for your purchase, this was no longer applicable."* A note of a telephone call that took place on 27 April 2015 stated Mr H was *"…adamant…that he is not paying 2014 [management fees] and they were incl[uded]"* and that he had said the Supplier *"…need[ed] to talk to the sales guys in [Tenerife]."*

It seems apparent Mr and Mrs H had understood the deal they'd made with the Supplier had included the 2014 management fees. I'm aware the Supplier did sometimes offer to cover the first year's management fees for prospective or returning customers, and the Supplier accepts it had, in this case, originally agreed that the fees would be included.

What is less clear is how, or whether, the Supplier informed Mr and Mrs H that it had decided it was no longer including the 2014 management fees. When responding to Mr and Mr H's complaint about the matter, the Supplier referred to point 3 of the "Member's Declaration" Mr and Mrs H had signed at the Time of Sale, which said:

"We understand that currently the annual Management Charge is €949 for 2014 and that an invoice will be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year".

While this does appear to indicate that Mr and Mrs H could expect to be charged for the 2014 management fees, I note the front page of the Purchase Agreement stated, under *"Details of Payments in First Use Year":*

(1)	*Purchase Price:*	*GBP 13298.00*
(2)	*Membership / Dues:*	*GBP 0.00*
(3)	*Total:*	*GBP 13298.00*

The first year of use was 2014, which was the year Mr and Mrs H said they'd been promised their management fees would be covered. While it's possible that "Membership / Dues" referred to something other than the management fees, I think this would not have been very clear to Mr and Mrs H, who would not have been familiar with the Supplier's terminology. I don't think, overall, that the information on the paperwork was a sufficient warning that the Supplier was now proposing to deal on different terms, and my view is that this change was never agreed to or became effective. I think the agreement *as made* by the parties included the payment of the 2014 management fees by the Supplier.

This means, that by invoicing Mr and Mrs H for the 2014 management fees, the Supplier was in breach of the Purchase Agreement. It did make an offer (without any admission of liability) to remedy the situation, which was to waive the 2014 management fees but remove the points associated with that year from Mr and Mrs H's membership account. That seems not to have been much of an offer at all – as it was essentially the Supplier offering the option of being paid in points rather than money, with the end result being that Mr and Mrs H could not have taken the holidays they expected. Mr and Mrs H rejected the offer and, by walking away from the membership and making no further payments, appear to have treated

the Supplier's breach of contract as having been so serious that they were entitled to terminate the Purchase Agreement.

However, I don't think this was a breach that was so serious that it went to the heart of the contract Mr and Mrs H had signed with the Supplier, entitling them to terminate it. An appropriate remedy for the breach of contract would have been damages – which in the circumstances would most likely have been the amount of any management fees Mr and Mrs H had paid incorrectly as a result of the Supplier's breach of contract, or compensation for their lost points if the Supplier had deducted the 2014 points from their membership balance.

But it doesn't appear Mr and Mrs H paid the disputed fees, and I don't think the points were deducted either. Based on emails I can see the Supplier sent Mr and Mrs H later trying to persuade them to re-engage with their membership, it seems the membership was in fact suspended for non-payment, meaning no holidays could be booked. It would seem in the circumstances that a reasonable measure of their loss as a result of the breach of contract, is the value of the accommodation they'd have been entitled to book with their membership in 2015, had it not been suspended for non-payment.

However, the claim encounters some significant difficulties at this point, because the Lender subsequently wrote off £10,244 which Mr and Mrs H owed it under the Credit Agreement. While the amount has been written off, it would be reasonable for the Lender to set off any compensation it would be liable to pay Mr and Mrs H as a result of their Section 75 claim, against this written-off balance. So unless Mr and Mrs H's entitlement to accommodation through the Supplier in 2015 would have been worth more than £10,244 there will be no compensation to pay to them.[4] I would like both parties to provide me with their arguments on what the lost accommodation in 2015 was worth in response to this provisional decision.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs H any compensation for a breach of contract by the Supplier. And while I think the Lender did not deal fairly with the Section 75 claim, given there was a breach of contract by the Supplier for which Mr and Mrs H would have been entitled to damages, as things stand there's no remedial action I can ask the Lender to take. If Mr and Mrs H can demonstrate the value of accommodation they should have been entitled to through the Supplier in 2015, was more than the Lender wrote off the Credit Agreement, then I am happy to consider any evidence they have of this.

I'll add here that, while I've already considered Mr and Mrs H's concerns relating to misrepresentation in an earlier section, I have additionally considered whether the Supplier's wrongdoing in relation to the 2014 management fees was in fact a *misrepresentation* rather than a breach of contract.

Where a statement of fact is made, which is true at the time but subsequently becomes untrue due to a change in circumstances before the contract is made, then this can sometimes be classified as a misrepresentation. It's possible to see how the Supplier's promises surrounding the management fees could fall into this category. However, it would be necessary for the false statement to have materially influenced Mr and Mrs H's decision to enter the contract for there to be an actionable claim for misrepresentation.

When I consider the overall scope of the Purchase Agreement, including the price, the term, the necessity of paying management fees for many years, along with the various other

[4] If the Credit Agreement is still reported on Mr and Mrs H's credit file, then it would be fair and reasonable that the reported balance is reduced by the amount of any compensation which would have been due to Mr and Mrs H but was set off against the written-off balance.

incentives offered by the Supplier – the promise to pay the management fees for one year appears to me to be something which is unlikely to have materially influenced Mr and Mrs H's decision to go ahead. And that's because it was a relatively small part of the overall deal. I think it's probable they'd still have entered the Purchase Agreement if the Supplier had clarified that it was unable to cover the 2014 management fees, so I don't think there was an actionable misrepresentation in respect of the dispute over the management fees.

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 H was misrepresented (or breached) by the Supplier in a way that means the Lender ought to pay compensation to them in respect of this complaint. But Mr and Mrs H also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mr and Mrs H and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; 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 H and the Lender.

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

Mr and Mrs H's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr and Mrs H and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

PR says that the decision to lend to Mr and Mrs H was irresponsible because the right checks weren't carried out before the Lender lent to Mr and Mrs H. Under the laws and industry guidance in place at the time, the Lender was required to carry out a creditworthiness assessment which involved making checks which were proportionate to the circumstances. It's not clear exactly what the Lender's checks entailed in this case, but even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I have not seen evidence that would allow me to make such a finding), I would have to be satisfied that the money lent to Mr and Mrs H was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. It's not enough simply to assert that the checks were insufficient. From the information provided, I am not satisfied that the lending

was unaffordable for Mr and Mrs H. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs H wish to provide, I would invite them to do so in response to this provisional decision.

Regarding the rate of interest on the loan being high, I note the interest rate was 13.81% per year or 16.6% APR. This does appear to be higher than the average rates offered by some other lenders at around that time, for loans of a broadly comparable amount and term. However, it is also the case that most lenders (around 84% in September 2013[5]) used risk-based pricing to set their interest rates, with customers with poor credit histories normally offered higher rates than the average. It's my understanding that either Mr H, Mrs H, or both, had poor credit histories, including having a County Court Judgment entered against them, and in light of that it's perhaps not surprising they were offered a higher than average rate, nor would it be guaranteed that they'd be offered the lower average rates being offered by some other lenders. I note the interest rate was displayed prominently on the information Mr and Mrs H were given about the Credit Agreement before signing, and if they had not wanted to take out a loan with this rate then it was open to them not to do so.

PR has also referred to the Lender (or Supplier) not providing *"an adequate or transparent explanation…to [Mr and Mrs H] as to the features of the agreement which may have made the credit unsuitable for [them] or have a significant adverse effect…which [they] would be unlikely to foresee…"* However, PR has not elaborated on what specifically was not explained to Mr and Mrs H or how any failings rendered the credit relationship between them or the Lender unfair. In light of the lack of further argument on this point from PR, it's difficult to see how I could find the credit relationship was unfair for this reason.

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

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs H'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 [56]. I will use the same definition.

[5] *Moneyfacts UK Credit Card Trends including Unsecured Personal Loans and Overdrafts*, June 2014

Mr and Mrs H's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. 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 H 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 competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that stated that Fractional Club membership was for the primary purpose of holidays and that it was not designed to be bought with the expectation of a future financial gain. So, it's *possible* that Fractional Club membership wasn't marketed or sold to Mr and Mrs H as an investment in breach of Regulation 14(3).

On the other hand, 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 accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs H as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mr and Mrs H rendered unfair to them?

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.

And in light of what the courts had to say in *Carney* and *Kerrigan,* 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 H and the Lender 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.

It's my view, having considered Mr and Mrs H's recollections of their relationship with the Supplier very carefully, that it's unlikely that the prospect of the Fractional Club membership being an investment was material to their decision to go ahead with their purchase. I say this for the following reasons:

- While Mr and Mrs H do recall thinking of the product as having been an investment, and of the Supplier having said it would go up in value over 19 years, this is something they mention in one paragraph of what is a relatively long witness statement, and it's not clear from this, that it was an important factor in their purchasing decision.

- Other parts of Mr and Mrs H's testimony explain explicitly why they made their purchase. They state: *"We had time to think about this on our own. We decided this was a good idea. It was a cheaper way of holidaying than how we do this now. We would get more holidays, especially if we could use the last minute holidays."* It appears, based on this, that the reason Mr and Mrs H decided to make the purchase was because they were interested in the product's holiday-related benefits.

- This is reinforced by other aspects of Mr and Mrs H's recollections, including (relatively) detailed descriptions of the kinds of holidays they had discussed being able to go on with the product, and numerous paragraphs covering their concerns over holiday related problems and their anger over being asked to pay the 2014 management fees.

- Mr and Mrs H's action in walking away from the membership due to the dispute over the 2014 management fees, essentially meant abandoning the investment, which they had borrowed a substantial amount of money to purchase, without any return. I think Mr and Mrs H were justified in disputing the fees, but the disputed amount was small when considered alongside the sums involved in purchasing the membership, or any potential investment returns (if it was the case that the Supplier had led them to believe they could make a profit). And it's in light of this that I find their decision to walk away difficult to square with the investment aspect of the product having been a material factor in their decision to purchase it.

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 H's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have gone ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs H and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr and Mrs H was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs H was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's 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 am not persuaded that the Lender was party to a credit relationship with Mr and Mrs H under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA.

I don't think the Lender acted fairly in failing to honour Mr and Mrs H's Section 75 claim, because there was a breach of contract by the Supplier which the Lender was jointly liable for. The Lender has since written off a significant sum owed by Mr and Mrs H, which I suspect will exceed any compensation Mr and Mrs H would have been due, and which the Lender would have been entitled to set off against that sum.

This means the only actions I am currently minded to decide First Holiday Finance Ltd must take to settle the complaint are following:

1) To reduce the outstanding debt reported to the credit reference agencies in relation to the Credit Agreement (if any), by the amount of compensation it ought to have paid to Mr and Mrs H to settle their Section 75 claim.

2) If the compensation it ought to have paid Mr and Mrs H *exceeds* the amount it wrote off the loan, to pay any excess to Mr and Mrs H, along with 8% simple interest per year* calculated from the date it declined their complaint, to the date the complaint is settled.

The amount of compensation referred to in the steps above is the monetary value of the accommodation Mr and Mrs H would have been entitled to book with their Fractional Club membership in 2015, had the Supplier not breached the Purchase Agreement by invoicing them for the 2014 management fees.

*HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer 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 currently minded to partially uphold Mr and Mrs H's complaint.

If there is any further information on this complaint that Mr and Mrs H or First Holiday Finance Ltd wish to provide, they should ensure this reaches me by **8 May 2025**.

Will Culley
Ombudsman

Appendix: The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *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*').

My Understanding of the Law on the Unfair Relationship Provisions

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.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/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.140A(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."[6]

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.

The Law on Misrepresentation

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[7]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts.

[7] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

Relevant Publications

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').

Will Culley
Ombudsman