DRN-5608604

The complaint

Mr and Mrs B's complaint is, in essence, 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 claims under Section 75 of the CCA.

What happened

On 24 June 2011 Mr and Mrs B bought a trial timeshare membership from a timeshare provider (the 'Supplier'). This trial membership cost £3,595 and entitled Mr and Mrs B to take five weeks' holiday at accommodation from the Supplier's portfolio of resorts in the following three years. This trial membership was bought using finance provided by the Lender. This purchase and finance agreement is not the subject of this complaint and is included for background purposes only.

Whilst on a holiday as part of their trial membership, Mr and Mrs B purchased a full membership of a timeshare (the 'Fractional Club') from the Supplier on 13 April 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £13,448 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B 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 B paid for their Fractional Club membership by paying a £500 deposit and taking finance of £12,984 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 21 July 2021 (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. 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) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

- Told them that they would own part of a resort asset which would grow in value like normal property and which they could sell and recoup some of their total investment.
- They had found it difficult to find accommodation due to a waiting list and poor availability*.
- The interest rate on the finance was exorbitantly high*.
- They were not told that their beneficiaries would inherit the management fee liability

should they die during the course of the membership*.

* Although set out by the PR in the Letter of Complaint as misrepresentations, this appears to be an error. I shall deal with these individual points later as appropriate.

Mr and Mrs B say that they have a claim against the Supplier in respect of the misrepresentation 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 Mr and Mrs B.

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

Although set out as a misrepresentation, Mr and Mrs B say that that they found it difficult to book the holidays they wanted, when they wanted. It seems that Mr and Mrs B are saying here that the Supplier did not live up to its obligations under the Purchase Agreement.

As a result of the above, Mr and Mrs B say that 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 B.

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

The Letter of Complaint set out several reasons why Mr and Mrs B say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

- Fractional Club membership was an Unregulated Collective Investment Scheme ('UCIS') the selling and/or marketing of which was illegal.
- There were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') in the Purchase Agreement and Credit Agreement, namely:
    - There had been no choice of lender given to Mr and Mrs B;
    - The interest rate applied to the Credit Agreement (13.8%) was extortionately high; and
    - Commission was paid to the Supplier by the Lender which had not been disclosed to Mr and Mrs B.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- The Supplier had pressured Mr and Mrs B into purchasing Fractional Club membership.

The Lender dealt with Mr and Mrs B's concerns as a complaint and asked the Supplier to respond to the elements relating to the Time of Sale. It issued its final response letter on 25 February 2021, rejecting the complaint on every ground. It also said that it thought elements of their complaint had been made too late under the Regulator's rules so they could not be considered by the Financial Ombudsman Service should Mr and Mrs B decide to refer it.

Mr and Mrs B did refer the complaint to this Service, where it was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs B disagreed with the Investigator's assessment and the PR said, amongst other things, that the Fractional Club membership was sold and/or marketed to Mr and Mrs B as

an investment in breach of Regulation 14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). So, Mr and Mrs B asked for an Ombudsman's decision – which is why it was passed to me.

And having considered everything that had been submitted, I agreed with the Investigator's outcome, in that I didn't think Mr and Mrs B's complaint ought to be upheld. But I expanded upon the reasons for doing so, so I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments that they wished me to consider.

The provisional decision

In my PD, I said:

"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 do not currently think this complaint should be upheld.

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

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

The Limitation Act 1980 (the 'LA') imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it was fair and reasonable for the creditor to take into account the timing of the claim to decline it.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued. But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

Mr and Mrs B have made a claim under Section 75 as they entered into a loan agreement with the Lender. So, the date on which the cause of action accrued was the date of the sale – 13 April 2014. I say this because Mr and Mrs B entered into the purchase of their Fractional Club membership on that date based on the alleged misrepresentation(s) of the Supplier, which they say they relied on. And as the loan from the Lender was used to help finance the purchase, it was when they entered into the Credit Agreement that they suffered a loss.

Mr and Mrs B first notified the Lender of their Section 75 claim on 21 July 2021. And as more than six years had passed between the Time of Sale and when they first put their claim to the Lender, I don't think it was unfair or unreasonable of the Lender to reject Mr and Mrs B's concerns about the Supplier's alleged misrepresentations.

For this reason, therefore, I do not think the Lender is liable to pay Mr and Mrs B any compensation for the alleged misrepresentation(s) 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 B a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Although set out as a misrepresentation, Mr and Mrs B have said they found it difficult to book the holidays they wanted, when they wanted due to a long waiting list and a lack of availability. This seems to be an allegation that the Supplier breached the terms of the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs B states that the availability of holidays was/is subject to demand. By their own testimony they have taken holidays with their membership, and they have not provided any evidence to show when they tried to book a holiday but were unable to do so due to a lack of availability. I accept that they may not have been able to take certain holidays, but on the evidence submitted, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs B any compensation for a breach of contract by 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 140A of the CCA: did the Lender participate in an unfair credit relationship?

I have already explained why I am not persuaded that Mr and Mrs B ought to have had a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs B 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.

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 will consider whether the credit relationship between Mr and Mrs B and the Lender was unfair.

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 B'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.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."[1]

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.

I have considered the entirety of the credit relationship between Mr and Mrs B and the Lender along with all of the circumstances of the complaint. When coming to my 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;*
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; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs B and the Lender. And having done so, I do not think the credit relationship between them was likely to have been rendered unfair to Mr and Mrs B for the purposes of Section 140A.

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

Mr and Mrs B'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.

Mr and Mrs B say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time, but they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They have said in their testimony the following:

> *"In 2014 we went to Malaga, Spain and we were asked to attend a meeting with [the Supplier] in the middle of the week. This ended up taking the whole day.... it was really quite confusing and very pressured.*
>
> *We told them that we couldn't afford it and they kept going away and redoing their calculations until it seemed to fit into our budget. [The Supplier] arranged the loan with [the Lender]. I was temping at the time and [Mr B] worked in a factory. They threw in a free holiday week and an iPad.*
>
> *... in the end we agreed between ourselves that we would sign the documents just so we could all leave and then when we got home that we would cancel it."*

So, it seems that Mr and Mrs B were able to explain that the cost was too high and seem to have been able to negotiate the terms of the purchase quite effectively. They also seem to have been able to talk to each other and agree what they were going to do. So, I'm not persuaded that Mr and Mrs B made the decision to purchase Fractional Club membership at the Time of Sale because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

And they did call the Supplier during the 14-day cooling off period and said they wished to cancel. This resulted in the Supplier sending a sales agent to meet Mr and Mrs B at their home to discuss the membership.

They say:

> *"When we got home we called [the Supplier] to cancel it and they sent somebody to the house to talk to us and who tried to convince us to keep the fraction. To start with we said no and that we didn't want to keep going to Spain and wanted to do some international holidays. Then we were told that by keeping our membership we could have an [sic] international holidays too and so we went to Florida. We were told that the fraction was an investment for us and our children."*

But this does not suggest to me that the Supplier put pressure on them to continue with the purchase. It seems that the negotiations were two-way, and through these two-way negotiations Mr and Mrs B obtained the membership that they wanted. So, I am not persuaded that Mr and Mrs B were pressured into making a purchase of a product that they simply did not want.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs B 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.

I can see from the account statements that the account was kept in good order for several years after the inception of the Credit Agreement, and it was only due to Covid that the repayments became difficult to maintain. But I can't see that this was in any way foreseeable at the Time of Sale. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs B. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs B wish to provide, I would invite them to do so in response to this provisional decision.

The PR says that Mr and Mrs B weren't offered a choice of credit providers by the Supplier. But it wasn't acting as an agent of Mr and Mrs B but as the supplier of contractual rights they obtained under the relevant purchase agreement. And, in relation to the loan, it doesn't look like it was the Supplier's role to make impartial or disinterested recommendations or to give Mr and Mrs B advice or information on that basis. So, I'm not persuaded that their credit relationship with the Lender was rendered unfair for this reason given the facts and circumstances of this complaint.

In addition, the PR says in the Letter of Complaint that the Supplier was paid commission by the Lender as a result of it arranging the Credit Agreement, and that this commission payment was not disclosed to Mr and Mrs B thereby rendering their credit relationship with the Lender unfair. But the PR has submitted no evidence to support this allegation, and the Lender has told both this Service and the PR that no commission was paid by it to the Supplier, which would seem likely to be the case given the Lender was the Supplier's in-house credit provider. So, I am not persuaded that any commission was paid in this case.

I'm not persuaded, therefore, that Mr and Mrs B'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 the PR says Mr and Mrs B's credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was a UCIS, the marketing and selling of which was prohibited.

But I don't agree the Fractional Club membership was a UCIS. The Lender does not dispute, and I am satisfied that Mr and Mrs B's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations, because Mr and Mrs B acquired holiday rights when purchasing the membership. And as such, the Fractional Club membership was exempt from giving rise to a Collective Investment Scheme (see paragraphs 39-54 in Shawbrook & BPF v FOS).

However, I have gone on to consider if the Fractional Club membership was marketed and sold to them as an investment in breach of prohibition under the Timeshare Regulations against selling timeshares in that way.

<u>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?</u>

As I've said, I am satisfied that Mr and Mrs B'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 the PR, in saying that Fractional Club was a UCIS, says that the Supplier did sell it as an investment at the Time of Sale. And Mr and Mrs B, in their testimony, say that the Supplier told them it was an investment for them and their children. 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.

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs B as an investment.

With that said, 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 possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mr and Mrs B's initial recollections of the sales process at both the initial Time of Sale and the subsequent meeting at their home, that is not what appears to have happened in this case. They have at no point said or suggested that the Supplier led them to believe that

their Fractional Club membership would lead to a financial gain (i.e., a profit). The only thing they have said about the membership, other than the holidays they wanted, was:

> *"We were told that the Fractional was an investment for us and our children."*

But there is nothing more which indicates how membership could be construed as an investment, and there is nothing to suggest it was positioned as something that could provide a financial gain/profit.

And indeed, in setting out Mr and Mrs B's concerns in the Letter of Complaint, the PR has said the following in relation to the investment element:

"Our Clients were introduced to fractions for which [the Supplier] claimed they would own a part of [the Supplier's] asset which would grow in value like normal property and which they could sell in 18 years times as per Fractional Rights Certificate and recoup ***some*** *of their total investment." (bold my emphasis).*

Although this is clearly not a record of Mr and Mrs B's actual words, I think that as it's a letter of complaint written on their behalf by a professional representative, it is fair to assume that it is an accurate reflection of what Mr and Mrs B told the PR when setting out their concerns and recollections of the Time of Sale. And, like their testimony, it does not set out that the Supplier told them, or led them to believe, that purchasing Fractional Club membership would or could lead to a profit. In fact, the Letter of Complaint says that Mr and Mrs B were told by the Supplier they could recoup some of their total investment.

And in any case, the PR did not adduce the allegation that Fractional Club was sold in a way that breached Regulation 14(3) of the Timeshare Regulations until after the Investigator's view that the complaint ought not to be upheld. And this was also after the outcome of Shawbrook & BPF v FOS which partly focussed on whether the Supplier breached Regulation 14(3) in the circumstances of that case.

So, while the PR now argues that the Supplier marketed and sold Fractional Club membership to Mr and Mrs B as an investment (i.e. with the hope or expectation of a financial gain/profit), I don't recognise that assertion in their recollections of the sale, nor is it set out as such in the Letter of Complaint.

Indeed, Mr and Mrs B's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what they remember of the sales process at that time and why they were unhappy with it, rather than the PR's very recent submissions following the Investigator's assessment. After all, if Fractional Club membership had been marketed and sold by the Supplier at the Time of Sale as something that would likely provide Mr and Mrs B with a profit, it is difficult to understand why they did not mention that in their initial recollections and, in turn, why PR only said in the Letter of Complaint that the Supplier had told them they could recoup some of their total investment – this is not suggesting that Mr and Mrs B expected or hoped to receive a profit.

And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit), given the evolving version of events.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way, given what I have already said about Mr and Mrs B's recollections of the sales process at both the Time of Sale and the subsequent visit to their home, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr and Mrs B rendered unfair?

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

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

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

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

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

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me, that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[2] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr and Mrs B's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. Indeed, from their testimony it seems that Mr and Mrs B were particularly interested in the holidays they could take using the membership. They say that the Supplier, in the visit to their home, said they could use it to go to places other than Spain, and they used it to go to Florida.

And when describing to the PR why they were dissatisfied with the membership they said:

> *"We would like to end this contract as we have since discovered that this package is not value for money as sold to us.*

[2] which, having taken place during its antecedent negotiations with Mr and Mrs B, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender

We have never used it as were never able to travel to use the facilities on the dates that were suitable to us... Hence, it is not worth us keeping something that cannot be used."

I find it hard to believe, that had the investment element of Fractional Club been of importance to Mr and Mrs B, that this was not mentioned when they set out, in their own words, why they were dissatisfied with the membership.

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 (and as I've said, I don't think that was the case here), I am not persuaded that Mr and Mrs B'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 pressed ahead with their purchase for the holidays they wanted to take, 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 B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs B when they purchased membership of the Fractional Club both at the Time of Sale and during the home visit.

The PR says that there are contractual terms in both the Purchase Agreement and Credit Agreement which are unfair, namely that the interest rate attached to the loan was extortionate (13.8%) and the term that means Mr and Mrs B's beneficiaries could become liable for the Fractional Club annual management charges should they die before their membership term ends. The PR says that these terms were contrary to the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

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

To conclude that a term (and in particular the term cited by the PR relating to forced inheritance) in the Purchase Agreement rendered the credit relationship between Mr and Mrs B and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR, and that the term was actually operated against Mr and Mrs B in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs B, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

But in any case, the PR has not shown how there would be a forced inheritance of Mr and Mrs B's membership and has not pointed to any terms which set this out. And the Lender has said this is not the case and there is no forced inheritance of any of the Supplier's products or their liabilities.

Having considered everything that has been submitted so far, it seems unlikely to me that the contract term(s) cited by the PR has led to any unfairness in the credit relationship between Mr and Mrs B and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that there is such a term, and even if there is, that term hasn't actually been operated against Mr and Mrs B. And the PR hasn't explained why exactly they feel this term causes an unfairness in their credit relationship with the Lender in any event.

In the Letter of Complaint to the Lender, the PR says that the loan's high interest rate made the agreement unfair to Mr and Mrs B. But I can see in the signed Credit Agreement that it clearly states the applicable interest rate and the duration of the agreement. It also explains the total amount Mr and Mrs B would be repaying after interest and charges. There are also further explanatory notes beside and below this which are noted as important and to be read carefully.

Being charged interest when borrowing money is normal, and I do not see that charging interest would have led to an unfairness in this case. I note that the PR says it feels the interest rate was high and it is described as 'exorbitant', but again, the interest rate was set out on the face of the loan agreement, so it would have been clear to Mr and Mrs B. Further, I've not been provided with any reason why such a rate was unfair given Mr and Mrs B's circumstances. After all it appears that this Fractional Club membership was something that Mr and Mrs B wanted, and they don't appear to have had alternative means to pay for it at the Time of Sale. So, I can't say the level of interest led to an unfairness that requires a remedy in this case.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the UTCCR are likely to have prejudiced Mr and Mrs B's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

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 B was unfair to them, I'm not persuaded it was.

<u>Section 140A: Conclusion</u>

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 B 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.

<u>My provisional decision</u>

Given the evidence so far submitted in relation to this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs B's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them."

The responses to the provisional decision

The PR set out why it disagreed with what I had said in the PD. In summary:

- The Letter of Complaint clearly set out that Fractional Club had the attributes of an investment and was sold as such.
- Mr and Mrs B said in their statement that they had been told Fractional Club was an investment for them and their children, and this clearly meant they believed there was a potential for profit.
- It was not unreasonable for Mr and Mrs B to believe that over an 18-year period that they may make money i.e. a profit, as the Fractional Club, unlike the trial membership or normal timeshare, had a monetary value.
- Any money derived from the sale of the Allocated Property is a profit.
- Mr and Mrs B initially tried to cancel the Fractional Club purchase, but were persuaded by the rep' on a home visit who said they could have international holidays as well as a monetary investment for their children.

The PR also submitted a handwritten sheet of paper, dated 17 February 2021 which it said was the notes made during the initial consultation call with Mr and Mrs B. It contained some of their personal details, and set out a summary of Mr and Mrs B's purchase of their trial membership in 2011, and their 2014 purchase of the Fractional Club membership.

This note seemed to support Mr and Mrs B's testimony that the Fractional Club was sold to them as an investment, in that it says:

> *"*get hols but also get investment. Sold after 19 years & get profit*"*

And then it supports what Mr and Mrs B said about getting a home visit after their Fractional Club purchase:

> *"When got back tried to cancel. Rep came to home. Convinced to stay with them – could sell + get profit after 19 years."*

This response, and the handwritten notes, were sent to the Lender, and it was asked to provide evidence of Mr and Mrs B's purchasing history, along with any sales notes relating to the purchases.

The Lender responded, and provided evidence that Mr and Mrs B had retained their trial membership until it expired in 2014, and had used it for a holiday in Florida. It also provided evidence which showed that Mr and Mrs B had purchased a points-based timeshare membership on their first trial membership holiday in 2011, and it was this membership that they cancelled during the 14-day withdrawal period. It said that it was at this point that there was a home visit, not in 2014 as claimed by Mr and Mrs B. The Lender went on to say that Mr and Mrs B did not try and cancel their Fractional Club membership as they claimed in their testimony, and there was no home visit after this purchase. It also showed that Mr and Mrs B made a further fractional purchase in 2015, and had cancelled this one within the 14-day withdrawal period.

Having considered what both parties had said in response to my PD, I thought what the Lender had sent was persuasive, and cast considerable doubt on Mr and Mrs B's account in their testimony. So, I asked the Investigator to write to the PR setting out my concerns. This said:

"The Ombudsman would ask you to consider what FHF have provided, along with what he wrote in the PD, Mr and Mrs [B's] testimony, and the client notes you provided.

The Ombudsman would draw your attention to the apparent inconsistencies in both Mr and Mrs [B's] testimony and your client notes. He considers the sales notes (having been written at or very close to the time) to be persuasive.

Whilst understanding that memories fade over time, and that mistakes are a normal part of trying to recall what happened sometime ago, the Ombudsman is concerned that Mr and Mrs [B] have said that they were visited at home following their [Fractional Club] purchase in 2014, and during that visit the sales person convinced them of the potential for profit from their purchase. As the client notes show, the home visit occurred in 2011 and was following a purchase of [the Supplier's] Vacation Club (a points based timeshare with no fractional element). And Mr and Mrs B cancelled this purchase.

It would seem, from the evidence provided by FHF, that no home visit occurred in 2014 and Mr and Mrs [B] were not minded to cancel this purchase in the way they have described.

So, given the inconsistencies in the testimony, which the Ombudsman thinks fundamentally undermine what they are saying in it, the Ombudsman feels he is unable to place any weight on it. As such he is not presently minded to uphold their complaint, for broadly the same reasons as set out in the PD."

The PR responded and said that it had no further evidence to provide, but maintained that the Supplier's training materials and the Fractional Club member's brochure showed that it was marketed and sold as an investment with the promise of a financial gain. It also submitted an email from Mrs B which reiterated that they were put under pressure and that agreeing to make the purchase was the only way they could leave the room.

As the deadline for responses has now passed, the complaint has come back to me for a decision.

The legal and regulatory context

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

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- The Consumer Protection from Unfair Trading Regulations 2008 (the CPUT 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 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 so, and having considered everything submitted by all parties, I am not persuaded that this complaint ought to be upheld.

As set out at the start of this decision, the complaint made to the Lender was about the way it had handled Mr and Mrs B's claim under Section 75 of the CCA (for misrepresentation and breach of contract), and that the Lender was party to an unfair credit relationship with them under Section 140A of the CCA.

In my PD (as set out above), I said I thought the Lender had a defence to the claim of misrepresentation under the LA, and that their claim of breach of contract was not unfairly rejected. Neither the PR (nor Mr and Mrs B) have made any further comment in relation to these findings, and having reconsidered everything afresh, I see no reason to depart from the findings I reached in the PD.

So, for completeness, I do not think that the Lender was unfair or unreasonable when it rejected Mr and Mrs B's claims under Section 75 of the CCA.

As regards the complaint of unfairness under Section 140A of the CCA, this was also made for several reasons, all of which I addressed in the PD. Having considered all the responses, the only aspects which have been contested is that Mr and Mrs B were put under pressure during the sales process at the Time of Sale, and that the Fractional Club was sold and/or marketed to Mr and Mrs B as an investment. And that either or both of these reasons rendered their credit relationship with the Lender unfair to them.

I will go on to consider these aspects of the complaint further. But as regards the remaining complaint points, which the PR initially argued rendered the credit relationship with the Lender unfair to Mr and Mrs B, as no further evidence or arguments have been submitted, I see no reason to depart from my findings on these issues (set out in my PD).

Mr and Mrs B's witness statement

As set out in the PD, Mr and Mrs B submitted an undated witness statement which they said set out their recollections of their relationship with the Supplier, and the circumstances which led to their purchase of the Fractional Club membership at the Time of Sale.

When considering how much weight I can place on Mr and Mrs B's statement, I am assisted by the judgement in the case of *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr and Mrs B have provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
> e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what Mr and Mrs B said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr and Mrs B that the inconsistencies have little to no bearing on whether their testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

And having thought about all of these things, I do not feel I am able to place much weight on what Mr and Mrs B have said in their testimony. I'll explain.

As I've said, inconsistencies in the testimony are unsurprising, but in this case, I do feel that they are significant enough to undermine what Mr and Mrs B have said. For example, Mr and Mrs B say that they agreed between themselves that they would make the purchase of Fractional Club at the Time of Sale, and then cancel it when they got home. They said:

> "When we got home we called [the Supplier] to cancel it and they sent somebody to the house to talk to us and who tried to convince us to keep the fraction. To start with we said no and that we didn't want to keep going to Spain and wanted to do some international holidays. Then we were told that by keeping our membership we could have an [sic] international holidays too and so we went to Florida."

But this does not appear to actually be what happened. As I've said, the evidence shows that Mr and Mrs B bought a points-based membership from the Supplier in 2011, and it was this membership that they sought to cancel, and it was at this point that a representative of the Supplier visited them at home. There was no home visit in 2014.

Up to this point, I can accept that Mr and Mrs B may have confused what happened in 2011 with what happened in 2014. But in their statement they went on to say that during the home visit:

> *"We were told that the fraction was an investment for us and our children."*

But I cannot see that this is correct, and I cannot see how there would be a confusion here about what was said at the home visit. The 2011 membership did not have an investment or fractional element to it, so I cannot understand how Mr and Mrs S recall being told, during a home visit, that the timeshare they had purchased was an investment.

But I can see that Mr and Mrs B said the same thing to the PR, as the notes taken reflect it being told by them that the home visit involved them being told of the investment opportunity. So, I am not calling into question Mr and Mrs B's truthfulness here, I just think it likely that they have become confused about what happened and what they were told.

So, overall, I do have sufficient doubts as to the reliability of their memories, as set out in the testimony, to mean I do not feel I can place much, if any, weight on it.

<u>Pressure</u>

Mr and Mrs B argued that they only made the purchase of the Fractional Club membership at the Time of Sale due to the pressure placed on them by the Supplier.

I acknowledge that they may have felt weary after a sales process that went on for a long time, and I also acknowledge that it would have been difficult with two small children being looked after in a neighbouring room for such a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period which they could have used, and have not provided a credible explanation for why they didn't if, as they now attest, they only agreed to make the purchase so they could leave the room. Moreover, I've seen they went on to make a further Fractional Club purchase in 2015 which they did cancel. I find this subsequent purchase difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs B made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Did the way Fractional Club was sold and/or marketed render the associated credit relationship unfair?

I have considered everything that the PR, Mr and Mrs B and the Lender have said in response to the PD. But I can't see that the PR has said anything new here which would persuade me to change the outcome of this complaint.

It has provided the initial call notes as I've said. But as I've also said, there are significant parts of these notes, as set out above, which cannot be true.

The PR has said that what is included in the training slides used to train the Supplier's sales staff, along with the contemporaneous documentation is sufficient to show there was likely to have been a breach of Regulation 14(3) of the Timeshare Regulations at the Time of Sale. But I don't agree.

As I said in the PD, 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 it is important to restress the agreed definition of the term "investment"[3]:

"An investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".

So, to conclude that Fractional Club membership was marketed or sold to Mr and Mrs B 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.

And I remain unpersuaded that this is what happened here. I acknowledge that the Supplier's training material left open the possibility that the sales representative may have

[3] As agreed in *Shawbrook & BPF v FOS.*

positioned Fractional Club membership as an investment. So, I accept that it's *possible* that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3), given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition, but I don't think it is *probable* here.

At no point have Mr and Mrs B said or suggested that the Supplier led them to believe that their Fractional Club membership would lead to a financial gain (i.e., a profit). The only thing they have said about the membership, other than the holidays they wanted, was:

> *"We were told that the Fractional was an investment for us and our children."*

And I have set out how I don't feel able to place much reliance on what Mr and Mrs B have said in their testimony anyway.

But there is nothing more which indicates how membership could be construed as an investment, and there is nothing to suggest it was positioned as something that could provide a financial gain/profit.

I repeat what I said in the PD. In setting out Mr and Mrs B's concerns in the Letter of Complaint, the PR has said the following in relation to the investment element:

> *"Our Clients were introduced to fractions for which [the Supplier] claimed they would own a part of [the Supplier's] asset which would grow in value like normal property and which they could sell in 18 years times as per Fractional Rights Certificate and recoup **some** of their total investment."* (bold my emphasis).

Although this is clearly not a record of Mr and Mrs B's actual words, I think that as it's a letter of complaint written on their behalf by a professional representative, it is fair to assume that it is an accurate reflection of what Mr and Mrs B told the PR when setting out their concerns and recollections of the Time of Sale. And it does not set out that the Supplier told them, or led them to believe, that purchasing Fractional Club membership would or could lead to a profit. In fact, the Letter of Complaint says that Mr and Mrs B were told by the Supplier they could recoup **some** of their total investment.

And in any case, the PR did not adduce the allegation that Fractional Club was sold in a way that breached Regulation 14(3) of the Timeshare Regulations until after the Investigator's view that the complaint ought not to be upheld. And this was also after the outcome of *Shawbrook & BPF v FOS* which partly focussed on whether the Supplier breached Regulation 14(3) in the circumstances of that case.

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mr and Mrs B as an investment (i.e. with the hope or expectation of a financial gain/profit), I don't recognise that assertion in their recollections of the sale, nor is it set out as such in the Letter of Complaint.

And with that being the case, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit).

As I said in the PD, for me to conclude that there was an unfairness caused to the credit relationship between Mr and Mrs B and the Lender from a breach of Regulation 14(3), I would have to be persuaded that the breach was material to their decision to purchase the Fractional Club membership at the Time of Sale.

Without feeling able to place much weight on Mr and Mrs B's testimony, I have looked at their purchase and reservation history to try and understand their likely motivation to purchase. And I can see they have made use of both of the memberships they have had. So, it is clear that Mr and Mrs B were interested in holidays, and specifically the type of holidays that they could get through the Supplier. And the sales notes from the Supplier indicate that Mr and Mrs B used their memberships to go to specific locations, like Florida.

So, on balance, 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 (and as I've said, I don't think that was the case here), I am not persuaded that Mr and Mrs B'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 pressed ahead with their purchase for the holidays they wanted to take, whether or not there had been a breach of Regulation 14(3). And for this reason, I do not think the credit relationship between Mr and Mrs B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Conclusion

For all of the reasons set out above and in my PD, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs B's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

I do not uphold this complaint against First Holiday Finance Ltd.

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

Chris Riggs
Ombudsman