DRN-5620267

The complaint

Mr and Mrs A'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

Mr and Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 20 June 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 738 fractional points at a cost of £9,400 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs A 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 A paid for their Fractional Club membership by paying a £500 deposit in cash and taking finance for the remaining amount of £8,900 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs A – using a professional representative (the 'PR') – wrote to the Lender on 9 February 2021 (the 'Letter of Complaint') to complain about:

1. A misrepresentation 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 A say that the Supplier made a pre-contractual misrepresentation at the Time of Sale – namely that the Supplier told them that the product provided the opportunity for them to make savings on holiday accommodation and to gain access to exclusive accommodation when neither was true.

Mr and Mrs A 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 A.

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

Mr and Mrs A say that the Supplier breached the Purchase Agreement but do not explain why they believe that to be the case.

If Mr and Mrs A 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 A.

(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 A 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:

1. Commission was paid by the Lender to the Supplier which was not disclosed to them.
2. 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.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable for them.
4. The Supplier failed to provide sufficient and timely information in relation to the Fractional Club.

The Lender dealt with Mr and Mrs A's concerns as a complaint and issued its final response letter on 17 March 2021, rejecting it on every ground.

Mr and Mrs A referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

Having considered everything, I came to the same conclusion as our Investigator and didn't think Mr and Mrs A's complaint should be upheld. I issued a provisional decision (PD), setting out my thoughts and invited both parties to respond with anything further they wished me to consider, before the deadline I gave, after which I would review the case again. The PD included the following:

'***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 includes the following:

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."[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

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

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.

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.[2]

<u>The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')</u>

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*

<u>The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')</u>

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

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

- *Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms*

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').

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 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.

Firstly, I will address the PR's complaint points regarding Section 75 of the CCA – both in terms of the Supplier's alleged misrepresentations at the Time of Sale and its alleged breach of contract.

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs A could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA.

It's worth noting that a Section 75 claim must be made against the creditor. At the time Mr and Mrs A's Credit Agreement was made in 2012, First Holiday Finance Ltd (incorporated in the UK) ('FHFUK') was not the creditor. The creditor when the agreement was made was an entity that was set up and incorporated in the British Virgin Islands (FHFBVI). On 1 August 2015, FHFBVI assigned its entire loan book including Mr and Mrs A's loan to the Lender, First Holiday Finance Ltd.

However, it didn't necessarily follow that FHFBVI's obligations – such as its potential liability for a section 75 claim – were similarly assigned. Although the definition of a creditor in section 189 of the CCA includes an assignee (like FHFUK), Goode[3] indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) Section 75.

That doesn't mean claims like Mr and Mrs A's can't be made. But, when made to FHFUK, the expert opinion in Goode does suggest that they face a certain degree of difficulty.

What's more, as Mr and Mrs A's breach of contract claim isn't particularised, and as I don't think there were any actionable misrepresentations at the Time of Sale by the Supplier (for reasons I'll come on to), even if I'm wrong about the difficulty Mr and Mrs A's claims might face, I'm not persuaded such claims would have any merit anyway.

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[3] Goode: Consumer Credit Law and Practice – Division I Commentary – Part IC Consumer Credit Legislation – 45A Assignment – III Assignment and the CCA 1974: the assignee as creditor/lender or owner – 1 The basic rule – Pre-assignment breaches"

And with all of that being the case, I'm not persuaded that FHFUK acted unfairly or unreasonably when it refused to pay Mr and Mrs A compensation for the claims they said it was liable for under Section 75.

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 Lender's response to Mr and Mrs A's Section 75 claims was unfair or unreasonable. But Mr and Mrs A 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 A 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 A and the Lender.

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

Mr and Mrs A'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 A 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. Nor am I persuaded that the Supplier made any misrepresentations. That's because of the lack of detail in the allegations made, and in the information and evidence brought to substantiate them.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs A. 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 A 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. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs A. If there is any further information on this (or any other points raised in this provisional decision) that the Mr and Mrs A wish to provide, I would invite them to do so in response to this provisional decision.

The PR also said that commission was paid to the Supplier by the Lender at the Time of Sale and because this was not disclosed to Mr and Mrs A, this made the credit relationship unfair. But the PR has not provided any evidence that commission was paid. And the Lender has confirmed to this Service (and the PR) that it did not pay any commission to the Supplier. I'm not persuaded that any commission was paid on this occasion.

I'm not persuaded, therefore, that Mr and Mrs A'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 they say 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 A'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 Mr and Mrs A say 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.

Mr and Mrs A'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 A 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 A, 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 A as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to them 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 A 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 on to shortly. And with that being the case, it is not necessary for me 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 A 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 A 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.

But there was no suggestion in the Letter of Complaint that the Supplier led Mr and Mrs A to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication in the initial complaint papers that they were induced into the purchase on that basis.

In January 2024 the PR sent in copy complaint papers which included an unsigned and undated statement from Mr A. The statement included the following:

'At the presentation we were told that we could purchase a fractional share of the property which would allow us the opportunity to use the facilities at any of the resorts worldwide for slots of time (subject to advance booking). We were told that they had affiliated resorts which were also available which meant we were not just limited to using [the Supplier's] Resorts only.

What clinched the deal for us was that it was made clear that what we were purchasing was an investment alongside a holiday club membership which meant that not only would we have the opportunity to holiday in any of their luxurious resorts but we would also be in a position to make money when the property was sold at the end date which was around 2030. It seemed a fantastic deal and we were interested…'

On the face of it, Mr and Mrs A seem to be saying that one of the main reasons they went ahead with the purchase was because of the opportunity to invest and make a profit. But I have doubts as to when the statement was made given it wasn't received when the PR originally referred the complaint to this service in 2021 but was received in 2024.

We asked the PR about this and it suggested the statement formed part of a bundle of papers date stamped 'RECEIVED 20 JAN 2021'. But only one document in the bundle had a 'RECEIVED' date stamp on it – and it wasn't the statement. More importantly, the statement wasn't included in the original bundle from 2021 at all. Confusingly, the document that was date stamped in the bundle received in 2024 wasn't date stamped in the bundle received in 2021.

I also note that, while the statement refers to investment, the Letter of Complaint setting out various reasons for Mr and Mrs A's dissatisfaction – and which presumably would have been written with any statement from Mr and Mrs A in mind – omits any reference whatsoever to investment or the like.

The PR's responses to our recent request for more information about when the statement was made do little, if anything, to allay my concerns about when it was made. I'm mindful, of course, that there is a possibility the statement has been influenced by the judgment in Shawbrook & BPF v FOS, given when it was submitted.

All of which leads me to place emphasis on the remaining evidence, most notably the Letter of Complaint. As I say, that correspondence doesn't mention investment at all and instead suggests there were other factors that may have led Mr and Mrs A into going ahead with the purchase, for example the chance to take certain holidays.

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 A'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 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 A 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 A when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

Specifically, it's argued that the Supplier breached Regulation 12 of the Timeshare Regulations in failing to provide Mr and Mrs A with information in good time or that was clear, comprehensible and accurate.

One of the main aims of the Timeshare Regulations was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure 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 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.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs A, have flowed from such breaches, 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 regulatory breach is likely to lead to an unfair credit relationship unless it had an impact on Mr and Mrs A. Given the facts and circumstances of this complaint, and despite what the PR says, I am not persuaded that the Supplier's alleged breaches of Regulation 12 of the Timeshare Regulations have been shown to have prejudiced Mr and Mrs A'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 A 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 A 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 do not think that the Lender acted unfairly or unreasonably in dealing with Mr and Mrs A's Section 75 claims as it did, 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.

If there is any further information on this complaint that the Mr and Mrs A wish to provide, I would invite them to do so in response to this provisional decision.

My provisional decision

For the above reasons, I don't intend to uphold the complaint.'

The Lender responded that it accepted the PD and had nothing further to add.

The PR said Mr and Mrs A didn't agree with my PD. Its initial submissions ('Response 1') ran to 33 pages in length, but the central arguments made in it can be summarised as follows:

- They were clear that they'd been told they'd 'make money' by purchasing the product and this unquestionably constituted an actionable misrepresentation under Section 75.
- The promise of savings on holiday accommodation and of exclusivity amounted to breach of a contractual term.
- The available evidence doesn't indicate that FHFUK was not the creditor at the Time of Sale. My assertion that FHFBVI was the creditor required clear evidential substantiation.
- In light of Mr and Mrs A's recollections from the time, it is more likely than not that the product was marketed in a manner that breached Regulation 14(3).
- In the PD I placed too much emphasis on the absence of any reference to investment in the Letter of Complaint as a factor in Mr and Mrs A's decision to go ahead with the sale.
- I hadn't properly applied the CPUT Regulations regarding the provision of material information to Mr and Mrs A in a transaction that was, in effect, commensurate to the sale of an interest in property. The same or similar could be said about the RDO Code. The failure to provide them with adequate information caused the credit relationship to be unfair under Section 140A.
- My assessment of Mr and Mrs A's recollections of the sale, submitted in January 2024, was flawed and didn't adequately address their allegations concerning pressure selling tactics.
- I didn't adequately address the lack of a creditworthiness and affordability assessment or lack of transparency and choice when it came to the facilitating of their finance arrangement.
- Certain important documents and information have not been made available to Mr and Mrs A, and these should be obtained and considered. These include all advertising, promotional materials and presentations used by the Supplier and its sales training materials among, other things.

Furthermore, the PR asked if I was willing to either request the information it felt was missing from the Lender or grant a deadline extension to give the PR the opportunity to do so. I granted an extension, but no further evidence or submissions were received by the end of it – just a request for a further extension while the PR made more enquiries.

Through the Investigator, I contacted the PR to provide a copy of the training materials held by this service that relate to the Time of Sale. I provided a copy of some evidence I'd seen prior to my PD regarding FHFUK taking over FHFBVI's loans and I elaborated some more on my thoughts regarding why the Lender had handled the Section 75 claims fairly. The PR submitted a further 14-page response ('Response 2').

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.

I recognise that the PR believes that the Lender has not provided a number of what it refers to as 'fundamental documents' relevant to the sale to Mr and Mrs A and their subsequent complaint. However, I believe sufficient information has been provided by the parties to allow me to weigh up the evidence and reach a fair and reasonable decision in the circumstances of this complaint.

Having done so, I've arrived at the same conclusions I did in my PD. As I've said before, my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So,

while I've read and considered the PR's further submissions in full, I will confine my findings to what I believe to be the key points it's made in relation to this complaint.

The PR argues that the available evidence indicates FHFUK was the creditor at the Time of Sale and not FHFBVI, as I'd found in my PD. In Response 1 it questioned what evidence I'd relied on in finding that the opposite was true. I'll explain how I reached the conclusion that I did.

Companies House records show that First Holiday Finance Ltd incorporated in the United Kingdom on 16 February 2011, but it remained dormant until 1 August 2015. In another case that was considered by this service, First Holiday Finance Ltd submitted an excerpt from the business plan it gave to the FCA when applying for full authorisation in 2015. I forwarded a copy of the business plan to the PR for review prior to issuing this decision.

First Holiday Finance Ltd's business plan explains how the entity had been set up and incorporated in the British Virgin Islands (as FHFBVI) in 1998. At the same time, its entire lending operation was outsourced to a third-party debt administrator operating from the Isle of Man. Plans for First Holiday Finance Ltd to start lending from the UK in 2011 were put on hold because of what it described as the 'general economic situation'. All loans continued to be written by FHFBVI, although its dormant UK entity, which had been incorporated in February 2011, did maintain its Office of Fair Trading (OFT) licence. As I said in my PD, on 1 August 2015 FHFBVI assigned its entire loan book to FHFUK (the UK entity that is the subject of Mr and Mrs A's complaint). All new loans were written by FHFUK from then on. So, this shows that the finance under the Credit Agreement brokered by the Supplier was provided by FHFBVI, which was operating outside of the UK.

For the purposes of considering how the Lender dealt with Mr and Mrs A's Section 75 claims about the Supplier's alleged misrepresentations and possible breach of contract, it's important to note that such a claim must be made against the creditor. At the time the Credit Agreement was made, the creditor was FHFBVI. While FHFBVI assigned its loan book to FHFUK, it didn't necessarily follow that all its duties or other obligations – such as any potential liability for a Section 75 claim – were similarly assigned. Although the CCA Section 189(1) definition of creditor includes an assignee, *Goode* indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) Section 75 of the CCA.

That's not to say that a claim can't be made along the lines outlined by Mr and Mrs A. Rather, as I said in my PD, it highlights the inherent difficulty they might face in succeeding with that claim. And with this in mind, I still can't say that FHFUK acted unfairly or unreasonably towards Mr and Mrs A when it declined to pay them compensation for the claims they said it was liable for under Section 75.

In my PD and in subsequent comments made to the PR via the Investigator, I went on to explain why, even if I was wrong about the above, that I still wasn't persuaded by the merits of the arguments Mr and Mrs A made regarding any possible breach of contract or misrepresentation. On reviewing the PR's responses to my PD in this regard, my view of that aspect remains the same given the lack of evidence brought in support of those allegations.

As I said following my PD, I don't believe the case for misrepresentation (or breach of contract) has been shown irrespective of who the creditor was at the material time. I'm mindful that a misrepresentation will be an untrue statement of fact made by the Supplier that induced Mr and Mrs A into entering the contract. I don't find that such untrue statements have been shown to be made by the Supplier or that, if they were made, they induced Mr and Mrs A into entering the contract when they otherwise wouldn't have, based on the available evidence.

So, I still don't consider that the Lender dealt with Mr and Mrs A's Section 75 claim unfairly.

Mr and Mrs A's complaint regarding an unfair credit relationship resulting from the Credit Agreement is a complaint made against the business that provided the loan – in this case, that was FHFBVI initially. But when FHFBVI assigned its loan book, including Mr and Mrs A's loan, it handed over administrative responsibility for that relationship to FHFUK.

Mr and Mrs A's loan from FHFBVI was written under English law and regulated under the CCA. FHFUK acquired the loan before Mr and Mrs A made their complaint, so Section 140A is relevant law. This aspect is not subject to the same difficulty as their Section 75 claim. So, determining what's fair and reasonable in all the circumstances of the complaint includes considering whether the credit relationship between Mr and Mrs A and FHFUK was unfair.

This brings me to the issue of whether there was a breach of Regulation 14(3) of the Timeshare Regulations. The PR argues that there was a breach in light of, among other things, Mr and Mrs A's written statement. I made no finding on that point in my PD on the basis that, even if there had been a breach, I wasn't satisfied that the credit relationship was rendered unfair. On considering all the evidence afresh, I remain of the view that I need make no finding on whether there was a breach of Regulation 14(3) since I'm still not satisfied that the evidence indicates the credit relationship was rendered unfair in any case.

As I said in my PD, in order to find that the credit relationship was rendered unfair to Mr and Mrs A, it was important to consider whether any breach by the Supplier of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement. The PR suggested, in the main, that Mr and Mrs A's written statement of their recollections of the Time of Sale was evidence of both breach and causation.

I was, and still am, disinclined to place much evidential weight on Mr and Mrs A's statement for the reasons I gave in my PD. These include uncertainty as to when the statement was made, the timing of when this service first received the statement and the lack of consistency between the arguments made in the initial Letter of Complaint and the statement.

The PR countered my disinclination to place much reliance by saying that, for example, minor inconsistencies in recalling dates or peripheral details so long after the events on question shouldn't invalidate the core thrust of the testimony provided. I didn't point to any such errors in the statement in my PD and, whether such errors were present, this didn't have a bearing on my view of it in any event. That's because of the serious concerns I do have about the statement that have not been adequately explained either before or in response to the PD I issued.

Doubts remain in my mind as to when the statement was made and why this wasn't provided as part of the PR's initial bundle of papers or, at the very least, much sooner than it was. Especially since, at paragraph 71 of Response 1, the PR wrote:

'*The PD appears to place disproportionate weight on the fact that the initial Letter of Complaint did not use the specific term "investment" as a central point of misrepresentation, while simultaneously downplaying the significance of* [Mrs A's] *subsequent, detailed witness statement which does.*' [my emphasis]

The PR's use of the word 'subsequent' here does suggest to me that, as I thought at the time of my PD, the statement was made after the Letter of Complaint and not before, as the PR had previously indicated.

I'm still unclear as to why, if the investment aspect was so central to Mr and Mrs A's initial complaint and reasoning for purchasing the product as is now argued, this was not mentioned at all in the Letter of Complaint. I can't reasonably see why that would be the case if the statement was made at any time before the Letter of Complaint was written, given that the latter was produced by a professional representative and included several other complaint points across as many as ten pages.

Looking at the remaining evidence other than the statement, it is difficult for me to find, on balance, that Mr and Mrs A were motivated in any significant way to buy the product as an investment even if there was a breach of Regulation 14(3).

Moving on, in Response 1 the PR repeated its allegation that there was no adequate creditworthiness assessment. I said in my PD that, while I saw no indication that this was the case or that the lending was unaffordable for Mr and Mrs A in any event, it was open for them to provide more information about this for me to consider. Overall, I haven't seen anything in the PR's responses to the PD that leads me to change my mind about the affordability of the lending.

The PR has also repeated its concerns that the Supplier misled Mr and Mrs A and carried on unfair commercial practices which were prohibited under the CPUT Regulations and that contravened the RDO Code. Among other things, it says Regulation 6 of the CPUT Regulations – which concerns misleading omissions – applies to sales such as this one. As I said in my PD, I took account of the RDO Code and the CPUT Regulations, including Regulation 6, in reaching that decision. I went on to say that, given the limited evidence in this complaint, I wasn't persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations. While I accept it's possible that aspects of the sale may have run contrary to the CPUT Regulations and/or the RDO Code, I would in any event also need to be satisfied that this materially affected Mr and Mrs A's decision about whether to enter into the contract, thus rendering it unfair. Given that I don't think any breach of Regulation 14(3) impacted on Mr and Mrs A in such a way, I don't find it likely that any other breaches were material to them.

Regarding the allegation that Mr and Mrs A were pressured into purchasing the product, I note this was mentioned very briefly as one of several complaint points in the initial complaint form this service received and in the Letter of Complaint. I acknowledge that they may have felt weary after a sales process that went on for a long time. But there's 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. Mr and Mrs A were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. An explanation is provided in Mr and Mrs A's statement but, for the reasons already given, I don't find that evidence to be persuasive.

And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs A made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

To some extent, the PR accepts my provisional findings regarding undisclosed commission in this case. Specifically, that no commission was paid between the Lender and the Supplier in relation to the Credit Agreement. It now argues that the nature of the arrangement between those two parties created an imbalance of power and information because it guided Mr and Mrs A towards the Lender's finance product without them being provided with a full understanding of the market alternatives. Interestingly, the PR goes on to accept that this was '*at the **potential** disadvantage of the consumer* [my emphasis]'. I think this is important here as, even if there was a failing by the Lender in this regard (and I don't find that there

was), I'd expect to see evidence that this had also materially affected Mr and Mrs A. On the basis that it seems applications were made to other lenders (albeit who refused to lend to them) before the Lender agreed to do so, I'm not satisfied that they were denied any options or were caused some other loss.

Taking all the circumstances into account, including the PR's responses to my PD, I've still not seen enough in this case to find that the Lender acted unfairly or unreasonably in dealing with Mr and Mrs A's Section 75 claims as it did, 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

For the above reasons, my final decision is that I don't uphold the complaint.

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

Nimish Patel
Ombudsman