DRN-5633670

The complaint

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

What happened

I issued a provisional decision on this case on 20 May 2025, in which I explained the background to the complaint and my provisional findings. A copy of that provisional decision, along with an appendix setting out the legal and regulatory context, is appended to and forms a part of this final decision. For that reason it's not necessary for me to go over all the details again, but to summarise briefly:

- Mr and Mrs R purchased membership of a type of asset-backed timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 15 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £10,194 (the 'Purchase Agreement'). The purchase was financed in part by a loan (the 'Credit Agreement'), which was arranged by the Supplier with the Lender.

- Mr and Mrs R later complained to the Lender via a professional representative ('PR'), in July 2021, about misrepresentations and breaches of contract allegedly committed by the Supplier, for which they considered the Lender was liable under Section 75 of the CCA. They also complained that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA for a variety of reasons.

The Lender didn't uphold the complaint, and so the matter was referred to the Financial Ombudsman Service. In my provisional decision, I concluded that the credit relationship between Mr and Mrs R and the Lender had been rendered unfair under Section 140A of the CCA. This was for the following reasons (explained in much more detail in the appended provisional decision):

- The Supplier, in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), had marketed and sold the Fractional Club membership to Mr and Mrs R as an investment. I noted Section 56 of the CCA meant that the Supplier's acts and omissions during these antecedent negotiations could be attributed to the Lender through statutory agency.

- Mr and Mrs R's purchasing decision, which caused the credit relationship with the Lender to come into existence, had been materially influenced by the Supplier's breach of the regulations.

I considered the Lender should provide redress to Mr and Mrs R as a result. The details can be found in the appended provisional decision, but essentially involved unwinding the purchase as far as practically possible.

I invited the parties to the complaint to let me have any further submissions they wanted me to consider. Mr and Mrs R accepted the provisional decision. The Lender did not however, and I think its arguments could fairly be summarised as follows:

- It was concerned that a witness statement and notes of a telephone call between Mr and Mrs R and PR and supposedly taken some years ago, and which I'd relied on in my provisional decision, had only come to light now in 2025. The Lender suggested these documents were not genuine. It said the matter of the Fractional Club product having been marketed as an investment had apparently not been so important to the complaint in 2021, given this point had not been made back then. It also noted that document metadata associated with the witness statement showed the author was an employee of PR and the document had been created in January 2024, not in 2021 when the statement was said to have been taken.

- The witness statement and call notes were not an accurate account of the sale in any event. In particular:

    - It hadn't taken Mr and Mrs R 30 minutes to get to breakfast – it had been a 5 minute drive, and then another 5 minute drive to the Supplier's Exhibition Centre for a sales presentation.

    - Mr and Mrs R were in fact shown a range of different accommodation.

    - Mr and Mrs R would not have been told they would own the fractional asset after 19 years, as that wasn't how the product worked. The asset was to be sold instead.

    - Mr and Mrs R could have left the sales process at any point – there had been a delay in the process because of mistakes in the documents, which needed to be reprinted.

    - Mr and Mrs R had not told the Supplier that Mr R earned £35,000 and Mrs R was a "stay at home mum", as they had claimed. The records from the time showed they had said Mr R earned £44,000 and Mrs R was self-employed with an income of £50,000.

    - The Supplier's sales notes stated that Mr and Mrs R had "read through everything", so it wasn't credible of them to suggest, as they did in the witness statement amd notes, that they knew nothing about the maintenance fees.

The case has since been returned to me to review once more.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I've arrived at the same conclusions I reached in my appended provisional decision, and for the same reasons. However, I will address the points the Lender has raised in response to that provisional decision.

When commenting on the call notes supplied by PR in May 2025, I said the following in my provisional decision:

"These notes are consistent with the witness statement produced previously (the witness statement appears to be a conversion of the notes into prose, with some embellishments). They are also consistent with my understanding of how PR took on clients – with an initial phone call being made to gather details of their experiences with the Supplier or other timeshare companies, with a witness statement being produced based on this.

Having studied the handwritten notes, I think it's likely they are genuine notes of a call made to Mr and Mrs R on 8 April 2021. They are unstructured and abbreviated, and give the impression the writer was trying to keep up with the conversation. While it's unfortunate these were not supplied at an earlier date, on balance I think they are likely to be representative of Mr and Mrs R's recollections of the Time of Sale, as of April 2021."

There's not a lot more I can add to that analysis, although I would say that I have now seen a number of handwritten call notes from PR in relation to different complaints, sometimes alongside other evidence which has allowed me to establish an audit trail, and the impression I get from them is that they are contemporary notes of telephone calls with PR's clients, rather than notes which have been produced at a later date.

As I observed, the failure to supply these notes at an earlier date is unfortunate, and I would go as far as to say that it is rather disappointing that such critical evidence of Mr and Mrs R's recollections of the Time of Sale has remained undisclosed by PR for over four years. But that said, it *is* evidence and, for the reasons I've explained, I think it's likely to be genuine. I don't think it would be fair on Mr and Mrs R for it to be completely dismissed on account of how late it has been submitted.

The Lender has questioned why the marketing of the Fractional Club product as an investment, contrary to the Timeshare Regulations, had not been emphasised at the time of the complaint in 2021, if this had truly been a matter of concern to Mr and Mrs R. I observe that PR *did* focus on the investment aspect of the Fractional Club product in the initial complaint, but emphasised the alleged illegality of the product (being, in its view, an Unregulated Collective Investment Scheme) rather than it having been marketed as an investment in prohibition of the Timeshare Regulations. But investment-related allegations have been present since the complaint was first made – they have not emerged only recently.

Regarding the Lender's concerns about the metadata, I would say there are a number of reasons why metadata may state a creation date for a document which is later than the date the original document was created, not all of which are suspicious. One such reason is where a document has been converted from one format to another – which is what the metadata indicates happened here. And while I understand a point the Lender has implied, which is that the document could have been edited before it was converted, in my provisional decision I relied on the handwritten notes, not the typed-up statement. So if the document was edited before its conversion (and I make no finding that it was), I don't think this assists the Lender's case.

The Lender also points out what it says are inaccuracies in the witness statement and/or call notes. I don't think some of the things the Lender has identified can fairly be described as inaccuracies. For example, the Lender says Mr and Mrs R were shown a range of accommodation, but that seems to be consistent with their recollections: they recalled being shown an impressive "showhouse" along with less impressive accommodation. Similarly, I can't see that Mr and Mrs R's understanding of how the fractional asset worked casts doubt on the credibility of their recollections. It's apparent there was some degree of confusion over the details, and whether they would own a share in the property, but they do appear to have understood it would be sold.

On the face of it, the inconsistency in the income and employment details given by Mr and Mrs R does appear to be more significant, but I note the screenshot the Lender has used to evidence this doesn't identify the customers the figures relate to, nor does it show the employment status or bear any signatures. It's difficult to attach much weight to this as a result.

I agree that notes made by the Supplier at the Time of Sale say that Mr and Mrs R had read through everything, and that the prominence of the management fees throughout the paperwork would have been sufficient to bring these to their attention. It also appears Mrs R paid the fees in 2015 and the Supplier had confirmed they would be billed every other year. So it does seem that this part of Mr and Mrs R's recollections cannot be accurate. That said, I am not convinced that this inaccuracy, given the rest of my findings as explained above and in the appended provisional decision, discredits the entirety of Mr and Mrs R's recollections as recorded in PR's call notes.

I recognise this is not a clear-cut case, but on the balance of probabilities I remain of the view that the Supplier most likely marketed or sold the Fractional Club membership to Mr and Mrs R as an investment, that this had a material impact on their decision to go ahead with the purchase, and their credit relationship with the Lender was rendered unfair under Section 140A of the CCA as a result.

Fair Compensation

The following text follows the wording of the appended provisional decision.

Having found that Mr and Mrs R would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs R agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Mr and Mrs R with that being the case – whether or not a court would award such compensation:

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

(2) The Lender should reimburse Mr and Mrs R the £500 payment they made towards the Purchase Agreement by card.

(3) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs R paid as a result of Fractional Club membership.

(4) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs R used or took advantage of; and
ii. The market value of the holidays* Mr and Mrs R took using their Fractional Points.

NB: promotional giveaways/holidays which were given by the Supplier on the understanding Mr and Mrs R would attend a meeting, tour or presentation at which it was hoped they would buy a product, should not be included in any deductions.

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

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

(6) The Lender should remove any adverse information recorded on Mr and Mrs R's credit files in connection with the Credit Agreement reported within six years of this decision.

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

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

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

My final decision

For the reasons explained above, and in my appended provisional decision, I uphold Mr and Mrs R's complaint and direct First Holiday Finance Ltd to take actions set out in the "Fair

Compensation” section above.

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

Will Culley
Ombudsman

COPY OF APPENDIX

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 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.

<u>The Law on Misrepresentation</u>

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

---

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

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]

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

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

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

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

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

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

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

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

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

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to arrive at a different set of conclusions to our Investigator, so I've decided to issue a provisional decision to allow the parties to the complaint an opportunity to make further submissions before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **3 June 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

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

The complaint

Mr and Mrs R'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 a claim under Section 75 of the CCA.

What happened

Mr and Mrs R purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 15 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £10,194 (the 'Purchase Agreement'). These points could be used, every other year, to book holiday accommodation in the Supplier's portfolio.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs R 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 R paid for Fractional Club membership by taking finance of £9,694 from the Lender in joint names (the 'Credit Agreement'). They also made a £500 payment on either a debit or credit card. It's my understanding that the Credit Agreement was active and running at least as late as August 2016.

Mr and Mrs R – using a professional representative ('PR') – wrote to the Lender on either 14 July 2021 or 27 July 2021 (the 'Letter of Complaint') to make a complaint. The way the complaint was particularised by PR was not very clear, but my interpretation of the main heads of complaint is as follows:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Having read PR's Letter of Complaint (and subsequent communications), I understand it is saying, on Mr and Mrs R's behalf, that the Supplier made a number of pre-contractual

misrepresentations at the Time of Sale – namely that the Supplier:

1. told them the Allocated Property would be sold at the end of 18 years when that wasn't true.
2. told them the product was an investment, that they'd own a part of one of the Supplier's assets which would grow in value, and allow them to recoup money after 18 years, but this wasn't true.
3. failed to tell them that their children would inherit their timeshare liabilities if they died while their membership was active.

My understanding is that Mr and Mrs R say they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

PR makes the point, on Mr and Mrs R's behalf, that they found it more and more difficult to secure holidays due to a lack of availability, as the membership went on, and that this represented a breach of contract by the Supplier.

As a result of the above, Mr and Mrs R say they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

PR's Letter of Complaint and subsequent correspondence set out several matters which I've interpreted as being reasons why Mr and Mrs R consider 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. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The Fractional Club product was an Unregulated Collective Investment Scheme ("UCIS"), which was illegal to promote to consumers.
3. They hadn't been given the terms of the Credit Agreement as required by law.
4. The Lender had failed to carry out the kind of creditworthiness assessment required under the relevant regulations at the time.
5. The interest rate of the Credit Agreement was extortionate compared to the Bank of England base rate at the time.
6. The Lender had breached various of the FCA's Principles.
7. The Lender had paid the Supplier a commission that was not properly disclosed.
8. They were pressured into purchasing Fractional Club membership by the Supplier.

The Lender passed some of Mr and Mrs R's concerns to the Supplier to respond to. Both Lender and Supplier responded on 1 September 2021, rejecting the complaint in full.

Mr and Mrs R then referred the complaint to the Financial Ombudsman Service. The Lender, at this point, argued that the complaint was out of the Financial Ombudsman Service's jurisdiction, because it had been brought more than six years after the events complained about. The complaint was assessed by an Investigator who, having considered the information on file, thought it was in our jurisdiction but should not be upheld.

PR, on Mr and Mrs R's behalf, disagreed with the assessment. It provided multiple responses over a period of months, but the main thrust of its further submissions was that it had been making a complaint from the start that the Supplier had improperly marketed and sold the Fractional Club membership to Mr and Mrs R as an investment. Originally, it had argued this was improper due to its belief that the product was a UCIS. It now accepted the product was not a UCIS, but maintained that selling the product as an investment was improper. PR appeared to take the view that because the judge in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) had concluded the Supplier had sold a timeshare as an investment in that case, it had done so every time it sold the Fractional Club product.

The Lender, for its part, emphasised that PR should not now be allowed to reformulate the complaint along the lines of the court case referenced above, having previously focused on an ill-founded argument that the Fractional Club product was a UCIS.

As no agreement has been reached, the case has now been passed to me to decide.

The legal and regulatory context

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

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

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.

I am aware the Lender had concerns prior to our Investigator's assessment that this complaint was not within the jurisdiction of the Financial Ombudsman Service, due to how long after the events complained of the complaint had been brought. The Lender does not appear to have maintained those concerns following our Investigator's assessment. If it still has concerns then it should detail these in response to this provisional decision.

At this stage, on the matter of whether Mr and Mrs R's complaint was, in effect, brought too late for the Financial Ombudsman Service to consider it, I will say only that:

- In general, complainants have six years from the date of the event which gave rise to their cause to complain, to either complain to the financial business responsible, or to the Financial Ombudsman Service. This can be longer in certain circumstances.

- This complaint is about two things: the Lender's alleged failure to deal fairly with a claim brought under Section 75 of the CCA, and the Lender's alleged participation in an unfair credit relationship.

- The event which gave Mr and Mrs R cause to complain regarding the Section 75 claim, was the Lender's decision not to honour or deal with that claim, which would have been apparent from the letters it and the Supplier sent on 1 September 2021. The clock, so to

speak, would only have started running at that point.

- The event which gave Mr and Mrs R cause to complain about an allegedly unfair credit relationship, is the unfairness of the credit relationship itself, which is a continuing event for as long as the credit relationship lasts. This is a position consistent with the case law on this point. Mr and Mrs R would have six years to complain (or more in certain circumstances) from the date the relationship came to an end. It is known that the credit relationship was running until at least August 2016, meaning Mr and Mrs R had until, at least, August 2022 to complain about the alleged unfairness of this credit relationship.

- Because Mr and Mrs R complained in 2021 (both to the Lender and the Financial Ombudsman Service), it's clear that they have not brought their complaint too late about either of the things their complaint is about.

As mentioned above, if the Lender continues to have concerns then it should outline these in further submissions. I can then deal with the matter of our jurisdiction in more detail if necessary.

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

However, 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, while I recognise that there are a number of aspects to Mr and Mrs R's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- The Supplier misrepresented something to them, or breached its contract with them, giving them a claim against the Lender under Section 75 of the CCA.
- The Lender had failed to carry out the required creditworthiness or affordability assessment, and charged an extortionate rate of interest.
- The Lender had breached the FCA's Principles.
- The Supplier had pressured them to make the purchase in question.
- The Lender had paid the Supplier an undisclosed commission.

And that's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs R in the same or a better position than they'd have been in, had any of these aspects of the complaint been upheld.

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

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale**,** including the contractual documentation and disclaimers made by the Supplier;

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

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

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

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

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

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

But Mr and Mrs R say that the Supplier did exactly that at the Time of Sale. Before outlining what Mr and Mrs R have said, I think it's important to outline what information we have as to Mr and Mrs R's recollections from the Time of Sale. Some of this has changed since our Investigator's assessment.

In January 2024, more than two years after the complaint was originally made, PR sent our Investigator a copy of a witness statement said to have been made by Mr and Mrs R in April 2021. The statement was undated and unsigned, and no explanation was offered as to why it was not provided at an earlier date. It appears our Investigator attached little weight to it, which is perhaps not surprising in the circumstances.

More recently, in May 2025, PR provided a copy of handwritten notes said to have been made by a member of its staff on a telephone call with Mr and Mrs R on 8 April 2021. These notes are consistent with the witness statement produced previously (the witness statement appears to be a conversion of the notes into prose, with some embellishments). They are also consistent with my understanding of how PR took on clients – with an initial phone call being made to gather details of their experiences with the Supplier or other timeshare companies, with a witness statement being produced based on this.

Having studied the handwritten notes, I think it's likely they are genuine notes of a call made to Mr and Mrs R on 8 April 2021. They are unstructured and abbreviated, and give the impression the writer was trying to keep up with the conversation. While it's unfortunate these were not supplied at an earlier date, on balance I think they are likely to be representative of Mr and Mrs R's recollections of the Time of Sale, as of April 2021.

In the notes, PR recorded Mr and Mrs R as having recalled receiving a discounted holiday to the Costa del Sol with their three children. They had a three hour presentation with the Supplier while they were there, they were then driven and shown around a resort and taken back to an office for a sales pitch. They failed a credit check and were about to leave, when the Supplier came back with an "extra special deal" due to their house having recently burned down and the fact they'd lost everything. This was a "bi-annual" deal where points would accumulate every other year, and they had a share in the property that they should look at as an investment for their children, and eventually they would own a part of the property which would be sold or pass on to their children.

It seems clear therefore that one of Mr and Mrs R's allegations was that the Supplier sold or marketed the Fractional Club membership to them as an investment, something which was prohibited under Regulation 14(3) of the Timeshare Regulations.

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 R's share in the Allocated Property clearly 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 R 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 R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that stated that Fractional Club membership was primarily for the purpose of holidays and that the Supplier made no representations as to the future value of their share in the Allocated Property.

On the other hand, another of the Supplier's disclaimers warned that its representatives were *"not licensed investment advisors"* and *"all information has been obtained solely from their own experience as investors and is provided as general information only…"* This appears to be an unusual disclaimer in the context of the Fractional Club product. To me, the fact the Supplier considered the disclaimer necessary suggests it expected or considered its representatives to talk to potential customers about the concept of financial investment when promoting the Fractional Club product. So, to some extent at least, I think the documents dating to the Time of Sale contained mixed messages on the topic of investment.

In any event, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs R or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn

(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

1. a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');
2. screenshots of a Electronic Sales Aid (the 'ESA'); and
3. a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')

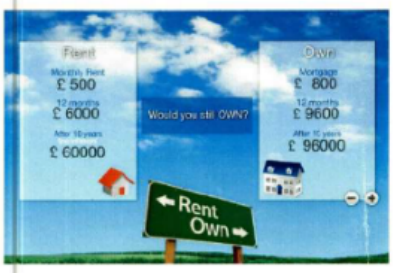
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

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

(2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr and Mrs R.

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



- Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return
- Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for
- Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" *(increase amount of owning and continue to do this for a couple of times until they don't agree.*

CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

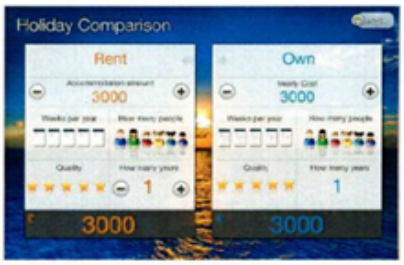
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners *"are building equity in their property"*. And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



- You are currently spending £xxxx on your holidays each year… (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? *(Get the answer "**Owning**")* **This is why so many people choose to holiday with [redacted].**

LINK: Before I show you how the product works, I am just going to tell you how [redacted] started and where we are today.

CLOSE:

With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
>
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
>
> *SUMMARISE LAST SLIDE:*
>
> *FPOC equals a passport to fantastic holidays for 19 years* ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
>
> *[…]*
>
> *LINK: Many people join us every day and one of the main questions they have is* ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*
>
> […]
>
> *"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*
>
> (My emphasis added)

The Fractional Club Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "script" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

> *"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.*
>
> […]
>
> *CLOSE:* ***I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.*** *So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*
>
> (My emphasis added)

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return".

For example, on page 69 of the Fractional Club Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:

[…]

"We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only got a small part of your initial outlay, say £5,000 it would still be more than you would get renting your holidays from a travel agent, wouldn't it?"

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

(1) The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus

(2) A significant financial return at the end of the membership term.

And to consumers like Mr and Mrs R who were interested in holidays but had little experience in relation to them, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

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

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

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

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of S*hawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

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

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*

I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end.

Furthermore, as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment. This also appears consistent with how Mr and Mrs R recalled the Supplier having marketed the product to them – as a share or part of a property that would be a (long term) investment for their children.

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs R to believe that membership of the Fractional Club was an investment that *may* lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find their recollection that they were told they were buying a share in a property that should be considered an investment for their children to be at all implausible. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs R were led by the Supplier to believe at the relevant time.

I acknowledge that Mr and Mrs R have never specifically said that they were told to expect a financial gain, nor have they explicitly said this was something they were hoping for or expecting. However, I think it is heavily implied that this was their understanding of what is meant by "investment" and by the Supplier's marketing – they don't indicate that they thought it was simply an investment in their future holidays, for example.

Ultimately, for the reasons outlined above, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

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

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.

It also it seems to me in light of *Carney* and *Kerrigan* that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs R 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.

On my reading of Mr and Mrs R's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. And I say this chiefly because of their comments to PR towards the end of the phone call in April 2021. It appears a discussion took place regarding why Mr and Mrs R had not cancelled their purchase with the Supplier. PR recorded the following notes:

"Tried to stop Loan – can't cancel –
Didn't think of 14 day cooling off as hols for kids + invest for future
Loan still running – no Fractional, lost investment – no hols Nothing"

My reading of this is that Mr and Mrs R did not cancel their purchase with the Supplier in the cooling off period because they wanted to use the product for holidays with their children and as an investment for the future. They also expressed disappointment at having lost the investment (my understanding, based on the rest of the notes, is that they considered they'd lost their membership due to non-payment of the management fees).

So it seems to me that Mr and Mrs R had two important reasons for purchasing Fractional Club membership, one of which was the prospect of it being an investment. I don't think it's likely they would have come to the view that the product was an investment, had the Supplier not marketed it as one, as I've already found it likely did. Nor do I think it's likely that they'd have pressed ahead with their purchase had it not been for the Supplier having marketed the product in this way in breach of Regulation 14(3). Mr and Mrs R haven't said or suggested that they'd have bought the product regardless, and it seems based on the timing of the Supplier's focus on the investment aspect of the product (as Mr and Mrs R were about to walk out of the sales process), that the Supplier leveraged it in order to overcome Mr and Mrs R's objections to purchasing. In light of this, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made, exposing them to long-term financial commitments and rendering their credit relationship with the Lender unfair.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs R under the Credit Agreement and

related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr and Mrs R would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs R agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Mr and Mrs R with that being the case – whether or not a court would award such compensation:

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

(2) The Lender should reimburse Mr and Mrs R the £500 payment they made towards the Purchase Agreement by card.

(3) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs R paid as a result of Fractional Club membership.

(4) The Lender can deduct:

iii. The value of any promotional giveaways that Mr and Mrs R used or took advantage of; and
iv. The market value of the holidays* Mr and Mrs R took using their Fractional Points.

NB: promotional giveaways/holidays which were given by the Supplier on the understanding Mr and Mrs R would attend a meeting, tour or presentation at which it was hoped they would buy a product, should not be included in any deductions.

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

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

(6) The Lender should remove any adverse information recorded on Mr and Mrs R's credit files in connection with the Credit Agreement reported within six years of this decision.

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

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the

market value of the holidays Mr and Mrs R took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My provisional decision

For the reasons explained above, I'm currently minded to uphold this complaint and direct First Holiday Finance Ltd to take the actions outlined in the "Fair Compensation" section.

I now invite the parties to the complaint to let me have any further submissions they'd like me to consider. These need to reach me by **3 June 2025**. I will then review the case again.

Will Culley
Ombudsman