DRN-5637887

The complaint

Mr A and Mrs A's complaint is, in essence, that First Holiday Finance Ltd ('the Lender') acted unfairly and unreasonably by (1) declining to meet their claim of misrepresentation under Section 75 of the Consumer Credit Act 1974 ("CCA") and (2) being party to an unfair credit relationship with them under Section 140A of the CCA. Mr A and Mrs A bring this complaint with the assistance of a third-party professional representative (the 'PR').

What happened

In early 2018, Mr A and Mrs A owned a trial timeshare membership, purchased from a supplier (the "Supplier"). On 12 March 2018 (the "Time of Sale") Mr A and Mrs A upgraded their trial membership to the Supplier's Fractional Points Owners' Club (the "Fractional Club") membership.

Fractional Club membership was asset backed – which meant it gave Mr A and Mrs A more than just holiday rights. It also included a share in the net sale proceeds of a property (the "Allocated Property") named on Mr A and Mrs A's agreement with the Supplier (the "Purchase Agreement") after the membership terms ended.

The Purchase Agreement (in both Mr A and Mrs A names) bought Mr A and Mrs A 1040 fractional points at a cost of £21,870. This purchase was funded by trading in the trial membership, paying a £500 deposit and taking credit of £17,373 (in both Mr A and Mrs A's names) provided by The Lender (the "Credit Agreement").

In March 2023 they appointed the PR to act on their behalf in pursuing complaints about their financial arrangements. With the PR's assistance Mr A and Mrs A complained to The Lender on 17 March 2023 (the "Letter of Complaint") to complain about:

- Misrepresentations under Section 75 of the CCA which led to Mr A and Mrs A losing out and which also led to an unfair relationship under section 140A of the CCA.
- They were misrepresented to when they were told they were making an investment which would make them a profit. This was a direct breach of 14.3 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
- That they were misrepresented to on the availability of the holidays.
- That no affordability checks were done during the sale and thus there was irresponsible lending in the arrangement of the finance for the purchase of this membership.

The Letter of Complaint makes the argument that The Lender is, as deemed principal of the Supplier, liable to Mr A and Mrs A for the above and sets out a claim in damages.

The Lender issued its response to the letter of claim on 28 March 2023 rejecting the complaint in every regard. So, the PR brought the complaint to this service.

Mr A and Mrs A's complaint was assessed by an investigator and having considered the information on file, our investigator proposed that the complaint should be not upheld on its

merits. But the PR disagreed with the investigator's assessment and asked for an ombudsman to review and determine matters.

I issued a provisional decision dated 30 May 2025 which didn't uphold Mr A and Mrs A's complaint. The Lender agreed with my position. The PR responded saying it didn't agree and it made a number of arguments on the matter.

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

- The CCA (including section 75 and sections 140A-140C).
- The law on misrepresentation.
- The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").
- The Consumer Rights Act 2015 ("the CRA").
- The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ("Plevin"), which remains the leading case in this area.
    - Scotland v British Credit Trust [2014] EWCA Civ 790 ("Scotland and Reast")
    - Patel v Patel [2009] EWHC 3264 (QB) ("Patel").
    - The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ("Smith").
    - Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ("").
    - Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ("Kerrigan").
    - R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ("Shawbrook & BPF v FOS").

Good industry practice – the RDO Code

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

What I've decided – and why

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

Having done that (including the submissions in response to my provisional decision) I do not uphold this complaint.

I shall firstly repeat my position from my provisional decision (in italics for ease of reading) and then deal with the PR's submissions under the heading 'further submissions.'

Before I explain why, I want to make it clear that my role as an ombudsman isn't to address every single point that has been made to date. Rather, it is to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it. Where necessary, I've reached my conclusions on the balance of probabilities; in other words, based on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75: The Supplier's alleged misrepresentations at the Times of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier. In short, a claim against The Lender under section 75 essentially mirrors the claim Mr A and Mrs A could make against the Supplier.

Certain conditions must be met for section 75 to apply including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. I'm satisfied those conditions are met in this case and note that the Lender doesn't dispute this aspect of the matter. Bearing in mind the way in which section 75 operates, if the Supplier is liable for having misrepresented something to Mr A and Mrs A at the Times of Sale, the Lender is also liable.

I have set out above the alleged misrepresentations made by the Supplier at the Times of Sale. I note that in the letter of claim of March 2023 and the supplemental statement dated November 2023 Mr A and Mrs A have said that they purchased the membership after they "were contacted by telephone" and "on the telephone" respectively and were sent documents in the post to sign and return. They also say in both documents that they had never used their trial membership.

The Lender here has said there are some significant inconsistencies with what Mr A and Mrs A have said. This includes showing reservation data that shows Mr A and Mrs A were already in Spain at one of its resorts prior to making this purchase which demonstrates that not only did they use their trial membership but also that they made the purchase of this membership in person whilst overseas. It seems to me that Mr A and Mrs A were on their 'prelude' week so technically they weren't using trial membership. However, as the documentation was created, signed and dated on the same date it seems clear that Mr A and Mrs A did buy this membership in person as it would be unlikely to be created in Spain and delivered to Mr A and Mrs A's home address and be signed all on the same day. Inconsistencies in memory are a normal part of someone attempting to recall facts that happened some time ago, but where the inconsistencies are significant, in my view, they can demonstrate a problem in the information remembered. Here Mr A has stated on three occasions that the sale took place over the telephone when the evidence suggests that was not the case. In my mind not recalling how the Supplier sold Fractional Club membership and in which country is such a significant inconsistency that it means I find it very hard to place much weight on what he remembers being told during the sale.

Aside from these significant inconsistencies I also note that Mr A and Mrs A's description of the sales process is lacking in any significant detail as to what happened and the broader circumstances of the purchase. So, that is something further that I have to consider the weighting I give to Mr A and Mrs A's recollections of the sales process when they purchased this membership.

The alleged misrepresentations include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr A and Mrs A were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr A and Mrs A's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

The PR also alleges there was a misrepresentation in saying this membership was an investment. But as I will go on to explain I'm satisfied that this isn't an actionable misrepresentation.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr A and Mrs A have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr A and Mrs A by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr A and Mrs A any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Section 75: The Supplier's alleged breaches of contract

Mr A and Mrs A ***say that*** *they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr A and Mrs A states that the availability of holidays was/is subject to demand. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.*

Mr A and Mrs A also says that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property because the guaranteed end date of the agreement isn't guaranteed. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, it won't be sold or that they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

As a result, I don't think The Lender unfairly or unreasonably declined Mr A and Mrs A's compensation for the breaches of contract they said it was liable for under section 75.

Section 140A: did The Lender participate in an unfair credit relationship?

I have already explained why I'm not persuaded the Supplier misrepresented or breached the Purchase Contract in a way that makes for a successful section 75 claim and outcome in this complaint. But Mr A and Mrs A also makes arguments that either say or infer 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 Supplier's sales process at the Times of Sale that they have concerns about. It is those concerns that I explore here.

As section 140A of the CCA is relevant law, I have considered it when determining what is fair and reasonable in all the circumstances of the case. That means considering whether the credit relationship between Mr A and Mrs A and The Lender was unfair.

Under section 140A, 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), (Section 140A(1) of the 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. It also creates a statutory agency in particular circumstances. The most relevant to this complaint is negotiations "conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c)" (Section 56(1)(c) of the CCA).

The arrangements between Mr A and Mrs A, the Supplier, and The Lender were such that the negotiations conducted by the Supplier during its sale of this Fractional Club membership to Mr A and Mrs A were 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 section 140A(1)(c).

Antecedent negotiations under Section 56 cover both the acts and omissions of C, based on my understanding of relevant law (See, for example Plevin, at paragraph 31, and Shawbrook & BPF v FOS at paragraph 135). I note that 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, 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." (The Court of Appeal's decision in Scotland was recently followed in Smith.)

It follows that I see no great difficulty with Mr A and Mrs A's position that the supplier is deemed agent of the Lender for the purpose of the pre-contractual negotiations. I recognise that 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 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.

Despite the breadth of the unfair relationship test under section 140A, 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, the Supreme Court said in Plevin that the protection afforded to debtors by section 140A is the consequence of all of the relevant facts.
I've considered the entirety of the credit relationship between Mr A and Mrs A and the Lender along with all of the circumstances of the complaint. Having done so, I don't think the credit relationship between them was likely to have been rendered unfair for section 140A purposes. In coming to that conclusion, and in carrying out my analysis, I've looked at:

> *1. the Supplier's sales and marketing practices at the Times of Sale – which includes any material provided that I think is likely to be relevant to the sale; and*
> *2. the Supplier's provision of information at the Times of Sale, including the contractual documentation and disclaimers made by C;*
> *3. Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;*
> *4. The inherent probabilities of the sale given its circumstances.*

I've considered the impact of these on the fairness of the credit relationship between Mr A and Mrs A and The Lender.

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

Mr A and Mrs A complained about The Lender being party to an unfair credit relationship for several reasons, which I've set out in this decision.

Mr A and Mrs A have said they felt 'pressured' by the Supplier into purchasing Fractional Club membership. They have said "Throughout the whole presentation, there was a lot of pressure on both me and my wife to go for the fractional product." They've also said in the same statement (dated November 2023) that "We were subsequently sent a bundle in the post, containing documents, which we were asked to sign and return to (Supplier)'s office in Spain."

Across the correspondence we have Mr A and Mrs A have said little about what the Supplier actually said and/or did during the sales presentation that made Mr A and Mrs A feel as if they had no choice other than to purchase Fractional Club membership when they didn't want to. I'm not persuaded this purchase was made over the phone and through returning documents by post as Mr A and Mrs A say for the reasons I've given. I think it's more likely it was made in person in Spain as the Supplier suggests. I think if Mr A and Mrs A had been pressured in person they'd have remembered it clearly. I think that if the sale had been over the phone as Mr A and Mrs A say then I'm unclear as to how sufficient pressure could be exerted from such distance to then receive the paperwork (presumably some days later) complete it and post it to the Supplier.

Neither the likely amount of time Mr A and Mrs A spent with the Supplier during the sales processes (in person) nor the number of documents they needed to read and sign appear to me to be particularly excessive, given the nature of the purchase they were making. Further, while Mr A and Mrs A were given a 14-day cooling off period, they didn't try to cancel their membership during that time.

Accordingly, I'm not persuaded that Mr A and Mrs A felt that they had no viable alternative to purchasing the membership or made a purchasing decision they otherwise wouldn't have done but for a pressured sale. Overall, I'm not persuaded they were pressured into taking this membership.

The PR also made the allegation that the Supplier misled Mr A and Mrs A and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their Section 75 claim for misrepresentation. 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.

For the reasons I've explained I'm not persuaded that Mr A 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 a further reason why their credit relationship with The Lender might be rendered unfair to them. That's the suggestion that Mr A and Mrs A purchased Fractional Club membership because the Supplier marketed and sold it 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, and if so, was this aspect material to Mr A and Mrs A's decision to purchase membership?

The Lender does not dispute, and I am satisfied, that Mr A 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 PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr A 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.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. The provision at the Time of Sale said that "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." And Mr A and Mrs A's PR has argued that this is what happened in this case.

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 in itself. 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 that Fractional Club membership was marketed or sold to Mr A 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; that is, told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (a profit) given the facts and circumstances of this complaint.

Not only that but, as the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that any such regulatory breach would 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. That includes taking into account the material impact of any breach on the customer's decision whether to enter into the Purchase Agreement.

So, I also must be satisfied that it was more likely than not that the prospect of a financial gain was a material factor in Mr A and Mrs A's purchasing decisions. I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation. In Carney, HHJ Waksman QC said the following in paragraph 51:

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

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr A 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) which, having taken place during its antecedent negotiations with Mr A and Mrs A, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the

Lender) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

There is evidence in this case 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 A 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 wasn't sold to Mr A and Mrs A as an investment. It is nonetheless possible that the Supplier marketed and sold Fractional Club membership to Mr A and Mrs A as an investment, and so I've thought about their evidence in this respect, and what prompted them to enter into the Purchase Agreement.

In the letter of claim to the Lender the issue of whether it was sold as an investment was raised by the PR but no persuasive (to my mind) description of how this was done or what was said was given. So, I can understand why neither the Lender nor the investigator were persuaded by it.

In response to the findings of the Investigator the PR provided a statement from Mr A on the matter dated 3 November 2023. And while I've noted Mr A's more recent evidence, I must take into account that the statement was made following being involved in the complaint process for some time and the outcome of Shawbrook & BPF v FOS, so to me there is a real risk these matters have affected Mr A's recollection of what happened. Further, he repeats comments about the purchase being made through telephone conversation and postal application that were made in the original letter of claim, which I have already said do not fit with the evidence of how Fractional Club membership was actually sold. However, there are further comments made about the membership being marketed/sold as an investment but with little detail as to how this was done in practice. I accept, of course, that being asked to recall specific information some years later is rendered more difficult with the passage of time. But it does seem to me that evidence has evolved over time in such a way that, in my view, it would be incorrect to place significant weight on what has been said more recently on what were the motivating factors in Mr A and Mrs A's decision to purchase the membership. Indeed, considering the strong contemporaneous evidence from the Supplier as to when and where this membership was sold, I'm not persuaded this later statement strengthens the arguments of the letter of claim either. As Mr A and Mrs A have maintained that they made the purchase from home over the phone and via the post, when there's strong evidence it was actually purchased in person in Spain, then I don't think I can place significant weight in my decision making on their recollections of what happened during the sales process with regard to whether it was marketed as an investment or not. I say this because of the lack of detail provided about how it was allegedly marketed as an investment and due to the clear issues with how the sale process was delivered.

I also have to take into account that this upgrade from trial to this membership meant Mr A and Mrs A were able to take holidays with the Supplier over a longer term and thus additional holiday benefits that would be available with this membership. And although I've described my concerns about Mr A's and Mrs A's recollections of what happened, I do note that they've said in reference to the trial membership:

"…because we couldn't book a holiday when we wanted. The (Supplier) representative then suggested that we "upgrade" our membership to full (Supplier) membership, as that would give us much more choice and availability."

So, I'm not persuaded that the investment element of this membership was a motivating factor in this purchase. It seems likely to me from what they've said here the significant uplift

in holiday benefits was something important to them and I simply can't rely on Mr A and Mrs A's memories of whether any breach of Regulation 14(3) was important to them.

Had Fractional Club membership been marketed and sold as an investment by the Supplier at the Times of Sale and that had been a key factor in Mr A and Mrs A's purchasing decisions, it is difficult to understand why Mr A and Mrs A recent statement and their PR's original letter of claim on the matter fell short of persuasively argue this point. I say this particularly in light of the lengths to which the PR went in the original letters of claim in seeking to demonstrate the other arguments that were made about what was wrong with this purchase. Additionally, there's very little in the way of any specific detail about what they were told about a financial gain or the profit they might make provided in any of these written comments on the matter.

On balance, therefore, even if the Supplier 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 A and Mrs A's decision to purchase Fractional Club membership at the Times of Sale was motivated by the prospect of a financial gain (a profit).

So, I'm minded that 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'm not currently inclined to think the credit relationship between Mr A and Mrs A and The Lender was unfair to them whether or not the Supplier breached Regulation 14(3).

In summary, given all of the facts and circumstances of this complaint, I don't think the credit relationship between The Lender and Mr A and Mrs A was unfair to them for the purposes of Section 140A. So, I don't propose to uphold this aspect of the complaint on that basis.

Were the right affordability checks carried out at the time of sale?

Originally Mr A and Mrs A have said that they do not recall any checks being carried out at the time of sale and the PR says this means the lending was irresponsible. Our investigator said that they could not see any evidence that this was a case of irresponsible lending. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if the Lender did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr A and Mrs A lost out as a result of its failings. Neither Mr A and Mrs A nor their PR has provided any persuasive evidence that they at the times of sale would have found it difficult to repay the loan. And whether they had later difficulty in paying the loan is not persuasive evidence that they could not afford the lending at the times it was taken. I also note that the PR here on receipt of the Investigators findings on affordability chose to neither contend them nor provide any further evidence on this point and I also note it is not mentioned in the recent statement from Mr A and Mrs A. So, I see no persuasive reason to uphold this element of their complaint.

Further submissions

I've considered the comments of the PR here. A significant part of these representations relates to what is already agreed or already known to the parties (for example the relevant law and relevant arguments around the relevant case law). So, I see no need to comment on those particular representations as they're not contested.

The PR has made a number of comments about what Mr A and Mrs A said and say its clear evidence that their complaint should be upheld. As I said in my decision:

"As Mr A and Mrs A have maintained that they made the purchase from home over the phone and via the post, when there's strong evidence it was actually purchased in person in Spain, then I don't think I can place significant weight in my decision making on their recollections of what happened during the sales process with regard to whether it was marketed as an investment or not. I say this because of the lack of detail provided about how it was allegedly marketed as an investment and due to the clear issues with how the sale process was delivered."

I maintain that I cannot place any significant weight on their recollections of the sale bearing in mind the strong contemporaneous evidence that the sales process was substantially different to that which Mr A and Mrs A describe. I see no persuasive argument from the PR on this point. It simply doesn't address the significant issues with the assertions made by Mr A and Mrs A in its response to my provisional decision. So there is no persuasive reason for me to deviate from what I said on the matter in my provisional decision.

The PR has said its disappointed that I didn't go into detail about what we know about the sales process used by the supplier. Firstly if I was to rely on what Mr A and Mrs A said then it would be clear the visual presentation usually used by the supplier in the sales process at that time which was designed to be delivered in person and which we have access to would not be persuasive as that wasn't the sales process they've described (i.e. over the phone). Secondly as I said in my provisional position:

"Not only that but, as the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that any such regulatory breach would 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. That includes taking into account the material impact of any breach on the customer's decision whether to enter into the Purchase Agreement."

As I'm not persuaded that I can rely on Mr A and Mrs A's comments on the manner of the sale then it follows that I am not persuaded that the manner of sale they say they went through had a material impact on their decision making to purchase this membership. So then it follows that there is no need to consider the sales process materials (which I'm familiar with) available in any significant detail because whether or not there may have been some form of regulatory breach, I'm not persuaded that it materially impacted their decision to purchase the membership for the reasons described. Accordingly I'm not persuaded that the Lender has done anything wrong in not agreeing to their claim.

The PR has pointed to a number of decisions by colleagues. Each case is decided on its individual merits and for the reasons I've given I am satisfied this complaint shouldn't be upheld on its own merits.

The PR says I didn't consider the issue of commission. The Lender has repeatedly made clear no commission was paid between the Lender and the Supplier as they are in the same group of companies. And as the PR has not demonstrated any commission was paid or argued persuasively why the commission it says was paid made a difference, then I don't consider it material to this case.

So considering the PR's position in the round and all the arguments it has made, I see no persuasive reason to deviate from my position in my provisional position.

Conclusion

In conclusion and given the facts and circumstances of the complaint I do not think the Lender has acted unfairly or unreasonably when it considered Mr A and Mrs A's Section 75

claim. Furthermore, I'm not persuaded the Lender was party to an unfair credit relationship with Mr A and Mrs A under the Credit Agreement that was unfair to them under Section 140A of the CCA. Having considered everything in this matter I see no persuasive reason that the Lender should compensate Mr A and Mrs A or do anymore.

My final decision

I do not uphold Mr A and Mrs A's complaint about First Holiday Finance Ltd. It has nothing further to do in this matter.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr A to accept or reject my decision before 23 July 2025.

Rod Glyn-Thomas
Ombudsman