DRN-5639674

The complaint

Mr H and Ms B complain First Holiday Finance Ltd (the "Lender") has failed to honour a claim from them in respect of the alleged mis-sale of timeshares they purchased, financed by loans from the Lender.

What happened

I issued a provisional decision on this complaint on 2 May 2025, in which I set out in detail the background to the matter and my provisional findings on it. A copy of that provisional decision, along with an appendix setting out the relevant legal and regulatory background, is appended to, and forms a part of, this final decision.[1]

For that reason, it's not necessary to go over all the details again, but in very brief summary Mr H and Ms B purchased a series of products from a timeshare provider (the "Supplier") between September 2011 and December 2013. Their second and third purchases were financed by loans arranged by the Supplier with the Lender. Their complaint relates to these two loans and associated purchases.

Mr H and Ms B then complained, initially with a professional representative ("PR") and later without, that they had been victims of mis-selling, and they sought to hold the Lender responsible. They considered the Supplier's mis-selling gave them a claim under Section 75 of the CCA against the Lender, and/or rendered their credit relationship with the Lender unfair to them under Section 140A of the CCA.

In my provisional decision I explained that I was unable to consider – directly – a complaint about the second purchase, because the relevant lending activities had taken place outside of the United Kingdom. However, I noted I could consider whether any wrongdoing by the Supplier in relation to the second purchase was relevant to the fairness of the credit relationship used to finance the third purchase.

I then went on to explain that I didn't think the complaint should be upheld. The full details and reasons are in the appended provisional decision, but I'll summarise briefly.

Section 75 of the CCA didn't apply to the third purchase due to it falling outside of the criteria for it to qualify for protection. So I didn't think the Lender ought to honour a Section 75 claim.

Regarding the allegation that the credit relationship between Mr H and Ms B had been rendered unfair to them due to the various mis-selling concerns mentioned by them, I did not think the credit relationship had been rendered unfair. This was broadly for the following reasons:

- I did not think the Supplier had misrepresented the product to Mr H and Ms B.

[1] A clerical error has been corrected in the appended provisional decision, in which three words of placeholder text were accidentally left at the end of the original document. This did not affect the meaning of the provisional decision, but nonetheless should not have happened. I apologise to the parties to the complaint for this error.

- I did not think Mr H and Ms B had made their purchases because they had been pressured into them by the Supplier.

- While Mr H and Ms B had claimed the contracts with the Supplier were unfair, they hadn't identified which terms they thought were unfair. They had also argued the contracts were illegal, but they had not explained what about the contracts made them illegal and appeared to be referring to laws which were not relevant to their purchases.

- I couldn't conclude that any failing by the Supplier or Lender to carry out a proper affordability check had led to unfairness, because no evidence had been put forward to show the lending in question was in fact unaffordable.

- While I thought the Supplier might not have provided as much information about the costs associated with their purchase as it should have, I couldn't see that this had led to significant harm or unfairness being caused to Mr H and Ms B in practice.

- I thought it was possible the Supplier had breached certain regulations by marketing or selling the timeshares to Mr H and Ms B as investments, I didn't think this had rendered the credit relationship between them and the Lender unfair to them, because I didn't think any breaches by the Supplier had had a material impact on their decision to go ahead with their purchases.

I also considered a further point Mr H and Ms B had made – which was that their loans from the Lender had been arranged by an unauthorised credit broker. However, I did not think that was correct, as I had seen evidence the credit broker had held the required authorisations at the relevant time.

I asked the parties to the complaint to let me have any further submissions they would like me to consider. The Lender said it agreed with the provisional decision. Mr H responded to say he didn't agree. He initially made the following points:

- The products he had purchased were not in fact attached to a property (as he'd been told). They were just timeshares and nothing tangible. If they had been tangible then surely they'd have increased in value.

- They would not have gone ahead and bought more timeshares, with all the annual costs that implied, if it hadn't been disguised as an investment opportunity.

- Other lenders had upheld complaints in similar circumstances.

Mr H then asked for some more time for further points to be put forward on his behalf. This was granted, but unfortunately no further information has been received and the deadline to make further submissions has long passed. I have therefore decided to proceed with my final decision.

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. But I think it's important to address the further points raised by Mr H.

Mr H says the Fractional Club product was just a timeshare and was not a tangible product attached to a property. While I agree the product was a type of timeshare, Mr H and Ms B's share in the property named on their contract (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 Mr H may question the legal mechanism used to give that interest, it does not change the fact that he and Ms B acquired such an interest. So in this sense, the product *was* attached to a specific property, and Mr H and Ms B would have been entitled to receive their share of the sale proceeds when the property was sold in the future. Mr H has questioned the value of the property, but I don't think it's possible to know, at this point, what the future sale price will be.

Mr H has also argued that, had he known the product was just a timeshare rather than an investment opportunity, he'd never have made his purchases. I set out my thoughts on this issue in the appended provisional decision, and I'm afraid these remain unchanged. Mr H and Ms B's actions at the time, and Mr H's words more recently, don't suggest to me that the investment aspect of the Fractional Club product was an important factor in their purchases. In other words, I think it's more likely than not that they'd have gone ahead with their purchases anyway, even if the Supplier had marketed or sold the product as an investment.

Finally, it may be that other lenders have upheld complaints which appear to involve a similar set of circumstances. However, I'm tasked with making a decision based on what is known about the facts and circumstances of this specific case and, based on my analysis of those facts and circumstances, my conclusion is that the complaint should not be upheld.

I appreciate Mr H and Ms B will be disappointed with my decision.

My final decision

For the reasons explained above, and in the appended provisional decision, I do not uphold Mr H and Ms B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Ms B to accept or reject my decision before 21 July 2025.

Will Culley
Ombudsman

Appendix: The Legal and Regulatory Context

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

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

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

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

My Understanding of the Law on the Unfair Relationship Provisions

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms “antecedent negotiations” and “negotiator”. As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *“a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]”*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *“finance a transaction between the debtor and a person (the ‘supplier’) other than the creditor […] and “restricted-use credit” shall be construed accordingly.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140A(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

“[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are “deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity”. The result is that the debtor’s statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor’s agent.’ […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor’s responsibility would be engaged only by its own acts or omissions or those of its agents.”*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

“*By virtue of the deemed agency provision of s.56, therefore, acts or omissions ‘by or on behalf of’ the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in ‘antecedent negotiations’ with the consumer*”.

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that “*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law”* before going on to say the following in paragraph 74:

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate,

they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

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

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[2] 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.[3]

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')

[3] 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 am issuing this provisional decision to give the parties to the complaint an opportunity to provide further comment before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **16 May 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If I don't hear from Mr H or Ms B, or if they tell me they accept my provisional decision, I may arrange for the complaint to be closed as resolved without a final decision.

The complaint

Mr H and Ms B complain First Holiday Finance Ltd (the "Lender") has failed to honour a claim from them in respect of the alleged mis-sale of timeshares they purchased, financed by loans from the Lender.

Background to the complaint

Mr H and Ms B made four purchases of timeshare products from a timeshare provider (the 'Supplier') between September 2011 and December 2013. This complaint concerns only the second and third purchases, because they were the only purchases financed by the Lender. However, I've set out all of their purchases below to put things in their proper context.

Mr H and Ms B's first purchase was made in September 2011, of a 'Trial' membership from the Supplier, for £3,995. This entitled them to a fixed number of weeks of holiday to be taken over a defined period.

On 10 May 2012, Mr H and Ms B traded in their Trial membership for a membership in the Supplier's 'Fractional Club'. The price of this was £22,544, reduced to £18,549 after the trade-in. £500 was paid by card towards the final price, with the remaining £18,049 borrowed by Mr H and Ms B from the Lender. Under this membership, Mr H and Ms B were entitled to 1,494 'points' each year, which could be exchanged for accommodation in the Supplier's portfolio. Fractional Club membership was also asset backed – which meant it gave Mr H and Ms B more than just holiday rights. It also included a share in the net sale proceeds of a property named on their contract (the 'Allocated Property') after their membership term was due to end.

A few months later, during October/November 2012, Mr H and Ms B purchased another membership in the Fractional Club, trading in their existing membership to, in essence, go from 1,494 points per year, to 2,070 points per year. The price of the new membership was, according to records from the Supplier, £47,805. Mr H and Ms B were given £22,544 for their trade-in, leaving £25,261 to pay. Again, £500 was paid by card, and the remaining £24,761 was financed by another loan from the Lender in Mr H and Ms B's joint names. As part of these financing arrangements, the balance (£17,850) of the loan financed by the May 2012 purchase was consolidated into the new loan.

The final purchase I'm aware of that Mr H and Ms B made from the Supplier occurred on 17 December 2013. I've not seen how many points were included in this purchase, however

I understand it was a further purchase of a Fractional Club membership. According to the Supplier's records, the price of the membership was £34,137 and Mr H and Ms B were given a trade-in value of £29,256 towards this price. The remaining £4,881 was financed by a loan with a different lender.

Due to non-payment of the annual management fees, Mr H and Ms B's membership with the Supplier was suspended in 2014. It was subsequently re-instated in 2016, and then surrendered in 2019 following Mr H and Ms B's separation. The Supplier says 20 bookings were made with the membership up to December 2019, out of which 15 were taken up.

Mr H and Ms B – using a professional representative ("PR") – wrote to the Lender, most likely in October or possibly November 2020, to complain about the sale of their timeshares, seeking to hold the Lender responsible. It's worth mentioning at this point that PR is no longer officially representing Mr H and Ms B, because it does not hold the necessary permissions to provide claims management services in the UK.

A copy of the original complaint has not been provided by any party to the case. This is unusual, and means I've needed to rely on the content of letters from the Lender and the Supplier to PR or Mr H and Ms B, to determine what the complaint was about. Based on these letters, and a later complaint form submitted on Mr H and Ms B's behalf, I understand their concerns could be grouped under the following headings.

1. Misrepresentations were made by the Supplier at the time the timeshares were sold, giving them a claim against the Lender under Section 75 of the Consumer Credit Act 1974 ('CCA'), which the Lender failed to accept and pay.
2. The Supplier had breached its contract with them, giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender had been a party to unfair credit relationships under the loan agreements and related timeshare contracts for the purposes of Section 140A of the CCA.
4. The loans were unenforceable because they were not arranged by a credit broker regulated by the Office of Fair Trading ('the 'OFT') to carry out such an activity.

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

Mr H and Ms B say that the Supplier misrepresented the Fractional Club product to them, namely by telling them that Fractional Club membership was an "investment", and they could sell it back to the Supplier or for a profit, when that wasn't true and they never actually owned a share in a property.

Mr H and Ms B say that 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 H and Ms B.

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

Mr H and Ms B say they were not able to book any accommodation, or alternatively they were never able to book accommodation of the standard they'd been shown or were required to book accommodation a year ahead, which wasn't feasible for them.

As a result of the above, Mr H and Ms B says that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr H and Ms B.

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

Some of the concerns raised by Mr H and Ms B I think are best characterised as claims that the credit relationship under the loan agreements was rendered unfair under Section 140A of the CCA by either the Lender or the Supplier's acts or omissions. 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 terms of the loans and timeshare contracts were unfair under the Unfair Terms in Consumer Contract Regulations 1999 ('UTCCRs')
3. They were pressured into purchasing the Fractional Club memberships by the Supplier through the use of aggressive sales techniques, and were either not given a cooling off period, or not told about it.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessments.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs, such as the management fees.
6. The timeshare contracts were illegal under Spanish law.

The Lender did not provide a formal final response letter addressing Mr H and Ms B's concerns. It did however reject their allegations regarding irresponsible lending, and asked the Supplier to comment on the rest of the allegations. The Supplier denied these allegations in full.

Mr H and Ms B then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, considered it should be upheld in part.

Our Investigator considered the Financial Ombudsman Service did not have the jurisdiction (power) to look at a complaint about the first purchase financed by the Lender, because the complaint had been made too late. He thought Mr H and Ms B's complaint about the second purchase financed by the Lender should be upheld however, on the basis the Supplier had marketed the Fractional Club membership as an investment and this had rendered the credit relationship between Mr H and Ms B, and the Lender, unfair.

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

The Lender's reasons for disagreeing with our Investigator could be summarised as follows:

- They did not believe that Mr H and Ms B had bought their memberships because they thought they were profitable investments.

- If Mr H and Ms B had thought this, it questioned why they had not raised concerns in December 2014 when the Supplier had advised them (in response to a request to sell the membership) that it could not give them a resale value. It further questioned why, had they thought the membership was a financial investment, Mr H and Ms B reinstated their membership in 2016 and took further holidays using it. Finally, it noted that Mr H and Ms B had enquired about reducing from 3 fractions to 2 fractions in 2016, but had decided against this because it wouldn't give them enough holidays.

The Lender provided copies of notes from the Supplier's systems which it said evidenced the above.

Prior to making my decision, I asked that our Investigator speak directly to either Mr H or Ms B about their recollections of their experiences with the Supplier. This was because there was very limited testimony from them in relation to what had happened. The information we did have came primarily from PR, and wasn't terribly clear. It was also unclear in places which purchases from the Supplier were being referred to.

Our Investigator was able to speak to Mr H. I'll turn to the significance of this phone call later in this decision.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') which has been attached to this provisional decision and should be read alongside 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.

And having done that, I do not currently think this complaint should be upheld.

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

I also need, before I continue, to outline some observations regarding the jurisdiction of the Financial Ombudsman Service to consider Mr H and Ms B's complaint.

Our Jurisdiction

Our Investigator said that he didn't think Mr H and Ms B's first purchase from the Supplier using a loan from the Lender, was something we had the power to consider, because the complaint had been made too late. I agree we don't have the power to consider a complaint directly about that purchase (and the loan used to finance it), but for different reasons.

We are only able to consider complaints about activities which are carried on from an establishment in the United Kingdom.[4] The Lender's loans, up until 1 August 2015, were made by an entity established in the British Virgin Islands, which is not a part of the United Kingdom. Any loans which were still running on that date were assigned to an entity based in the United Kingdom, and therefore fell within our jurisdiction. However, loans which had finished by that date were not assigned and therefore are not within our jurisdiction.

[4] DISP 2.6.1 *FCA Handbook*

The relevance of this to Mr H and Ms B's complaint is that their first loan from the Lender came to an end in or around November 2012 when it was consolidated by the second loan from the Lender (which I understand is still running). So that first loan was never assigned to the Lender's entity in the United Kingdom and any activities relating to the loan are therefore outside of our jurisdiction.

That said, the relevant sections of the CCA make it clear that the first loan from the Lender, and the associated timeshare contract, are "related agreements" to the second loan. That is because the first loan was consolidated into the second loan. The CCA provides that a credit relationship can be rendered unfair because of matters relevant to any related agreement.

In practical terms, this means that I am able to consider the alleged mis-selling of the timeshare Mr H and Ms B purchased in May 2012, along with the loan which was used to finance it, but only to the extent that they render the credit relationship between Mr H and Ms B in relation to the second loan, unfair.

Section 75 of the CCA

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr H and Ms B could make against the Supplier. Section 75 covers breaches of contract and misrepresentations, but certain conditions must be met if this protection is engaged – which are set out in the CCA.

One of these conditions is that Section 75 only applies to items to which a supplier has attached a cash price of more than £100, and no more than £30,000.

In this case, the second purchase financed by the Lender had a cash price of over £30,000, so Section 75 does not apply to that purchase and I'm unable to conclude, therefore, that the Lender ought to have paid a claim under Section 75 in relation to it. I can, however, still consider whether the Supplier's alleged misrepresentations rendered the credit relationship between Mr H and Ms B and the Lender unfair, for the second loan. I will go on to do that in the next section of this decision.

The first purchase had a cash price which does fall within the range to which Section 75 would apply, however I'm unable to consider a complaint against the Lender about its failure to honour a Section 75 claim relating to the loan which financed the first purchase, because a complaint about that loan falls outside our jurisdiction, for the reasons explained above.

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

Mr H and Ms B also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the time they purchased the timeshares financed by the Lender. It is those concerns that I explore here.

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

1. The Supplier's sales and marketing practices at the time the timeshares were sold – which includes training material that I think is likely to be relevant to the sale;

2. The provision of information by the Supplier when the timeshares were sold, 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 the timeshares were sold; and
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 H and Ms B and the Lender.

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

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

They include that the right affordability checks weren't carried out before the Lender lent to Mr H and Ms B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr H and Ms B was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the very limited information provided, I am not satisfied that the lending was unaffordable for Mr H and Ms B. If there is any further information on this (or any other points raised in this provisional decision) that Mr H and Ms B wish to provide, I would invite them to do so in response to this provisional decision.

Mr H and Ms B say that they were pressured by the Supplier into purchasing their Fractional Club memberships. I acknowledge that the Supplier's sales processes could be rather lengthy and that they may have felt worn out after a sales process that went on for a long time. But they say little about what was specifically said and/or done by the Supplier during their sales presentations that made them feel as if they had no choice but to make their purchases when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their purchases during that time. Mr H and Ms B have said they were either not given this cooling off period, or the Supplier failed to tell them about it, but I don't think that can be correct. And I say that because I can see that for both purchases in question, they had signed a separate page which informed them that they had a 14-day cooling off period.

Moreover, Mr H and Ms B did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchases in question was because they were pressured into them. I'm also aware, from the Supplier's response to the complaint and Mr H's phone call with our Investigator, that Mr H and Ms B sometimes attended sales presentations with the Supplier and decided *not* to buy a product at the end of them. And with all of that being the case, there is insufficient evidence to demonstrate that Mr H and Ms B made the purchases in question because their ability to exercise a choice was significantly impaired by pressure from the Supplier.

Mr H and Ms B have also said that the timeshare contracts were illegal under Spanish law. They haven't pointed to what about the contracts would make them illegal under Spanish law, nor have they provided evidence that a Spanish court has, for example, made any ruling in respect of the legality of their specific contracts. And I note that the contracts appear to contain a choice of law clause which states that English law applies to them, as opposed to Spanish law. Further, I'm aware that the Court of Justice of the European Union (CJEU) made a ruling in 2023, clarifying that for contracts like those entered into by Mr H and Ms B, English law would be the applicable law. So I don't think this point helps to advance Mr H and Ms B's complaint.

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

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

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

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

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

But PR said 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 H and Ms B's share in the Allocated Properties associated with each purchase 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. In light of this, I don't think the Supplier would have *misrepresented* the product if it described it as an investment. And 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 H and Ms B as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr H and Ms B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was primarily for the purpose of holidays and that the Supplier was unable to give representations as to the resale value of any fractions. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representatives may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr H and Ms B as an investment in breach of Regulation 14(3).

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

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

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

And in light of what the courts had to say in *Carney* and *Kerrigan,* it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr H and Ms B and the Lender that was unfair to them and warranted relief as a result, whether any breaches by the Supplier of Regulation 14(3) led them to enter into their purchases is an important consideration.

At this point it's important to consider what evidence there is of Mr H and Ms B's motivations for making both the May 2012 and October 2012 purchases. We have a complaint form, which appears to have been drafted by PR, in which the following words are attributed to them:

"I only entered the agreement under the promise from the sales representative that I would be making an investment and would be able to sell my timeshare at a profit. The upgrade was to give me more choice as I was never able to book the standard accommodation that we were promised from the start."

The complaint form referred to a purchase made in 2014 (there appears to be no record of a purchase made in that year) and our Investigator sought to clarify which purchases Mr H and Ms B were referring to or indeed complaining about. Mr H sent an email in which he said the complaint was about the May 2012, October 2012 and December 2013 purchases. He referred to having made the October 2012 purchase because *"we would receive rental income from the investment"* and the December 2013 purchase *"was supposed to be a pure investment…"* He did not comment on the reasons for making the May 2012 purchase.

So there *are* some comments from Mr H and Ms B which suggest the investment features of the Fractional Club product were important to their purchasing decisions, at least in October 2012.

On the other hand, I did not get the impression from the phone call our Investigator had with Mr H, that he and Ms B had been particularly interested in the investment aspect of the Fractional Club product. Mr H appeared to be focused on the holidays he and Ms B had planned to use the product for. He explained that they'd been taking two or three holidays per year, and the way the Supplier had explained it, was that it was more economical to do it through them and they would get the same high standard of accommodation each time. Mr H also explained that they had been persuaded to upgrade their membership on the promise of having more points and better facilities, and fewer problems booking. When speaking of his unhappiness with the product, Mr H also focused on holiday-related concerns. He explained that he and Ms B couldn't get the holidays they'd wanted, they often had to accept their third or fourth choice of accommodation or book so far in advance it was impractical for them.

That's not to say that Mr H didn't mention the investment aspect of the product when speaking to our Investigator. He referred to having been told by the Supplier that after 19 years they would have something to sell, and that it was like buying an apartment or a room. He said he viewed it as like investing in a flat. Our Investigator asked Mr H if he'd been aware that by surrendering the membership in 2019, that he was essentially giving up any future return from the sale of the fraction, and Mr H replied that he had *already* moved to another product by that time which did not involve any property but offered a better standard of holiday.

I am not sure if Mr H and Ms B did in fact ever change their product with the Supplier to a product which was not a fractional timeshare backed by an Allocated Property. The records shared by the Supplier suggest their final purchase in December 2013 was also a type of fractional timeshare. It appears, however, that Mr H's understanding of his final purchase was that it did not contain an investment element. To me, that is difficult to reconcile with the idea that the investment aspect of the May 2012 and October 2012 purchases was material to his and Ms B's decisions to go ahead with those two purchases. It appears to be more consistent with their motivation for their purchases being related to the *holiday* features of the Supplier's products.

This analysis is, I think, reinforced by some of the figures relevant to their purchases. In particular, I note that the cash price of the October 2012 Fractional Club membership had been £47,805. However, when this was traded in 14 months later, it was assigned a trade-in value of £29,256. So in just over a year it would have appeared to Mr H and Ms B that it had *lost* around 39% of its value. If it had been important to Mr H and Ms B that the product was an investment (in the sense that it could make them a financial gain), then I would have expected concerns to have been raised at this point, but I've not seen any evidence that they were. This, in my view, points away from any prospect of making a financial gain from their purchases, having played a material role in their purchasing decisions.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr H and Ms B's decisions to purchase Fractional Club membership were motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have gone ahead with their purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr H and Ms B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that a lot of information passed between the Supplier and Mr H and Ms B when they made their

purchases. But they've suggested that the Supplier failed to provide them with all of the information they needed to make an informed decision, such as sufficient information about the ongoing management fees.

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

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

I've considered firstly the information provided by the Supplier relating to the annual management fees to be paid in respect of the membership. Regulation 12 of the Timeshare Regulations required the Supplier to provide this information in a way that was *"clear, comprehensible and accurate, and sufficient to enable the consumer to make an informed decision about whether or not to enter the contract".*

The specific information the Supplier was required to provide is outlined in schedule 1, part 3 of the Timeshare Regulations. The relevant section states the required information is:

"an accurate and appropriate description of all costs associated with the timeshare contract; how these costs will be allocated to the consumer and how and when such costs may be increased; the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs)."

The documents the Supplier provided to Mr H and Ms B signed when they made their purchases in May 2012 and October 2012, set out some information about the ongoing costs that would be associated with the contracts. Broadly speaking, this information included the fact that there would be ongoing management charges to pay and what these charges would be for the first year of membership. There was also an indication that the charges would increase over time, but there was not much information about how the charges would be calculated, or what exactly they covered. Mr H and Ms B were directed to other, rather lengthy, documents to find out more, but the Supplier didn't say where in these documents the relevant information could be found. In these other documents there were details of additional costs which were not mentioned in the documents signed when the purchases were made.

It follows that it's possible the Supplier didn't meet the requirements of regulation 12 of the Timeshare Regulations to provide, in the prescribed way, an accurate and appropriate description of *all* costs. And while I've not analysed in detail the position regarding whether any of the terms relating to the management charges were *unfair* under the UTCCRs, I think it's possible that some of the terms had the potential to operate in an unfair way, taking into account the lack of transparency and the level of discretion given to the Supplier as to the setting of various charges.

But given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of regulation 12 of the Timeshare Regulations and the UTCCRs

in relation to the costs of membership, are likely to have prejudiced Mr H and Ms B's purchasing decisions and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And that's because Mr H and Ms B haven't provided any information or evidence which would lead me to believe that any potential breaches of regulation 12 of the Timeshare Regulations by the Supplier, or the inclusion of unfair terms in their timeshare contract relating to the management charges, has led to any significant harm or unfairness to them arising *in practice*.

It's also been argued that some of the terms of the loans with the Lender themselves, or other terms of the timeshare contracts, were unfair under the UTCCRs. However, the terms in question have not been identified, nor has it been explained how they are unfair or what unfairness they have caused Mr H and Ms B to experience in practice. Without more information on this point there is little I can say, and I would certainly not be in a position to be able to conclude that the credit relationship between Mr H and Ms B was rendered unfair because of it.

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

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr H and Ms B was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the OFT to carry out that activity

Mr H and Ms B say that the second loan was arranged by an unauthorised credit broker, suggesting that the Lender wasn't (and isn't) permitted to enforce the credit agreement as a result.

However, having looked at the Financial Ombudsman Service's internal records, I can see that the entity named on the credit agreement as the credit intermediary held, at the Time of Sale, a Consumer Credit Licence issued by the Office of Fair Trading. And in the absence of any evidence to suggest that its Licence did not cover credit broking, I am not persuaded that the credit agreement was arranged by an unauthorised credit broker.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think it would be fair or reasonable to direct the Lender to pay compensation because of the way it handled Mr H and Ms B's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the second loan that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

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

Will Culley
Ombudsman