DRN-5639704

The complaint

Mr and Mrs B's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) deciding against paying a claim under Section 75 of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) being party to an unfair credit relationship with them under Section 140A of the CCA and (3) irresponsibly lending to Mr and Mrs B.

Background to the complaint

On 13 May 2013 (the 'Time of Sale'), while on a promotional holiday with a timeshare provider (the "Supplier"), Mr and Mrs B purchased membership of a timeshare (the 'Fractional Club') from the 'Supplier'. They entered into an agreement with the Supplier to buy 747 Fractional Points at a cost of £9,251 (the 'Purchase Agreement'). I will refer to this membership as FC Membership 1, which is the subject of this complaint.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement ('Allocated Property 1') after their membership term ends.

Mr and Mrs B paid for their Fractional Club membership by taking finance of £8,751 from the Lender in both their names (the 'Credit Agreement'). They paid the remainder using a credit card.

On 13 December 2013, Mr and Mrs B upgraded their Fractional Club membership by trading in FC Membership 1 and purchasing FC Membership 2, which gave them 1,040 fractional points (an increase of about 39%) and a share in the net sale proceeds of a different apartment at another of the Supplier's resorts ('Allocated Property 2'). This transaction was valued at £15,194, which was paid using the trade in value of FC Membership 1 at £9,251 and Mr and Mrs B sending a bank transfer for the remaining £5,943. The sale of FC Membership 2 is not the subject of this complaint, since the Lender was not involved in the transaction.

Mr and Mrs B's complaint to the Lender

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 26 October 2020 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

3. The Lender was irresponsible in choosing to lend to Mr and Mrs B.

Some parts of the Letter of Complaint clearly relate to the upgrade to FC Membership 2 in December 2013, which Mr and Mrs B paid for through their own means. As these aspects of

the letter are not relevant to this complaint – the Lender having no involvement and therefore no potential liability for what happened then – I have not mentioned them here.

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

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

1. The Allocated Property would be sold on the sale date.

2. Fractional Club membership was an investment.

3. The Allocated Property would be sold and there would be a financial return on their investment.

4. Fractional Ownership would enable them to have holidays for considerably less than the cost of booking with a travel agent.

And that the Supplier told them in writing in the sales documents that:

1. The advice received during the sales meetings was based on the knowledge of the salesperson from their experience as an investor.

2. That the Fractional Club membership has more than one purpose, with reference to holidays, trade-in, and investment.

3. The net proceeds from the sale of the Allocated Property would be distributed to them in accordance with their fractional share.

Mr and Mrs 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 and Mrs B.

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

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

1. A lack of availability – Mr and Mrs B have not been able to book holidays where and when they wanted using the number of fractional points they own.

2. A lack of exclusivity – Fractional Club membership was sold to Mr and Mrs B as an exclusive member only club. But they have found that non-members can book to stay at the Supplier's resorts, often for significantly less that what Mr and Mrs B pay in annual management fees.

3. The terms of the contract are unclear and contradictory. Mr and Mrs B had no chance to familiarise themselves with the documents. They were given no clear indication or explanation of the implications of the management fees. This created a significant imbalance in the contract. The duration and payment of management fees with no end were unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

4. The Supplier breached the Consumer Protection from Unfair Trading Regulations

2008 (the 'CPUT Regulations') in relation to unfair commercial practices, aggressive and pressure sales practices, misleading actions and misleading omissions, including in relation to what the Supplier told Mr and Mrs B about availability and access to a superior standard of accommodation.

5. 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').

6. The Supplier breached Regulation 25(3) of the Timeshare Regulations by accepting a £500 credit card payment at the Time of Sale, which was before the end of the 14-day withdrawal period.

(3) Irresponsible lending

Mr and Mrs B say that the Lender lent to them irresponsibly, because it did not carry out a proper assessment of their creditworthiness and didn't give them an adequate and transparent explanation of the features of the Credit Agreement that may make it unsuitable for them.

The Lender's response to the complaint

The Lender forwarded the complaint to the Supplier and provided its response to Mr and Mrs B on 17 November 2020, saying it had nothing further to add, and saying that Mr and Mrs B could refer the matter to the Financial Ombudsman Service if they remained dissatisfied.

Referral to the Financial Ombudsman Service

On 24 November 2020, Mr and Mrs B referred the complaint to the Financial Ombudsman Service.

Our investigation

Our Investigator did not think the complaint should be upheld. They said that the Lender had a valid defence to the misrepresentation claim due to the time that had passed. That the credit relationship between the Lender and Mr and Mrs B was not unfair on them. And that the irresponsible lending complaint had been made too late under our rules, meaning we could not look at it.

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

The PR has since indicated that if the Lender paid commission to the Supplier and did not obtain Mr and Mrs B's informed consent, then this will have contributed to the credit relationship between the Lender and Mr and Mrs B being unfair to them.

My Provisional Decision

On 22 May 2025, I issued a Provisional Decision explaining why I was not planning to uphold this complaint and giving the Lender and Mr and Mrs B (and the PR) an opportunity to respond before I made this final decision.

The Lender responded to say that it agreed with my Provisional Decision, and it had nothing further to add.

The PR responded on behalf of Mr and Mrs B. In summary, the PR said:

1. The Provisional Decision did not mention or analyse the training slides the Supplier used at the Time of Sale.

2. The Provisional Decision is inconsistent with the judgement in *Shawbrook & BPF v FOS*.

3. Mr and Mrs B's recollections are the only ones available from people who were present during the sale, and they say FC Membership 1 was sold to them as an investment and one of the factors in their decision to purchase is that they were guaranteed a return on their investment. This need not be the only reason why they made the purchase for there to be an unfair relationship.

4. Previous decisions of the Financial Ombudsman Service set the precedent that fractional products were sold to consumers as investments and created an unfair relationship.

5. It is for the Lender to prove the credit relationship with Mr and Mrs B is fair, and it hasn't done so.

6. It is clear that pressure was applied, and that prejudice occurred as a result.

I respond to these points below in the section *"Additional findings following my Provisional 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 below.

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

<u>Case Law on Section 140A</u>

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').

<u>My Understanding of the Law on the Unfair Relationship Provisions</u>

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

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

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

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

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

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

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

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the

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

case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

> *"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."*

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

The Law on Misrepresentation

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in Chitty on Contracts (33rd Edition), a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive).

The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[2]

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

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And its 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:

- 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')

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:

- Regulation 5: Unfair Terms

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

• Regulation 6: Assessment of Unfair Terms

• Regulation 7: Written Contracts

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

County Court Cases on the Sale of Timeshares

1. Hitachi v Topping (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.

2. Brown v Shawbrook Bank Limited (18 June 2020, County Court at Wrexham)

3. Wilson v Clydesdale Financial Services Limited (19 July 2021, County Court at Portsmouth)

4. Gallagher v Diamond Resorts (Europe) Limited (9 February 2021, County Court at Preston)

5. Prankard v Shawbrook Bank Limited (8 October 2021, County Court at Cardiff)

Relevant Publications

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

What I've 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.

For the same reasons set out in my Provisional Decision, which are incorporated below, I've decided not to uphold this complaint.

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.

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs B could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

However, the Lender appears to have a total defence to the Section 75 claim for misrepresentation due to the provisions of the Limitation Act 1980. The effect of the Limitation Act is that a supplier and credit provider would have a defence to a claim for misrepresentation if the customer made their claim more than 6 years after the misrepresentation caused them to enter the contract when they otherwise would not have done so.

In this case, Mr and Mrs B signed the relevant contracts at the Time of Sale. So, they had until the 13 May 2019 to make a misrepresentation claim. But Mr and Mrs B did not make the claim until the Letter of Complaint dated 17 November 2020. So, it appears that the Lender has a total defence to the misrepresentation claim, regardless of whether the claim would otherwise have merit.

However, I will still analyse below whether there was a misrepresentation in this case. This is because, if there was, this could create or contribute to there being an unfair credit relationship under Section 140A of the CCA.

Alleged misrepresentation: The Allocated Property would be sold on the sale date.

Looking at what Mr and Mrs B have said in their witness statement it appears they were aware that Allocated Property 1 would be sold at the end of the final year of their membership term. I cannot see that they have recalled being told the sale would be completed on a certain date. And it seems unlikely that the Supplier would've made such a representation. I say this because the sale of a property tends to be complex and can take time, so it would be impossible to guarantee the sale happening on or by a certain date.

In any case there is no indication that if Mr and Mrs B were told this, that this caused them to enter into the contract when they otherwise wouldn't have done so.

Alleged misrepresentation: Fractional Club membership was an investment.

If the Supplier said this, it would not appear to be a misrepresentation (despite being prohibited from doing so by the Timeshare Regulations). I say this because it is possible that on the sale of Allocated Property 1 Mr and Mrs B's share in the net sale proceeds could potentially exceed what they paid for FC Membership 1. This could reasonably be said to meet the definition of investment agreed in Shawbrook & BPF v FOS – "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".

Alleged misrepresentation: Allocated Property 1 would be sold and there would be a financial return on their investment.

This allegation suggests that the Supplier told Mr and Mrs B that there "would be" a return on their investment. That is, a financial gain or profit. It seems unlikely that the Supplier would have said this, since Mr and Mrs B's share of the net sale proceeds of Allocated Property 1 would depend on how much it was sold for at the end of the membership term. That was 16 years in the future at the Time of Sale, and I doubt that the Supplier would make such predictions.

The Information Statement provided to Mr and Mrs V at the Time of Sale pointed this out on page 3:

> *"The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market and supply and demand at the time of sale."*

And on page 8 it said:

> *"[The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights."*

In any case, the witness statement dated 11 August 2020 says Mr and Mrs B were told that:

> *"12… At the end we would get our money back, and probably a profit, depending on the sale price."*

This means that Mr and Mrs B's recollections of what they were told was only that they would "probably" make a profit, but that depended on the sale price. So, this indicates that ny profit was not guaranteed. And in that case, it was also possible that they would not make a financial gain or profit. This contradicts the allegation made in the Letter of Complaint.

So, by their own recollections, Mr and Mrs B say that the Supplier told them only that there was potential for a financial gain or profit on the sale of Allocated Property 1. And for reasons mentioned above, that would not be untrue. So, I am not persuaded that the Supplier said there "would be" a financial return or profit.

Alleged misrepresentation: Fractional Ownership would enable Mr and Mrs B to have holidays for considerably less than the cost of booking with a travel agent.

Mr and Mrs B's witness statement does not mention the Supplier making this statement. In terms of why they decided to go ahead with the purchase, the witness statement says, "We were impressed at the idea of nice holidays every year and getting our investment back at the end. It seemed like a win-win situation." This does not suggest that getting cheaper or better value holidays was a factor in their decision.

In addition to this, the Members' Declaration said that:

> *"10 We understand that [the Supplier] aims to provide personal service to our members and its prices will be comparable to buy not necessarily cheaper than other providers of the same services."*

This indicates that the Supplier's services may be more expensive than if purchased elsewhere. Considering this, I do not think there is sufficient evidence for me to conclude that the Supplier made the alleged misrepresentation. Nor that, if it did, this was material to Mr and Mrs B's decision to enter into the contract.

Alleged misrepresentation: The advice received during the sales meetings was based on the knowledge of the salesperson from their experience as an investor.

The Information Statement did have a disclaimer to this effect. But I cannot see that this was untrue. And Mr and Mrs B have not explained why this was material to their decision to enter into the contract.

Alleged misrepresentation: That the Fractional Club membership has more than one purpose, with reference to holidays, trade-in, and investment.

Again, this does not appear to be untrue. FC Membership 1 provided Mr and Mrs B holiday rights and a share in the net sale proceeds of Allocated Property 1 as well as other benefits.

They could trade in their membership if making further purchases with the Supplier (which they later did). Or sell it on the open market if they could find a buyer. Or they could wait until the end of the membership term to receive their share in the net sale proceeds.

If Mr and Mrs B sold their membership or waited until the end of the membership term, it was possible that they would get back more than they paid for FC membership 1. So, I think FC Membership 1 could have several purposes, including taking holidays, trading it in towards a future purchase, or to hold as an investment (in the hope or expectation of making a profit on what they paid for it). With that being the case, describing it as such does not appear to be a

misrepresentation.

Alleged misrepresentation: The net proceeds from the sale of Allocated Property 1 would be distributed to Mr and Mrs B in accordance with their fractional share.

This is as set out in the rules of the Fractional Club. So, it does not appear to be a misrepresentation.

There's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs B by the Supplier at the Time of Sale that led them to enter into the contract when they otherwise would not have done so. So, I do not think there was an actionable misrepresentation by the Supplier.

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

Mr and Mrs B 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

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

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

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;

4. The inherent probabilities of the sale given its circumstances.

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

Mr and Mrs B's allegations as to why the credit relationship is unfair

Mr and Mrs B's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, and I will look at each in turn before considering whether in all the circumstances of this complaint, this rendered the credit relationship unfair to them.

Alleged misrepresentations

I analysed the alleged misrepresentations above. But having found there were no misrepresentations, it follows that the alleged misrepresentations did not create or contribute to the credit relationship between the Lender and Mr and Mrs B being unfair for the purposes of Section 140A of the CCA.

A lack of availability – Mr and Mrs B have not been able to book holidays where and when they wanted using the number of fractional points they own.

The Information Statement also made clear that bookings were subject to availability: "Owners should note that accommodation during school holidays should be booked as far in

advance as possible. All bookings are subject to availability and are handled on a first-come, first-served basis."

That does not appear to be unfair or unreasonable, nor do I think it would be unexpected.

Mr and Mrs B's witness statement shows that they were disappointed with the holidays they could book using the points purchased under FC Membership 1, because *"the fraction that [the Supplier] had sold us didn't give us enough points to stay at the majority of the various… sites for a normal week outside 'offer weeks'. We would be completely relying on the half price offers."* And that this was a major factor in their upgrading to FC Membership 2, which involved purchasing more Fractional Points.

My understanding is that the presentation would've included some examples and discussion of the types of accommodation that they could book using different amounts of points. And there appears to be no suggestion that the Supplier misled Mr and Mrs B in regard to what their points could purchase. For example, this has not formed part of their Section 75 claim for misrepresentation. So, it is not clear to me why this would lead to unfairness in Mr and Mrs B's credit relationship with the Lender.

A lack of exclusivity – Fractional Club membership was sold to Mr and Mrs B as an exclusive member only club. But they have found that non-members can book to stay at the Supplier's resorts, often for significantly less that what Mr and Mrs B pay in annual management fees.

My understanding is that Fractional Club membership does come with some benefits that are not available to non-members. However, I am not persuaded that the Supplier would've described their resorts as being exclusive to members. This was not the case. Part of how the Supplier operated was to provide promotional holidays to non-members in the hope they would purchase membership. Indeed, that is how Mr and Mrs B became members.

I can understand that Mr and Mrs B may be disappointed to find non-members able to book to stay at the Supplier's resorts for apparently less than they pay. But, as mentioned above, I have not found that FC Membership 1 was misrepresented in this way.

Indeed, the Members' Declaration said that:

> *"10 We understand that [the Supplier] aims to provide personal service to our members and its prices will be comparable to buy not necessarily cheaper than other providers of the same services."*

This indicates that the Supplier's services may be more expensive than if purchased elsewhere.

The terms of the contract are unclear and contradictory. Mr and Mrs B had no chance to familiarise themselves with the documents. They were given no clear indication or explanation of the implications of the management fees. This created a significant imbalance in the contract. The duration and payment of management fees with no end were unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

My understanding of the sales process was that once the customer had agreed in principle to the purchase, the contract documents would be prepared before another member of staff went through them with the customer. This was to ensure they understood what they were purchasing and could ask any questions away from the salesperson. This process had no set time limit and how long it took would depend on the customer.

Mr and Mrs B have said that by the time they got to this part of the process they "just wanted

to get out so we would have signed anything." I appreciate that the sales process had taken a long time and they may have been tired. But they could have refused to sign the contract then and asked for more time to think about it. And even if they did not feel able to do that at the time, they had the 14-day withdrawal period in which they could have read through everything, asked any questions and changed their mind without having to pay anything.

I note from the witness statement that the salesperson contacted them a number of times to ensure they were happy with their decision to purchase and even took them out for "a lovely meal." So, it appears they were happy with their purchase at that time, given they did not choose to cancel it – and even later upgraded their membership.

My understanding is that the first year's management fees would've been explained to Mr and Mrs B at the Time of Sale. So, they would have been aware of what it would cost in the first year. And that it was likely explained to them that the management fee could increase over time.

While some of the terms of the contract, particularly concerning management fees, may potentially be unfair under the UTCCR, it is important to consider what affect those terms have had on Mr and Mrs B. But there is no suggestion here that those terms have been operated in an unfair way that has caused Mr and Mrs B any detriment or loss.

The Supplier breached the CPUT Regulations in relation to unfair commercial practices, aggressive and pressure sales practices, misleading actions and misleading omissions, including in relation to what the Supplier told Mr and Mrs B about availability and access to a superior standard of accommodation.

The Letter of Complaint has not explained in detail how the Supplier breached the CPUT Regulations at the Time of Sale and what affect this had on Mr and Mrs B. Some specific allegations made are about the sale of FC Membership 2, which is not the subject of this complaint, so I will not discuss those here.

Mr and Mrs B's witness statement does not appear to indicate that they only entered into the contract because they felt they had no other choice, nor that they were made promises about availability and access to a superior standard of accommodation at the Time of Sale.

Mr and Mrs B have said that by the end of the process their "heads felt scrambled with all the info". That suggests they may have felt overwhelmed by the amount of information they had been given. But they have not provided any explanation of why they did not exercise their right to cancel the purchase, which I might expect them to have done if they felt that they had been pressured into a purchase they did not actually want to make.

Their supplementary statement dated 6 February 2024 says that Mr and Mrs B were not told about the 14-day withdrawal or cooling-off period. But I think that is unlikely given it was set out in the documents provided to them at the point of sale, including a page they had to sign to acknowledge being told about it. The withdrawal period would've given Mr and Mrs B time to digest the information they had been given, ask any further questions and ultimately withdraw from the purchase if they wanted to. But they did not exercise this right.

Indeed, their own recollections show they had further contact with the salesperson within the withdrawal period. So, it seems likely that they were satisfied with their understanding of what they had purchased at that time.

Overall, I am not persuaded that there is sufficient evidence in this case for me to conclude that the Supplier breached the CPUT Regulations.

Fractional Club membership was marketed and sold to Mr and Mrs B as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

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

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

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

But Mr and Mrs B say that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr and Mrs B's share in the Allocated Property, in my view, could constitute an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that FC Membership 1 was marketed or sold to Mr and Mrs B as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is 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 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 attempted to show that Fractional Club membership was not an investment. So, it is possible that Fractional Club membership wasn't marketed or sold to Mr and Mrs B as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it is equally possible that Fractional Club membership was marketed and sold to Mr and Mrs 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. This is because I am not persuaded that, even if the Supplier did breach Regulation 14(3) at the Time of Sale, this was material to Mr and Mrs B's decision to enter into the contract.

The reason I say this is because, although Mr and Mrs B do allege in their witness statement that FC Membership 1 was sold or marketed to them as an investment (in that they were told they could make a profit from it), they have not said that the prospect of making a profit was one of the reasons they entered into the agreement. The only time in this complaint where they have given their reasons for making the purchase was in the witness statement where they said:

> *"We were impressed, at the idea of nice holidays every year, and getting our investment back at the end. It seemed like a sensible proposition. and a win-win situation."*

Mr and Mrs B's description of their reasoning only mentions getting their investment back. That appears to point to the possibility of getting back what they paid for FC Membership 2. There is no suggestion here that the potential of making a profit motivated them to make the purchase. So, it is difficult for me to conclude in this instance that any breach of Regulation 14(3) was material to their decision.

This conclusion is reinforced by Mr and Mrs B's supplementary statement made on 6 February 2024 in response to our Investigator's assessment. Again, this explains about how the sale took place and what the Supplier did that breached Regulation 14(3). But it only says the following in relation to their motivations for the purchase:

> *"In the end, based on what we had been told and shown, we agreed to buy one week in [the Supplier]'s Fractional Property Owners Club. At the time it seemed like a good deal, and at that point, we had no reason not to believe what we had been told."*

In light of this, I am not persuaded that any breach of Regulation 14(3) by the Supplier at the Time of Sale was material to Mr and Mrs B's decision to purchase. There is not enough here for me to conclude, for instance, that Mr and Mrs B would not have gone ahead with the purchase if there had been no breach of Regulation 14(3) at the Time of Sale.

<u>The Supplier breached Regulation 25(3) of the Timeshare Regulations by accepting a £500 credit card payment at the Time of Sale, which was before the end of the 14-day withdrawal period.</u>

Regulation 25(3) of the Timeshare Regulations states:

> *"No person may accept any consideration from the consumer before the end of the withdrawal period in relation to the contract".*

This means that the Supplier would've breached Regulation 25(3) if it took the credit card payment at the Time of Sale, rather than waiting until the 14-day withdrawal period had expired.

The credit card receipt provided to Mr and Mrs B at the time shows that the Supplier got Mr

and Mrs B to pre-authorise the payment of £500 on 13 May 2013, but that the payment would not be taken until after 27 May 2013 (this was clearly shown on the receipt). That was after the 14-day withdrawal period had elapsed.

I have seen no evidence that the payment was taken before the end of the withdrawal period. So, it does not appear that the Supplier breached Regulation 25(3).

Undisclosed commission

The PR has suggested that if the Lender paid commission to the Supplier this may have created an unfair relationship because Mr and Mrs B did not give their informed consent for this. But my understanding is that no commission was paid by the Lender. So, this cannot have contributed to there being an unfair relationship under Section 140A of the CCA.

Was the credit relationship between the Lender and Mr and Mrs 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 and Mrs B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I've explained above that even if FC Membership 1 was sold or marketed to Mr and Mrs B as an investment at the time of sale, I think there is insufficient evidence for me to conclude this was material to Mr and Mrs B's decision to enter into the Purchase Agreement. This was because they do not appear to have been motivated by the potential of making a financial gain or profit from the purchase – given that they have not said that they were at any point during this complaint. And, given my findings on their other allegations above, I've not seen sufficient evidence of anything else that, considering at all the circumstances in this case, would render the relationship between Mr and Mrs B and the Lender unfair for the purposes of Section 140A of the CCA.

Irresponsible and/or unaffordable lending

Mr and Mrs B say that the right checks weren't carried out before the Lender lent to them. I haven't seen anything to persuade me that was the case in this complaint given its circumstances.

But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs B was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason.

From the information provided, I am not satisfied that the lending was unaffordable for the Mr and Mrs B. But if there is any further information on this (or any other points raised in this provisional decision) that the Mr and Mrs B wish to provide, I would invite them to do so in response to this provisional decision.

Section 140A: Conclusion

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

Irresponsible lending

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs B.

In my opinion this part of the complaint is likely to be outside of the jurisdiction of the Financial Ombudsman Service. This is because the complaint was made more than six years after the lending decision was made.

However, the rules setting out the time limits could provide Mr and Mrs B more time (up to three years) depending on when they became aware or ought reasonably to have been aware that they had cause to complain about this.

Mr and Mrs B say that no affordability checks were carried out at the Time of Sale. And that they were only offered credit from the Lender after applications were declined by other credit providers. They say they were surprised that the loan was offered to them, given they had a poor credit score and were in a debt management plan at the time. So, it seems to me that the circumstances at the Time of Sale may have suggested to Mr and Mrs B that the Lender did not carry out proper checks, and that they may have cause to complain about this. In which case the rules would not provide any additional time for them to complain.

However, I have considered above whether the alleged lack of affordability checks at the Time of Sale created or contributed to there being an unfair relationship under Section 140A of the CCA – since the time limits for such claims are different.

Additional findings following my Provisional Decision

In this section, I will comment on the PR's response to my Provisional Decision.

I am not persuaded that my Provisional Decision, or this final decision, is inconsistent with the judgement in *Shawbrook & BPF v FOS*. The judgement does not mean that Fractional Club membership was sold by the Supplier in breach of Regulation 14(3) in every case or that where that happened this would always lead to there being an unfair credit relationship.

I explained in my Provisional Decision, as I have above, that, while it is possible that the Supplier breached Regulation 14(3) at the Time of Sale, I did not need to make a finding on that. This is why I did not spend time analysing the documents provided by the Supplier (including the training materials the PR refers to).

That was because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, in the specific circumstances of this complaint I was not persuaded that it led to there being an unfair relationship between the Lender and Mr and Mrs B. What they said about their motivations for purchasing FC Membership 1 did not persuade me that the prospect of making a profit from it, and therefore any breach of Regulation 14(3), was material to their decision to purchase. And so did not cause there to be an unfair relationship. I appreciate that the PR takes a different view. But it is for me to make a decision that is, in my opinion, fair and reasonable in the circumstances of this complaint.

The PR refers to what it calls precedents. But it should be aware that the Financial Ombudsman Service is not like the courts. I am not bound to follow or reach the same outcome as other Ombudsmen reached on other complaints. Each complaint is considered on its own individual merits.

Even where there are similarities in circumstances between complaints, this does not mean the same outcome will be reached in every case. So, if a timeshare provider breached Regulation 14(3) in one case, that does not mean it did so in every case – even if the same product was being sold. And if such a breach led to an unfair relationship in one case, it does not mean that it did so in every case. The outcome will depend on the individual circumstances and evidence in each case.

The PR points to the burden of proof under Section 140B (9) of the CCA. But, as stated in *Smith* at paragraph 40, this does not mean that *"the claimant can make allegations of fact which the court is bound to accept unless the creditor disproves them; it is still the debtor who has the onus of proving facts on which he or she positively relies"*.

In any case, the PR's comments here speak to the allegation of the Supplier breaching Regulation 14(3). But this complaint, in my opinion, turns on Mr and Mrs B's motivations for the purchase. And as explained above, their evidence in this regard is insufficient to persuade me that any breach of Regulation 14(3) (if there was one) was material to their decision to enter into the purchase, such that an unfair relationship was created. And that is why I have decided not to uphold this complaint.

The PR has suggested that pressure was applied to Mr and Mrs B, but I do not think I need to add to what I said about that above.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs B Section 75 claim. I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And I am not persuaded that I can consider whether the Lender was irresponsible in providing the loan to them.

Having taken everything into account, I see no reason why it would be fair or reasonable to uphold this complaint.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 25 July 2025.

Phillip Lai-Fang
Ombudsman