

The complaint

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

What happened

In May 2017, Mr and Mrs A bought a trial membership of a timeshare from a timeshare provider (the 'Supplier'). This purchase isn't the subject of this complaint, but is included here for background information only.

On 2 October 2017 (the 'Time of Sale'), Mr and Mrs A purchased full timeshare membership (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 1,010 fractional points at a cost of £14,976 (the 'Purchase Agreement'). But after trading in their trial membership, they ended up paying £10,981 for their Fractional Club membership.

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

Mr and Mrs A paid for their Fractional Club membership by paying a £500 deposit and taking finance for the remaining amount of £10,481 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs A – using a professional representative (the 'PR') – wrote to the Lender on 31 March 2022 (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. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.

3. told them that Fractional Club membership was an “investment” when that was not true.
4. told them that if they did not purchase, their children would inherit the ongoing liability to pay management charges in respect of the points membership when that was not true.
5. told them that the Supplier’s holiday resorts were exclusive to its members when that was not true.

Mr and Mrs A 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 A.

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

Mr and Mrs A say that they found it difficult to book the holidays they wanted, when they wanted.

This suggests that Mr and Mrs A are saying they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs A.

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

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

1. Mr and Mrs A did not receive a copy of the standard Information Statement prior to entering into the Purchase agreement or, if they did, they were not given adequate time to review it.
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Consumer Rights Act 2015 (‘CRA’).
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier’s sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the ‘CPUT Regulations’) as well as prohibited practices under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn’t carry out the right creditworthiness assessment. Mr and Mrs A were also not given an adequate or transparent explanation as to the features of the agreement which may have made the credit unsuitable for them or ‘have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest rate and total charge for the credit provided’.
6. The Supplier failed to provide sufficient information in relation to the Fractional Club’s ongoing costs.

The Lender dealt with Mr and Mrs A’s concerns as a complaint and issued its final response letter on 6 June 2022, rejecting it on every ground.

The PR, on Mr and Mrs A’s behalf, then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file,

rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision (the 'PD') dated 10 June 2025. In that decision, I said:

"I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs A's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership and breached the Purchase Agreement and the Lender ought to have accepted and paid the claim under Section 75 of the CCA, and the other reasons the credit relationship was alleged to have been unfair. This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs A in the same or a better position than they would be if the redress was limited to those other parts of the complaint.

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

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

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

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

Mr and Mrs A's testimony

As part of Mr and Mrs A's submissions to this Service, the PR has submitted a witness statement. So, I have considered how much weight I can place on this statement when assessing the merits of Mr and Mrs A's complaint.

I acknowledge that when this complaint was first made to the Lender and referred to our Service, the PR did not provide any witness statement from Mr and Mrs A.

However, upon our Service's request, the PR did then provide a witness statement from Mr and Mrs A in January 2024 and said this was drafted prior to the complaint being made. I can see that the statement is not signed or dated

I think it's likely the statement was probably prepared as part of the PR's case preparation. I say this because the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

But the statement was, in my view, clearly prepared and written by the PR. For example, I can see what appears to be a note from the PR as part of the statement which says "Statement (misrepresentation or unfulfilled promises during the sales presentation) [the Supplier] Ref: 3713873", which appears to be for their reference rather than something Mr and Mrs A said.

So, I am mindful of the risk that Mr and Mrs A may have been guided through the process, and the associated risk that what has been written may not be their own specific recollections. But it does contain personal information about the Time of Sale that only Mr and/ or Mrs A would have known, such as which family members were with them during the sales presentation, so I have no doubt that Mr and Mrs A had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mr and Mrs A's recollections of the Time of Sale and I can place weight on what they've had to say within the statement.

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

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

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

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

But Mr and Mrs A say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

"We were allocated a head sales rep (unfortunately again I cannot remember his name as this never appeared in any paperwork), who set out to convince us to upgrade our trial membership to full membership or fractional membership. The use of diagrams to show us how much cheaper it would be to become a member of [the Supplier] than pay for holidays was demonstrated.

They used these charts and computer software to [sic] from their website to convince us. There were no hardcopy documents given out at the sales presentation, only some figures written on paper to show us how the final costs of £10,481 arose.

[...]

At this point we had been with them for around six hours and my sister and young children had to return back to the apartment as the children were exhausted and myself and husband could not leave at the same time, as we were informed that they had not finished with us and we needed to finalise the upgrade which we were still bargaining as it was a lot of money for us to commit to, and each time we inform [sic] them that we wanted to stay on the trial membership for some time to understand how the process works before becoming full members, but we were convinced at this point, that owning a fractional membership means that we will own a fraction of a building and when it is sold, our investment will appreciate, and that caught our attention, even though we were exhausted and wanted to get it finished so we could go.

[...]

We were also given online [sic] account that states that we have a fractional rights membership which in our mind was not any form of deeds and since we have found out this does not have no [sic] value to say we indeed had a share in the property rights”.

Mr and Mrs A allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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

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

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an ‘investment’ or quantifying to prospective purchasers, such as Mr and Mrs A, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs A as an investment.

For example, in the Member's Declaration document given to Mr and Mrs A to read and sign, there are 15 statements. These include:

"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate."

And the Standard Information form, for example, stipulated the following on page 8 under the heading "Primary Purpose":

"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights."

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

"11. Investment advice

The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all the information has been obtained solely from their own experience as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property."

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the Fractional Club weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer in the Standard Information Form if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs A's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

- (1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs A or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn*
- (2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

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

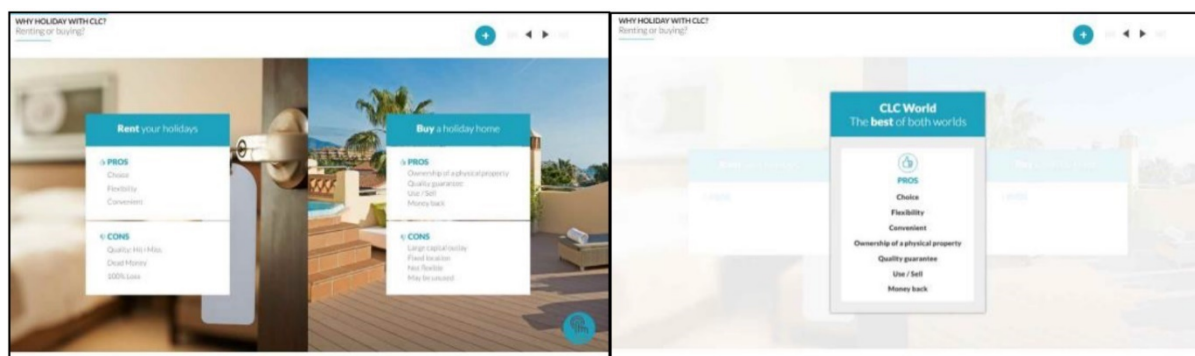
How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr and Mrs A's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual').

As I understand it, the 2017 Fractional Training Manual was used from November 2016 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr and Mrs A appear to have purchased. It is not entirely clear whether Mr and Mrs A would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

- (1) *the training the Supplier's sales representatives would have got before selling Mr and Mrs A's Fractional Club membership; and*
- (2) *how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs A.*

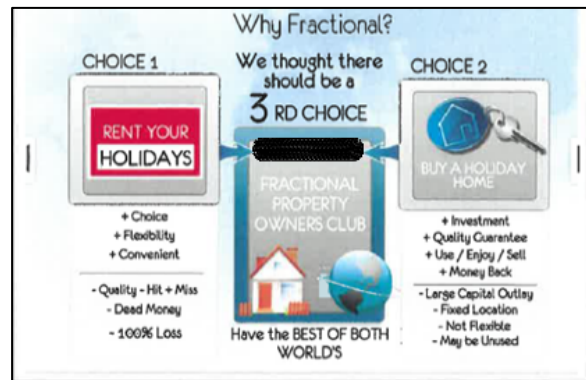
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seem to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr and Mrs A that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:



All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

- (1) "Rent Your Holidays"
- (2) "Buy a Holiday Home"
- (3) The "Best of Both Worlds"

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking 'normal' holidays and purchasing a holiday home. Further, for the reasons I will come onto, although the word 'investment' did not appear in the 2017 Fractional Training Manual, I think the idea that Fractional Club membership offered the same benefits as purchasing an investment property did form part of the sales process.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially when combined with the phrase "money back".

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

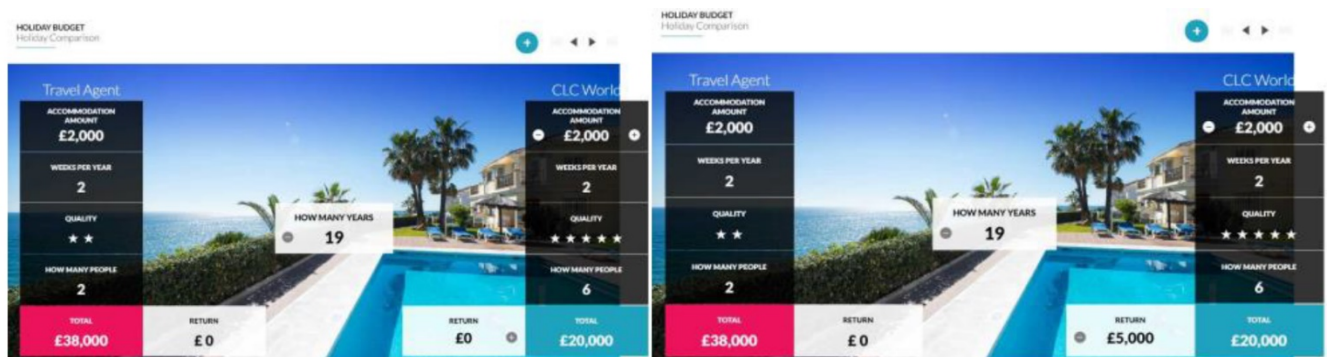
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

“So really FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back?”.

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between “renting” holidays and “owning” them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with “no return” in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:



“We aren’t only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spent over £... with no return.

However, with [the Supplier] you would still have spent the same £... because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

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

I acknowledge that the slides above set out a “return” that is less than the total cost of the holidays and the “initial outlay”. But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

- (1) The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
- (2) A significant financial return at the end of the membership term.*

And to consumers (like Mr and Mrs A) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that

the financial return was in fact an overall profit. And this is what comes across in Mr and Mrs A's testimony where they say:

"The use of diagrams to show us how much cheaper it would be to become a member of [the Supplier] than pay for holidays was demonstrated".

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr and Mrs A) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs A the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that "[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3))."¹ And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

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

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

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

¹ The Department for Business Innovation & Skills "Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".
<https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf>

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

Given what I’ve already said about the Supplier’s training material and the way in which I think it was likely to have framed the sale of Fractional Club membership to prospective members (including Mr and Mrs A), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it

So, overall, I think the Supplier’s sales representative was likely to have led Mr and Mrs A to believe that Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don’t find them either implausible or hard to believe when they say they were told membership was an “investment” and that it meant they would “own a fraction of the building” and their investment would “appreciate” by the time the Allocated Property was sold. On the contrary, in the absence of evidence to persuade me otherwise, I think that’s likely to be what Mr and Mrs A were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

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

As the Supreme Court’s judgment in Plevin² makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

It also seems to me in light of Carney and Kerrigan that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs A and the Lender that was unfair to them and warranted relief as a result, whether the Supplier’s breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs A’s testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. Indeed, it seems that Mr and Mrs A were not initially interested in upgrading to full membership “as it was a lot of money for us to commit to, and each time we inform [sic] them that we wanted to stay on the trial membership for some time to understand

² See Appendix

how the process works before becoming full members". And, that it was only when the membership was marketed as an investment by the salesperson that they were then persuaded to purchase: "but we were convinced at this point, that owning a fractional membership means that we will own a fraction of the building and when it is sold, our investment will appreciate, and that caught our attention, even though we were exhausted and wanted to get it finished so we could go."

Further, when describing why they're unhappy with the membership now, their focus appears to be on the investment element of the membership: "We were also given online [sic] account that states that we have a fractional rights membership which in our mind was not any form of deeds and since we have found out this does not have no [sic] value to say we indeed had a share in the property rights".

That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs A say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing trial membership and the more 'standard' type of timeshare available to them.

Mr and Mrs A have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

And with all of that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs A under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

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

Mr and Mrs A were trial members before purchasing Fractional Club membership. As I understand it, trial membership involved the purchase of a fixed number of week-long

holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs A's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I think needs to be done to compensate Mr and Mrs A – whether or not a court would award such compensation:

- (1) The Lender should refund Mr and Mrs A's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.*
- (2) In addition to (1), the Lender should also refund:*
 - i. The annual management charges Mr and Mrs A paid as a result of Fractional Club membership.*
 - ii. The trade-in value given to Mr and Mrs A's trial membership.*
- (3) The Lender can deduct:*
 - i. The value of any promotional giveaways that Mr and Mrs A used or took advantage of; and*
 - ii. The market value of the holidays* Mr and Mrs A took using their Fractional Points.*

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)
- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*
- (5) The Lender should remove any adverse information recorded on Mr and Mrs A's credit files in connection with the Credit Agreement reported within six years of this decision.*
- (6) If Mr and Mrs A's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.*

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

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

The PR responded to the PD on Mr and Mrs A's behalf and accepted the PD. The Lender did not accept it, and provided some further comments and evidence they wished to be considered.

Having received responses from both parties, I'm now finalising my 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.

As I did in my PD, the legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') at the end of my findings – which forms part of this 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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

Having read the Lender's response to my PD in full, it's clear that their main reason for disagreeing with it, in summary, is that they consider there are inconsistencies in Mr and Mrs A's testimony which the Lender feels mean that their recollections cannot be relied on. So, I'll now address this point.

As I explained in my PD, Mr and Mrs A provided a witness statement setting out their memories of what happened.

And I acknowledged that it was likely the statement was probably prepared as part of the PR's case preparation. I said this because the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

In their response, the Lender has said that Mr and Mrs A's testimony contained comments also used by other consumers in testimony provided on other, similar complaints. In particular, they've referred to their comments regarding the holiday price comparison the Supplier gave at the Time of Sale and the computer software used.

I've considered this point, but I'm aware that this particular Supplier did use such software when selling this product to consumers, and as I outlined in my PD, sales representatives were trained to make a cost comparison between 'renting' and 'owning' holidays, which is what these comments from Mr and Mrs A's testimony appear to be referencing. So, it's not surprising that other consumers, who were sold the same product by the same Supplier at a similar time, have made similar comments as to how they were sold. And I don't think this, in and of itself, is a reason to entirely disregard what Mr and Mrs A have had to say in this particular case.

But in any event, as I explained in my PD, I am mindful of the risk that Mr and Mrs A may have been guided through the process, and the associated risk that what has been written may not be their own specific recollections. But what they've had to say does contain personal information about the Time of Sale that only Mr and/ or Mrs A would have known, such as information about their family, so I have no doubt that Mr and Mrs A had significant input into its contents. As I said previously, it is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I remain satisfied that it is a record of Mr and Mrs A's recollections of the Time of Sale and I can place weight on what they've had to say within the statement.

Turning to the inconsistencies the Lender has highlighted within the testimony, I'm assisted here by the judgment in the case of *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr and Mrs A have provided. That paragraph reads as follows:

"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:

- a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
- b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot*

simply ignore the evidence (Kogan).

- c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
- d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
- e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
- f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

From this, and my own experience, and indeed as the Lender has acknowledged in their response to the PD, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what Mr and Mrs A said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from them that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

So, for example, I do not find it in any way material that Mr and Mrs A got the name of the sales representative for their previous trial membership purchase incorrect. In my view, remembering the name of the sales representative for an earlier sale which is not the subject of this complaint is not material to Mr and Mrs A's memories of what happened at the Time of Sale some five months later. Likewise, I don't think it's material that Mrs A didn't initially mention that Mr A also travelled with them – she has mentioned him later in her description of the sales process, or that they got access to their online account with the Supplier at a different time than they said. I don't think these inconsistencies are material to how the membership came to be sold to them at the Time of Sale, or that this should mean their evidence about that should be discounted.

Similarly, I don't see the relevance of the sales notes from the Time of Sale indicating that Mr and Mrs A were happy with their purchase. I don't see how this is relevant to whether the Supplier breached the relevant prohibition at the Time of Sale, or why Mr and Mrs A made their purchase – the note the Lender has referred to doesn't particularly give any insight into either of these points.

The Lender has also referred to sales notes made by the Supplier in relation to the sale of Mr and Mrs A's trial membership. And, they say these show that they 'were already

becoming full members' as they already had another timeshare and so 'knew how it worked' without seeing the Supplier's sales presentation.

But having looked at the note in question, while it does say that Mr and Mrs A already had an existing timeshare membership with another Supplier, it doesn't say what kind. So, it's entirely possible this other membership was of a different kind than the one that is the subject of this complaint i.e. that it did not have any investment element to it. But, in any event, the note only says that Mr and Mrs A thought that the trial membership was a "*fantastic way of experiencing the club before becoming full members*". I don't agree that this is evidence they were already intending to purchase full membership at that time or importantly, what their motivations were at the Time of Sale for doing so. Ultimately, it only shows that they felt positively about the trial membership concept. Again, this note relates to a previous sale not the subject of this complaint, so doesn't, in my view, particularly assist in determining what happened at the Time of Sale.

Mr and Mrs A have set out in their evidence what they say happened at the Time of Sale and I have no reason to disbelieve them. It's clear to me that Mr and Mrs A are saying that the Supplier sold them Fractional Club membership as an investment which would 'appreciate' in value. And, as I highlighted before, that this is what 'caught their attention'.

For all of the reasons I already explained in my PD, it also remains my view that the evidence suggests that Fractional Club membership being marketed to Mr and Mrs A as an investment was a material part of their purchasing decision. The Lender hasn't provided anything further in relation to this point, beyond what I've already addressed above.

So overall, having considered everything afresh, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs A under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. I therefore remain of the view that it is fair and reasonable that I uphold this complaint.

Neither party provided any further comments in relation to my proposed method of redress, as set out in my PD. So, it follows that I still think that is a fair and reasonable way to resolve the matter. I've set this out again below:

Fair Compensation

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

As I explained in my PD, Mr and Mrs A were trial members before purchasing Fractional Club membership. As I understand it, trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs A's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I still think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what the Lender needs to do to compensate Mr and Mrs A – whether or not a court would award such compensation:

- (1) The Lender should refund Mr and Mrs A's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
- (2) In addition to (1), the Lender should also refund:
 - i. The annual management charges Mr and Mrs A paid as a result of Fractional Club membership.
 - ii. The trade-in value given to Mr and Mrs A's trial membership.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways that Mr and Mrs A used or took advantage of; and
 - ii. The market value of the holidays* Mr and Mrs A took using their Fractional Points.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)
- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr and Mrs A's credit files in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr and Mrs A's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

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

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.”³

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.

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

³ 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.⁴

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

⁴ See Recital 9 in the Preamble to the 2008 Timeshare Directive.

- 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(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).

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, County 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').

My final decision

I uphold Mr and Mrs A's complaint against First Holiday Finance Ltd and direct it to calculate and pay fair compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr A to accept or reject my decision before 15 August 2025.

Fiona Mallinson
Ombudsman