DRN-5663982

The complaint

Mr and Mrs A complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by firstly deciding against paying claims under Section 75 of the Consumer Credit Act 1974 (as amended) (the 'CCA') for (1) misrepresentation and (2) breach of contract, and secondly (3) being party to an unfair credit relationship with them under Section 140A of the CCA.

What happened

On 23 August 2017 (the 'Time of Sale'), while on a promotional holiday, Mr and Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier'). They entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £15,246 (the 'Purchase Agreement'). I will refer to this as 'FC Membership 1', which is the subject of this complaint.

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 ('Allocated Property 1' in relation to FC Membership 1) after their membership term ends.

Mr and Mrs A paid for their FC Membership 1 by making an advance payment of £500 and taking out finance of £14,746 from the Lender in both their names ('Credit Agreement' 1).

On 13 August 2018, Mr and Mrs A traded in FC Membership 1 towards the purchase of 1,370 Fractional Points linked to a different property ('Allocated Property 2'). The total cost of the purchase was £22,184. FC Membership 1 was given a trade-in value of £15,246 in the transaction, so Mr and Mrs A paid an extra £6,938 for FC Membership 2. They took out a loan of £21,355 ('Credit Agreement 2') from a different credit provider, which was used to pay off Credit Agreement 1 and pay the £6,938 for FC Membership 2. The purchase of FC Membership 2 is not the subject of this complaint.

Mr and Mrs A – using a professional representative (the 'PR') – wrote to the Lender on 14 February 2023 (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 says that the Supplier made a number of pre-contractual misrepresentations

at the Time of Sale – namely that the Supplier:

- Told Mr and Mrs A that FC Membership 1 gave them the opportunity to make savings on holiday accommodation and to gain access to exclusive accommodation. But this was untrue because Mr and Mrs A could access the same accommodation as a non-member, and once the membership fee (by which I think they mean the management charge, which was paid annually) was factored in it was more expensive for them as a member.

Mr and Mrs A says that they have a claim against the Supplier in respect of this misrepresentation 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 them.

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

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

(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:

- The misrepresentation as set out above.

- The Lender paid commission to the Supplier but did not disclose this to Mr and Mrs A.

- The documentation was unclear and was not provided in good time before entering into the contract.

- Mr and Mrs A were made to pay CLC's legal and administration fees. No clear information was provided to them explaining what these fees were for.

- The affordability or creditworthiness assessment was defective or non-existent.

- The loan was at a very high interest rate, and this made the loan unsuitable for Mr and Mrs A.

- Mr and Mrs A were only provided with the documentation late in the day and not in good time. Given time to consider the purchase and credit agreement Mr and Mrs A may not have proceeded.

- No adequate explanation of the loan was provided to Mr and Mrs A, so they could not assess whether the agreement was adapted to their needs and financial situation.

- Mr and Mrs A were not advised of their right to take away the Credit Agreement.

- The credit broker was a company under the control of the Supplier, denying Mr and Mrs A access to independent financial advice about the loan.

- No alternative sources of finance were offered to Mr and Mrs A.

- Material information about management charges was omitted from the presentation, which was a misleading omission. This distorted Mr and Mrs A's behaviour.

- Mr and Mrs A were subjected to a high-pressure sales presentation.

- FC Membership 1 is not worth what Mr and Mrs A paid for it.

- The Supplier did not adhere to the codes of conduct of the Finance & Leasing Association and the Finance Industry Standards Association.

The Lender's response to the complaint

The Lender responded to Mr and Mrs A's concerns on 12 April 2023, rejecting it on every ground. Amongst other things it said:

- No commission was paid by the Lender to the Supplier in relation to the Credit Agreement, which Mr and Mrs A paid off in September 2018.

- Mr and Mrs A referred 16 friends and family for promotional holidays with the Supplier.

- Mr and Mrs A did not complete their purchase on the day of the presentation, but six days later.

- Mr and Mrs A did not contact the Lender at any point to say they were struggling to make the repayments.

- Mr and Mrs A were provided with the necessary Pre-Contract Credit Information as required by the Consumer Credit Act. This included the interest rate. They took the Credit Agreement and other documents with them after they singed them.

- Mr and Mrs A had the 14-day withdrawal period in which they could consider their purchase and cancel it if they were not happy.

- The Information Statement makes clear that the management charges may change and more information about this is provided in the Fractional Club Rules.

- The management charges cannot have increased significantly given they traded in FC Membership 1 when making a further purchase the following year.

Referral to the Financial Ombudsman Service

The PR, on behalf of Mr and Mrs A, referred the complaint to the Financial Ombudsman Service on 21 March 2023.

On 30 November 2023, the PR sent a witness statement to us (the 'Witness Statement'). In its accompanying email, the PR said:

> *"Whilst the statement is not signed or dated, we have provided the bundle of documents sent to us, some of which are dated."*

Included in the bundle of documents was a copy of the Purchase Agreement, which had a stamp on it that said, *"RECEIVED 6 JAN 2023"*.

The complaint was assessed by one of our Investigators who, having considered the information on file, rejected the complaint on its merits.

Response to our Investigator's assessment

Mr and Mrs A disagreed with the Investigator's assessment and the PR asked for an Ombudsman's decision on their behalf – which is why the complaint has been passed to me.

Among other things the PR said:

- The Witness Statement clearly said that FC Membership 1 was represented to Mr and Mrs A as an investment and that this representation was fundamental to the purchase.

- The complaint should be upheld in line with the precedent set by the Ombudsman decisions that were the subject of the judgement in *Shawbrook & BPF v FOS*.

Further claim made by the PR on Mr and Mrs A's behalf

On 20 January 2025, the PR sent what it said was a new letter of claim to the Lender. The PR forwarded this to the Financial Ombudsman Service on 19 March 2025 and asked us to consider this as part of the complaint that I am now deciding.

The letter of claim included the following points:

- Mr and Mrs A purchased the fractional timeshare product on the basis that they would acquire a share in the Property and that they would receive payment for their share when the Property was sold.

- Information and facts were concealed from Mr and Mrs A despite the Supplier having a legal duty to disclose them, including:

    - The commercial value of Allocated Property 1.

    - The total value of all of the shares in Allocated Property 1.

    - The title deeds to Allocated Property 1.

    - The fact that the entire resort, of which the Property was a part, was not all contained within the product.

- The use class of Allocated Property 1.
- A written agreement existed between the Supplier and the Lender.
- The written agreement entitled the Supplier to a Commission from the Lender on completion of the Credit Agreement.
- How the commission due to the Supplier was calculated.
- The amount of commission paid by the Lender to the Supplier, following the completion of the Credit Agreement.
- The payment of commission by the Lender to the Supplier, following the completion of the consumer credit agreement.
- The points value of holidays which could be booked by Mr and Mrs A.
- The holidays available under FC Membership 1 were also available to non-members.
- That the points acquired by Mr and Mrs A would be insufficient for their needs.
- The availability of holidays within the product were limited during peak season.
- Mr and Mrs A would suffer a substantial loss at the end of the term of the product.

My provisional decision

I issued a provisional decision on 16 June 2025, which explained why I was not planning to uphold this complaint. My provisional findings are incorporated below and form part of my final decision (aside from one change which is acknowledged in the footnotes).

The Lender responded to say it agreed with my provisional decision and had nothing further to add.

The PR responded on behalf of Mr and Mrs A to disagree with my provisional decision. It provided its reasons at some length, and I summarise the main points below:

1. The PR says there is no evidence that Allocated Property 1 exists or that Mr and Mrs A had any rights in relation to it. The PR says that without evidence of the existence of Allocated Property 1, such as the title deeds amongst other information (which the PR says it has requested from the Lender, the Supplier, the Trustee and the Financial Ombudsman Service), the whole concept of Mr and Mrs A owning a fraction of Allocated Property 1 is an illusion. As such, the Supplier has breached the contract by not providing what it said it would.

2. The Timeshare Regulations, Schedule 1 Part 3, means that an accurate and detailed description of Allocated Property 1 and its location should've been provided to Mr and Mrs A at the Time of Sale. But the Purchase Agreement only shows a number and the name of a resort, which is insufficient.

3. The provisional decision did not engage with the arguments that:

    a. The Supplier breached Regulation 6 of the CPUT Regulations about Misleading Omissions, by not providing specific information about Allocated Property 1.

    b. Mr and Mrs A have claims under common law relating to fraudulent misrepresentation, unjust enrichment, and fraudulent concealment.

    c. The purchase price was inflated to include a hidden security charge payable to the Lender by the Supplier.

    d. The Supplier breached the RDO Code of Conduct.

4. The provisional decision dismissed Mr and Mrs A's witness statement in error.

5. The Ombudsman's incorrectly approaches whether there was an unfair relationship under Section 140 of the CCA by dismissing individual points in isolation instead of making a holistic assessment.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out in this section and forms part of this decision.

The Legal and Regulatory Context

<u>The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')</u>

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

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

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

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

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

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

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

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

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

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

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 decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these

Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[2]

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

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

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices

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

- Schedule 1: Paragraphs 7 and 24

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

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

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.

In line with my provisional decision, I have 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.

In addition, I think it is appropriate to point out that an Ombudsman's decision does not set a precedent that must be followed in other complaints dealt with by the Financial Ombudsman Service. Each complaint is to be decided on its individual merits by reference to what is, in the Ombudsman's opinion, fair and reasonable in all the circumstances of the case.

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

A claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs A 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.

The PR says that the Supplier told Mr and Mrs A that FC Membership 1 gave them the opportunity to make savings on holiday accommodation and to gain access to exclusive accommodation. But this was untrue because Mr and Mrs A could access the same accommodation as a non-member, and once the management charge was factored in it was more expensive for them as a member.

I am not persuaded that the Supplier made such a representation. While this allegation is made in the Letter of Complaint, there is no comments direct from Mr and Mrs A in relation to what they were told about this. They do not mention it in the Witness Statement.

It is possible that the sales presentation included examples of holidays that could be booked by members for less than they were available to the general public booking online. That Mr and Mrs A had the opportunity to make savings on holiday accommodation is something they may have been told. But that does not appear to be untrue. And the allegation is not that they were told that booking through the Supplier would always be cheaper. [3]

In addition to this, there is nothing in the sales documents or other documents provided by the Supplier that suggests the accommodation available through FC Membership 1 will be at resorts that are exclusive to members of the Supplier's timeshare products.

In fact, statement number 10 on the one-page Members Declaration, which Mr and Mrs A signed, says:

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

Mr and Mrs A will have been aware that the Supplier's resorts were not for the exclusive use of members, given they purchased FC Membership 1 while on holiday with the Supplier, despite them not being members.

While I recognise that Mr and Mrs A have concerns about the way in which their FC Membership 1 was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons they allege. There is nothing on file that persuades there were any false statements of existing fact made to Mr and Mrs A by the Supplier at the Time of Sale, so I do not think there was an actionable misrepresentation by the Supplier.

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

Section 75 of the CCA: the Supplier's breach of contract

The Letter of Complaint says that Mr and Mrs A have a claim for Breach of Contract by the Supplier. But looking at the Letter of Complaint and other evidence in this case, it does not appear that they have set out what breach or breaches of contract have occurred, and I cannot see that there were any.

Overall, therefore, I do not think the Lender is liable to pay Mr and Mrs A any compensation for a breach of contract by the Supplier. So, I do not think the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs A's Section 75 claim for breach of contract.

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

Mr and Mrs A also says that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

[3] This differs from my provisional findings. The sales presentation slides do show a comparison between the cost of a booking using Fractional Club membership and independently booking online, where the latter is more expensive. But Mr and Mrs A's allegation was not that it would always be cheaper to book through their membership, just that it gave them the opportunity to make savings.

I have considered the entirety of the credit relationship between Mr and Mrs A 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 – which includes training material that I think is likely to be relevant to the sale.

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 complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision. I will look at each in turn before considering whether in all the circumstances, on the balance of probabilities, there was an unfair credit relationship.

<u>The misrepresentation as set out above</u>

Given I was not persuaded that there were any misrepresentations by the Supplier at the Time of Sale, these cannot have contributed to there being an unfair relationship between the Lender and Mr and Mrs A.

<u>The Lender paid commission to the Supplier but did not disclose this to Mr and Mrs A</u>

The Lender says it has confirmed to the PR on a number of occasions and on a number of separate complaints that it did not pay any commission to the Supplier. It has confirmed this in its response to this complaint, which it sent to the PR, as well as directly to the Financial Ombudsman Service. I am satisfied that no commission was paid in relation to Mr and Mrs A's Credit Agreement. As such this cannot have contributed to there being an unfair relationship.

<u>The documentation was unclear and was not provided in good time before entering into the contract</u>

I'm satisfied that Mr and Mrs A were provided with the contractual documents at the Time of Sale. I do not know exactly how long they had to consider them before making their decision to purchase. But there is no evidence to suggest that they wanted or asked for more time to consider the documents.

The Supplier has confirmed that Mr and Mrs A signed the documents six days after they attended the sales presentation. So, they certainly had time to consider what they had been told and to ask for further information (or for a copy of the relevant documents if they had not been provided to them at that point).

Mr and Mrs A also had the benefit of the 14-day withdrawal period during which they could've studied the documents, asked for more information, or cancelled the purchase if they were unhappy.

Mr and Mrs A have not explained exactly what aspects of the documentation were unclear and how better information would have affected their decision to purchase.

Mr and Mrs A were made to pay CLC's legal and administration fees. No clear information was provided to them explaining what these fees were for.

The legal and administration fees were clearly shown on the Purchase Agreement. So, I think Mr and Mrs A were told about them and agreed to pay them. It is not clear to me what further information about these fees the PR thinks should've been provided, or why it thinks it was unfair for Mr and Mrs A to have to pay such fees. It appears to me that Mr and Mrs A were clearly told about the fees and agreed to pay them as part of the purchase. There is no evidence that they asked questions about these fees or objected to paying them at the Time of Sale.

The affordability or creditworthiness assessment was defective or non-existent.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs A. 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 A was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs A.

If there is any further information on this (or any other points raised in this provisional decision) that the Mr and Mrs A wishes to provide, I would invite them to do so in response to this provisional decision.

The loan was at a very high interest rate, and this made it unsuitable for Mr and Mrs A.

The Pre-Contract Credit Information and the Credit Agreement itself clearly set out the interest rate, as well as the monthly repayments and the total amount payable if the loan ran to its full term. So, Mr and Mrs A ought reasonably to have been aware of the interest rate and what they were agreeing to pay under the Credit Agreement. Given they appear to have been given clear information about the interest rate and agreed to enter into the Credit Agreement, it is hard to see how this will have created any unfairness.

Mr and Mrs A were only provided with the documentation late in the day and not in good time. Given time to consider the purchase and credit agreement Mr and Mrs A may not have proceeded.

As mentioned above Mr and Mrs had the 14-day withdrawal period in which to reconsider their decision, in which time they had all the relevant documents. They have not provided any reasons why they did not do so. Given this, I think it is hard to conclude in this case that being given the information sooner would've led to Mr and Mrs A not entering into the agreements.

No adequate explanation of the loan was provided to Mr and Mrs A, so they could not assess whether the agreement was adapted to their needs and financial situation.

The required information appears to have been provided to Mr and Mrs A in the Pre-Contract Credit Information and the Credit Agreement. The PR has not explained what further explanation it thinks was necessary, or why the information provided was inadequate. So, it is hard for me to see why this would've created any unfairness.

Mr and Mrs A were not advised of their right to take away the Credit Agreement.

My understanding is that after signing the Credit Agreement Mr and Mrs A did take away a copy of it. If that was not the case, and I make no finding that it was, Mr and Mrs A could've requested a copy, either from the Supplier or the Lender.

The credit broker was a company under the control of the Supplier, denying Mr and Mrs A access to independent financial advice about the loan. No alternative sources of finance were offered to Mr and Mrs A.

The Member's Declaration at point 6 states:

> *"We acknowledge that where we have purchased with the assistance of finance and were introduced to one of CLC's approved external finance companies that, (a) no other introductions or recommendations will be made …"*

So, it appears that the Supplier made clear that it would only introduce Mr and Mrs A to one of their approved finance providers. There is nothing to indicate that the Supplier suggested it was providing independent financial advice or that it would offer alternative sources of finance. Nor does there appear to be any requirement that means that the Supplier should have done so.

Material information about management charges was omitted from the presentation, which was a misleading omission. This distorted Mr and Mrs A's behaviour.

My understanding is that Mr and Mrs A were told what the first-year management charges would be. Indeed, this is shown at point 3 on the Members Declaration that they signed, which says:

> *"We understand that currently the annual Management Charge is €999.00 for 2017 and that an invoice will be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year."*

Given that Mr and Mrs A traded in FC Membership 1 as part of a purchase just over a year after the Time of Sale, and that was in the first year they could use their Fractional Points (2018), it appears that they only paid one management charge under the Purchase Agreement. And that they were informed how much this would be before they entered into the agreement.

As such, it is not clear that any material information about the management charge was omitted or that this would've affected Mr and Mrs A's decision to purchase.

Mr and Mrs A were subjected to a high-pressure sales presentation.

The PR has not explained what the Lender did that caused Mr and Mrs A to feel pressured into purchasing FC Membership 1 when they otherwise would not have done so.

There is no testimony from Mr and Mrs A which describes them feeling pressured into making the purchase. The Witness Statement says:

"During the presentation, the sales representative… commenced by introducing themselves and providing an overview of the resort's features and amenities. They emphasized the luxurious accommodations and the various vacation benefits associated with owning a timeshare.

Throughout the presentation, the sales representative highlighted the potential financial benefits of owning a timeshare. They discussed the concept of "vacation ownership" and explained that by purchasing a timeshare, the buyer could enjoy annual vacations at the resort while potentially earning returns on their investment."

This (and the rest of the Witness Statement) does not suggest that there was any pressure applied to Mr and Mrs A. Nor that if there was, this caused them to enter into the purchase. So, I am not persuaded that the Supplier pressured them into the purchase. They have also given no explanation as to why, if the pressure was why they entered into the agreement, they did not cancel it within the 14-day withdrawal period.

FC Membership 1 is not worth what Mr and Mrs A paid for it.

I understand that Mr and Mrs A may now feel the purchase was not worthwhile. But it appears that they were clearly told the price of their FC Membership 1, and they agreed to pay it. So, it is hard to see how this would've created any unfairness. Given they traded in and upgraded their membership just over a year later, it seems likely that they were satisfied with their purchase at that time.

The Supplier did not adhere to the codes of conduct of the Finance & Leasing Association (the 'FLA') and the Finance Industry Standards Association.

The Finance Industry Standards Association ceased to exist in 2009. So, its Code of Practice does not appear to be relevant to the Time of Sale or the Credit Agreement.

The FLA Lending Code 2012 (the 'Lending Code') may be considered a relevant consideration. It sets out what may be considered good industry practice, regardless of whether the Lender was a member at the Time of Sale. Having said that, the Lending Code does not appear to go further in its requirements than the Consumer Credit Sourcebook (CONC) in the Financial Conduct Authority Handbook, which I have also taken into account.

I am not persuaded that the Lender or the Supplier breached the Lending Code or the requirements of CONC at the Time of Sale at all, or in such a way that would create an unfair relationship between the Lender and Mr and Mrs A.

The required information about the loan was provided to Mr and Mrs A and I think they had the opportunity to read and consider it. I discussed above the PR's allegations about the lack of a credit assessment being carried out and the allegations of high-pressure selling. The loan does not appear to have been unsuitable for Mr and Mrs A's needs and circumstances.

Summary of my findings regarding Mr and Mrs A's original allegations of what caused an unfair relationship

I'm not persuaded that Mr and Mrs A's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason that could potentially render the credit relationship unfair to them (albeit this was not mentioned in the Letter of Complaint). And that's the possibility that FC Membership 1 was marketed and sold to Mr and Mrs A as an investment in breach of prohibition against selling timeshares in that way.

Was FC Membership 1 marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs A's FC Membership 1 met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr and Mrs A's share in Allocated Property 1 could, in my view, 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 FC Membership 1 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 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 FC Membership 1 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 FC Membership 1 was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs A, the financial value of their share in the net sales proceeds of Allocated Property 1 along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that FC Membership 1 was not sold to Mr and Mrs A as an investment. So, it's *possible* that FC Membership 1 wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned FC Membership 1 as an

investment. So, I accept that it's equally possible that FC Membership 1 was marketed and sold to Mr and Mrs A as an investment in breach of Regulation 14(3).

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

Was the credit relationship between the Lender and Mr and Mrs A 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 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.

But there was no suggestion in the Letter of Complaint (dated 14 February 2023) that at the Time of Sale the Supplier led Mr and Mrs A to believe that the FC Membership 1 was an investment from which they would make a financial gain nor was there any indication that they were induced into the purchase on that basis.

On 30 November 2023, the PR sent the Witness Statement to the Financial Ombudsman Service and the Lender. In its accompanying email, the PR said:

> *"Whilst the statement is not signed or dated, we have provided the bundle of documents sent to us, some of which are dated."*

Included in the bundle of documents (the 'Bundle') was a copy of the Purchase Agreement, which had a stamp on it that said, *"RECEIVED 6 JAN 2023"*.

The implication from this appears to be that the Witness Statement was sent to the PR along with the other documents in the bundle, and that the PR received this on 6 January 2023 – before the Letter of Complaint was sent. However, I have reason to be sceptical about this.

The PR has not explicitly stated that was the case. The Witness Statement was not sent to the Lender with the Letter of Complaint. Nor was it sent to the Financial Ombudsman Service with the PR's submission on 29 January 2023 – even though the other documents in the Bundle were sent to the Financial Ombudsman Service at that time.

The Purchase Agreement sent to the Financial Ombudsman Service on 29 January 2023 does not have the date stamp on it that says, *"RECEIVED 6 JAN 2023"*. That suggests to me that the date stamp was added to the Purchase Agreement sometime between 29 January 2023 and 30 November 2023. And that the Witness Statement may have been written after 6 January 2023.

The Witness Statement did allege that the Supplier described FC Membership 1 as an investment. In fact, that was the main focus of the document. But that is not an allegation that had been made previously. It was not in the Letter of Complaint, despite this detailing over ten pages what the Supplier and Lender had allegedly done wrong – including referring to other parts of the Timeshare Regulations. If Mr and Mrs A had mentioned to the PR in

January 2023 that the Supplier had sold or marketed FC Membership 1 to them as an investment at the Time of Sale, it seems to me that this would most likely have been included in the Letter of Complaint.

Between January 2023 and November 2023, the judgement in *Shawbrook & BPF v FOS* was issued (in May 2023). This made clear that it was open to an ombudsman to conclude that a breach of Regulation 14(3) could lead to an unfair relationship if this was material to a customer's decision to purchase a timeshare. So, if the Witness Statement was written after this, there is a real risk that it could've been influenced by the judgement in *Shawbrook & BPF v FOS*, of which the PR was aware.

While it is possible that the Witness Statement does accurately reflect what Mr A remembers of the sale, even if I accepted that was the case (and I make no such finding), it would not lead me to think there was an unfair relationship. This is because the Witness Statement does not suggest that the Supplier describing FC Membership 1 as an investment (as defined above) was a material factor in Mr and Mrs A's decision to enter into the Purchase Agreement. It simply says that the Supplier did do this.

Therefore, even if the Supplier had marketed or sold the FC Membership 1 as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs A's decision to purchase FC Membership 1 at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs A and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Further claim made by the PR on Mr and Mrs A's behalf

I have considered the additional points made in the further claim. They appear to be an addition to the existing claim about an unfair relationship, rather than a new claim. But there is nothing in the letter that makes me think I should uphold this complaint.

It seems clear to me that the Supplier explained to Mr and Mrs A how FC Membership 1 worked in relation to Allocated Property 1. In summary, at the end of the membership term the Trustee would sell Allocated Property 1 and pay them their share of the net sale proceeds according to the fractions they owned. I am not persuaded that the Supplier had a legal duty to provide the additional information stated by the PR. Or that if it had done so, Mr and Mrs A would not have entered into the agreement.

I think it is likely that Mr and Mrs A were shown examples of holidays they could book using the Fractional Points they were purchasing. The documents provided to them at the Time of Sale stated that bookings are subject to availability and could be reserved on a first come first served basis.

The PR's points about commission are redundant, given no commission was paid to the Supplier by the Lender in relation to the Credit Agreement.

In summary, the points made by the PR in the further claim letter make no difference to my decision in this complaint.

If the Lender has responded to the further claim and treated it as a new complaint, it should let me know (and provide a copy of its response) in reply to this Provisional Decision.

Additional findings following my provisional decision

1. Existence of Allocated Property 1

I am not persuaded by the PR's argument that Allocated Property 1 does not exist. Its reasons for saying this are that the Purchase Agreement does not include details such as Allocated Property 1's physical address and other information that one might be given when buying a property were not provided to Mr and Mrs A. But the Purchase Agreement does indicate which of the Supplier's resorts Allocated Property 1 is on, and has an identifying number, which appears to me to likely indicate the block, floor, and apartment number of Allocated Property 1 within the resort.

The Purchase Agreement provided to Mr and Mrs A at the Time of Sale is intended to allow identification of Allocated Property 1 by the Trustee. The Fractional Rights Certificate (signed by the Trustee after the sale was completed) is evidence of Mr and Mrs A's fractional rights and likewise identifies Allocated Property 1 as on the Purchase Agreement. I have not seen their actual Fractional Rights Certificate, but I am aware that it would have included information about the type of apartment it was (such as studio, 1 bed or 2 bed). I have not seen Mr and Mrs A's actual Fractional Rights Certificate, but given they appear to have used their Fractional Rights to take holidays, I have no reasons to think it was not issued to them (and likely surrendered when they later upgraded their membership).

As the PR ought to be aware, the purchase did not technically give Mr and Mrs A ownership of a fraction or part of Allocated Property 1. That was however a simple way of explaining the effect of this aspect of FC Membership 1. But the documents provided to Mr and Mrs A at the Time of Sale set out how that worked in practice. For example:

1. Point 4 on the Purchase Agreement:

   "... We acknowledge that the Property is described below for the sole purposes of identifying it for the purposes of its disposal at the Sale Date in accordance with the Rules and the subsequent distribution to the Owner of the appropriate one fifty second part (or multiples of) held in trust for the Owner."

2. Information statement:

   "Short description of the product (e.g. description of the immovable property):
   By entering into a Purchase Agreement… an Applicant will become a Fractional Rights Owner (Owner) and be entitled to the exclusive rights associated with the Weekly Period in the Allocated Property owned or controlled by the Trustee for the number of Weekly Periods each year as set out in the Purchase Agreement and in the Fractional Rights Certificate…The Allocated Property is one of various Properties in the Project on tourist resorts (Resorts) from which Allocated Properties have been selected (as described further in this document)…

   In legal terms Fractional Rights are personal interests and do not need to be real estate or lease interests because the title to the Property is controlled by the Trustee through its wholly owned and controlled subsidiary company which will hold registered title to the Property. Each Owner has his personal interest in an Allocated Property protected by the Trust and the Trustee…

   Exact nature and content of the rights:
   …

Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Property is sold. There is a provision for distribution of funds or assets to Owners at a future Sale Date after the payment of any taxes and all costs related to that Allocated Property as described in the Rules…

Each Allocated Property is or will be legally owned or controlled by a UK company (Owning Company) which will be controlled either directly or indirectly by the Trustee, operating in accordance with the Deed of Trust… Although there may be various Properties belonging to the Owning Company for the purposes of usage and of distribution, Owners are allocated a specific property known in the Rules as the Allocated Property and specified in the Fractional Rights Certificate. The Owning Company will retain such Allocated Property until the automatic sale date in 19 years time or such later date as is specified in the Rules or the Fractional Rights Certificate.

The Trustee will manage the sales process of the Allocated Property and following a sale distribute the net proceeds among the Owners and the Vendor. Each Owner will be entitled to a distribution as set out on the Fractional Rights Certificate for each Weekly Period held under a Fractional Rights Certificate…" (Part 1)

"*Additional information*
1. Title
Fractional rights are personal interests and not real estate or lease interests because protection comes from the fact that the title to an Allocated Property is held by [the Trustee], a professional, independent trustee company. [The Trustee] holds the Allocated property solely for the benefit of the Owners through its wholly-controlled owning company/companies and ensures that the Accommodation is unencumbered and is responsible for maintaining the Fractional Rights Register, thus providing assurances for the Club as set out in the Deed of Trust."

The Fractional Club Rules, Deed of Trust and Management Agreement set out in detail how the Fractional Club worked, including in relation to Allocated Properties, their ownership and sale. Essentially, the Trustee owned or controlled Allocated Property 1 and was responsible for selling it at the end of the membership term and distributing the net sale proceeds to its Fractional Owners.

The PR says it has asked for evidence pertaining to the existence of Allocated Property 1 from the Lender, Supplier and Trustee but has not received any. Because of this it says I should conclude that Allocated Property 1 does not exist, and/or that Mr and Mrs A never had any rights in relation to Allocated Property 1. But the PR has not provided me with evidence of its requests to the Lender, Supplier and Trustee, nor their responses. And I am not persuaded that the absence of evidence here indicates that Allocated Property 1 does not exist.

I am satisfied that the documentation in relation to Mr and Mrs A's FC Membership 1 show that they were members and gained a right to the net sale proceeds of Allocated Property 1 at the Time of Sale by virtue of their purchase. As such, I do not think there was a breach of contract in this respect.

In my view any suspicion or suggestion that Mr and Mrs A may not have received their share of the net sale proceeds of Allocated Property 1 (if they had retained the Fractional Rights purchased at the Time of Sale when Allocated Property 1 was due to be sold) is nothing more than speculation. The Sale Date has not yet been reached, and Mr and Mrs A traded in and surrendered the Fractional Rights in question when they upgraded their membership. So again, I cannot see that there is or would be a successful breach of contract claim in this regard.

2. Information about Allocated Property 1

The Timeshare Regulations indicate that the Supplier should provide certain information, including that set out in Schedule 1 Standard Information Form for Timeshare Contracts, Part 3. This says:

> *"Additional information to which the consumer is entitled and where it can be obtained specifically (for instance, under which chapter of a general brochure) if not provided below:*
>
> *2. INFORMATION ON THE PROPERTIES*
> *- where the contract concerns a specific immovable property, an accurate and detailed description of that property and its location; where the contract concerns a number of properties (multi-resorts), an appropriate description of the properties and their location; …*
> *-the services (e.g. electricity, water, maintenance, refuse collection) to which the consumer has or will have access to and under what conditions,*
> *- where applicable, the common facilities, such as swimming pool, sauna, etc., to which the consumer has or may have access and under what conditions."*

The Information Statement was clearly intended to provide the information required by the Timeshare Regulations, it being in the specified format. Under the Section *"INFORMATION ABOUT THE PROPERTIES",* Mr and Mrs A's Information Statement says:

> *"Please see the Project Guide and Directory"*

The Project Guide explained how a member would use FC Membership 1 in practice. And the Directory included details of all the resorts available to book using Fractional Points, including the resort addresses, contact details, types of accommodation available and how many points would be required to book them. The Resort at which Allocated Property 1 is located was included in the Directory, including its address, phone number and GPS coordinates.

It is possible that the information provided did not meet the standard required by the Timeshare Regulations. But Regulation 12 (4) (b) says the information must be:

> *"sufficient to enable the consumer to make an informed decision about whether or not to enter into the contract."*

I am not persuaded that additional information would've affected Mr and Mrs A's decision to purchase. If for example, Mr and Mrs A had been given additional information about Allocated Property 1, it is hard to see why this would've dissuaded them from entering into the contract.

3. Claims under common law, inflation of purchase price and breach of RDO Code

I explained in my provisional decision that I was not persuaded there was a misrepresentation by the Supplier. For the avoidance of doubt, I do not think there was a fraudulent misrepresentation either.

The PR says that Mr and Mrs A were told they were paying for independent legal advice, and that this was fraudulent because what they paid for was *"for an individual contracted to the Supplier on a commission basis, who was neither independent nor necessarily legally*

qualified". But I am not persuaded that Mr and Mrs A were told they were being given independent legal advice, nor that they believed that is what they were paying for.

The only evidence beyond the PR's comments is the Pricing Sheet which shows a fee of £699 for *"legal and admin"* forming part of the Purchase Price. Mr and Mrs A have provided no comments about what they were told about this fee, nor that they were misled in relation to it or relied on anything they were told on the understanding that it was independent legal advice. There is nothing here to make me conclude that Mr and Mrs A thought they were speaking at the Time of Sale to anyone other than representatives of the Supplier.

Other reasons the PR gave for their being a fraudulent misrepresentation were:

- Allocated Property 1 will never be sold, or if it is there will be no net sale proceeds, meaning Mr and Mrs A would never get any money back.

- The trust protects the Supplier not the fractional owners.

I am not persuaded by these arguments. The PR does not believe the trust works in the way described in the various Fractional Club documents, including the Deed of Trust (which is the agreement between the Supplier and the Trustee and governs how the trust works). But I have no reason to think that the Trustee would not fulfil its obligations, including selling Allocated Property 1 at the appropriate time and distributing any net sale proceeds as suggested by the Supplier at the Time of Sale.

The PR's suggestion that Allocated Property 1 would never be sold, that there will be no net sale proceeds, and that Mr and Mrs A would never have got any money back appear to be speculative and unsupported by the evidence.

A potential claim of unjust enrichment was referred to by the PR in its letter in response to our Investigator's assessment. A key question in a claim for unjust enrichment[4] is whether the enrichment was received in circumstances which the law recognises as unjust. This does not mean unjust in a general sense, but in discrete factual situations or 'unjust factors' recognised in English Law.

The PR says that unjust enrichment occurred because the Supplier sold fractions of Allocated Property 1 for an amount well in excess of its market value while concealing the true nature of FC Membership 1 and material information. And that the Lender was unjustly enriched as a consequence of this through receiving interest, charges and fees from Mr and Mrs A. But this appears to be speculation not supported by any evidence. The PR has not set out what unjust factor or factors occurred nor explained why nor provided evidence to support its claim.

It seems clear that the price Mr and Mrs A paid for their FC Membership 1 was to pay for membership as a whole – including obtaining holiday rights and other benefits relating to taking holidays using their fractional points. There is no compelling evidence that shows the Supplier presented the purchase price in any other way. So, the price paid was not solely to obtain a share in the net sale proceeds of Allocated Property 1.

Having considered the law around unjust enrichment, the allegation made and the evidence in this case, on the balance of probabilities I am not persuaded that Mr and Mrs A would have a successful claim against the Lender for unjust enrichment.

[4] the enrichment in this case being the Lender receiving interest payments from Mr and Mrs A

The PR says Mr and Mrs A have a claim for fraudulent concealment and that the Supplier breached CPUT Regulation 6 and the RDO Code because the Supplier had a duty to disclose the following information but deliberately concealed it:

1. The commercial value of Allocated Property 1.
2. The total value of all the shares in Allocated Property 1.
3. The title deeds to Allocated Property 1.
4. That the entire resort, of which Allocated Property 1 was a part, was not all contained within the product.
5. The use class of the Property.
6. A written agreement existed between the Supplier and the Lender.
7. The written agreement entitled the Supplier to a commission from the Lender, upon completion of the Credit Agreement.
8. How the commission due to the Supplier was calculated.
9. The amount of commission by the Lender to the Supplier, following the completion of the consumer credit agreement.
10. The payment of commission by the Lender to the Supplier, following the completion of the consumer credit agreement.
11. The points value of holidays which could be booked by Mr and Mrs A.
12. The holidays available under the product were also available to non-members.
13. The points acquired by Mr and Mrs A would be insufficient for their needs.
14. That the availability of holidays within the product were limited during peak season.
15. Mr and Mrs A would suffer a substantial loss at the end of the term of the product.

As stated in my provisional decision, I am not persuaded that the Supplier had to provide the information at points 1 to 5. As mentioned above, Mr and Mrs A were not technically becoming owners of Allocated Property 1. The Members's Declaration stated at point 5 that, *"Fractional Rights… are personal rights and not interests in real estate"*. So, I do not think the Supplier had to provide this information to them, nor did it deliberately conceal that information.

That an agreement existed between the Lender and the Supplier is unlikely to have been a surprise to Mr and Mrs A, given the Supplier was acting as a Credit Intermediary and arranging the loan with the Lender. Had this been more clearly explained to Mr and Mrs A, it seems unlikely that this would've made any difference to their decision to make the purchase using the loan.

As mentioned in my provisional decision, no commission was paid by the Lender to the Supplier in relation to this loan. So, points 7 to 10 are redundant in this case. There was nothing to disclose in this regard, nor could any unfairness arise out of it.

In relation to point 11, I found in my provisional decision that it is likely that Mr and Mrs A were shown examples of holidays they could book using the Fractional Points they were purchasing. They were also provided with the Club Directory which showed the points cost of each type of accommodation at each resort in each week of the year. So, I do not think that information about the points value of holidays and what they could purchase was hidden from them.

The Supplier often invited non-members to stay at its resorts in the hope of them becoming members. At times, some apartments were also available for non-members to book. I do not think it is likely that the Supplier hid this from Mr and Mrs A or that if this had been explicitly explained to them, they would not have gone ahead with the purchase. I am not persuaded that the Supplier made a representation that its resorts were for the exclusive use of members.

I do not think the Supplier concealed that availability could be limited during peak season. The documents provided to Mr and Mrs A at the Time of Sale explicitly stated that holidays were subject to availability and that booking early was advised particularly for holidays during peak season.

I have seen no evidence to persuade me that the amount of fractional points purchased by Mr and Mrs A at the Time of Sale was insufficient for their needs, nor that this would've been clear to the Supplier at the Time of Sale, nor that the Supplier concealed this. Nor that it would have been clear to the Supplier at the Time of Sale that Mr and Mrs A would suffer substantial loss at the end of their membership term (which appears to be unsubstantiated speculation).

I have seen no evidence that the purchase price was inflated by the inclusion of a security charge payable to the Lender by the Supplier.

With all of this in mind, I am not persuaded that the Supplier fraudulently concealed anything or breached the CPUT Regulations and/or the RDO Code in such a way that I ought to uphold this complaint.

4. Mr and Mrs A's witness statement

In my provisional decision I did not dismiss the witness statement. As above, I carefully considered it and set out in my provisional decision the reasons why I was not persuaded by it that – most crucially – any breach of Regulation 14(3) by the Supplier at the Time of Sale was material to Mr and Mrs A's decision to enter into the purchase. To be clear, the reasons were because:

- There was no suggestion in the Letter of Complaint (dated 14 February 2023) that at the Time of Sale the Supplier led Mr and Mrs A to believe that FC Membership 1 was an investment from which they would make a financial gain nor was there any indication that they were induced into the purchase on that basis.

- The Witness Statement may have been written after 6 January 2023.

- If Mr and Mrs A had mentioned to the PR in January 2023 that the Supplier had sold or marketed FC Membership 1 to them as an investment at the Time of Sale, this would most likely have been included in the Letter of Complaint.

- If the Witness Statement was written after May 2023, there is a real risk that it could've been influenced by the judgement in Shawbrook & BPF v FOS, of which the PR was aware.

- While it is possible that the Witness Statement does accurately reflect what Mr A remembers of the sale, even if I accepted that was the case, it would not lead me to think there was an unfair relationship. This is because the Witness Statement does not suggest that the Supplier describing FC Membership 1 as an investment was a material factor in Mr and Mrs A's decision to enter into the Purchase Agreement. It simply says that the Supplier did describe it in this way.

I appreciate that the PR disagrees with my analysis and findings. But it is for me to make a decision based on what I think is fair and reasonable in all the circumstances of this complaint.

5. The Ombudsman's approach to whether there was an unfair relationship

I explicitly said in my provisional decision that my approach was to look at each allegation before considering whether in all the circumstances, on the balance of probabilities, there was an unfair credit relationship. So, while I discussed each allegation individually, I then considered the credit relationship *as a whole* when making my decision on whether there was an unfair relationship. I think that was an appropriate approach to take.

Section 140A: Conclusion

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

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 A Section 75 claims, and 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 having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

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

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 A and Mr A to accept or reject my decision before 1 August 2025.

Phillip Lai-Fang
Ombudsman