DRN-5670207

The complaint

Ms C and Mr M complain that First Holiday Finance Limited (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 a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on Ms C and Mr M's complaint on 12 June 2025, in which I set out the background to the complaint and my provisional findings on it. A copy of that decision is appended to, and forms part of, this final decision, so it's not necessary for me to go over all the details again. However, in very brief summary:

- Ms C and Mr M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') in October 2017 (the 'Time of Sale'), for £25,301 (the 'Purchase Agreement'). The membership entitled Ms C and Mr M to 'points' which could be used each year to book holiday accommodation, and a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property'), which was to be put up for sale after a certain number of years. Ms C and Mr M used a loan from the Lender (the 'Credit Agreement'), arranged by the Supplier, to pay for most of the purchase price.

- Ms C and Mr M later complained via a professional representative ('PR') that – in essence – the timeshare had been mis-sold to them. They said the Supplier had misrepresented the timeshare and breached its contract with them, giving them a claim against the Lender under Section 75 of the CCA. They also said the Lender had been party to an unfair credit relationship with them for the purposes of Section 140A of the CCA, for a number of reasons which included:

    - The Supplier having improperly sold the timeshare as an investment.

    - The Lender having failed to carry out proper affordability checks before lending to them.

    - Their contract with the Supplier containing unfair terms.

    - Having been put under improper pressure from the Supplier to make the purchase.

- Finally, Ms C and Mr M also complained the Credit Agreement had been arranged by individuals who were not authorised to arrange loans, meaning the Credit Agreement was not enforceable and they were entitled to a refund of money paid under it.

The complaint was rejected by the Lender.

In my appended provisional decision, I said I didn't think the complaint should be upheld. The full reasons for this can be found in the appended document, but to again summarise

briefly:

- There was insufficient evidence to support any of Ms C and Mr M's claims that the Supplier had made actionable misrepresentations to them at the Time of Sale. The examples of allegedly false statements made to Ms C and Mr M were either not misrepresentations (because they were true statements), were statements which were contradicted by the paperwork dating to the Time of Sale, or otherwise lacked evidence to support them having been made.

- While I could see why Ms C and Mr M might consider the Supplier to be in breach of contract because parts of its business had become insolvent in late 2020, no evidence had been put forward to show that this meant Ms C and Mr M's rights under their membership no longer existed or couldn't be used in the same way as previously, or that they would no longer be entitled to their share of the sale proceeds of the Allocated Property.

- I didn't think the credit relationship between Ms C and Mr M and the Lender, had been rendered unfair to them for any of the reasons alleged. Specifically:

    - While Ms C and Mr M may have felt overwhelmed by the sales process, they'd had a 14-day cooling off period which they'd not taken advantage of. There was insufficient evidence to demonstrate they'd purchased the timeshare because their ability to exercise a choice in the matter had been significantly impaired by pressure from the Supplier.

    - There was only very limited evidence available to support the claim relating to the Lender having not carried out the proper affordability checks. But even if the Lender hadn't carried out the checks it should have, it would need to be shown that the Credit Agreement was actually unaffordable for Ms C and Mr M for this to have rendered the credit relationship unfair to them. Based on the limited evidence available, I wasn't satisfied the lending was unaffordable.

    - I thought there may have been terms within the contracts with the Supplier which had the potential to operate in an unfair way, but there was no evidence to suggest the Supplier had sought to operate the terms in that way in relation to Ms C and Mr M, nor that it was likely to do so in the future.

    - It was against the Timeshare Regulations for timeshares such as the Fractional Club membership to be marketed or sold as investments. There was conflicting evidence in this case as to whether the Supplier had sold or marketed the product to Ms C and Mr M in this way. But based on Ms C and Mr M's recollections, it seemed more likely that the Supplier *hadn't* breached the Timeshare Regulations. Even if it had, this didn't seem to have been a material reason for Ms C and Mr M having made their purchase, which would have been necessary for the breach to have rendered the credit relationship unfair.

- The Credit Agreement had not been arranged by an unauthorised credit broker. While the individuals who dealt with Ms C and Mr M on the day may not have been authorised themselves, they were working for or on behalf of the company named as the credit intermediary on the Credit Agreement. It was the authorisation status of that company which was relevant, and I could see that it held the relevant authorisations/permissions at the time.

I invited the parties to the complaint to let me have any further submissions they'd like me to

consider. The Lender said it accepted the provisional decision. PR said it disagreed with the provisional decision and made a number of points in support of Ms C and Mr M's case. I think these could fairly be summarised as follows:

- It didn't think it was right that I should have attached little weight to Ms C and Mr M's witness statement. While this may have been produced very late in the process (in early 2024), it was an honest set of recollections and not influenced either by the content of our Investigator's assessment (which PR said it hadn't shown to Ms C or Mr M) or the outcome of the case of *Shawbrook & BPF v FOS*.

    - Additionally, Ms C and Mr M had made a claim in the Spanish courts in November 2020, and part 7 of the claim related to how the Supplier had sold the Fractional Club product to them as an investment. The claim had been successful in a court of first instance but had been unsuccessful in the Spanish Court of Appeal, and was currently with the Spanish Supreme Court. PR said the fact that these allegations had been made by Ms C and Mr M in 2020 showed they were not new points which had been raised in response to our Investigator's assessment or with the benefit of knowing the outcome of *Shawbrook & BPF v FOS*.

- It had asked Ms C and Mr M for further recollections and they had confirmed:

  "We were told that once we pay for it would have increased in value, and we would get bigger plate from the apartment that they were convincing us to buy, it was presented as an investment and that we would get a profit from it. They said we could travel anywhere in the world cheaper, receiving discounts and of course that we would get the money at the end."

  PR noted that these recollections related to Ms C and Mr M's *"…upgrade on 17 September 2019".*

- The fact that a pricing sheet completed at the Time of Sale, as well as the certificate Ms C and Mr M received following their purchase, both showed they had a 4.34% unit share, demonstrated that the investment element of the product was an important part of the sales process.

- There was a significant discrepancy in the Purchase Agreement. The sale date of the Allocated Property was stated to be 31 December 2035 on the certificate Ms C and Mr M received, while the Information Statement (part of the Purchase Agreement) said the property would be sold *"in 19 years time or such later date as is specified in the Rules or the Fractional Rights Certificate."*

    - This meant there was a contradiction in the contract and it was unclear if the sale of the Allocated Property was to take place in 17 or 19 years or even later.

    - Under the Consumer Rights Act 2015 ("CRA") a contradiction like this could make the contract unenforceable or unfair.

    - Alternatively, having told Ms C and Mr M the sale date was in 17 years, then hiding in the small print that it was actually in 19 years, was a misrepresentation.

The case has been returned to me to review once again.

What I've decided – and why

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

Having done so, I've arrived at the same conclusions as I did in my appended provisional decision, and for the same reasons.

I will, however, address the further points made by PR on Ms C and Mr M's behalf.

An important issue emerges in PR's further submissions. PR has said that the additional statement supplied by Ms C and Mr M, relates to an upgrade that took place on *17 September 2019.* This appears to be a different purchase to the October 2017 purchase which is the subject of this complaint. Additionally, the pricing sheet supplied by PR shows there was another purchase *prior* to October 2017. Based on the trade-in value assigned to the purchased product, this seems likely to have been a "trial" membership with the Supplier.

It would have been helpful had the purchase history been known at an earlier stage. The complaint as presented provides none of this important context, and it's disappointing that neither party to the complaint appears to have thought it necessary to provide this kind of information to assist the Financial Ombudsman Service in its investigation over the past three years.

Comments from Ms C and Mr M about a purchase which took place two years *after* the purchase which is the subject of this complaint, do not help to establish what was said at the Time of Sale or whether the Supplier breached the Timeshare Regulations by marketing or selling the product to them as an investment. I don't think there is anything further I can add on this point. Regarding the percentage displayed on the certificate and the pricing sheet, I do not think that demonstrates a lack of compliance by the Supplier with the relevant prohibition in the Timeshare Regulations. All it appears to be is a factual representation of the share Ms C and Mr M were entitled to of the net sale proceeds of the Allocated Property. Without some further evidence as to *how* this figure was used in conversations with Ms C and Mr M, it's difficult to see how I could conclude the Fractional Club product must have been marketed or sold to them as an investment.

This is the first time the Financial Ombudsman Service has been made aware of the fact that Ms C and Mr M are apparently involved in ongoing court proceedings in Spain against the Supplier. As I understand it from PR's commentary, the current situation is that the courts have ruled against Ms C and Mr M and an appeal is waiting to be heard by the Supreme Court. It's unknown for what reasons the courts have ruled against Ms C and Mr M to date, nor which of the multiple purchases these court proceedings relate to. No direct testimony from Ms C or Mr M relating to these court proceedings, and which might have shed some light on their recollections closer to the Time of Sale, has been provided. In view of this, I think the fact of these proceedings does nothing unfortunately to advance their complaint against the Lender.

PR also says that the discrepancy over the sale date in the paperwork dating to the Time of Sale, could make the contract with the Supplier unenforceable or potentially be a misrepresentation.

There does appear to be a discrepancy of between one and two years between the specific sale date mentioned on the certificate and implied in the Purchase Agreement, and the timescale mentioned in the Information Statement. PR has suggested this could lead to unfairness to Ms C and Mr M in the future, because there could be a delay in them realising the value of their share in the Allocated Property.

Which of the two sale dates the Supplier would seek to rely on in the future is presently unknown. However, if a dispute arose at that time, then I think it's likely that this would be resolved in favour of Ms C and Mr M, and that's because where part of a contract could have more than one meaning, the CRA says it is the meaning which is most favourable to the consumer which will prevail. At this point, I note it's also not certain which of the dates would be considered more favourable to Ms C and Mr M. This would depend on their circumstances, whatever the current management fees are and, perhaps, the broader state of the property market in the locality of the Allocated Property. I think to claim that unfairness will arise is somewhat premature. Additionally, I can see no reason why this discrepancy would cause the whole contract to become unenforceable or unfair. The CRA explains that unfair terms are not binding on the consumer but the rest of the contract *"continues, so far as practicable, to have effect in every other respect."*

I also think it's difficult to see how the Supplier's presentation of two apparently contradictory timescales for the sale of the Allocated Property amounted to a misrepresentation. While both timescales can't be correct (so one must be incorrect), I think it's unlikely a difference of two years would have made a difference to Ms C and Mr M's purchasing decision. It's also unknown, in any event, which of the dates Ms C and Mr M understood to be the correct one.

In short, I don't think the points made by PR in relation to the sale date help to establish that the credit relationship between Ms C and Mr M, and the Lender, is an unfair relationship for the purposes of Section 140A of the CCA, nor do I conclude a misrepresentation occurred in relation to the sale date which could give rise to liability for the Lender under Section 75 of the CCA.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C and Mr M to accept or reject my decision before 1 August 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to reach the same conclusions as our Investigator, but I've explained my reasons in more detail. As a result, it's necessary to give the parties to the complaint an opportunity to comment further before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **26 June 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

Ms C and Mr M's complaint is, in essence, that First Holiday Finance Limited (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 a claim under Section 75 of the CCA.

Background to the complaint

Ms C and Mr M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 25 October 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,040 fractional points at a cost of £25,301 (the 'Purchase Agreement'). The points could be used each year to book holiday accommodation within the Supplier's portfolio.

Fractional Club membership was also asset backed – which meant it gave Ms C and Mr M 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. According to the relevant membership certificate, Ms C and Mr M were entitled to a 4.34% share.

Ms C and Mr M paid for their Fractional Club membership by taking finance of £24,801 from the Lender in joint names (the 'Credit Agreement'), and paid the balance of £500 by other means.

Ms C and Mr M – using a professional representative (the 'PR') – wrote to the Lender on 20 or 22 October 2021 (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.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

Ms C and Mr M say that the Supplier made a number of pre-contractual misrepresentations

at the Time of Sale – namely that the Supplier:

1. told them that they were buying a share in a specific property when that was not true.
2. told them that the product was an "investment" and would appreciate in value when that was not true.
3. told them that they could sell the product back to the Supplier or easily sell it at a profit, when that wasn't true.
4. told or led them to believe that they would have access to "the holiday's apartment" at any time, all year round.

Ms C and Mr M say 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 Ms C and Mr M.

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

Ms C and Mr M say that the Supplier breached the Purchase Agreement because it went into liquidation in in December 2020.

As a result of the above, Ms C and Mr M say 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 Ms C and Mr M.

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

The Letter of Complaint set out several reasons why Ms C and Mr M 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. Fractional Club membership was marketed and sold to them as an investment, which was illegal. In particular, it was in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out the Supplier's ability to forfeit their membership and all the money they'd paid for it if they failed to make payments such as their management fees, were unfair contract terms under the Consumer Rights Act 2015 ('CRA').
3. The Lender failed to carry out an affordability assessment and lent to them irresponsibly.

(4) The arrangement of the Credit Agreement by an unauthorised credit broker

Ms C and Mr M say that while the entity which arranged the credit agreement may have had the permissions required by the FCA to carry on such an activity, the individual sales representatives were self-employed people and did not have the necessary permissions. As a result, they argue the Credit Agreement is not enforceable and they are entitled to recover any sums paid under it.

The Lender dealt with Ms C and Mr M's concerns as a complaint and rejected it on every ground in an undated letter.

Ms C and Mr M 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.

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

I could summarise the disagreement with the assessment as follows:

- The Fractional Club membership had included an investment element.
- The Supplier had sold the membership as an investment, as evidenced by a training manual and Ms C and Mr M's recollections of the sales process. While Ms C and Mr M might not remember all the details of the sales meeting now, they did recall the product having been presented as an investment.
- It was well known that the Supplier's sales presentations went on for many hours and involved high-pressure selling.
- While customers may have been motivated to purchase Fractional Club membership for reasons relating to holidays, the investment element of the product also played an important part in convincing them to purchase.

PR supplied a witness statement from Ms C and Mr M dated 29 January 2024 along with other materials such as the training manual referred to above. In the witness statement, Ms C and Mr M said they recalled the following:

- They had won a holiday with the Supplier and were invited to a presentation while they were there. During the presentation they were encouraged to buy a fraction of a property.
- The Supplier had made it sound like a great opportunity and had even said that when the mortgage was paid they would "get money back".
- They were pushed into agreeing and it had all been a bit overwhelming. When the finance was not approved originally, they thought that was the end of the process. However, the Supplier had said it would see what they could do with their finance team and the application has come back as approved.
- After signing up they were given gifts such as a free iPad and champagne, along with some VIP cards, and probably more things but they couldn't really remember.
- It had seemed a fantastic investment but they later realised it was nothing like what had been sold to them.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') which is attached to and forms part of this decision.

What I've provisionally decided – and why

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

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

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair

and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Ms C and Mr M 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.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Ms C and Mr M were told that they were buying a share of a specific property when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Ms C and Mr M's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Ms C and Mr M have concerns about the way in which their Fractional Club membership was sold, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because:

- If the Supplier had told Ms C and Mr M that the membership was an investment then this wouldn't have been untrue, because there was in fact an investment element to the product. Marketing or selling the product as an investment was prohibited however, and I go into more detail on this issue later in the decision.

- It would not have been false for the Supplier to state that Ms C and Mr M could sell the product, as according to the contemporaneous paperwork this was possible. These documents also state quite prominently that the Supplier did not operate any resale programme itself and would not buy back products except when traded in against another purchase. I've seen insufficient evidence that the Supplier made representations relating to how much Ms C and Mr M could sell the product for.

- The contemporaneous documents do not support an allegation that Ms C and Mr M were told they would have access to a specific apartment, at any time, all year round. I think the documents make it clear enough that Ms C and Mr M were not paying for rights to stay in a specific apartment (rather, they could use their points to book accommodation). The documents also said that holidays would be subject to availability and "first-come, first-served".

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Ms C and Mr M by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Ms C and Mr M 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

I've already summarised how Section 75 of the CCA works and why it gives Ms C and Mr M a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Ms C and Mr M also suggest that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. I can see that certain parts of the Supplier's business did go insolvent. And I can understand why it could be alleged that there was a breach of the Purchase Agreement as a result. However, neither Ms C and Mr M nor PR have said, suggested or provided evidence to demonstrate that the insolvency of part of the Supplier's business means they are no longer:

1. Members of the Fractional Club;
2. Able to use their Fractional Club membership to holiday in the same way they could initially; and
3. entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Ms C and Mr M any compensation for a breach of contract by 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 140A of the CCA: did the Lender participate in an unfair credit relationship?

I have already explained why I am not persuaded that the contract entered into by Ms C and Mr M was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Ms C and Mr M also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Ms C and Mr M 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; 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 Ms C and Mr M and the Lender.

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

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

response to our Investigator's assessment, I've identified some further matters which could be relevant to the question of the fairness of the credit relationship, which I consider below.

They include the allegation that Ms C and Mr M were pushed or pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that the Supplier's sales processes could go on for some time and that Ms C and Mr M may have felt worn out by the end of this or, as they've put it, overwhelmed. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they haven't provided an explanation for why they did not cancel membership during that time if they had felt pressured to buy it. And with that being the case, there is insufficient evidence to demonstrate that Ms C and Mr M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

PR says that the right affordability checks weren't carried out before the Lender lent to Ms C and Mr M. 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 Ms C and Mr M 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. It is not enough simply to assert that insufficient checks were carried out or that the lending was unaffordable, and I am not satisfied that the lending was unaffordable for Ms C and Mr M based on the very limited evidence available. If there is any further information on this (or any other points raised in this provisional decision) that Ms C and Mr M wish to provide, I would invite them to do so in response to this provisional decision.

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

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

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

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

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

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

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a*

transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

As I've indicated already in this decision, Ms C and Mr M's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. 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 Ms C and Mr M as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms C and Mr M, 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 for the primary purpose of holidays and that the Supplier made no representations as to future price or value of the fractional asset. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material relevant to this version of the Fractional Club product[1] left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. PR has provided a copy of some of this material and I am also aware of other material produced by the Supplier. In any event, I accept that it's equally possible that Fractional Club membership was marketed and sold to Ms C and Mr M 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 Ms C and Mr M rendered unfair to them?

[1] The Supplier sold variations of the same product over time – the product purchased by Ms C and Mr M was the second version.

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 Ms C and Mr M 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. Given the importance this implies as to Ms C and Mr M's state of mind and motivations at the time they made their decision to go ahead with the purchase, I think direct testimony from them is likely to be key evidence in this case.

However, prior to the witness statement produced in January 2024, more than six years after the Time of Sale and following an unfavourable assessment from our Investigator, we had not received any testimony from Ms C and Mr M in their own words, as to how the Supplier marketed the product to them, or why they decided to buy it. The Letter of Complaint from PR was unfortunately somewhat generic in nature and I did not find it very helpful in ascertaining the reasons for Ms C and Mr M's purchase. Given the circumstances in which the witness statement was received – many years after the Time of Sale, following the case of *Shawbrook & BPF v FOS*[2] and an assessment from our Investigator which stated the complaint ought not to be upheld – I think the weight I can attach to it is somewhat limited.

That said, I have carefully read the witness statement more recently supplied by Ms C and Mr M. The statement is quite short at four paragraphs long and, perhaps understandably, it's apparent they do not recall very much from the Time of Sale. In relation to the share in the Allocated Property, they recalled the following:

"…they sold it so well even stating that when the mortgage was paid that we would get money back."

It appears that when referring to a "mortgage", Ms C and Mr M are referring to the Credit Agreement. They've said they recall the Supplier told them they would get money back, but they've not indicated this was a specific amount or more than they put in. If this recollection is accurate, it appears the Supplier is likely <u>not</u> to have breached Regulation 14(3) of the Timeshare Regulations and simply gave a neutral description of how the share in the Allocated Property worked: it meant Ms C and Mr M would get some money back.

I also don't think that, even if the Supplier had breached Regulation 14(3), there is enough in the witness statement as to Ms C and Mr M's motivations to purchase the Fractional Club membership, to allow me to conclude with any confidence that the Supplier's breaches were material to their decision-making process. The main reason that comes across in the witness statement appears to be that Ms C and Mr M felt overwhelmed and that they'd been pushed or pressured into the purchase. But I don't think this rendered the credit relationship unfair for reasons I've already explained in this decision.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Ms C and Mr M's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). And for

[2] This case highlighted the potential significance of breaches of Regulation 14(3) to the fairness of the credit relationship between a timeshare purchaser and the lender which financed the purchase.

that reason, I do not think the credit relationship between Ms C and Mr M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The alleged unfairness of terms in the Purchase Agreement

PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CRA.

As I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such issues render a credit relationship unfair must also be determined according to their impact on the complainant. So it's not enough to assert that some of the Supplier's terms were unfair under the relevant law or regulations, or could potentially operate in an unfair way. It needs to be shown that significant harm has been, or will be, caused by the inclusion of the allegedly unfair terms.

The key concern highlighted by PR is that the Supplier has wide-ranging powers to cancel/repossess Ms C and Mr M's membership and fractional rights and take them for itself, for example for non-payment of maintenance fees or minor breaches of the Purchase Agreement. No evidence has been supplied that the Supplier has used its powers in this way in Ms C and Mr M's case, and my understanding is that in practice the Supplier does not exercise its ability to cancel/repossess memberships in the event of the kind of breaches PR has described, so it appears unlikely these terms will cause unfairness in the future. I appreciate PR has referred to a court case (*Link Financial v Wilson*) involving a different product sold by the Supplier where similar terms were found to have rendered a credit relationship unfair, however my understanding is that it was believed by the High Court in that case that the Supplier *had* in fact invoked its right to cancel the membership in question, meaning the term had operated in an unfair way in practice. So I don't think this case assists Ms C and Mr M, as their circumstances are different.

I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Ms C and Mr M was unfair to them due to potential unfairness of the terms of the Purchase Agreement, and so my conclusion is that the terms of the Purchase Agreement have not rendered the credit relationship between Mss C and Mr M and the Lender unfair to them.

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 Ms C and Mr M was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

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

Ms C and Mr M says that the Credit Agreement was arranged by an individual or individuals who were not authorised credit brokers, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement as a result.

However, having looked at the Financial Ombudsman Service's internal records, I can see that the entity named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA for credit broking.

I appreciate PR has alleged that the sales representatives were self-employed and were not individually authorised by the FCA, but I'm not convinced the employment status of the individuals who sold the Fractional Club membership and Credit Agreement to Ms C and Mr M, is relevant. What is relevant is that these individuals were representing the entity named as the credit intermediary, and that entity did hold the required permissions. Ultimately, I don't think this argument by PR advances the complaint any further.

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 Ms C and Mr M's Section 75 claim, 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 Ms C and Mr M wish to provide, I would invite them to do so in response to this provisional decision.

My provisional decision

For the reasons explained above, I'm not currently minded to uphold this complaint. If the parties have any final submissions they wish me to consider, they must ensure these reach me by **26 June 2025** at the latest.

Will Culley

Ombudsman

Appendix: The Legal and Regulatory Context

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

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

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

Case Law on Section 140A

Of particular relevance to the complaint in question are:

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

My Understanding of the Law on the Unfair Relationship Provisions

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

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

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

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

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

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

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's

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[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
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

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

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

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

Will Culley
Ombudsman