DRN-5680814

The complaint

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

What happened

Mrs C and Mr C purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 7 April 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 810 fractional points at a cost of £19,094 (the 'Purchase Agreement'). But after trading in their existing trial membership, they ended up paying £15,099 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mrs C and Mr C 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.

Mrs C and Mr C paid for their Fractional Club membership by taking finance of £14,599 from the Lender in both of their names (the 'Credit Agreement'). They paid a deposit of £500 separate to this.

Mrs C and Mr C – using a professional representative (the 'PR') – wrote to the Lender on 19 January 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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 decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
5. 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>

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

- Told them that they had purchased an investment and that their timeshare would considerably appreciate in value.
- Told them that he would have a share of a property and its value would considerably increase, therefore they were promised a considerable return on investment.
- Told them they could sell the timeshare back to the resort or easily sell it at a profit.
- Told them they would have access to the holiday's apartment at a time all around the

year.

Mrs C and Mr C said that they had 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 had a like claim against the Lender, who, with the Supplier, was jointly and severally liable to Mrs C and Mr C.

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

The Letter of Complaint set out why Mrs C and Mr C said that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they said the contractual terms setting out the consequences of failing to make a payment due under the agreement within 14 days of being given written notice to pay it were unfair contract terms under the Consumer Rights Act 2015 ('CRA')].

The Lender dealt with Mrs C and Mr C's concerns as a complaint and issued its final response letter on 14 February 2022, rejecting it on every ground.

Mrs C and Mr C 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.

Mrs C and Mr C disagreed with the Investigator's assessment and asked for an Ombudsman's decision. After the investigator's assessment they refined one of their complaint points so as to include (and focus mainly on) the following:

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

I issued a provisional decision in June 2025 explaining why I didn't plan to uphold Mrs c and Mrs C's complaint. I said:

> ***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.*
>
> *I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:*
>
> - *The CCA (including Section 75 and Sections 140A-140C).*
> - *The law on misrepresentation.*
> - *The Timeshare Regulations.*
> - *The CRA.*
> - *The CPUT Regulations.*
> - *Case law on Section 140A of the CCA – including, in particular:*

- *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
- *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
- *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
- *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
- *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
- *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
- *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').*

Good industry practice – the RDO Code

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

My provisional findings

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

And having done that, I 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.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under section 75 essentially mirrors the claim Mrs C and Mr C could make against the Supplier.

However, creditors have no means of knowing what section 75 liabilities they may have, nor of investigating such liabilities nor of recovering them from suppliers, unless or until debtors raise section 75 claims against them; and raising the claim, if it's a valid one, brings the creditor under a duty then to honour its liability.

But it would not be fair or reasonable to require a creditor to respond to section 75 claims however long in the past they arose. And our service must decide complaints based on what is fair and reasonable in all the circumstances of a case.

The Limitations Act 1980 (the 'LA') imposes a six-year limitation period on the relevant claims. Taking into account this time period, the particular nature of liability under section 75, and the need for the debtor to raise a section 75 claim against their creditor before any cause for complaint to our service can arise, I consider it was fair and reasonable for a creditor not to have to look into or honour a section 75 claim that was first raised with it by the debtor after the claim had become time barred under the LA.

The alleged misrepresentations happened when an agreement was entered into on 7 April 2015.

In these circumstances Mrs C and Mr C had brought their section 75 claim to the Lender on 19 January 2022 which is more than six years after they entered into an agreement with the Lender on 7 April 2015 – which I consider to be around the time when the cause of action for misrepresentation to have accrued.

Where it is unlikely a claim against the supplier could succeed due to the expiry of the likely relevant limitation periods of six years, I think it would have been fair and reasonable for the Lender to decline the section 75 claim.

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mrs C and Mr C and the Lender was unfair.

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."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs C and Mr C's membership of the Fractional Club 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.140(1)(c) CCA.

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

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

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

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

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

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

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

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

I have considered the entirety of the credit relationship between Mrs C and Mr C 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; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

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

The PR says that the right checks weren't carried out before the Lender lent to Mrs C and Mr C. 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 Mrs C and Mr C 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 Mrs C and Mr C. If there is any further information on this (or any other points raised in this provisional decision) that the Mrs C and Mr C wishes to provide, I would invite them to do so in response to this provisional decision.

I'm not persuaded, therefore, that Mrs C and Mr C's credit relationship with the Lender was rendered unfair to them under Section 140A for the reason 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 Mrs C and Mr C'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.

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

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

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mrs C and Mr C rendered unfair?

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of

*substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs C and Mr C and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mrs C and Mr C , is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I've thought carefully about everything Mrs C and Mr C have told us about the sale. However, I'm not persuaded there is any indication that they were induced into the purchase on the basis that Fractional Club membership was an investment from which they would make a financial gain. I'll explain why.

I accept that upon making their complaint to the Lender in February 2022 the PR said things such as:

> *"(they were) told that (they) had purchased an investment and that (their) timeshare would Considerably appreciate in value."*

And,

> *"(they were) told that (they) would have a share of a property and its value would considerably increase, therefore (they were) promised a considerable return on investment".*

And,

> *"The misrepresentation was actionable, my client believed in it. relied on it and as a result was induced to enter into the contract, which otherwise would not have done and was materially influenced by the misrepresentation, because relying on this representation, decided to enter into the contract"*

However, there is very little in the Letter of Complaint which appears to include any of Mrs C and Mr C's individual recollections from the Time of Sale and it seems they were not Mrs C and Mr C's own words.

That is not to say that the Letter of Complaint could not possibly have reflected Mrs C and Mr C's experience at the Time of Sale. However, in this particular case I think the evidence, including a personal statement the PR provided from Mrs C and Mr C in August 2023, suggests that they did not place the importance on receiving a profit from the investment that the PR said they did in the Letter of Complaint.

In said personal statement Mrs C and Mr C (albeit rather briefly) describe some of their recollections of the sale in their own words. In respect of Fractional Club membership being sold as an investment they said:

> *"The fractional title was sold as an investment as we were assured that we could sell it at the end of the term"*

And;

> *"We definitely feel that they lied to us about the investment and the actually (sic) value at the end as well as the fact it wouldn't be easy to book holidays"*

There's very little in the statement to suggest that the prospect of a profit or financial gain was material to Mrs C and Mr C's decision to purchase. Indeed, the prospect of a profit or financial gain are not even mentioned in the statement. Mrs C and Mr C say they were lied to about the "value at the end" but they do not elaborate on what that "lie" was, or why they relied upon it when making their decision to purchase Fractional Club membership.

It's possible that Mrs C and Mr C were interested in both holidays and the investment element, which wouldn't be surprising given the nature of the product at the centre of this complaint, but from what I have seen and been told to date, I don't think the investment element of the membership was the reason for their purchase.

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 Mrs C and Mr C'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). 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 Mrs C and Mr C and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The PR has said that terms around the forfeiting of membership for non-payment of management fees were found to be unfair in Link Financial Ltd v Wilson [2014] EWHC 252 (Ch). In that case, a member of the Supplier's forfeited their membership when they failed to pay management fees. A judge found that the relevant terms were unfair and could lead to an unfair debtor-creditor relationship. But here, I've not seen that any terms were operated
unfairly against Mrs C and Mr C nor that any potentially unfair contract terms, even if not applied unfairly in practice, caused them to act in a way that otherwise rendered the credit relationship in question unfair to them. So, although it's possible that terms in the Purchase Agreement had the potential to cause an unfairness, as that hasn't happened in practice, I fail to see how there could be an unfair debtor-creditor relationship arising out of
them.

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

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mrs C and Mr C 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

Mrs C and Mr C say that the Credit Agreement was arranged by an unauthorised credit broker, 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 and the FCA register, I can see that the Lender named on the Credit Agreement as the credit intermediary was at the Time of Sale, authorised by the FCA for credit broking. And in the absence of any evidence to suggest that its Licence did not cover credit broking, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

The PR said that all of the Supplier's sales representatives are self-employed and so they are not authorised by the FCA for credit broking. However, no evidence has been provided in support of this. What would seem relevant to me is that the 'compliance officer' named on the Credit Agreement and the Client Compliance Confirmation document was representing the company named on the Credit Agreement and that company did hold the required permissions.

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 Mrs C and Mr C's section 75 claim(s), 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 Mrs C and Mr C wishes to provide, I would invite them to do so in response to this provisional decision.

First Holiday Finance Ltd agreed with my provisional decision and said it had nothing further to add.

The PR said Mrs C and Mr C did not agree with my provisional decision. The complaint has therefore been passed back to me for a final decision.

What I've decided – and why

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

I note the PR has focussed its response on the parts of my provisional decision headed

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?

And

Was the credit relationship between the Lender and Mrs C and Mr C rendered unfair?

I've therefore re-focussed similarly on these parts and on the PR's response to my provisional decision. As no other comments or evidence have been provided in response to the remainder of my provisional decision, my findings in respect of these parts remain as they were in the extract of my provisional decision above and for the same reasons.

However, in respect of Mrs C and Mr C's claim under section 75 I would add that the Credit Agreement was entered into by a company that wasn't engaged in regulated lending activity until a UK entity of the same name purchased its loan book in August 2015. So, at the time the agreement was made, the creditor was the non-UK (and separate) entity of the lender. Although the CCA section 189(1) definition of creditor includes an assignee, I'm mindful that Goode: Consumer Credit Law and Practice [2]indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) section 75.[3]

That's not to say that a claim can't be made along the lines outlined by Mrs C and Mr C.

Rather, it highlights the inherent difficulty they might face in succeeding with that claim. But in any event, it remains that Mrs C and Mr C's section 75 claim was made to the Lender more than six years after the misrepresentation cause of action arose and so either way it remains that I do not find the Lender was not unreasonable to decline the claim.

The PR said that Mrs C and Mr C's testimony made clear reference to the term investment when describing how Fractional Club membership was sold to them. I have acknowledged that it was possible Fractional Club membership was marketed by the Supplier as an investment in breach of regulation 14(3) of the Timeshare Regulations. However, as I explained in my provisional decision, this is only likely to have made Mrs C and Mrs C's relationship with the Lender unfair if it had *some* material impact on them when deciding whether or not to enter the agreement.

I still find that Mrs C and Mr C's testimony provided in their personal statement from August 2023 does not demonstrate that the potential marketing of Fractional Club membership as an investment had some material impact on their decision to purchase it for the reasons I explained in my provisional decision above. The PR has provided new testimony from Mrs C and Mr C where they say:

"The following were promised to me and my wife and what convinced us to buy the fractional ownership:

- *Investment value and appreciation*
- *Guaranteed availability and priority booking*
- *Actual property ownership*

[2] Goode: Consumer Credit Law and Practice is a widely recognised expert commentary on the application of the Consumer Credit Act 1974 and related legislation. It offers relevant guidance to certain of the matters at hand in this complaint.

[3] Goode: Consumer Credit Law and Practice – Division I Commentary – Part IC Consumer Credit Legislation – 45A Assignment – III Assignment and the CCA 1974: the assignee as creditor/lender or owner – 1 The basic rule – Pre-assignment breaches (para 45A.62)

- *Legal title to a fraction of real estate that could easily be resold at a profit to CLC"*

The PR says this now demonstrates that any breach of regulation 14(3) of the Timeshare Regulations did have a material impact on Mr C and Mrs C's decision. It said this testimony has been provided with Mrs C and Mr C having not seen either the investigator's assessment, my provisional decision, or the judgment in *Shawbrook & BPF v FOS.* So, it says the new testimony is not coloured by any of these things.

Looking at the testimony, it still doesn't offer much insight into Mrs C and Mr C's thinking behind their decision to purchase Fractional Club membership. While it talks about a profit, it does so in the context of selling the fraction back to the supplier – which from looking at the 'member's declaration' Mrs C and Mr C signed to confirm their understanding of, was something the Supplier said it did not do. And while words such as investment value and appreciation are used, they are done so with very little additional context.

I think that if the prospect of a financial gain or profit were material to Mr C and Mrs C's decision to purchase Fractional Club membership, this would have been more apparent from the testimony they provided earlier on (in their own words), but it isn't. The earlier testimony only describes their recollections of how Fractional Club membership was sold to them, not why they went ahead with the purchase. I reiterate that although Mrs C and Mr C talk about being lied to in that earlier testimony, it's not clear what that lie was or how it was material to their decision to purchase.

The PR said that the exact percentage of Mrs C and Mr C's fraction was handwritten on the pricing sheet given to them by the Supplier and this shows it must have played an important role in convincing them to purchase. I've seen the pricing sheet, and I can see that a 'unit share' of 1.93% is contained on the sheet among lots of other information such as the cost of Fractional Club membership, the trade in value of Mrs C and Mr C's existing timeshare, and the amount of finance. However, all the pricing sheet does is display information about the unit share i.e. that their fraction is nearly 2/100th. It's not a reason to find Fractional Club membership was marketed as investment (which I reiterate I've found was possible for other reasons) as it doesn't imply a profit or financial gain. So, it's not persuasive evidence that profit or financial gain were the motivating factors in Mrs C and Mr C's purchase.

With all of this in mind I'm still not persuaded that the prospect of a profit or financial gain were material to Mrs C and Mr C's decision to purchase Fractional Club membership. It follows that I still find Mrs C and Mr C's relationship with the Lender was unlikely to have been unfair as a result of any potential breach by the supplier of Regulation 14(3) of the Timeshare Regulations.

Overall therefore, I do not find that the Lender acted unfairly or unreasonably when it dealt with Mrs C and Mr C's section 75 claim(s), 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.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr C to accept or reject my decision before 14 August 2025.

Michael Ball
Ombudsman