DRN-5692767

The complaint

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

The loans that are the subject of this complaint were both taken out in Mr M's name only, and so he is the only eligible complainant here. However, as the timeshares in question were purchased in joint names, I will refer to both Mr and Mrs M throughout where appropriate.

What happened

On 29 March 2017 (the 'Time of Sale 1'), Mr and Mrs M purchased a timeshare (the 'Fractional Club membership 1') from a timeshare provider (the 'Supplier'). They entered into an agreement with the Supplier to buy 810 fractional points at a cost of £13,110 (the 'Purchase Agreement 1').

Fractional Club membership 1 was asset backed – which meant it gave Mr and Mrs 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.

Mr and Mrs M paid for their Fractional Club membership 1 by paying a £500 deposit and taking finance for the remaining amount of £12,610 from the Lender in Mr M's name only (the 'Credit Agreement 1').

Then, on 4 October 2017 (the 'Time of Sale 2') Mr and Mrs M made a further purchase with the Supplier (the 'Fractional Club membership 2'). They entered into an agreement with the Supplier to upgrade their membership, trading in their existing membership to do so, and buy 1,200 fractional points at a cost of £18,917 (the 'Purchase Agreement 2').

Again, the Fractional Club membership 2 was asset backed – which meant it gave Mr and Mrs 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.

Mr and Mrs M paid for their Fractional Club membership 2 by paying a £500 deposit and taking finance for the remaining amount of £18,418 from the Lender in Mr M's name only (the 'Credit Agreement 2'). This loan also consolidated their existing lending.

In October 2019, Mr M raised a complaint with the Lender about both of these purchases. The Lender responded to that complaint with a final response letter which was undated but appears to have been sent around that time, in late 2019.

In October 2021, Mr M raised another complaint with the Lender about these purchases, this time being represented by a professional representative. The Lender responded to that complaint with a final response letter which was undated but appears to have been sent around that time, in late 2021.

Neither of these aforementioned complaints were referred to our Service at any stage.

Mr M – using a different professional representative (the 'PR') – then wrote to the Lender on 17 December 2021 (the 'Letter of Complaint') to make a new complaint about the same purchases. In this letter, he complained about:

1. Misrepresentations by the Supplier at the Times of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. Breach(es) of contract by the Supplier giving him claim(s) against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to unfair credit relationship(s) under the Credit Agreements and related Purchase Agreements for the purposes of Section 140A of the CCA.

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

Mr M says that the Supplier made a number of pre-contractual misrepresentations at the Time(s) of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true.
4. told them that the membership was desirable and would quickly sell out and that they were being offered a heavily discounted price which would only be available on the day, when this was not true.
5. told them that the Supplier's holiday resorts were exclusive to its members and that it would offer better availability and a higher standard of accommodation, when that was not true.

Mr M says that he has claim(s) against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has like claim(s) against the Lender, who, with the Supplier, is jointly and severally liable to Mr M.

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

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

Although not framed in this exact way, as a result of the above, Mr M suggests that he has breach of contract claim(s) against the Supplier, and therefore, under Section 75 of the CCA, he has like claim(s) against the Lender, who, with the Supplier, is jointly and severally liable to Mr M.

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

The Letter of Complaint set out several reasons why Mr M says that the credit relationships between him and the Lender were unfair to him under Section 140A of the CCA. In summary, they include the following:

1. The terms of the agreements were unfair in themselves as the Lender paid the Supplier commission but this was not disclosed to Mr and Mrs M.
2. 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').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Times of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as prohibited practices under Schedule 1 of those Regulations.
5. The decisions to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessment. And, no comparisons to other loan companies were given and it was not mentioned that they could arrange their own finance to fund the purchases.
6. The Supplier failed to provide sufficient information in relation to the membership(s) so that they could make an informed decision, in particular, in relation to the annual management charges and the fact that these could increase.

The Lender initially responded to the complaint in early 2022 and explained that as a complaint had already been made in 2019, they would not be responding to the same matters again.

Unhappy with this, the PR, on Mr M's behalf, then referred the matter to the Financial Ombudsman Service in June 2022.

The Lender then dealt with Mr M's concerns as a complaint and issued its final response letter on 1 August 2022, rejecting it on every ground. In this letter, they also explained that they still felt they had already dealt with Mr M's concerns previously when he complained in 2019 and 2021 and therefore, they would not consent to our Service considering them.

The complaint was then assessed by an Investigator who firstly explained that they felt we could consider the complaint as neither of the previous final responses the Lender had sent in 2019 and 2021 were valid. Namely, because they were both undated and did not contain the correct referral wording to our Service, required under the regulator's rules to be included.

The Lender accepted this and so this issue was resolved – I won't therefore be commenting on it any further in this decision.

The Investigator then assessed the merits of the complaint and having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision dated 30 June 2025. In that decision 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.

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

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.

As outlined above, Mr M has complained about two purchases here. But, the complaint does not particularly differentiate between them and raises the same points in relation to each. So, while I've considered both sales separately, I will set out my findings here largely as one.

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim 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 Mr and Mrs M were told that they were buying an interest in a specific piece of "real 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. Mr and Mrs M's share(s) in the Allocated Properties were clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the 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.

Mr and Mrs M also say they were told Fractional Club membership was an 'investment' when that was not true. But, for reasons I'll go on to explain, the memberships plainly did have an investment element to them. So, even if the Supplier did make such a statement at the Times of Sale (which I make no finding on here), this would not have been untrue.

The PR also said the Supplier told Mr and Mrs M that Fractional Club membership had a guaranteed end date when that was not true. But I can't see that what the Supplier allegedly said here was actually untrue. I say this because I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the

contract period. The Terms and Conditions generally set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mr and Mrs M are included.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs M have concerns about the way in which their Fractional Club memberships were sold, they still have not persuaded me that there was an actionable misrepresentation by the Supplier at either of the Times of Sale for the other reasons they allege. And I say that because beyond the bare allegations, they haven't provided any evidence to support them such as what exactly they were told, by whom and in what context. I also note that Mr and Mrs M don't describe such statements being made by the Supplier at either Time of Sale in their testimony. Further, I'm aware that this particular Supplier did often offer discounted prices only available for that particular day, so this also would not appear to be untrue.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs 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 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(s) 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 Mr M a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Mr and Mrs M say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement(s). Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs M at both Times of Sale states that the availability of holidays was/is subject to demand. Further, from the information provided, it seems that Mr and Mrs M have not taken holidays using their membership for other reasons relating to their personal circumstances, which have occurred following the sales. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay 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(s) in question.

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

I have already explained why I am not persuaded that the contracts entered into by Mr and Mrs M were 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 Mr M also

says that the credit relationships between him and the Lender were 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 Times of Sale that he and Mrs M have concerns about. It is those concerns that I explore here.

I have considered the entirety of both of the credit relationships between Mr M and the Lender along with all of the circumstances of the complaint and I do not think the credit relationships between them were 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 Times of Sale – which includes training material that I think is likely to be relevant to the sales; and*
2. *The provision of information by the Supplier at the Times 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 Times of Sale;*
4. *The inherent probabilities of the sales given their circumstances.*

I have then considered the impact of these on the fairness of the credit relationships between Mr M and the Lender.

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

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

They include the allegation that the Supplier misled Mr and Mrs M and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to 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 Mr M was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationships with the Lender were unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr M. If there is any further information on this (or any other points raised in this provisional decision) that Mr M wishes to provide, I would invite him to do so in response to this provisional decision.

Mr and Mrs M also say they weren't given any comparison with any other loan companies, and it wasn't mentioned that they were free to arrange their own finance. But, I can't see that the Supplier was acting in an advisory role in this regard. Mr and Mrs M also paid a £500 deposit at both Times of Sale as well as taking out the loans, so it would seem likely they were aware they could fund the purchases via other means. And in any event, they haven't explained exactly how they feel this caused an unfairness in their particular case, and I see no reason to think it did.

Mr and Mrs M say that they were pressured by the Supplier into purchasing Fractional Club membership at the Times of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentations 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 have not provided a credible explanation for why they did not cancel their membership(s) during that time. Moreover, I find it difficult to understand why they made their second purchase if the reason they went ahead with the first purchase was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to purchase Fractional Club membership at either Time of Sale because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also said that commission was paid to the Supplier by the Lender at the Time of Sale and because this was not disclosed to Mr M, this made the credit relationships unfair. But the PR has not provided any evidence that this was the case, and the Lender has confirmed that they did not pay any commission to the Supplier.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs M when they purchased membership of the Fractional Club at the Times of Sale. But, the PR also say the Supplier failed to provide sufficient information in relation to the membership(s) so that Mr and Mrs M could make an informed decision, in particular, in relation to the annual management charges and the fact that these could increase.

One of the main aims of the Timeshare Regulations and the CRA[1] was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, the Supreme Court made it clear in Plevin[2] 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 mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

But in relation to the annual management charges, it seems Mr and Mrs M were likely told about these at the Times of Sale and that these would be payable for the length of the membership term. And, that these could increase over that term.

I say this because the Information Statement provided at the Times of Sale (which Mr and Mrs M signed) explained that members would be required to contribute to the repair and maintenance of the Allocated Property by way of an annual management charge, payable whether weeks are used or not. And, that these charges will be allocated among members in a fair manner according to the number of points held. The Information Statement also explained that these are payable annually in advance and are subject to increase and decrease as determined by the costs of managing the project.

So, while it's possible the Supplier didn't give Mr and Mrs M sufficient information, in good time, regarding the annual management charges in order to satisfy its regulatory responsibilities at the Times of Sale, I haven't seen enough to persuade me that this, alone, rendered Mr M's credit relationships with the Lender unfair to him.

Moreover, as I still haven't seen anything else to suggest that there are any other reasons

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[1] See Appendix.
[2] See Appendix.

why the credit relationships between the Lender and Mr M were unfair to him because of an information failing by the Supplier, I'm not persuaded they were.

I'm not persuaded, therefore, that either of Mr M's credit relationships with the Lender were rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says his credit relationships with the Lender were unfair to him. And that's the suggestion that the Fractional Club membership(s) was marketed and sold to him and Mrs M as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs M's Fractional Club memberships met the definition of a "timeshare contract" and were both 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 Times 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 Times of Sale. So, that is what I have considered next.

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

Mr and Mrs 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 Mr and Mrs M as an investment in breach of Regulation 14(3) at either of the Times of Sale, 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 Times of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs 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 not sold to Mr and Mrs M as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

I've also considered Mr and Mrs M's testimony. No witness statement was provided when the complaint was first referred to our Service. The PR did then subsequently provide a witness statement in April 2024, but only after receiving the Investigator's view on the complaint and following the judgment in Shawbrook & BPF v FOS[3]. No evidence has been provided to show when it was drafted, and I find it hard to understand why it was not submitted until much later. But in any case, I do not think the statement assists me greatly in my decision making process. I'll explain.

In relation to the Time of Sale 1, Mr and Mrs M said:

> *"We were constantly pressured to buy fractional points but the meeting was so long and pressured we 'just wanted out'. The representatives advised that fractional points were property ownership that was an investment that we could sell in the future and make a profit."*

And, in relation to the Time of Sale 2, they said:

> *"In October 2017 we were in Tenerife and were advised by the representatives that we had to go to a mandatory presentation. This was a 5 hour sales presentation where we were pressured to upgrade our fractional points to offer us a greater profit when our investment was sold."*

The testimony given here is brief, with little information about what exactly they were told, by whom and in what context regarding any potential sale of the membership(s) as an investment at the Times of Sale. For example, they haven't explained how exactly the salesperson at either Time of Sale explained or justified any potential of a profit or how exactly making another purchase at the Time of Sale 2 would achieve that for them.

With all of that said, I acknowledge what Mr and Mrs M have said here and, I also acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs 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.

Were the credit relationships between the Lender and Mr M rendered unfair to him?

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

[3] See Appendix.

their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

And in light of what the courts had to say in Carney and Kerrigan, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr M and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

As I've outlined above, there is little in the testimony which helps me in determining what Mr and Mrs M's motivations were when they made the purchases.

In addition, the Lender has also provided a copy of the first complaint Mr M made to the Lender by email in 2019 which outlined, in his own words, why he was unhappy. I consider this to be more reliable evidence of why Mr and Mrs M made the purchases and why they're unhappy with them as it was put together much closer to the Times of Sale and importantly, is direct testimony in his own words.

In this email, there is no suggestion in that the Supplier led them to believe at either Time of Sale that the Fractional Club membership was an investment from which they would make a financial gain nor was there any indication that they were induced into either of the purchases on that basis. If this was the case, as the PR asserts, it's difficult to understand why there was no mention of it in Mr M's first complaint to the Lender.

Further, what Mr M has subsequently said also suggests they are unhappy with the membership now is due to issues relating to holidays. And I also note that he's said:

> *"Well as we have said for the year we want out of this no money back just out".*

This suggests to me that Mr and Mrs M simply wanted to relinquish their membership, regardless of any potential financial gain they may make out of it in the future. And again, it's difficult to understand such a statement if they were induced into either of the purchases on the basis of the potential for a financial gain i.e. a profit.

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 Mr and Mrs M's decision to purchase Fractional Club membership at either of the Times 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 purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationships between Mr M and the Lender were unfair to him even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationships between the Lender and Mr M were unfair to him 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."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr M's Section 75 claims, and I was not persuaded that the Lender was party to a credit relationship with him under the Credit Agreements that was unfair to him for the purposes of Section 140A of the CCA. And having

taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

The Lender responded to the provisional decision and accepted it, confirming they had nothing further to add. Neither the PR, nor Mr M, responded to the provisional decision, nor did they provide any further comments or evidence they wished to be considered.

As the deadline for responses has passed, I'm now finalising my 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.

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

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

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."[4]

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

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

pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

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

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

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

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

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

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[5]

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')

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.

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

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').

My final decision

I do not uphold Mr M's complaint against First Holiday Finance Ltd.

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

Fiona Mallinson
Ombudsman