

The complaint

Mr and Mrs M's complaint is, in essence, that First Holiday Finance Ltd 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

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 27 December 2011 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £18,621 (the 'Purchase Agreement'). But after trading in their existing trial membership, they ended up paying £14,626 for membership of the Fractional Club.

Fractional Club membership 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 by taking finance of £14,126 from First Holiday Finance (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to First Holiday Finance on 22 February 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against First Holiday Finance under Section 75 of the CCA, which First Holiday Finance failed to accept and pay.
2. First Holiday Finance being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreements for the purposes of Section 140A of the CCA.
3. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated to carry out such an activity.

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

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

1. told them they had purchased an investment, through which they would have a share of a property – the value of which would “*considerably increase*” and therefore provide them a “*considerable return*”.
2. told them that they could sell the timeshare back to the resort or “*easily sell it at a profit*”, when that was not true.
3. told them they would have access to the Allocated Property at any time throughout the year, when that was not true.

Mr and Mrs M say that they have a claim against the Supplier in respect of one or more of

the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against First Holiday Finance, who, with the Supplier, is jointly and severally liable to Mr and Mrs M.

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

The Letter of Complaint set out why Mr and Mrs M say that the credit relationship between them and First Holiday Finance 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 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 obligation to pay annual management charges for the duration of their membership – and more significantly, the consequences of failing to do so – were unfair contract terms.
3. The decision to lend being irresponsible because First Holiday Finance did not carry out the right creditworthiness assessment.
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.

First Holiday Finance dealt with Mr and Mrs M's concerns as a complaint and rejected it on every ground.

Mr and Mrs 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.

Mr and Mrs M disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so it was passed to me.

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 includes the following:

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 Agreements) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

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

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

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

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

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

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

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

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

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

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

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.

¹ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

“Section 140A [...] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with [...] whether the creditor’s relationship with the debtor was unfair.”

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

The Law on Misrepresentation

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

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

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

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

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

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

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

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

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

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

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

Relevant Guidance – Goode: Consumer Credit Law and Practice

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

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

guidance to certain of the matters at hand in this complaint.

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 provisional decision

I issued a provisional decision on Mr and Mrs M's complaint explaining to both parties why I didn't intend to uphold it and inviting them to send me anything else they wanted me to consider before I made a final decision. I said:

Mr and Mrs M's claim under Section 75 of the CCA

Certain conditions must be met for section 75 to apply including, but not limited to, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. Because of the way in which section 75 operates, if the Supplier is liable for having misrepresented something to Mr and Mrs M at the Time of Sale or has breached its contract with them, that might give rise to a potential joint and several liability on the part of First Holiday Finance. Equally, of course, if the Supplier has a defence to such a claim, that defence is also available to First Holiday Finance.

I do not currently think that the conditions necessary to bring a Section 75 claim are met in this case.

I say this because it's my understanding that when Mr and Mrs M entered into the Credit Agreement in December 2011, they did so with First Holiday Finance Ltd based in the British Virgin Islands ("FHFBVI") and operating from the Isle of Man, rather than the UK entity of the same name. The UK entity has provided us with evidence that shows it wasn't engaged in regulated lending activity until it applied for permission from the Financial Conduct Authority ("FCA") in 2015. On 1 August 2015, FHFBVI assigned its loan book (including Mr and Mrs M's loan) to the UK entity First Holiday Finance.

Section 75 enables a claim to be brought against the creditor. At the time the Credit Agreement was made, the creditor was FHFBVI. While FHFBVI assigned its loan book to First Holiday Finance, it didn't necessarily follow that its duties or other obligations – such as any potential liability for a section 75 claim – were similarly assigned. Although the CCA section 189(1) definition of creditor includes an assignee, *Goode*³ 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.

That's not to say that a claim can't be made along the lines outlined by Mr and Mrs M. Rather, it highlights the inherent difficulty they might face in succeeding with that claim. And with this in mind, I can't say that First Holiday Finance acted unfairly or unreasonably towards Mr and Mrs M when it declined to pay them compensation for the claim they said it was liable for under section 75.

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)

Section 140A of the CCA: did First Holiday Finance participate in an unfair credit relationship?

I've explained why I'm not persuaded Mr and Mrs M's relationship with First Holiday Finance could lead to a successful section 75 claim and outcome in this complaint. But Mr and Mrs M also make arguments that either say or infer that the credit relationship between them and First Holiday Finance was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including the Supplier's representations and parts of its sales process at the Time of Sale they've mentioned.

Mr and Mrs M's loan from FHFBVI was written under English law and regulated under the CCA. First Holiday Finance acquired and continued to administer the loan when Mr and Mrs M made their complaint, so section 140A of the CCA is relevant law. It is not subject to the same difficulty as their section 75 claim⁴. So determining what is fair and reasonable in all the circumstances of the complaint includes considering whether the credit relationship between Mr and Mrs M and First Holiday Finance was unfair.

I have considered the entirety of the credit relationship between Mr and Mrs M and First Holiday Finance 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.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs M and First Holiday Finance.

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

Mr and Mrs M's complaint about First Holiday Finance 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.

I have firstly considered whether the misrepresentations they allege were made by the Supplier in the context of their Section 75 claim could have caused any unfairness for the purposes of Section 140A.

In the PR's Letter of Complaint, it is said that the Fractional Club membership was misrepresented by the Supplier as an investment, through which Mr and Mrs M would have a share of a property and obtain a "*considerable return*". As I'll come on to in more detail below, I consider that the acquisition of a share in the Allocated Property did amount to an investment – as it offered the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a

⁴ *Goode* (para 45A.65) indicates that section 140B empowers a Court to impose a positive liability on an assignee

misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

The amount of money Mr and Mrs M receive on their investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard, I cannot say they would amount to a misrepresentation.

It is also said in the Letter of Complaint that Mr and Mrs M were told that they could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr and Mrs M were given, which they signed, at the Time of Sale. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr and Mrs M.

Lastly it was said in the Letter of Complaint that Mr and Mrs M were “made to believe that [they] would have access to the holiday's apartment at any time all around the year”. I understand this to mean that Mr and Mrs M thought they would be able to stay at the Allocated Property whenever they wanted, which was not the case. But it may also mean that they thought availability of accommodation more broadly was guaranteed, and I note that within a statement from Mr and Mrs M provided during our investigation that they were unhappy at what they describe as difficulties in booking the holidays they wanted.

Like any holiday accommodation though, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork Mr and Mrs M were given states that the availability of holidays was subject to demand. And with regard to the usage of the Allocated Property, the Purchase Agreement that Mr and Mrs M explained that they were ceding their Fractional Rights – the rights of exclusive use of the Allocated Property – in exchange for their Fractional Points, to exchange for the booking of other holiday resorts. I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint. And while I accept that Mr and Mrs M may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement in such a way as to render the credit relationship between Mr and Mrs M and First Holiday Finance unfair.

The PR also says that the right checks weren't carried out before First Holiday Finance lent to Mr and Mrs 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 First Holiday Finance failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs M was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with First Holiday Finance was unfair to them for this reason.

From the information provided, I do not currently think that the lending was unaffordable for Mr and Mrs M. First Holiday Finance took details of Mr and Mrs M's income and expenditure within their application form. Those details do not suggest to me that the loan ought not to have been affordable for Mr and Mrs M at the time. And looking at a history of Mr and Mrs M's repayments, I can see that they were able to maintain payments consistently over the first few years of the loan with only the occasional missed payment that was swiftly made up.

I note Mr and Mrs M refer in their statement to the loan having “*created an issue with my personal credit*”, which I take to mean adverse information on their credit file. And I can see that, in more recent years, they have missed a number of repayments that will have impacted their credit rating. But coming some years after the loan was taken out, this doesn’t suggest to me that there was an affordability issue at the Time of Sale that First Holiday Finance ought to have known about.

That said, if there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs M wish to provide, I would invite them to do so in response to this provisional decision.

I’m not persuaded, therefore, that Mr and Mrs M’s credit relationship with First Holiday Finance was rendered unfair to them under Section 140A for this reason. But there is another reason, perhaps the main reason, why they say their credit relationship with First Holiday Finance 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?

First Holiday Finance does not dispute, and I am satisfied, that Mr and Mrs 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 the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr and Mrs 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), 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 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).

On the other hand, 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. 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.

Was the credit relationship between First Holiday Finance and Mr and Mrs M rendered unfair to them?

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

And in light of what the courts had to say in *Carney* and *Kerrigan*, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs M and First Holiday Finance 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.

To help me decide this point, I've carefully considered what Mr and Mrs M have said in the course of their complaint about how the membership was sold to them and their motivation for taking it out.

Within the Letter of Complaint, it is said that Mr and Mrs M were told that they had purchased an investment and could expect a profit. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions are made in an identical fashion by the PR in a number of other complaints. In any case, as set out above I accept that it is possible that the Supplier positioned Fractional Club membership as an investment. What I

need to establish is whether such positioning was material to Mr and Mrs M's decision to purchase the membership.

Following our Investigator's view, the PR provided a statement from Mr and Mrs M with their recollections from the Time of Sale. And I've noted that within this, they said that:

"Some of the facts that we were told ... by the sales team included the following:

- 1. The product was an investment as well as a holiday product.*
- 2. The product being a share of a property would increase in value over the term which would benefit the owner/members and should be considered an asset.*
- 3. At the end of the term the owner/members would receive their portion of the value based on the amount of shares owned and the market value of the property."*

This is a largely factual description of how the Fractional Club membership operated, in that Mr and Mrs M would receive a proportion of the sale proceeds of the Allocated Property based on the share they held. As above, I accept the possibility that the membership was positioned as an investment in the manner Mr and Mrs M have alleged, which may have included the suggestion that the value of their share could or would increase over time.

However, as explained above what I am considering here – in assessing whether any unfairness has arisen – is whether any such positioning of the Fractional Club membership as an investment was material to Mr and Mrs M's decision to purchase it (and in turn, therefore, to enter into the Credit Agreement). There is nothing within Mr and Mrs M's statement that leads me to think that it was.

While Mr and Mrs M recall some aspects of how the membership was presented to them as an investment, they also recall a number of aspects relating to the various holiday-related benefits and options that were available. Importantly, they do not say that one aspect of the membership was more attractive to them than another. An obvious and significant attraction of the membership was the holiday options it offered. Mr and Mrs M clearly had a level of interest in the type of holidays offered by the Supplier, given their purchase of a trial membership (which was ultimately traded in towards the purchase of the Fractional Club membership).

Given all of this, I do not currently think that the investment element of the Fractional Club membership was a material factor in Mr and Mrs M's decision to purchase it. I think they were at least as motivated by the holiday options it offered them. So I think they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3) – given their interest in the holiday-related benefits the membership offered them. And for that reason, I do not think the credit relationship between Mr and Mrs M was unfair to them even if the Supplier had breached Regulation 14(3).

Unfair contract terms

The PR also says that the contractual terms included unfair default provisions. On my reading, the provisions in question effectively mean that if Mr and Mrs M were to fail to make a payment due under the Purchase Agreements (such as the annual management charges), they could, ultimately, forfeit their “fractional rights”. Non-payment could therefore have significant consequences for Mr and Mrs M, such as the loss of their share in the Allocated Property and the holidays to which their points would otherwise entitle to them – without getting back any of the money they’ve paid to acquire these rights.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs M and First Holiday Finance unfair to them, I’d have to see that the term was unfair under the UTCCR and operated against Mr and Mrs M in practice.

In other words, it’s important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs M, have flowed from such a term because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (*Link Financial v Wilson* [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don’t think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr and Mrs M and First Holiday Finance for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr and Mrs M, let alone unfairly.

Moreover, as I haven’t seen anything else to suggest that there are any other reasons why the credit relationship between First Holiday Finance and Mr and Mrs M 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 First Holiday Finance and Mr and Mrs 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 to carry out that activity

The PR says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that First Holiday Finance wasn’t and isn’t permitted to enforce the Credit Agreement in accordance with Section 27 of the Financial Services and Markets Act 2000 as a result.

I understand that the business named on the Credit Agreement as the credit

intermediary did, at the Time of Sale, hold a Consumer Credit Licence issued by the Office of Fair Trading. And in the absence of any evidence to the contrary, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

In any event, the conditions that need to be met in order to invoke the protection under Section 27 that has been cited are not met in this case, given that the loan was arranged outside of the UK. So even if the Credit Agreement was arranged by an unregulated credit broker, I do not think it would be rendered unenforceable under the provisions of Section 27 of the Financial Services and Markets Act 2000 or entitled Mr and Mrs M to any other redress.

First Holiday Finance confirmed it accepted my provisional decision and had nothing further to add.

The PR replied to say that they disagreed with my provisional decision, raising a number of points that I will set out and address in the findings below.

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, with careful consideration of the points raised by the PR in response to my provisional findings, I've not seen reason to depart from my initial conclusions. So I'll explain why the PR's further points haven't changed my mind.

The PR did not respond with anything further for me to consider in respect of Mr and Mrs M's claim under Section 75, so I have nothing further to add to my provisional findings as set out above on that aspect of the complaint.

With regard to the complaint that Mr and Mrs M's credit relationship with First Holiday Finance was rendered unfair, the PR objects to the approach I've taken in assessing this aspect of the complaint. They say that it was not found in *Shawbrook & BPF v FOS* that the borrowers under the loan agreements at issue had purchased their timeshare memberships *primarily* for investment reasons. But I did not say that Mr and Mrs M needed to have done so. I said, in summary, that the marketing of the membership as an investment needed to have been material to Mr and Mrs M's decision to purchase it in order for me to uphold the complaint.⁵ I accepted that the investment element may have been a factor in that decision, but went on to discuss other factors that ultimately led me to conclude that Mr and Mrs M would have purchased the membership even if there had been no breach of Regulation 14(3).

The PR reiterated that Mr and Mrs M had “*obviously*” expected a profit from the future sale of their share in the Allocated Property and that this was an “*important factor*” in their decision. They also provided some further comments from Mr and Mrs M, given in response to specific questions posed by the PR. In summary, Mr and Mrs M said that they had not seen our Investigator's view, were not aware of the *Shawbrook & BPF v FOS* case or judgement and that they would not have purchased the membership had the investment element not been a feature.

⁵ See paragraph 185 of *Shawbrook & BPF v FOS*, where the judge held:

*“The ombudsmen held the breach in each case to be **serious/substantial** and the constituent conduct **causative** of the legal relations entered into: timeshare and loan.”* (emphasis judge's own)

I've considered Mr and Mrs M's further comments, but find it difficult to place much weight upon them. Coming as they do in light of my provisional decision, there is an obvious risk that they have been influenced by what I said. Even if Mr and Mrs M haven't seen that provisional decision, the PR's questions were leading to such a degree that I think there nevertheless remains a risk that their testimony has been indirectly influenced by it.

Ultimately, looking at all of Mr and Mrs M's comments in the round, they remain rather vague and have all been provided a considerable time after the events in question. There is further difficulty in me relying upon the most recent statement for the reasons I've outlined. If Mr and Mrs M felt they would not have purchased the membership were it not for the investment element, I find it hard to understand why they didn't set this out in their earlier statement.

Consequently, the PR's further submissions have not changed my view that Mr and Mrs M would still have purchased the Fractional Club membership even if the Supplier breached Regulation 14(3) – and as such, I do not think the credit relationship Mr and Mrs M and First Holiday Finance was unfair to them such that it warrants a remedy.

It follows, therefore, that there is no basis on which I think this complaint should be upheld.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before 23 September 2025.

Ben Jennings
Ombudsman