

The complaint

Mr L complains that First Holiday Finance Ltd acted unfairly and unreasonably by declining to meet his claim in misrepresentation under section 75 of the Consumer Credit Act 1974 (“CCA”), and by being party to an unfair credit relationship with him under section 140A of the CCA. He’s assisted in his complaint by “S”, a third-party professional representative.

Background to the complaint

I recently issued my provisional conclusions setting out the events leading up to this complaint, including how I thought matters would best be resolved. I’ve reproduced my provisional findings below, which form part of this final decision.

What happened

While on a promotional holiday in July 2013 (the “Time of Sale”) Mr L attended a sales presentation by “C”, a timeshare provider. After discussing things with the sales representative he purchased membership of C’s Fractional Points Owners’ Club (the “Fractional Club”).

Fractional Club membership was asset backed – which meant it gave Mr L more than just holiday rights. It also included a share in the net sale proceeds of a property (the “Allocated Property”) named on Mr L’s agreement with C (the “Purchase Agreement”), when it was sold on or after 31 December 2031 (the “Sale Date”).

The Purchase Agreement bought Mr L 747 fractional points, described therein as equivalent to one week of fractional rights, at a cost of £9,300. This purchase was part-funded by credit of £8,800 in Mr L’s name, provided by First Holiday Finance (the “Credit Agreement”). Mr L says he paid the remaining £500 by credit card.

Under the Purchase Agreement Mr L was also liable for annual management charges. As I understand it, Mr L has never sought to make a holiday booking in exercise of his holiday rights, nor has he paid the management charges. The current position in respect of those holiday rights is unclear, but Mr L appears to suggest they are forfeit.

In October 2019 Mr L authorised a professional representative “S” to act on his behalf in pursuing a complaint about the arrangements. S wrote to First Holiday Finance on 10 January 2020 (the “Letter of Complaint”) to complain about:

- Misrepresentations, omissions and unfair sales practices by C at the Time of Sale, including failing to give him important information relevant to his decision to purchase Fractional Club membership.
- First Holiday Finance unlawfully funding the arrangements of an Unregulated Collective Investment Scheme (“UCIS”), contrary to the provisions of the Financial Services and Markets Act 2000 (“FSMA”).

The Letter of Complaint argued that First Holiday Finance was, as deemed principal of C under section 56 of the CCA and/or under connected lender liability provisions of section 75, liable to Mr L for the above and set out a claim in damages.

First Holiday Finance didn't agree that it was liable to compensate Mr L, and he referred his complaint to us via S, which we received on 27 February 2020. S raised several points in relation to C's pre-contractual acts and omissions at the Time of Sale, which I've summarised below. These are that:

- Mr L found it more and more difficult to secure holidays due to the wait list or availability. Although he wasn't able to fully utilise the resorts, Mr L felt the management charges increased each year.
- C made an untrue statement to Mr L that the Allocated Property would be sold on 31 December 2031, bringing his Fractional Club membership to an end. In effect, the trustees would only initiate the sales process prior to this date by appointing valuers. There was no clear indication as to C's duty to actively market and sell the Allocated Property. Until the property was sold, Mr L would continue to incur management fees.
- C failed to tell Mr L that the developer could postpone the sale, in its absolute discretion, for up to two years past the set sale date.
- C didn't explain to Mr L that based on the contractual documentation, his beneficiaries would inherit his liability for management fees.
- the Fractional Club membership sold to Mr L was a UCIS, the promotion and financing of which was unlawful.
- the interest rate on the Credit Agreement when compared to the Bank of England base rate amounted to an unfair contract term causing Mr L financial detriment.

S said that in light of the concerns expressed against C, under the section 56 deemed agency and section 75 connected lender liability provisions of the CCA, First Holiday Finance was liable to compensate Mr L. S also referenced FCA core principles it argued hadn't been complied with, as shown by the points made, and expressed the view that First Holiday Finance was party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

Mr L's complaint was assessed by an investigator who recommended that it should be upheld on its merits. She concluded that the circumstances averred in the complaint correspondence were such that they gave rise to an unfair credit relationship between Mr L and First Holiday Finance. She proposed redress intended to put Mr L (as close as possible) back in the position he would have been in had he not purchased Fractional Club membership or borrowed the money to do so.

First Holiday Finance disagreed with the investigator's assessment. It asked for an ombudsman to review and determine the complaint¹.

What I've provisionally decided – and why

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

¹ More recently, S has provided attendance notes relating to initial discussions with Mr L about his concerns over the sale. In reaching my conclusions I've considered those notes, which were provided to First Holiday Finance for comment.

As outlined below, I've taken into account relevant law and regulations, regulators' rules, guidance and standards and codes of practice, and (where appropriate), what I consider to have been good industry practice at the relevant time. Where necessary, I've made my decision on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Relevant law and regulations

Matters of particular relevance to this complaint include:

- The CCA (including section 75 and sections 140A-140C).
- The law on misrepresentation.
- The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").
- The Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCCR").
- The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").
- Case law on Section 140A of the CCA – including, in particular:
 - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ("*Plevin*"), which remains the leading case in this area.
 - *Scotland v British Credit Trust* [2014] EWCA Civ 790 ("*Scotland and Reast*").
 - *Patel v Patel* [2009] EWHC 3264 (QB) ("*Patel*").
 - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ("*Smith*").
 - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ("*Carney*").
 - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ("*Kerrigan*").
 - *R (on the application of First Holiday Finance 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*").

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

Good industry practice – the RDO Code

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

My provisional findings

After careful consideration, I intend to uphold Mr L's complaint. Before I explain why, I want to make it clear that my role as an ombudsman doesn't mean I need to address every single point that has been made to date. Rather, it is to decide what's fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

Mr L's Section 75 claim

I'm conscious S has suggested that Mr L has a section 75 claim against First Holiday Finance. However, I can see the difficulties in such a claim being successful because of the way the finance arrangements were set up.

At the time the Credit Agreement was made, the creditor was 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 L's loan) to the UK entity First Holiday Finance.

While FHFBVI assigned its loan book to First Holiday Finance, it didn't necessarily follow that all of 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, Goode² 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.

I'm also conscious of the conclusions reached by the High Court in *Jones v Link Financial Ltd* [2012] EWHC 2402 ("*Jones*"), which drew a distinction between pre-assignment liabilities such as might arise under section 75 and those statutory duties under the CCA that the assignee was required to perform in order to enforce its assigned rights³.

That's not to say that Mr L can't make a claim along the lines S outlined. Rather, both *Goode* and *Jones* highlight the inherent difficulty Mr L might face in succeeding with that claim.

However, I don't need to reach a conclusion on this point, because I consider the available evidence indicates D breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr L as an investment which, in the circumstances of this complaint, rendered unfair the credit relationship between Mr L and First Holiday Finance for the purposes of section 140A of the CCA.

So irrespective of the potential difficulty in Mr L bringing a successful section 75 claim, the outcome I'm proposing puts him in the same (or better) position as he would have been in if redress were limited to the remedies for misrepresentation or breach of contract.

Section 140A: First Holiday Finance's participation in an unfair credit relationship

Mr L makes arguments that either say or infer that the credit relationship between him and First Holiday Finance was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including C's representations and parts of its sales process at the Time of Sale.

Mr L'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 L made his complaint, so section 140A of the CCA is relevant law. It is not subject to the same difficulty as his section 75 claim⁴. So determining what's fair and reasonable in all the

² 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)

³ Jones (paras 33-34)

circumstances of the complaint includes considering whether the credit relationship between Mr L and First Holiday Finance was unfair.

Under section 140A, 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)⁵.

Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and 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.

I see no great difficulty with the position that C is deemed agent of FHFBVI for the purpose of the pre-contractual negotiations⁶, nor with the possibility referenced in Goode that the operation of sections 140A through 140C effectively extend the deemed agent provision to First Holiday Finance after the loan was assigned to it.

With this in mind I've considered the entirety of the credit relationship between Mr L and First Holiday Finance along with all of the circumstances of the complaint. Having done so, like our investigator I think the credit relationship between them was likely to have been rendered unfair for section 140A purposes.

S (on behalf of Mr L) complained about First Holiday Finance being party to an unfair credit relationship for several reasons, which I've set out in this decision. It included in its submissions several examples in support of the allegation that C misled Mr L, either by misrepresentation or by omission, and that C carried on unfair commercial practices (contrary to the CPUT Regulations).

S is undoubtedly aware of the conclusion reached in *Shawbrook & BPF v FOS*. That was that a timeshare contract is not a Collective Investment Scheme ("CIS") – nor, by extension a UCIS. I see no proper reason to depart from the court's carefully considered and clearly explained conclusion on this matter⁷. I'm satisfied that Mr L's Fractional Club membership met the definition of a "*timeshare contract*" regulated by the Timeshare Regulations. That means an argument that the sale of finance in connection with a UCIS was prohibited under FSMA cannot succeed.

But it is still possible that the way C marketed and sold Fractional Club membership to Mr L amounted to it selling a timeshare contract as an investment, albeit not a UCIS. If it did, then that would be a breach of Regulation 14(3) of the Timeshare Regulations, which has the effect of prohibiting C from marketing or selling membership of the Fractional Club as an investment. And the way section 140A is worded makes clear that

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*"⁸. I'll use the same definition.

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

⁵ Section 140A(1) of the CCA

⁶ Section 56 of the CCA

⁷ *Shawbrook & BPF v FOS* (paragraphs 43, 45, 47-48, 52)

⁸ *Ibid.*, paragraph 56

At the Time of Sale the provision in Regulation 14(3) said that “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 contract⁹.” Further, when the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that “[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).¹⁰”

With this in mind, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. So it’s important to consider the way in which C marketed and/or sold membership to Mr L.

However, it’s worth adding that despite the breadth of the unfair relationship test under section 140A, a credit relationship isn’t rendered unfair to a debtor simply because of a breach of a legal or equitable duty. Rather, the protection afforded to debtors by section 140A is the consequence of all of the relevant facts. 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.”

For Mr L’s credit relationship with First Holiday Finance to be rendered unfair under section 140A, it’s important to consider whether an unfair commercial practice or a breach of the Timeshare Regulations had a material impact on his decision¹¹ to purchase membership and participate in the Credit Agreement. With this in mind, I’ve also thought about what prompted Mr L to enter into the Purchase Agreement.

Here, I’ve taken into account Mr L’s evidence, along with First Holiday Finance’s submissions and materials from C relevant to the Time of Sale, provided to us in the course of our work on complaints about the sale of timeshares in general.

In its response to our investigator’s assessment, First Holiday Finance has questioned whether Mr L’s statement setting out his recollections about the sale should be admitted or considered as evidence in the case, received as it was after the outcome in *Shawbrook & BPF v FOS*. It says Mr L’s statement is undated and was previously unseen.

Under our rules, which can be found in the FCA Handbook, I can exclude evidence that would otherwise be admissible in a court or include evidence that would not be admissible in a court¹². There seems to me little doubt that Mr L’s personal recollections of the sale are relevant to the issue in dispute. Nor does there appear to be any reason to conclude that any exclusionary rules apply to Mr L’s evidence.

I take First Holiday Finance’s point in relation to the timing of the presentation of that evidence, which to my mind speaks to the reliability and weight to be placed on it. Having

⁹ As I’ve already mentioned, Fractional Club membership met the definition of a regulated contract.

¹⁰ Department for Business, Innovation and Skills (BIS) – Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts – July 2010

¹¹ I’m mindful here of what was said in *Carney* (paragraph 51) and *Kerrigan* (paragraphs 213 and 214) in relation to causation.

¹² DISP 3.5.9(1)R

made further enquiries of S, it has provided supporting documents that I'm inclined to say support that Mr L's evidence of what happened during the sale dates from October 2019¹³. This predates the judgment in *Shawbrook & BPF v FOS* and I'm minded to find it provides a credible and reliable source of evidence in this case – subject, of course, to any comment First Holiday Finance might provide in response to this provisional decision.

Mr L's recollection of the sales process at the Time of Sale doesn't go into great detail in terms of what C actually said and/or did. However, he's explained he attended the sales presentation with a friend, that it lasted for more than five hours and included a talk from C's sales representative. And Mr L has been clear that C led him to believe that the Fractional Club membership was an investment from which he would make a financial gain (a profit) when the Allocated Property was sold. His position is that this is what induced him into the purchase:

"The agent was really convincing, informing me that it would be a great investment and that after 15 years I would be able to sell it and profit from it, hence I ended up joining the scheme."

and

"A slide show was shown. We were offered the Fractional property which was on the slide show. I was not going to buy but somehow they convince me to buy the Fractional...[The] most convincing part was they informed me that it would be a great investment and after the end of 15 years I would be able to sell it and get some profit from the sell [sic]. This was the main reason of purchase."

I haven't been provided with the slide show in question, or other sales materials C used in its presentation to Mr L. It has always been – and remains – open to First Holiday Finance to submit such evidence. Absent this, I have been able to review training material C used to prepare its sales representatives – including a document titled "*2011 Spain PTM FPOC 1 Practice Slides Manual*" (the "Training Manual").

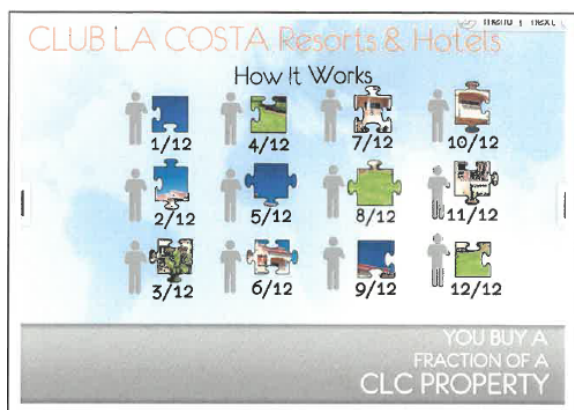
As I understand it, the Training Manual was used by C during the period in which it sold the Fractional Club membership Mr L purchased. While the Training Manual includes slides, I can't say whether those exact slides would have been shown to Mr L in C's sales presentation. But the Training Manual seems to me to be reasonably indicative of both the training C's sales representatives would have got before selling Mr L his Fractional Club membership and how the sales representatives would have framed that sale.

Having looked through the Training Manual, I can see that page 6 (of 41) – contains the following slide, headed "*Why Fractional?*"

¹³ See note 1



This slide indicates that C's sales representatives were told that Fractional Club membership combined the best of Choice 1 and Choice 2 – providing choice, flexibility, convenience, quality and, significantly, an investment that could be used, enjoyed and then sold for money back. The next slides (on pages 7 and 8) were concerned with how the purchase and selling arrangements worked:



While it was of course important for C's sales representatives to have an understanding of how Fractional Club worked, the association between the buying and selling arrangements and the 'Best of Both Worlds' structure doesn't assist in discounting the possibility that C's sales representative presented Fractional Club membership to Mr L as an investment – whether explicitly or by inference – from which he would make a financial gain (a profit) when the Allocated Property was sold, as he says. And that would be a breach of Regulation 14(3) of the Timeshare Regulations.

Mr L describes being convinced by C that Fractional Club membership was a "*great investment*" with a profit once the sale took place, and cites these factors as being why he proceeded with the purchase. His account does not appear to me to be inconsistent with the possibility presented by the Training Manual. And I've no reason to find that Mr L

would otherwise have bought Fractional Club membership. There's nothing in his testimony or the evidence from First Holiday Finance that suggests he was particularly motivated by exercising any holiday rights, whether by taking holidays himself or as a rental opportunity.

I'm aware that the complaint submissions in this case include correspondence from C to us in which reference is made to the stated object of the Purchase Agreement, being "to enjoy a flexible system to reserve holidays in worldwide locations", and to the Members' Declaration that "We understand that the purchase of our Fraction is for the primary purpose of holidays...and that [C] makes no representation as to the future price or value of the Fraction."

I think it would be fair to say that in light of the allegations Mr L has made about what C told him, the wording referenced here doesn't entirely counter what he says. A prospective member who was told what Mr L says C told him could easily read this paperwork without being dissuaded that investment was a legitimate secondary purpose of membership, even if it wasn't the primary purpose.

Further, the existence of such wording perhaps recognises there was a real risk of buyers forming the impression, from the way C was marketing and selling membership of the Fractional Club, that it was an investment. The fact C might not have been willing to put a figure on the future price or value of the share in the Allocated Property doesn't seem to me to go far enough in light of the sales presentation on which Mr L says he made his purchase decision.

Like our investigator then, I'm inclined to conclude that it is more likely than not that C marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, and that Mr L's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (a profit). And for that reason, I'm currently inclined to think the credit relationship between Mr L and First Holiday Finance was unfair to him. It follows that I'm inclined to uphold his complaint.

Fair Compensation

My provisional findings are that:

1. Mr L would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for a breach of Regulation 14(3) of the Timeshare Regulations by C (as deemed agent of First Holiday Finance); and
2. the impact of that breach meant the relationship between First Holiday Finance and Mr L was unfair under section 140A of the CCA.

With this in mind I propose (as far as can practically be achieved) that First Holiday Finance puts Mr L back in the position he would have been in had he not purchased the Fractional Club membership (that is, had he not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is provided Mr L agrees to assign to First Holiday Finance his Fractional Points or hold them on trust for First Holiday Finance if that can be achieved.

So, here's what I think First Holiday Finance needs to do to compensate Mr L – whether or not a court would award such compensation:

1. Refund Mr L's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
2. Pay compensation equivalent to the £500 paid by credit card at the Time of Sale as part of the purchase cost of Fractional Club membership.
3. Refund any annual management charges Mr L paid as a result of his Fractional Club membership.
4. First Holiday Finance can deduct:
 - i. The value of any promotional giveaways that Mr L used or took advantage of; and
 - ii. The market value¹⁴ of any holidays Mr L took using his Fractional Points.

(I'll refer hereafter to the output of steps 1 to 4 as the 'Net Repayments')

5. Add simple yearly interest at 8% to each of the Net Repayments from the date each one was made until the date First Holiday Finance settles this complaint¹⁵.
6. Insofar as any adverse information has been recorded within the six years prior to this decision on Mr L's credit file in connection with the Credit Agreement, this should be removed.
7. I understand Mr L has suggested his Fractional Club membership is forfeit. However, if that's not the case and the Fractional Club membership is still in place at the time of this decision, as long as Mr L agrees to hold the benefit of his interest in the Allocated Property for First Holiday Finance (or assign it to First Holiday Finance if that can be achieved), First Holiday Finance must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.

I invited both parties to let me have any further comments they wished to make in response to my provisional conclusions.

Response to my provisional decision

S responded on behalf of Mr L to say he accepted my provisional findings and proposed conclusion. First Holiday Finance didn't agree with my intended decision. Its response questioned the reliability of the documents S recently provided and suggested no weight should be attached to them, making the following points:

- The supporting documents included an email referencing Mr L's contact with a third party lead generator "T", which bore an invalid day and date combination. As such First Holiday Finance was unwilling to accept in good faith any of S's recent submissions, including contact notes.

¹⁴ It can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr L took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect his usage. Of course, there might be no deduction to make if, as Mr L indicates, he has never taken any holidays using his Fractional Points.

¹⁵ HM Revenue & Customs may require First Holiday Finance to deduct tax from this interest. If that's the case, First Holiday Finance must give Mr L a certificate showing how much tax it's deducted if he asks for one.

- The client information sheet was not limited to Mr L's own recollections but contained questions capable of eliciting prompted responses.
- Some of Mr L's responses to the questions were not reflective of the case facts. For example, the boxes "*only exit option was to 'upgrade' (e.g. Fractional)*" and "*the resort is only available to members (exclusivity)*" were ticked, despite Mr L not having been a member at the Time of Sale.
- S's handwritten call notes could not be verified, and were written in a way that wasn't suggestive of being Mr L's own words, or reflective of his reasons for purchasing membership. They didn't mention any sales materials shown at the Time of Sale or suggest Mr L needed more information to help him understand the nature of his purchase. Nor did they offer any context to the conversations between Mr L and C's sales representative – particularly in respect of why or how Mr L was led to believe Fractional Club membership was an investment.

What I've decided – and why

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

I understand the points First Holiday Finance has made in response to my provisional decision. While there might be a plausible explanation for the day/date discrepancy, it isn't something I'd expect to see on electronically generated correspondence such as email. The incongruity in that document suggests to me that I can't reasonably place reliance on it as evidence of Mr L's initial contact.

That doesn't automatically mean that the remaining evidence is in some way tainted such that I should disregard it, as First Holiday Finance would appear to suggest. Some of the principles I've borne in mind when considering this point were set out (albeit in respect of assessing oral evidence) by Mrs Justice Thornton in the case of *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB)¹⁶, notably:

"The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable...Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony...The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable."

Although the email document bears the discrepancy I've mentioned, it purports merely to be evidence of when Mr L's initial contact was passed to S. No such discrepancy is apparent in the other documents, and I can't simply discount them for the same reason as the email. Given it isn't in dispute that S's first contact with First Holiday Finance in relation to Mr L's complaint was the Letter of Complaint dated 10 January 2020, it doesn't seem to me particularly fanciful that he and S discussed his concerns in October 2019, as a preliminary step in preparation for the claim.

I've thought about the structure of the client information sheet. It is a fairly basic data collection form, completed by T and dated 15 October 2019. In addition to personal information and questions about the financial arrangements supporting the purchase, it comprises a series of 'yes or no' tick boxes alongside questions that have, in my view, been

¹⁶ The case in question included references to the judge's observations in *Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd)* [2016] EWHC 1699 (TCC) (paras 250-251).

designed with the intention of establishing factual detail about the timeshare sale. A further section provides for additional comments or expanded answers. There isn't anything about the client information sheet that suggests answers are prompted. I see no reason not to accept it as evidence of the concerns T passed on to S as a precursor to S contacting Mr L shortly afterwards.

The real question for me in relation to this evidence turns on certain of the answers indicated on the client information sheet. As First Holiday Finance has highlighted, Mr L was unlikely to have been correct in his recollection of being told that upgrading to Fractional Club membership was his only option to exit any current arrangement, for the simple reason that he didn't have any such existing arrangement. But it's neither impossible nor implausible that the sales representative told Mr L about exclusivity. That's potentially one of the advantages of purchasing membership and wasn't contingent on Mr L already being a member.

The precise nature of the call notes is unclear to me. They read more as a summary of the content of a call recording rather than contemporaneous notes. They are handwritten and dated 17 October 2019. Somewhat contrary to First Holiday Finance's assertion, they contain reference to the sales presentation featuring a slide show, which is consistent with the finding I outlined in my provisional decision. I wouldn't expect Mr L to be able to provide much in the way of evidence of specific sales materials C used, though as I said in my provisional decision, if a different sales presentation and slide show was used by C, it has all along been open to First Holiday Finance to obtain and provide details of it. It hasn't sought to do so, and so I'm not persuaded to reach a different finding in this respect.

After considering all that First Holiday Finance has said in response to my provisional decision, I'm not persuaded it offers me compelling grounds to depart from the overall conclusions and outcome I set out previously. For the reasons I set out in my provisional decision, which I adopt here as part of my final decision, I remain of the opinion that it is more likely than not that C marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, and that Mr L's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (a profit). Because of this, the credit relationship between Mr L and First Holiday Finance was unfair to him and I therefore uphold his complaint.

Putting things right

Taking into account all of the above, I'm satisfied that the redress I proposed in my provisional decision represents a fair and reasonable way for First Holiday Finance to resolve the complaint. For the avoidance of any doubt, I'll reiterate here the steps I require it to take:

1. Refund Mr L's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
2. Pay compensation equivalent to the £500 paid by credit card at the Time of Sale as part of the purchase cost of Fractional Club membership.
3. Refund any annual management charges Mr L paid as a result of his Fractional Club membership.
4. First Holiday Finance can deduct:
 - i. The value of any promotional giveaways that Mr L used or took advantage of; and
 - ii. The market value¹⁷ of any holidays Mr L took using his Fractional Points.

¹⁷ It can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or

(I'll refer hereafter to the output of steps 1 to 4 as the 'Net Repayments')

5. Add simple yearly interest at 8% to each of the Net Repayments from the date each one was made until the date First Holiday Finance settles this complaint¹⁸.
6. Insofar as any adverse information has been recorded within the six years prior to this decision on Mr L's credit file in connection with the Credit Agreement, this should be removed.
7. I understand Mr L has suggested his Fractional Club membership is forfeit. However, if that's not the case and the Fractional Club membership is still in place at the time of this decision, as long as Mr L agrees to hold the benefit of his interest in the Allocated Property for First Holiday Finance (or assign it to First Holiday Finance if that can be achieved), First Holiday Finance must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.

My final decision

My final decision is that I uphold Mr L's complaint. To settle it, I require First Holiday Finance Ltd to take the steps I've set out at points 1-7 under the heading 'Putting Things Right' above.

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

Niall Taylor
Ombudsman

possible to determine the market value of the holidays Mr L took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect his usage. Of course, there might be no deduction to make if, as Mr L indicates, he has never taken any holidays using his Fractional Points.

¹⁸ HM Revenue & Customs may require First Holiday Finance to deduct tax from this interest. If that's the case, First Holiday Finance must give Mr L a certificate showing how much tax it's deducted if he asks for one.