

The complaint

Mr B and Miss B's complaint is that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA'), (2) deciding against paying a claim under section 75 of the CCA, (3) lent to them without carrying out proper checks, and (4) is responsible under section 56 of the CRA for a third party having sold them an unregulated collective investment scheme ('UCIS').

Background to the complaint

Mr B and Miss B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 4 August 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,340 fractional points at a cost of £31,502 (the 'Purchase Agreement'). But after trading in their existing fractional timeshare, they ended up paying £6,386 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr B and Miss B 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 B and Miss B paid for their Fractional Club membership by paying a deposit of £500 and taking finance of £5,886 from the Lender in their joint names (the 'Credit Agreement'). This loan was closed in July 2021.

Meanwhile, their timeshare had been suspended for failing to pay their 2020 management fees. (I understand that the balance of the loan has since been written off.)

Mr B and Miss B – using a professional representative (the 'PR') – wrote to the Lender on 12 May 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
4. The Credit Agreement being unenforceable because it was a UCIS.

The Lender dealt with Mr B and Miss B's concerns as a complaint and issued its final response letter on 8 June 2022. It denied that it had paid any commission to the Supplier, and it referred all of the other complaint grounds to the Supplier. The Supplier did not uphold any part of the complaint.

Mr B and Miss B then referred the complaint to the Financial Ombudsman Service. It was assessed by an investigator who, having considered the information on file, decided that our service did not have jurisdiction to consider the complaint about irresponsible lending, because this complaint had been brought too late under our time limits. He considered the

rest of this complaint on its merits, and decided that the Lender had been entitled to reject the section 75 claim because it had been brought too late under the Limitation Act 1980. And he rejected the rest of the complaint on its merits.

Mr B and Miss B disagreed with the investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me. I wrote a provisional decision which read as follows:

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.¹

Jurisdiction

I have not been invited to reconsider the investigator's conclusions about our service's jurisdiction in this matter. But I have still considered our jurisdiction, and I have reached the same conclusion as the investigator and for the same reasons. I will therefore not consider the allegation of irresponsible lending as a stand-alone complaint issue. But I can still consider it as a ground for finding an unfair credit relationship under section 140A, and so I will deal with it in that context instead.

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.

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

As both sides may already know, a claim against the Lender under section 75 essentially mirrors the claim Mr B and Miss B could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender did not dispute that the relevant conditions are met in this complaint. But I am not satisfied that they are.

Section 75 says that it does not apply to a claim "*so far as the claim relates to any single item to which the supplier has attached a cash price not ... more than £30,000*". But as I've said, the cash price of the Fractional Club was £31,502. So the section does not apply to Mr B and Miss B's purchase.

¹ I have omitted the Appendix from this decision as it is familiar to the parties.

I also agree with the investigator that the section 75 claim was brought more than six years after the cause of action had accrued, and so the claim was also barred under the Limitation Act.

And with all that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the section 75 claim in question.

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

The Letter of Complaint set out several reasons why Mr B and Miss B say that the credit relationship between them and the Lender was unfair to them under section 140A of the CCA. In summary, they include the following:

1. Mr B and Miss B were coerced into their purchase.
2. The contractual terms of the Fractional Club do not set out a clear duty to sell the Allocated Property at the end of their membership, leaving open the possibility that Mr B and Miss B may have to continue to pay annual management fees indefinitely.
3. Mr B and Miss B's children will inherit their financial liabilities under the Fractional Club membership on their own deaths.
4. The Supplier failed to offer them a choice of lenders to finance their purchase, instead just selling them a loan with the Lender.
5. The interest rate of 13.81% is said to be extortionate.
6. The Supplier and the Lender failed to provide sufficient information in relation to the commission paid by the Lender to the Supplier.

In addition, the PR described the following issue as a misrepresentation, but I think it is better characterised as another ground to consider under section 140A:

7. 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').

And as I said above, I will consider the allegation of irresponsible lending as an eighth ground.

I have considered the entirety of the credit relationship between Mr B and Miss B and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

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

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

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

I have seen no evidence that Mr B and Miss B were coerced into their purchase, and they do not mention this in their witness statement; nor do they seem to have mentioned it in a phone call they made to a third party which they instructed to help them relinquish their timeshare, of which I have seen a handwritten note. But even if they were coerced (and I make no finding that they were), there was a 14-day cooling-off period in which they could have withdrawn from the purchase and from the loan, and they didn't. So I am not persuaded that this complaint issue is made out.

It is true that the Fractional Club membership did not have a guaranteed end date, in that it is not possible to guarantee when a property will actually be sold. But it did have a prescribed date on which the Allocated Property would be put up for sale. The sale would be conducted not by the Supplier, but by a trustee which owned the property on behalf of the club members (see rule 9 of the club Rules). So I'm satisfied that Mr B and Miss B's membership was not indefinite.

The PR alleges that the Supplier failed to tell Mr B and Miss B that their children would inherit their liability to pay annual maintenance charges after their death. But it certainly was not the case that their children would inherit their liability, or that there was no way out of the original timeshare membership. The Purchase Agreement is a personal contract, which will expire on their deaths (if it is still subsisting at that time).² Any debts already incurred before their deaths would be owed by their estates, but that is a rule in the general law and I don't think the Supplier was obliged to tell them all about that. Such debts cannot be inherited by their children, nor can their children be compelled to become members or owners. And rule 7 says that owners (that is, Mr B and Miss B) can transfer their rights to the Allocated Property to someone else on the open market at any time during their ownership.

The interest rate was set out clearly in the Credit Agreement. On the same page of the agreement, the 14-day withdrawal period was explained. So if Mr B and Miss B were not satisfied with the interest rate, then they had a reasonable opportunity to change their mind and reject the loan. I think that is fair. And I think the same thing about the choice of lender. It was open to them to withdraw from the loan and find another lender if they wanted to.

I'm not persuaded, therefore, that Mr B and Miss B's credit relationship with the Lender was rendered unfair to them under section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that

² See *Chitty on Contracts* (35th edition), paragraph 29-030; and see also paragraph 24-009.

Fractional Club membership was marketed and sold to them as an investment in breach of the prohibition against selling timeshares in that way.

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

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

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

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

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

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

Mr B and Miss B'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 B and Miss B 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 B and Miss B, 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 B and Miss B 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 B and Miss B as an investment in breach of regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint, for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mr B and Miss B 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 B and Miss B and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement.

In their witness statement, Mr B and Miss B say that they originally bought a non-fractional timeshare from a timeshare owner in a private sale. Later, in 2013, they approached the Supplier because they had found that the availability of holidays was limited. The Supplier advised them to upgrade to a fractional timeshare because (1) it would give them a wider range of choice of holiday destinations and (2) it would be a profitable investment. So they upgraded to a fractional timeshare. That purchase was not funded by the Lender, and so the Lender is not responsible for the sale.³

Then they say this about the 2015 sale:

"In August 2015 we were again upgraded to a more luxurious but more expensive Fractional Timeshare, with the same promises of better accommodation and more flexibility as to were moving up a few grades that would give us better options her we could stay." (sic)

That says nothing about making an investment or a profit.

The PR has also provided handwritten notes of its conversation with Mr B and/or Miss B when it took instructions from them in January 2022. Again, I can't see that these notes show that Mr B and Miss B were motivated or interested in any investment element at the Time of Sale. Further, the PR has provided a questionnaire that was filled in by Mr B and Miss B in January 2022, but this was provided to a third-party claims handler. In this questionnaire, Mr B and Miss B were

³ That sale was the subject of a separate complaint against another lender, which has been upheld.

provided a set of statements to which they could tick yes or no, depending on whether they were told these things. They ticked 'yes' to every suggested statement, including to say they were told the timeshare would increase in value and was a financial investment. However, they have not explained to which sale this applies and, in any event, I find the leading nature of this information-gathering exercise means I can place little evidential weight on the contents of the questionnaire.

So on balance, 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 B and Miss B's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of regulation 14(3). And for that reason, I do not think the credit relationship between Mr B and Miss B and the Lender was unfair to them 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 relationship between the Lender and Mr B and Miss B 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.

Section 235 of the FSMA: was the Fractional Club an unregulated CIS?

The Fractional Club was a timeshare, as defined in regulation 7 of the Timeshare Regulations. The Collective Investment Schemes Order excludes timeshares from the definition of a CIS, and timeshares are regulated by the Timeshare Regulations. So I'm satisfied that it was not unregulated.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr B and Miss B's section 75 claim, and if I put the issue of commission to one side for the time being, I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My addendum provisional decision: Commission

I dealt with commission in a later decision, in which I said that no commission had been paid at the Time of Sale, and so there was no basis for upholding a complaint about that issue.

The PR's response to my provisional findings

The PR had nothing to add about commission or about collective investment schemes, but it objected to the rest of my provisional findings. In summary, it made the following points:

1. I should take into account Mr B and Miss B's evidence about how their first fractional timeshare was sold to them as an investment in 2013. The 2015 sale should not be viewed in isolation, but as part of a pattern of mis-selling, since what was said in

2013 would certainly have influenced Mr B's and Miss B's understanding of the 2015 sales presentation.

2. On a document headed "Client Enquiry Sheet", in the section "Any Other Comments" Mr B had written in his own words that during the 2015 sale he had been told that "*fractional offered profit at the end.*"
3. The PR's call notes (from January 2022) mention investment in the context of the 2013 sale, and then go on to say "*same as above*" in relation to the 2015 sale. There was also an email from Mr B to the PR at nearly the same time in which he mentioned "*a profit at the end when sold.*"
4. The PR pointed out that in its original Letter of Complaint in May 2022, it had mentioned (on page 3) that the 2015 timeshare had been sold as an investment and that this had influenced their clients' decision to upgrade, in line with its clients' instructions. This demonstrated that this issue had been part of the complaint all along, and was not just something that had been added later on.
5. In Mr B and Miss B's witness statement they had described the 2013 sales presentation, which included describing the product as an investment, and then went on to say that "*the same promises*" were also made in 2015.
6. It was inconceivable that Mr B and Miss B would have relinquished their 2013 timeshare, from which they had expected to make a profit, and to replace it with the 2015 timeshare if they did not also expect the 2015 timeshare to be profitable too.

Point six changed my mind about the outcome of this complaint, and so I issued a second provisional decision in which I said I was now minded to uphold this complaint, so that the Lender could have a fair and full opportunity to comment on it. That read as follows:

My second provisional decision

Although the 2013 purchase was financed by a different lender, which means that the Lender is not responsible for it, that does not prevent me from taking it into account as evidence insofar as it is relevant to what was likely to have been said during the 2015 sales presentation. Our service does not have rules of evidence.

However, I don't think that evidence of what was said in 2013 really makes much difference to this case. The sales presentation in 2013 was delivered to people who did not already own a fractional timeshare, so of course there was an emphasis on the advantages of a fractional timeshare over the traditional kind. But in the 2015 presentation, the Supplier was selling additional fractional points to people who already had some. So I think there would have been less said about the investment aspect in 2015, and everything that was said in 2013 would not necessarily have been repeated in 2015. (I will come back to that issue.)

The reason I was not minded to uphold this complaint in my last decision was not because I did not think that there had been a breach of regulation 14(3) in 2015, but because I thought the impact of that breach was limited. I was not persuaded that it had led Mr B and Miss B to enter into the Purchase Agreement and the Credit Agreement, and there was nothing in their witness statement to suggest that it had.

That witness statement said they had upgraded in 2015 because of "*the same promises of better accommodation and more flexibility as to were moving up a few grades that would give us better options her we could stay*" (sic). So I think that the

PR's reference to the phrase "*the same promises*" in the witness statement can only be a reference to this passage, and it does not incorporate any reference to the prospect of making a profit into Mr B and Miss B's motives for their 2015 purchase.

That statement is no longer the only evidence of their intentions, however. There are also the call notes, the email, and the Client Enquiry Sheet. These (and the Letter of Complaint too) do demonstrate that the prospect of a profit in 2015 was not a later invention, but was something which Mr B had mentioned at the outset. I had already accepted in my provisional decision that the profit aspect may have been mentioned in the 2015 sales presentation (although I did not then make a formal finding about that one way or the other). But I still had to consider to what extent this really influenced Mr B and Miss B's decision to upgrade. I was then of the view that the 2015 purchase was only about acquiring more points to spend on holidays. And having now considered this new evidence, I still think that was their sole motivation for upgrading.

However, I think there is force in the PR's argument that Mr B and Miss B would not have given up their 2013 fractional timeshare, which they expected to be a profitable investment, to replace it with another timeshare if they did not think that the new one would be profitable too. I recognise that that is not quite the same thing as saying that the upgrade was *motivated* by a profit. I am still sure that they only bought the upgrade to get better holidays. But I do think that their decision must still have been *influenced* by the expectation that exchanging their old timeshare for the new one would not result in them losing a profitable investment as a result, with nothing to show for it but improved holidays.

In other words, I think that but for Mr B and Miss B's belief that their 2015 purchase would be a profitable investment, they would not have traded in their 2013 timeshare to get it – meaning that they would not have entered into the 2015 Purchase Agreement or the Credit Agreement which financed it. (And I don't think they could have afforded to pay or borrow £31,502 to get the upgrade without the trade-in.)

However, I cannot conclude that this belief caused unfairness in the relationship arising from the 2015 Credit Agreement unless it resulted from a breach of regulation 14(3) at the Time of Sale *in 2015*. As I've said, the Lender is not responsible for the 2013 mis-sale, or for anything that was said on that occasion. And I won't infer that there must have been a breach in 2015 just because there was one in 2013. So I now need to make a finding about what was said at the sales presentation in 2015.

So I have considered:

- (1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, *i.e.* told Mr B and Miss B or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (*i.e.*, a profit); and, in turn:
- (2) whether the Supplier's actions constituted a breach of regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided various training material used to prepare its sales representatives. These show that prospective *new* members of the Fractional Club would have been told about the investment aspect of owning an Allocated Property, and to expect to make a profit.

However, I accept that the part of the sales pitch which explains how the Fractional Club works, including the slide show, would have been omitted in view of the fact that Mr B and Miss B were already members of the Fractional Club. There would have been no need to repeat everything they had already been told about that, because they knew it already. So instead, the focus would principally have been on the benefit of gaining additional fractional points.

However, I remain unpersuaded that the investment angle would not have been mentioned at all; that does not ring true to me. I think it is more likely than not that the sales representative would still have told Mr B and Miss B that by buying more fractional points they would also be getting a better investment than the one they had. After all, more points means more profit. And while Mr B and Miss B were motivated by the desire for better holidays, the salesperson was trying to make a sale, and would have been likely to remind them of the advantages of fractional membership to the extent that they were relevant to an increase in the number of fractional points held.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr B and Miss B the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in regulation 14(3).

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)).'*⁴ And in my view that must have been correct because it would defeat the consumer-protection purpose of regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, 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 – or that upgrading club membership would yield greater profits one day (as in this case) – then I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Membership were a good reason to upgrade – which, broadly speaking, is consistent with Mr B's and Miss B's recollections of the 2015 sale.

⁴ The Department for Business Innovation & Skills "Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)". <https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf>

So overall, on the balance of probabilities, I think the Supplier's sales representative was likely to have led Mr B and Miss B to believe that Fractional membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I do not find them either implausible or hard to believe when they say that they were told that they were buying more shares in property that, being an investment, may well lead to an increased financial gain. On the contrary, given everything I have seen so far, I think that is likely to be what Mr B and Miss B were led to believe by the Supplier at the Time of Sale. And for that reason, I think the Supplier breached regulation 14(3) of the Timeshare Regulations in 2015.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr B and Miss B under the Credit Agreement and related Purchase Agreement for the purposes of section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair compensation

Having found that Mr B and Miss B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr B and Miss B was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the 2015 Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr B and Miss B agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr B and Miss B were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 1,932 Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr B and Miss B not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr B and Miss B from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

So with that being the case, here's what I think needs to be done to compensate Mr B and Miss B – whether or not a court would award such compensation:

- (1) The Lender must refund Mr B and Miss B'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) In addition to (1), the Lender must also refund the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mr B and Miss B's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2.

- (3) The Lender can deduct:
- i. The value of any promotional giveaways that Mr B and Miss B used or took advantage of; and
 - ii. The market value of the holidays* Mr B and Miss B took using FC Membership 2 *if* the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr B and Miss B took a holiday worth 1,982 Fractional Points after the Time of Sale and they would have been entitled to use a total of 1,932 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,000 Fractional Points under FC Membership 1, for instance, then there shouldn't be a deduction for the market value of the relevant holiday.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

- (4) Simple interest** at 8% per annum must be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender must remove any adverse information recorded on Mr B and Miss B's credit files in connection with the Credit Agreement reported within six years prior to this decision.
- (6) If Mr B and Miss B Fractional Club membership is still in place at the time of this decision, then as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that 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 B and Miss B took using their 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 their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My provisional decision

So my new provisional decision is that I am minded to uphold this complaint.

Responses to my new provisional decision

Both parties accepted my provisional decision and they had nothing to add. So there is no

reason for me to depart from my provisional findings, and I confirm them here.

My final decision

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

My decision is that I uphold this complaint, and I order First Holiday Finance Ltd to put things right in the way I have set out above (under the heading 'Fair compensation').

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Miss B to accept or reject my decision before 19 March 2026.

Richard Wood
Ombudsman