DRN-5967227

The complaint

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

What happened

Mr and Mrs N were existing members of a timeshare, having bought 1,300 fractional points in April 2019 from a timeshare provider (the 'Supplier')

Mr and Mrs N purchased a new membership (the 'Fractional Club') from the Supplier on 27 October 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to trade in their existing points and buy 1,820 fractional points which cost £29,307 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £12,407 for this membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs N 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 N paid for their Fractional Club membership with a £500 deposit, and the balance by taking finance of £11,907 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 11 January 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

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

- Told them that they had purchased an investment and that their timeshare would considerably appreciate in value, when this was not true.

- Told them that they would have a share of property, and its value would considerably increase, therefore they were promised a considerable return on investment, when this was not true.
- Told them that they could sell the timeshare back to the resort or easily sell it at a profit, when this was not true.
- Told them that they would have access to the holiday's apartment at any time all year round, when this was not true.

Mr and Mrs N 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 the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs N.

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

Mr and Mrs N say that the Supplier breached the Purchase Agreement because it went into liquidation, which means they will not be able to recover any amounts due to them.

As a result of the above, Mr and Mrs N say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs N.

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

The Letter of Complaint set out several reasons why Mr and Mrs N 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:

- 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').
- The contractual term (Clause D) setting out that the membership would be defaulted in the event of non-payment by the member is an unfair contract term[1].
- 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.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs N's concerns as a complaint and issued its final response letter on 3 February 2022, rejecting it on every ground.

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

Having considered everything that has been submitted, I agreed with the outcome reached by the Investigator, in that I didn't think this complaint ought to be upheld, but I expanded

[1] Although not set out as such, this is alleging a breach of the Consumer Rights Act 2015 ('the CRA').

somewhat on the reasons for not doing so. As such I set out my initial thoughts in a provisional decision (the 'PD'), and invited both sides to submit any new evidence or arguments that they wished me to consider prior to me making my final decision.

The provisional decision

I began by setting out what I considered to be the legal and regulatory context that was relevant to the case, and then addressed the merits of the complaint. I said:

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

And having done that, I currently do not 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.

This complaint is the second of two made by Mr and Mrs N. The first, also made with the assistance of the same PR, was regarding a timeshare bought with a finance agreement in Mrs N's sole name. It was this first timeshare that was traded in for the purchase I am considering here. The letters of complaint for both sales are virtually identical, as is the evidence submitted. As such there is considerable duplication in the two provisional decisions. I wish to confirm however, that each complaint has been considered on its own merits.

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

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

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

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs N were told that they were buying a share of property, and its value would considerably increase. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs N's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

It has also been alleged that the Supplier misrepresented that Fractional Club was an investment that would considerably increase in value. I will address this further below, but for reasons I will explain, had Mr and Mrs N been told Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

In addition, it has been said that the Supplier told Mr and Mrs N that they could sell their membership back to the resort, or easily sell it at a profit, when that was untrue. But other

than setting out the bare allegation in the Letter of Complaint, there is no evidence to support that they were told this by the Supplier. And the terms and conditions of the membership expressly set out that the Supplier has no repurchasing programme.

As for the Supplier's other alleged pre-contractual misrepresentation, while I recognise that Mr and Mrs N have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reason they allege. And I say that because there is no evidence to suggest that the Supplier told them that they would be able to have access to the Allocated Property at any time, all year round. And I think it is inherently unlikely that the Supplier would have said this anyway as this is not the way their Fractional Club membership worked. The membership gave Mr and Mrs N no rights to access or use the Allocated Property in any way, and this is set out in bullet point 4 of the Purchase Agreement. And in any case, holiday accommodation was subject to availability, and each membership has a limit to the number of weeks holiday members can take, dependant on the number of points they had. So, I am not persuaded that the Supplier would have told Mr and Mrs N that they would be able to use their membership to stay at the property at any time, all year round.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs N by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs N any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Mr and Mrs N a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Although not set out in terms of a breach of contract, Mr and Mrs N say that the Supplier went into liquidation in December 2020, and this means that they would be unable to recover any monies which may be due to them from the Spanish Court.

But the PR's argument is difficult to square with the claim that seems to be made here under Section 75. After all, suing the Supplier in a Spanish court follows from, and is separate to, the rights and obligations that the parties to a contract might have.

I can, however, see that certain parts of the Supplier's business were put into administration. But it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain. And in any case, neither Mr and Mrs N nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. *members of the Fractional Club;*
2. *able to use their Fractional Club membership to holiday in the same way they could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs N any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs N was misrepresented or breached by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs N also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

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

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

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

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

Mr and Mrs N's complaint about the Lender 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.

They include the allegation that there is an unfair term in the contractual documentation (Clause D) which means that their Fractional Club membership can be defaulted should Mr and Mrs N fail to make a required payment within 14 days of it being due.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs N and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against them in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs N, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in 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.

Having considered everything that has been submitted, 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 N and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant term in the Purchase Agreement has actually been operated against Mr and Mrs N, let alone unfairly. The PR hasn't explained why exactly it feels this term causes an unfairness, and as I've said, I can't see that this term has been operated in an unfair way against Mr and Mrs N in any event.

The PR has also said that the Credit Agreement was not brokered by a properly authorised person, because although the Supplier had the correct authorisation by the regulator, the specific salesperson did not as they were not an employee of the Supplier. But I am not persuaded that this is the case. I can see that the Supplier was correctly authorised by the Financial Conduct Authority to broker credit, and it was the Supplier, not an individual, who was named as the credit broker. And in any case, the Lender has confirmed that the relevant sales representative who dealt with Mr and Mrs N's sale was employed by the Supplier and had undertaken training in brokering credit agreements. I have no reason to doubt this, so I'm not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs N. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs N 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 and Mrs N. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs N 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 N'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 Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs N'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 in the Letter of Complaint 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 N'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 N 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 N, 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 N 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.

In addition to this, after the Investigator gave his answer to the merits of Mr and Mrs N's complaint, there was an unsigned and undated statement, sent to this Service by the PR on 1 February 2024, which purports to set out Mr and Mrs N's recollections of the Time of Sale. In this they say:

> *"We were told that we would have a share of ownership of the property and so when is sold it [sic] we would benefit from the profit are."*

So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs N 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 and Mrs N 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 N and the Lender 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.

Up until the PR sent in a statement in the name of Mr and Mrs N, there had been no first-hand testimony from them as to what happened at the Time of Sale, and why they ended up purchasing the membership of the Fractional Club. It was only after the Investigator sent his answer to their complaint, and didn't uphold it, that the PR sent in a short statement. As I've said, this testimony was sent to this Service on 1 February 2024 and is set out as follows:

Witness statement

[Mr N] and [Mrs N]

"The presentation was all day and we felt really pressured to finalize this ,,deal,, With it being all day we was tired and wanting go back to our apartment.
We were told that we would have a share of ownership of the property and so when is sold it we would benefit from the profit are. We were informed that apartment it was not for our holiday purposes only. They told us when we take that offer on the same day will own a piece of this property since we signed the papers!. They do everything they can to convince us to this ,, opportunity,,
Give us little time to make the decision."

So, this does seem to set out, in Mr and Mrs N's own words, what happened at the Time of Sale.

But I have considerable doubt as to how much weight I can place on this testimony when making my decision. I say this because this exact same testimony has been submitted previously, on 7 December 2023, by this same PR, in relation to Mrs N's complaint against a different Lender about their earlier timeshare purchase.

In this other complaint, which is with this Service, the following was submitted as Mr and Mrs N's testimony regarding that earlier sale.

Witness statement

[Mr N] and [Mrs N]

"The presentation was all day and we felt really pressured to finalize this ,,deal,, With it being all day we was tired and wanting go back to our apartment.
We were told that we would have a share of ownership of the property and so when is sold it we would benefit from the profit are. We were informed that apartment it was not for our holiday purposes only. They told us when we take that offer on the same day will own a piece of this property since we signed the papers!. They do everything they can to convince us to this ,, opportunity,,
Give us little time to make the decision."

I acknowledge that the previous complaint was also regarding a sale of the same type of timeshare by the Supplier, in April 2019, so the sales processes were likely to have been similar. But I cannot see that it is likely that exactly the same thing happened, in different locations, at different times.

So, I do not think that the testimony provided by the PR here can be relied upon. I am unable to also say with any degree of confidence that what is said in it reflects what happened at the Time of Sale, because Mr and Mrs N are saying, in effect, that exactly the same thing happened at both sales. And as I've said, I cannot believe that to be true.

Given both statements are identical, down to the same grammatical errors, it is clear that the same statement has been submitted to this Service in evidence twice. And this concerns me, as it has been presented as evidence of Mr and Mrs N's recollections of the Time of Sale that I am considering here, whilst at the same time also purports to be their recollections of a completely separate sale.

But in addition to the above, I also don't feel able to place much weight on the statement given when it was submitted. This was after the Investigator's view, and after the judgement in Shawbrook and BPF v FOS. So, I think there is a very real risk that Mr and Mrs N's recollections may have been tainted, even subconsciously, by either or both of these outcomes.

The PR may say that what is contained in the Letter of Complaint is sufficient for me to understand what is likely to have happened at the Time of Sale. And I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation or conversations with Mr and Mrs N – after all, it contains personal information that only Mr and Mrs N would know. However, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations.

Direct testimony from the consumer, in full and in their own words, is very important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible. It's also important that the decision-maker can see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case, because I feel unable to accept the testimony presented.

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 and Mrs N'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) as alleged in the Letter of Complaint. There is simply no reliable evidence to suggest this.

And for that reason, I do not think the credit relationship between Mr and Mrs N 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 am not persuaded that the credit relationship between the Lender and Mr and Mrs N 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.

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 and Mrs N Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that Mr and Mrs N wish to provide, I would invite them to do so in response to this provisional decision."

The responses to the provisional decision

The Lender accepted the provisional decision and had nothing further to add.

The PR, on Mr and Mrs N's behalf, did not accept, and submitted a further statement from Mr and Mrs N, signed and dated 14 June 2025. The PR also sent a comprehensive response explaining why it did not agree with the provisional decision. In summary, it said:

- Mr and Mrs N were not provided with a copy of the Investigator's rejection of their complaint, nor the provisional decision. When the view was rejected, Mr and Mrs N did so because they rejected the outcome.
- The statement submitted in both claims was Mr and Mrs N's brief, but honest recollection of events, how the product was presented to them, and the benefits which were explained to them at the Time of Sale, and these were the same for both sales.
- Mr and Mrs N had not heard or read anything about the Judicial Review[2], nor did they have any legal background and would not understand the legal terms and issues in the Judicial Review decision.
- There is no possibility that Mr and Mrs N's recollections in their additional witness statement have been influenced by the Investigator's view or the Judicial Review judgement.
- It was wrong of the Ombudsman to highlight the grammatical errors in Mr and Mrs N's initial recollections, and these don't reflect on their honesty or knowledge of the facts.
- The primary goal of witness testimony is to convey facts and information relevant to the case. It has been difficult for Mr and Mrs N to write the statement and what to include in it, as the PR has not been allowed to help them, or correct their witness statement, in order not to influence their recollections.

[2] *Shawbrook & BPF v FOS (see the legal and regulatory context below)*

The statement submitted following the PD, as relates to their fractional purchases, was as follows:

"On 06/04/2019 we attended our Prelude holiday at [the Supplier] Fuengirola, Spain with 2 of our children. We get accommodation in luxury Signature apartment whit [sic] private pool and beautiful view. We never expect this kind of standard on our first week.

Next day were taken for breakfast and attended a presentation as a condition of our Prelude holiday. During the presentation we were shown around various apartments on the resort, all of a similar high standard and we were shown a video about the many resorts around the world with the same standard of accommodation. We were advised that we could upgrade our Trial Membership to a full membership whit [sic] Fractional Property Owners Club, which would give us holidays every year till the end of the contract and which we could leave to our children being a valuable asset. Whit [sic] membership we would no longer have to pay a booking fee when we took our holydays [sic].

We spent approximately 7 hours with various representatives who explained the benefits of joining to this Club. Reps, very strong convince us so our holyday [sic] deal is best then [sic] others, even he need to get approval from head manager to sell this offer to us. We were never left fully on our own to discuss with each other whether we wanted to go ahead or not, and we feel pressure from representative to make decision instantly. We were informed that apartment it was not for our holiday purposes only. We were told that we would have a share of ownership of the property and so when is sold it we would benefit from the profit. We will get some money back on top of what we paid. This sounded as a good deal because it was a kind of investment. With this deal we get another ,,free bonus week,, to use in Tenerife resort or Fuengirola.

The cost of Club membership was £20384. We paid £500 by card and traded in our Trial Membership, entering into another Finance Arrangement for £15989 paying £229 per month. We contacted [the Supplier] to take up the additional 'bonus week' which we were awarded we try book Tenerife resort but was unavailable. In this case we need to take this week again at the [Supplier] resort in Fuengirola. We arrive on 26/10/2019, once again we get luxury apartment in Malibu suite. We were then told that we would need to attend another meeting which they assured us was just to ensure we knew how to use the membership and how to get the best out of it. We were taken to a breakfast meeting with a young gentleman who was very friendly and showed us around the resort. We were finally taken to same meeting room where we was [sic] last time. We sat with him and again went through options on holidays. We went along with this even though we thought we had already done all before.

On this time reps, showing us all benefits if we upgrade our holiday or luxury Signature Collection. This same what we was [sic] accommodate on our previous time. He convince [sic] us to trade our Club Membership for this one, we got offered luxury Signature Apartment on Tenerife in High season and be part owners of that property.

Once again this meeting was very long we spend there nearly all day, our kids was very tired, and bored. Even senior manager sit whit [sic] us and convince us to upgrade, because this is opportunity we wont miss. They pressure us to make decision instantly. They said it is a better property, in a better area, more luxurious, and it is expected to bring more money at the end of the contract when they will be selling the apartment. This was very important because it was a better investment. In final we make this upgrade.

We trade our Club membership for that Signature Collection. Cost of this fraction after trading the previous ownership was £11907, whit [sic] annual maintenance fee £1180.

We sign another financial arrangement whit [sic] [the Lender] paid additional £169 per month, so total of this finance is £398.00 per month for 180 months.

Since we sign our last membership we dont have a chance to use any holyday [sic], we not use any of points what [sic] we got.

From time perspective I see now the [Supplier] is one big scam, to put naive people like we and many others families by promises of luxury holyday [sic] for best price in the market and investments, to go for big finance with massive interest and crazy maintenance fees to pay every single year. Each employee of this company plays his own role to sell as much as he can to get bigger provision.

We have spent many hours of pressurised sales. The presentations always make the timeshare product sound good value and logical to trade in previous products for an upgrade because you will receive so much more as a result. The reality is that management fees are ignored, finance fees are ignored and the cost for the product is higher than you would spend on similar holiday accommodation elsewhere, and we doubt we will receive anything at the end."

This statement is signed by both Mr and Mrs N and dated 14 June 2025.

As both parties have now responded to the PD, the case has come back to me.

I considered the new testimony provided, and the assurances given by the PR that Mr and Mrs N had confirmed they had not been influenced by the Investigator's view, my provisional decision nor the Judicial Review.

The new statement provided much greater detail, apparently setting out Mr and Mrs N's recollections of both sales, and what they say their motivation to make the purchases was. But I remained concerned that Mr and Mrs N's recollections *had* been influenced in some way. I thought this because I recognised the final paragraph in their statement as having been repeated in precisely the same way in three other statements in complaints from different consumers. So, I requested the PR to ask Mr and Mrs N to explain how, if they had not been influenced by external sources when making this second statement, the final paragraph had been seen word-for-word in three other statements from three other people.

The PR responded to explain that Mr and Mrs N had engaged with a different claims company in January 2021 to process a potential court claim in the Spanish court. They had been asked to complete a statement setting out any misrepresentations that had been made at the Time of Sale. As English was not their first language they asked for help, and were given a sample of a statement of misrepresentation in order to see the structure and what type of issues should be included in it. Mr N said that while the paragraph was copied from the sample, that did not mean it was incorrect. He said it fitted their experience and was confident that this is what happened. He only copied the last paragraph that fitted their circumstances.

The PR also cited *Pomphrey v Secretary of State for Health & North Bristol NHS Trust* [2019] EWHC [2019] Med LR Plus 25 and *Muyepa - V- Ministry of Defence (2022)* EWHC 2648 (KB) in which the following was said:

"When evaluating the evidence of a witness whose testimony has been challenged it should be broken down into its component parts. If one element is incorrect it may, but does not necessarily, mean that the rest of the evidence is unreliable. There are a number of reasons why an incorrect element has crept in."

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

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

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

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

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

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

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

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

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

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[3]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant 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

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

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.[4]

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

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

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 Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

Relevant Publications

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

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.

And having done so, and while I will address the points made by the PR in response, I still do not think this complaint ought to be upheld, for broadly the same reasons as set out in the PD above.

But in my response, I note again that my role as an Ombudsman is not to address every single point that has been made by the PR. Instead, it is to decide what is fair and reasonable, on the balance of probabilities, in the circumstances of this complaint. So, while I have read the PR's response in full, I will confine my findings to what I believe are the salient points.

The PR has said that it is unfair to not place weight on the testimony originally submitted as part of this complaint. It said the statement submitted in both claims was Mr and Mrs N's brief, but honest recollection of events, how the product was presented to them, and the benefits which were explained to them at the Time of Sale, and these were the same for both sales.

But having reconsidered this, I still find this hard to accept. As I said in my PD, the two sales being referred to here by the PR were at different times and different locations. And the products actually bought, although both fractional, were significantly different – the first was known as FPOC2, which did not provide guaranteed rights to stay in a property, so all

reservations were subject to availability. The purchase being considered here was what was referred to as from the Supplier's 'Signature Collection'. These memberships were sold as being more luxurious, and importantly, guaranteed the member's accommodation in their property on set weeks. So, the products would have been sold in a different way as they were different products. But, in addition, the first sale (which is the subject of a separate complaint) involved the trading in of a trial membership, so would likely have been Mr and Mrs F's first experience of the concept of fractional membership. The second sale, which I am considering here, involved the trading in of their existing fractional membership, for additional points. So, I cannot see that the sales presentation would have likely been the same for the two sales, given their circumstances and products purchased at each time were quite different.

The PR also said that it was wrong of the Ombudsman to highlight the grammatical errors in Mr and Mrs N's initial recollections, and these don't reflect on their honesty or knowledge of the facts. But I think the PR has misunderstood the point I was making here. I wasn't in any way highlighting that there were grammatical errors in the statement as a way of discrediting what was said. I was merely pointing out that the two submitted statements were identical, even down to the same grammatical errors. It was because the same statement was clearly submitted as testimony in two different complaints about two different sales, that I felt unable to rely on its contents – and that was nothing to do with the fact that it contained grammatical errors.

So, I remain of the opinion that the original testimony provided by the PR here cannot be relied upon. I am unable to say with any degree of confidence that what is said in it reflects what happened at the Time of Sale, because Mr and Mrs N are saying, in effect, that exactly the same thing happened at both sales. And as I've said, I cannot believe that to be true.

But, as set out above, in response to the PD, the PR has submitted a further statement from Mr and Mrs N. Along with this statement, the PR has confirmed that Mr and Mrs N have no knowledge or understanding of *Shawbrook & BPF v FOS*, nor were they aware of the contents of the Investigator's view. So, the PR says Mr and Mrs N's recollections cannot have been influenced by either, so are reliable.

The PR has said that the primary goal of witness testimony is to convey facts and information relevant to the case. And I agree with this. As I said in the PD, direct testimony from the consumer, in full and in their own words, is very important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. I have also taken into account Mr and Mrs N's account of how their second statement came to include a final paragraph that had been repeated word-for-word in three other cases.

So, I have gone on to consider how much weight I can place on Mr and Mrs N's latest statement when considering what was most likely to have happened at the Time of Sale, and what Mr and Mrs N's motivations were when deciding to purchase the Fractional Club membership.

When the Investigator set out that he didn't think the complaint ought to be upheld, he said this was partly due to there not being any direct testimony from Mr and Mrs N which set out what had happened. As a result, the PR said they wanted the complaint to be resolved by an Ombudsman, and submitted the first statement, as set out earlier in this decision. But I said in the PD that I didn't feel able to place any weight on this statement as it had been submitted in two different complaints, about two distinctly different sales and circumstances, so it was inherently unlikely that what had been set out could reflect what happened at both sales. So, a further statement was submitted, providing a far greater depth of evidence, and

again it was stressed that this was Mr and Mrs N's own words, and had not been influenced by either the PR or any external factors.

But again, I had reason to believe that Mr and Mrs N *had* been influenced when making this statement given that the final paragraph was a copy of a paragraph found in consumers' statements in three other cases.

When asked about this, Mr N said it was only the last paragraph that had been copied, but even so, it did represent what had happened.

So, I have taken all of this into account and have considered what Mr and Mrs N, and the PR have said here. I have also taken into account what was said in *Pomphrey v Secretary of State for Health & North Bristol NHS Trust* [2019] EWHC [2019] Med LR Plus 25 and *Muyepa - V- Ministry of Defence (2022)* EWHC 2648 (KB).

I have no reason to doubt that Mr and Mrs N say they have no knowledge of the Judicial Review in *Shawbrook & BPF v FOS.* But I'm not persuaded the second statement, as set out, was made without any influence, even subconsciously, of other cases. Indeed, it seems it was, in that a sample statement provided by another PR (albeit seemingly only relating to a claim of misrepresentation in Spain) was provided to them as an example of the layout and contents of a statement. So, I think there is a real risk, as can be seen by the final paragraph, that Mr and Mrs N have looked for sources of information relating to this type of complaint, and have been influenced as to what they should say.

So given their evolving recollections of events, and given I have significant concerns that what they have said more recently has been influenced by external factors, I have doubts as to whether what has been set out in response to the PD is an accurate representation of their genuine recollections. As a result of all of this, I do not feel able to place any weight on it.

Conclusion

So, in the absence of any evidence that I feel it is safe to rely on, I remain unpersuaded that the Supplier made actionable misrepresentations at the Time of Sale, nor that the Purchase Agreement was breached. Therefore, I do not think the Lender is liable to pay Mr and Mrs N any compensation for misrepresentation or a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claims in question.

And even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs N'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) as alleged in the Letter of Complaint. There is simply no reliable evidence which makes me think this is likely.

And for that reason, I am not persuaded that the credit relationship between Mr and Mrs N and the Lender was unfair to them even if the Supplier had breached Regulation 14(3). And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

I do not uphold this complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N and Mr N to

accept or reject my decision before 19 December 2025.

Chris Riggs
Ombudsman