DRN-5984822

The complaint

Mr and Mrs H's complaint is, in essence, that First Holiday Finance Ltd, trading as FIRST HOLIDAY FINANCE, (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 H purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 24 October 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,241 fractional points at a cost of £15,936 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

I gather Mr and Mrs H paid for their Fractional Club membership with a £500 deposit and by taking finance for the remaining £15,436 from the Lender (the 'Credit Agreement').

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 8 March 2023 (the 'Letter of Complaint') to raise a number of different concerns. Since then the PR has raised some further matters it says are relevant to this outcome of the complaint. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.

When Mr and Mrs H didn't receive a response from the Lender, they referred a complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint that the Lender ought to have accepted a claim made under Section 75 of the CCA, and that there was an unfair credit relationship under Section 140A, on their merits. The Investigator felt that the complaint that the lending was unaffordable for Mr and Mrs H hadn't been made in time as per the rules this service must follow and that it couldn't be considered.

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

Having reviewed the file afresh, I issued a provisional decision (PD) and gave the parties the opportunity to respond before I reconsidered the complaint. The PD included the following:

'***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 no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

What I've provisionally decided – and why

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

Having done so, I conclude that:

1. *Mr and Mrs H's complaint about unaffordable lending and a credit relationship with the Lender that was unfair to them is within our jurisdiction because it was made within the time limits set out in DISP 2.8.2 R (2). But for the reasons I give below, I don't think these aspects of the complaint should succeed.*
2. *The rest of Mr and Mrs H's complaint – about the Lender's decision to reject their concerns about the Supplier's alleged misrepresentations and breaches under Section 75 of the CCA – was made in time under DISP 2.8.2 R (2). But for the reasons I give below, I don't think these aspects of the complaint should succeed.*

I'll explain my reasons for my conclusions below.

Section 2 of the Rules set out in DISP covers whether Mr and Mrs H's complaint was made in time for the purposes of allowing the Financial Ombudsman Service to consider them.

This is what DISP 2.8.2 R says (insofar as it's relevant to this complaint):

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *[…]*
>
> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
>
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *[…]*
>
> *unless:*
>
> *[…]*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R […] was as a result of exceptional circumstances; or […]"*

Part 1 – Six Years

One of the events complained about for the purposes of DISP 2.8.2 R (2)(a) is the allegation that the Lender was party to an unfair credit relationship with Mr and Mrs H and, during the currency of that relationship, it perpetuated the unfairness, failing in its responsibilities to take the necessary steps to correct the situation.

I can see from the relevant annual statement that the Credit Agreement and, in turn, Mr and Mrs H's credit relationship with the Lender was still in place as of 31 August 2022. The complaint about that credit relationship was first made to the Lender on 18 May 2023. So, it's clear that Mr and Mrs H complained while the credit relationship was still ongoing or, at the very least if the credit relationship has since ended, within six years of the event complained about.

With regard to the Lender's decision to lend to Mr and Mrs H, the Investigator was of the view that they complained more than six years after the event complained of. I agree with that finding since the lending took place in October 2012.

Part 2 – Three Years

However, that isn't the end of the matter. DISP 2.8.2 R (2)(b) could provide Mr and Mrs H with more time to complain about the event in question if they did so within three years of the date they became aware, or ought reasonably to have become aware, that they had cause to complain.

This raises the question as to whether Mr and Mrs H was aware, or ought reasonably to have been aware, more than three years before they first complained to the Lender that they had cause to complain to it.

So, that's what I've considered here.

To answer this question, I need to consider whether and when Mr and Mrs H were aware or ought reasonably to have been aware that:

1. *There was a problem with the lending or with the timeshare.*
2. *The problem(s) caused them a loss.*
3. *Another party's actions (or its failure to act) may have caused the loss.*
4. *The other party may have been the Lender.*

The Letter of Complaint set out that Mr and Mrs H don't recall any checks being carried out to determine their income and expenditure other than the information they added to the loan application form. The Investigator argued that they ought to have known some sort of affordability check needed to be carried out, meaning they became aware of the cause for complaint at around the Time of Sale.

I don't agree that the lack of checks should have triggered awareness in Mr and Mrs H. I wouldn't have expected the average consumer to know about the duties on lenders to carry out appropriate checks or to have known that they were or were not carried out on this occasion. I don't think Mr and Mrs H became aware or ought to have become aware until several years later.

I'm aware, as the Lender points out, that Mr and Mrs H complained to the Supplier in 2017 via a professional representative other than the one they've currently instructed to deal with this complaint. That complaint included a number of allegations but not, it seems, any

regarding the affordability of the lending.

The Lender says that the professional representative – and therefore Mr and Mrs H – ought to have been aware that their claims could have been raised through other avenues. However, I'm mindful that the complaint in 2017 concerned Mr and Mrs H's wish to terminate the timeshare and was directed to the Supplier, not the Lender. I haven't seen any evidence to indicate they knew or ought to have been aware back then that there was a problem with the lending or that, if there was, this may have been caused by the Lender.

With that being the case, I'm persuaded that the three-year part of the relevant time limit extends the six-year part of it for the purpose of Mr and Mrs H's complaint about the lending. On the basis that they probably didn't become aware until around the time they instructed the PR in 2022, I think they complained in time under the rules I have to apply.

Mr and Mrs H's Section 75 Complaint

Section 75 creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which Section 75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid Section 75 claim, it should pay its liability. And if it fails or refuses to do so, that failure or refusal can give rise to a complaint to the Financial Ombudsman Service.

So, when a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the Service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the six and three-year time limit (under DISP 2.8.2 (2) R) to complain about an unsuccessful attempt to initiate a Section 75 claim doesn't usually start until the respondent firm answers and refuses the claim.

In this case, as the Lender refused to accept and pay Mr and Mrs H's claim in 2023 (by not responding to the claim), the primary time limit (of six years) only started at that time. And the complaint about the Lender's handling of those claims was referred to the Financial Ombudsman Service in time for the purpose of the rules on our jurisdiction.

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

As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA') as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mr and Mrs H's Section 75 claim for misrepresentation was time-barred under the LA before he put it to the Lender.

As I mentioned above, a claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim Mr and Mrs H could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim, like the one in question here, under Section 75 is also 'an action to recover any sum by virtue of any enactment' under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Mr and Mrs H entered into the purchase of his timeshare at that time based on the alleged misrepresentations of the Supplier – which they say were relied upon. And as the loan from the Lender was used to help finance the purchase, it was when they entered into the Credit Agreement that they suffered a loss.

Mr and Mrs H first notified the Lender of their Section 75 claim on 8 March 2023. And as more than six years had passed between the Time of Sale and when that claim was first put to the Lender, I don't think it was unfair or unreasonable of the Lender to reject – or at least refuse to accept – Mr and Mrs H's concerns about the Supplier's alleged misrepresentations.

Section 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

As noted above when looking at the claim there was an unfair credit relationship, Mr and Mrs H say that they could not holiday where and when they wanted to. On my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, meaning it could be viewed as potentially breaching the Purchase Agreement. It is not clear precisely when this was alleged to have happened, but if it happened within six years of the time the complaint was first made, such a claim would not have been made too late under the LA.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mr and Mrs H states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on a number of occasions. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs H 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 in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr and Mrs H and the Lender along with all of the circumstances of the complaint, I don't 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
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; and*
5. *Any existing unfairness from a related credit agreement.*

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

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

Mr and Mrs H's complaint about the Lender being party to an unfair credit relationship was and is made for several reasons.

They include allegations that:

1. *Mr and Mrs H were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.*
2. *the right checks weren't carried out before the Lender lent to Mr and Mrs H.*
3. *the loan interest was excessive.*

However, as things currently stand, none of these strike me as reasons why this complaint should succeed.

I acknowledge that Mr and Mrs H may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's 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 H 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. I realise that Mr and Mrs H suggest that their credit rating was at one stage 'abysmal', but it's clear from what they say that that was in relation to a subsequent sale. From the information provided, I am not satisfied that the lending in 2012 was unaffordable for Mr and Mrs H.
Further, I don't think the rate of interest was excessive, compared either to other rates available from other point-of-sale lenders or on the open market, so I can't say it would be fair or reasonable to tell the Lender to do anything because of this.

Overall, therefore, I don't think that Mr and Mrs H'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 the PR now says the 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.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs H'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 Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

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

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr and Mrs H were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs H the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that 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.[1]

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 H 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.

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[1] The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *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).

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 H, 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.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs H 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's 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 H rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs H and the Lender under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, 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 H 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.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs H decided to go ahead with their purchase. I say that having considered the signed but undated Statement of Truth that was provided by the PR in August 2023. According to the statement, Mr and Mrs H's recollections of the sale consisted of the following:

'In October 2012, we attended [the Supplier's] presentation; during which we bought into their scheme paying £15,936 by taking out a loan with [the Lender] which was arranged with [the Supplier]. We were not sure what we were buying because the presentation started by offering us an apartment but by the time we finished it looked like we had bought points.'

From this, and the PR's handwritten call notes dated 22 November 2022, I conclude on balance that the prospect of a financial gain wasn't material to the decision Mr and Mrs H made to go ahead with the purchase. While there is reference in the statement and call notes to Mr and Mrs H being told they stood to 'get their money back', that was in relation to a subsequent sale that is not the subject matter of this complaint.

I note that the Letter of Complaint does mention that Mr and Mrs H felt they'd be in a position to 'recoup some of their total investment'. But I don't recognise that allegation as one that was made in the Statement of Truth in relation to the Time of Sale. In any event, I don't find that recouping 'some' of their outlay equates to making a profit.

That doesn't mean Mr and Mrs H weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs H themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs H'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 and Mrs H and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

The PR says that Mr and Mrs H were not given sufficient information at the Time of Sale by the Supplier about membership, including about the ongoing costs of Fractional Club membership and the fact that Mr and Mrs H's heirs could inherit these costs.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs H sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr and Mrs H nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

As for the PR's argument that Mr and Mrs H's heirs would inherit the on-going management charges, I fail to see how that could be the case or that it could have led to an unfairness that warrants a remedy.

My provisional decision

For the reasons set out above, I think the Financial Ombudsman Service has the jurisdiction to consider Mr and Mrs H's complaint about the Lender's decision to lend and its participation in and/or perpetuation of an unfair credit relationship under Section 140A of the CCA. But I don't think these aspects of the complaint should be upheld.

Insofar as Mr and Mrs H's complaint about the Lender's refusal to accept their Section 75 claims for misrepresentation and breach of contract is concerned, I think that part of this complaint is in jurisdiction. But I do not think that the Lender acted unfairly or unreasonably in not accepting the relevant Section 75 claims.'

The Lender accepted my PD and confirmed it had nothing to add.

The PR didn't comment on my findings regarding this service's jurisdiction and so I confirmed those findings in a separate jurisdiction decision. The case remained with me to consider what the PR did respond with regarding my provisional findings on the merits of the complaint.

Having received the relevant responses from both parties, I'm now finalising my decision.

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, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD only relate to the issue of whether the credit relationship between Mr and Mrs H and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr and Mrs H as an investment at the Time of Sale.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in its response to my PD. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

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

The Supplier's alleged breach of Regulation 14(3) of the Timeshare regulations

The PR said that the structure and obligations of the Purchase Agreement means that an annual maintenance fee was collected for the upkeep of an allocated property that Mr and Mrs H had no right to use. It argues that the only logical conclusion to draw from this is that the fee was intended to preserve or enhance the value of the Allocated Property so that it may be resold at a profit.

I make no finding on the Supplier's intentions or why it structured the maintenance fees in the way it did, as this provides no support in this specific complaint as to what Mr and Mrs H's motivations for purchasing Fractional Club membership were likely to have been. And as this is not determinative of the outcome in respect of Mr and Mrs H's complaint about an unfair relationship with the Lender, the argument does not persuade me that their complaint should be upheld.

The PR has made arguments that in my view go to whether Fractional Club membership was marketed as an investment in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. However, as I explained in my provisional decision, while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it isn't necessary to make a finding on this as it is not determinative of the outcome of the complaint. I explained that Regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

These arguments do not persuade me that I should uphold Mr and Mrs H's complaint because they do not in my view provide any further insight as to whether the Supplier's breach of Regulation 14(3) led Mr and Mrs H to enter into the Purchase Agreement and the Credit Agreement.

The PR has provided its further thoughts as to Mr and Mrs H's likely motivations for purchasing Fractional Club membership. I recognise it has interpreted Mr and Mrs H's

testimony differently to how I have and thinks it points to them having been motivated by the prospect of a financial gain from Fractional Club membership.

In my provisional decision I explained the reasons why I didn't think Mr and Mrs H's purchase was motivated by the prospect of a financial gain (i.e., a profit). And although I have carefully considered the PR's arguments in response to this, I'm not persuaded the findings I made on this point were unfair or unreasonable.

The PR has highlighted part of the Judgment in 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 and BPF v FOS') suggesting from this that the term investment extends beyond profit or financial gain to the prospect of money back. I have taken Shawbrook and BPF v FOS into account when making my decision and I don't think that is what the judge intended in the paragraph the PR has highlighted. I explained in my provisional decision that the definition of investment I used was that agreed by the parties in Shawbrook & BPF v FOS and I see no reason to view this differently.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr and Mrs H's purchasing decision.

S140A conclusion

Given all of the factors I've looked at in this part of my decision, including the relevant relationships, arrangements and payments between the debtor creditor and supplier and having taken all of them into account, I'm not persuaded that the credit relationship between Mr and Mrs H and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. So, I don't think it is fair or reasonable that I uphold this 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 H's 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.

My final decision

For the above reasons, my final decision is that I do not uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs H to accept or reject my decision before 26 December 2025.

Nimish Patel
Ombudsman